Municipal Tort and Civil Rights Litigation Update

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MUNICIPAL TORT AND CIVIL RIGHTS LITIGATION UPDATE

FOR

THE LEAGUE OF CALIFORNIA CITIES

FALL CONFERENCE

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

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

- **Probable cause does not defeat a retaliatory arrest claim against a public entity.**

In *Lozman v. City of Riviera Beach, Fla.*, __U.S. __, 138 S. Ct. 1945 (2018), the Supreme Court granted review to determine the circumstances, if any, in which a plaintiff could assert a claim for retaliatory arrest for engaging in protected First Amendment activity, even where probable cause existed for the arrest. The case arose from a more than decade-long series of disputes between the plaintiff, Lozman, and the City of Riviera Beach. During the public comment portion of a city council meeting, Lozman began to speak about matters concerning county, not City officials. A council member directed Lozman to stop making those remarks, and when Lozman continued speaking, the council member requested the assistance of a police officer. The officer approached Lozman and asked him to leave the podium, and when Lozman refused, the council member told the police officer to "carry him out." The officer handcuffed Lozman and removed him from the meeting, subsequently arresting him for disorderly conduct and resisting arrest. Although the State Attorney determined there was probable cause to arrest Lozman, all charges were dismissed.

Lozman filed suit under 42 U.S.C. § 1983, asserting that the arrest was in retaliation for his First Amendment activity. A jury was instructed that in order to succeed on his retaliatory arrest claim, Lozman would have to prove there was no probable cause for the arrest. A jury found for the City. Lozman appealed to the Eleventh Circuit, arguing that probable cause was irrelevant to his retaliatory arrest claim, and that probable cause would not defeat a First Amendment claim for retaliation. The Eleventh Circuit affirmed the district court, noting that under its precedents, the existence of probable cause would defeat a retaliatory arrest claim.

In granting certiorari, the Supreme Court was set to address an issue that it had left open for well over a decade. In *Hartman v. Moore*, 547 U.S. 250 (2006), the Court had held that in order to succeed on a claim for retaliatory prosecution, a plaintiff had to establish the absence of probable cause. In intervening years, the Court had granted review in a case presenting the retaliatory arrest question but eventually resolved it based on qualified immunity without addressing the precise elements of any such claim. *See Reichle v. Howards*, 566 U.S. 658, 663 (2012).

In *Lozman*, the Court once again sidestepped the underlying question. The Court expressly declined to determine the circumstances, if any, in which the existence of probable cause might defeat a retaliatory arrest claim against a police officer making a routine arrest. 138 S. Ct. at 1954. Instead, the Court confined its analysis to the circumstances in which a public entity could be held liable under *Monell v. Dep't. Soc. Servs.*, 436 U.S. 658 (1978), where a retaliatory arrest is supported by probable cause. The Court held that the existence of probable cause would not bar a retaliatory arrest claim against a public entity and that where a plaintiff can show that retaliation was a "but for" cause of the arrest under *Mt. Healthy City Bd. of Education v. Doyle*, 429 U.S. 274 (1977), a public entity could be held liable for violation of the First Amendment. *Id*. at 1954-55. The Court therefore remanded the matter to the lower court to determine whether the evidence would support Lozman's retaliatory arrest claim under the newly articulated standard. *Id*. at 1955.

Although *Lozman* would seem to encourage retaliatory arrest claims against public entities, the language of the opinion makes it clear how extremely rare such cases are likely to be. This is because, under *Monell*, a plaintiff must show a custom, policy or practice of retaliatory animus and directly link that animus to the underlying arrest. The Court noted that Lozman's case was unique in that he had transcripts of internal city council meetings at which he was discussed, as well as video of the actual arrest which demonstrated a direct link between his exercise of free speech and the council member's

direction to have him arrested. Following *Lozman*, it might well be prudent to reaffirm existing policy, or if necessary, create new policy making it clear that police officers at city council meetings are charged with an independent obligation to assess probable cause for arrest, and must not simply follow the directive of city council members in dealing with potentially disruptive members of the public.

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

- **Expression of hostility to religion by an adjudicatory body supports a claim for violation of the Free Exercise Clause of the First Amendment.**

In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, __ U.S. __, 138 S. Ct. 1719 (2018), a baker was charged with violating the state's Anti-Discrimination Act when he refused to create a wedding cake for a same-sex couple. The baker argued that requiring him to create a cake for a same-sex marriage would violate his right to free speech by compelling him to exercise his artistic talents to express a message with which he disagreed and would violate his right to free exercise of religion. The state's Civil Rights Commission, as well as the Colorado appellate courts, affirmed the finding that he had violated the state statute.

Although the case raised broad issues concerning the extent to which baking constituted an expressive activity, as well the need to strike a balance between the right to free exercise of religion and the strong public policy of preventing discrimination, the case ultimately turned on very narrow grounds. Writing for the majority, Justice Kennedy found that the underlying administrative proceeding had been conducted in a manner that violated the free exercise of religion, and hence the order finding a violation of the statute had to be set aside. Specifically, a transcript from the administrative proceedings revealed that at least one decision-maker had made disparaging remarks

about religious practices. This violated the state's obligation to be neutral with respect to religious matters. *Id*.

The most salient point for local public entities to be gleaned from *Masterpiece Cakeshop* is the need to be mindful of comments made when a governing body is serving in an adjudicatory capacity. The Court emphasized that while there is some debate about the extent to which the religious views of public officials expressed during legislative proceedings are to be given any weight by a court in assessing First Amendment claims, when a public body sits in adjudicatory capacity, it must be neutral. *Id*. at 1730. Public officials should therefore be reminded to be extremely cautious in their comments when the city council is sitting as an adjudicatory body, as stray remarks may well give rise to a claim, even in circumstances outside the First Amendment context.

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

- **Government may regulate speech in a non-public forum, but must use specific criteria in doing so.**

In *Minnesota Voters Alliance v. Mansky*, __ U.S. __, 138 S. Ct. 1876 (2018), the plaintiffs challenged a state statute prohibiting any person from wearing a political badge, button, or other political insignias inside a polling place on election day. The lower federal courts ultimately dismissed plaintiffs' facial and as-applied challenge to the statute. The Supreme Court, however, reversed.

The Court noted that it recognized essentially three forums for speech -- traditional public forums, designated public forums, and nonpublic forums. *Id*. at 1885. In a traditional public forum, such as a park, street, sidewalk, and the like, the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited. The same standards apply to designated public forums, which are spaces that have not traditionally been regarded as a public forum but which the government has intentionally opened up for that purpose. *Id.* A nonpublic forum is a space that is not by

tradition or designation a forum for public communication, and, as a result, the government has more flexibility to craft rules limiting speech in such areas.

The Court viewed the polling place as a nonpublic forum, and hence could properly be regulated by the state so long as there was no viewpoint discrimination. The state statute, however, ran afoul of the First Amendment because it was facially vague as to what sort of public speech was prohibited, thus leaving open the possibility that it might be enforced in such a way as to discriminate against a particular viewpoint. Specifically, the statute banned a voter from wearing a shirt that had a "political" message, but the term "political" was "unmoored" to any precise meaning. *Id*. at 1888-89.

Minnesota Voters Alliance is important for local public entities in that it reaffirms the government's right to regulate speech in non-public forums, and cautions that any such regulation must be crafted with specificity.

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

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

- **Supervisory liability, qualified immunity, and excessive force.**

In *Felarca v. Birgeneau,* 891 F.3d 809 (9th Cir. 2018), university students erected an encampment during a protest. University police officers were summoned to break up the demonstration and dismantle the camp, during which they used batons on some of the protesters. Several protesters subsequently filed suit against several University police officers, as well as administration officials, arguing that the use of force was excessive and violated the Fourth Amendment. The defendants moved for summary judgment, arguing that no clearly established law would have put the officers on notice that use of batons under the circumstances was improper, or that administrative officials could be

held liable based upon their limited involvement in the incident. The district court denied the motion and the defendants appealed.

The Ninth Circuit reversed, finding that as to some plaintiffs the undisputed evidence established that the force was reasonable as a matter of law. 891 F.3d at 818-19. The court observed that the plaintiffs had relatively minor injuries, indicating that a minimal amount of force was used against them, which was justified by the University's need to disperse the crowd and restore order. *Id*. at 818. As to the supervisory liability claims, the court found that none of the senior administrators who had been sued was in the police chain of command, and hence could not be deemed supervisors of anyone in the police department with respect to the use of force. *Id*. at 820. As to administration officials that were within the police chain of command, plaintiffs presented no evidence indicating they knew or should have known any of their actions would cause officers to inflict a constitutional injury. *Id*. The court observed that administrators could not be held liable "solely by virtue of their office." The court also found that plaintiffs could not assert claims against two officers directly in the chain of command, because they could not tie any alleged excessive force to any action or inaction by the supervisory officials. *Id*. at 821. Finally, as to those few plaintiffs who submitted evidence that they had suffered substantial injuries, and hence had been subjected to more than minimal use of force, the court held that the law with respect to the use of a baton was not clearly established, and hence both the officers and the supervisory officials were entitled to qualified immunity and could not be held liable. *Id*. at 822-23.

Felarca provides authority for several key defense arguments. The first is that minimal force may be utilized to further a legitimate state-interest in keeping order under tense, chaotic circumstances. Second, the case reaffirms the need for plaintiffs to draw a direct link between an alleged constitutional violation, and the actions of a supervisor in attempting to hold the latter liable for failure to take steps to prevent an employee from committing a constitutional violation. Finally, the case also underscores that in order to

avoid qualified immunity a plaintiff needs to point to clearly established law putting officers on notice that they can be held liable for the use of force under circumstances closely analogous to those in the underlying lawsuit.

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

- **Illegal search and collateral estoppel arising from state proceedings.**

In *Pike v. Hester*, 891 F.3d 1131 (9th Cir. 2018), the plaintiff asserted that following a personal dispute with a police officer, Brad Hester, he became the target of various acts of retribution by Hester. The plaintiff worked at a community center, and, while off-duty at night, Hester, accompanied by some on-duty officers, went to the then-closed community center, unlocked the door and had a K-9 search Pike's office, looking for drugs. The dog did not "alert," and no drugs were found.

When Pike later learned of the search, he obtained a temporary restraining order against Hester, asserting that the officer was improperly stalking him, citing the improper search as one of several acts committed by Hester. The state court judge granted the restraining order and in a footnote stated that on "this record," there did not appear to be probable cause for the search, and that it was likely prompted by Hester's animosity towards Pike and hence was not done under the Fourth Amendment or with lawful authority under state law. Hester did not appeal from the state court order.

Pike then filed a federal suit against Hester, asserting that the search of his office violated the Fourth Amendment, and the district court granted summary judgment to the plaintiff, concluding that the undisputed evidence demonstrated that the search was unlawful. *Id*. at 1136-37.

The Ninth Circuit affirmed in a 2-1 decision. The majority found it unnecessary to evaluate whether the search in fact violated the Fourth Amendment, concluding instead that the defendant was barred from re-litigating the lawfulness of the search, as the issue

had been adjudicated adversely to him in the state court restraining order proceedings. *Id*. at 1139-41. The court then found that the officer was not entitled to qualified immunity, because the law was clearly established that the Fourth Amendment governs searches of an employee's office and that a dog sniff search under such circumstances would be unconstitutional. *Id*. at 1141-42.

Pike is someone concerning with respect to the court's broad application of collateral estoppel arising from state court proceedings in which the finding of constitutional violation 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 a civil rights suit is preceded by related state court adjudicatory proceedings, for example, an administrative proceeding concerning officer discipline or the like, *Pike* counsels that the earlier proceeding should be closely examined to determine what, if any, preclusive effect might be given to adverse determinations in any subsequent federal lawsuit.

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

- **Excessive force and qualified immunity.**

In *Easley v. City of Riverside*, 890 F.3d 851 (9th Cir. 2018), the plaintiff was shot while fleeing police officers on foot, clutching the waistband of his pants. *Id*. at 854. During the chase, plaintiff pulled a gun from his waistband in what he asserted was an attempt to throw it away, but which was perceived by the officers as an attempt to turn and shoot them, thus prompting them to fire and wound him. *Id*. at 854-55.

Plaintiff sued for excessive force and the district court granted summary judgment, concluding that the officers were entitled to qualified immunity because the law was not clearly established with respect to the specific circumstances confronted by the officers, namely, the need to make a split-second decision as to whether an individual was turning to fling a gun away or attempting to point it at the officers. *Id*. at 865. The Ninth Circuit affirmed, but found it unnecessary to address the issue of whether the law was clearly established because the majority concluded that the undisputed evidence demonstrated

that the officers' use of force was objectively reasonable. *Id*. at 856-57. The court noted that the facts concerning plaintiff's conduct were effectively undisputed, i.e., that he was attempting to fling a gun away, and that the officers had only several seconds to react to what could reasonably, even if mistakenly, appear to be a threat against them. *Id*.

Easley is a 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. The court also 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.

D. *Caldwell v. City and County of San Francisco,* 889 F.3d 1105 (9th Cir. 2018)

- **Fabrication of evidence and causation.**

In *Caldwell v. City and County of San Francisco*, 889 F.3d 1105 (9th Cir. 2018), the plaintiff, who had spent nearly 20 years in prison for a murder he did not commit, filed a section 1983 action against various police officers, asserting that one had fabricated evidence and manipulated and in-person identification, while two other officers had allegedly improperly coerced a photo lineup identification of the plaintiff. The district court granted summary judgment, concluding that as to the two officers who had allegedly conducted the improper photo lineup, no evidence supported the contention that they had deliberately fabricated anything. *Id*. at 1108. With respect to fabrication of evidence by the other officer, and the improper in-person identification, the court concluded there were genuine issues of fact, but that in any event, the officer was insulated from liability because a prosecutor had made an independent decision to charge the plaintiff, thus cutting off the officer's liability. *Id*.

The Ninth Circuit affirmed as to the two officers who had conducted the photo lineup, concluding that there was no evidence that they had improperly coerced an

identification. However, the Ninth Circuit reversed as to the officer who had conducted the improper in-person identification and had otherwise fabricated evidence, holding that the prosecutor's decision was, in fact, not independent of the officer's misconduct, and hence could not cut off liability. In so holding, the court observed that although it had held in *Smiddy v. Varney*, 665 F.2d 261, 266 (9th Cir. 1981), that the filing of a criminal complaint immunizes investigating officers from liability for an improper prosecution because it is presumed the prosecutor exercised independent judgment in making the decision to file charges, that *Smiddy* was inapplicable because the instant case involved fabrication of evidence. The court noted that where a prosecutor relies on fabricated evidence, or where an officer has withheld evidence from a prosecutor, the presumption of independence is rebutted, and an officer is not insulated from liability. 889 F.2d at 1116-17.

Caldwell re-affirms what has been termed the "garbage in, garbage out" exception to the *Smiddy* rule of prosecutorial independence. A prosecutor's decision to charge a criminal defendant will not insulate an officer from liability where it is asserted that the prosecutor relied on fabricated evidence, or otherwise made a decision without full knowledge of the actual facts.

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

- **Excessive force, qualified immunity, state law negligence, and ADA claims arising from the use of force.**

In *Vos v. City of Newport Beach*, 892 F.3d 1024 (9th Cir. 2018), officers responded to a call about a man behaving erratically and brandishing a pair of scissors in a convenience store. *Id*. at 1028. The suspect, Vos, had been running around the convenience store shouting and holding a pair of scissors, at one point grabbing and then immediately releasing an employee and stating, "I've got a hostage." Multiple officers arrived at the scene, and saw Vos inside the convenience store mimicking having a gun and asking them to shoot him. *Id*. at 1029. As more officers arrived, some with non-

lethal weapons, the officers secured the perimeter, and finally, Vos opened the door at the back of the convenience store and started to run around to the front. *Id*. Vos, with scissors, started running towards officers from a distance of approximately 30 feet, ignoring commands to drop the weapon. *Id*. When Vos did not drop the scissors and kept charging, an officer gave the command to shoot, and several officers fired, killing Vos. *Id*. at 1029-30.

Vos's parents filed suit, asserting claims for wrongful death under state law, excessive force under the Fourth Amendment, as well as a discrimination claim under the Americans With Disabilities Act ("ADA"). The district court granted summary judgment, and the plaintiffs appealed.

The Ninth Circuit reversed in a 2-1 decision. The majority concluded that there was a material issue of fact whether the force was excessive, in light of the fact that the officers had less lethal alternatives to deploy that might have subdued Vos, and that a jury could find that defendants improperly failed to take Vos's mental state into account. *Id*. at 1032-34. However, the court found that the officers were entitled to qualified immunity because no clearly established law would have put them on notice that the use of force would have been improper under the specific circumstances they confronted. *Id*. at 1035. The majority also found that the plaintiffs could properly state a claim for violation of the ADA, based upon *Sheehan v. City and County of San Francisco*, 743 F.3d 1211, 1231 (9th Cir. 2014)(*Sheehan I*), cert granted sub nom, *City and County of San Francisco v. Sheehan*, 135 S. Ct. 702 (2014), and reversed in part, cert dismissed in part sub nom, *Sheehan II*, 135 S. Ct. at 1778. The court observed that although the Supreme Court had granted cert on the ADA question in *Sheehan*, that ultimately the Supreme Court had not resolved the ADA issue, and hence *Sheehan I* was still controlling. The Ninth Circuit also reversed as to the state law claims, noting that under the California Supreme Court's decision in *Hayes v. County of San Diego*, 57 Cal. 4th 622 (2013), an officer's use of force must be assessed in light of the officer's entire

course of conduct, including steps taken prior to the use of force.. *Id*. at 1038. The court also found that the plaintiffs could assert a claim under California Civil Code section 52.1 since the officers' entitlement to qualified immunity did not immunize them from state law claims. *Id*.

Vos is an extremely troublesome case. Although the court granted qualified immunity to the officers, its discussion of the excessive force issue creates 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 the dissent noted, the majority's opinion appears to depart from both Ninth Circuit and Supreme Court precedent in unduly singling out these two particular considerations as precluding summary judgment. In addition, in reaffirming that the ADA applies to use of force claims, the court has broadened potential liability given the frequency with which force must be employed again individuals who have mental impairments. That issue, in particular, seems ripe for Supreme Court review, given the Court's grant of certiorari in *Sheehan*. Finally, the majority opinion underscores the stark difference between state law claims and excessive force claims under section 1983, with the former providing a much broader basis for liability.

F. *Wheeler v. City of Santa Clara*, 894 F.3d 1046 (9th Cir. 2018)

- **Survivorship and standing to assert federal claims arising from use of force.**

In *Wheeler v. City of Santa Clara*, 894 F.3d 1046 (9th Cir. 2018), the plaintiff's biological mother died after a confrontation with police. The plaintiff had been formally adopted by other parents as an infant. Nonetheless, he filed suit on behalf of his biological mother, asserting Fourth Amendment claims under section 1983 as her successor-in-interest, along with claims under the ADA and the Rehabilitation Act. He also asserted a claim under the Fourteenth Amendment based upon the loss of

companionship resulting from the death of his biological parent. The district court dismissed the case, finding that the plaintiff had no cognizable interest in his relationship with his biological mother based upon the California survivorship statute, Code of Civil Procedure section 377.20.

In affirming the district court, the Ninth Circuit reaffirmed the principle that survivorship in federal civil rights claims is governed by state law survivorship statutes. It noted that under California law, adoption severs the parent-child relationship, and hence the plaintiff had no standing to assert a claim based upon the death of his biological mother.

Wheeler is useful in reaffirming the principle that California law generally governs the standing of individuals to bring survivorship claims in federal court.

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

- **Inadequate medical care for pre-trial detainees.**

In *Shorter v. Baca*, 895 F.3d 1176 (9th Cir. 2018), 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. Specifically, plaintiff contended that she was 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. Plaintiff also alleged that the defendants conducted improperly invasive searches without justification. The district court granted partial summary judgment for defendants on some claims, and the other claims went to a jury, which ultimately decided in favor of defendants. Plaintiff moved for a new trial, which was denied.

The Ninth Circuit reversed, finding that the district court had improperly instructed the jury that the decisions of the jail administration were entitled to deference in light of the need for security within the facility. The court concluded that such a

"deference" instruction was only proper where the conduct that formed the basis of the lawsuit was indeed related to a legitimate security concern. The court noted that here, the various practices were not related to any legitimate security concern, but rather, where the result of staffing shortages, and hence the jury should not have been instructed to give the defendants' decision-making any deference. In addition, the court noted that the plaintiff's inadequate medical care claim had to be reevaluated under the objective reasonableness standard recently articulated by the court in *Gordon v. County of Orange*, 888 F.3d 1118 (9th Cir. 2018).

Shorter expands liability for inadequate medical treatment claims by pre-trial detainees. It greatly narrows application of the "deference" standard for decision-making by jail officials related to security concerns. It also reaffirms *Gordon*'s holding that such claims are governed by a broad objective reasonableness standard under the Fourteenth Amendment.

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

- **Unlawful entry without a warrant may proximately cause subsequent use of force for purposes of liability under the Fourth Amendment and state law negligence.**

In *Mendez v. County of Los Angeles,* __F.3d__, 2018 WL 3595921 (9th Cir. 2018), officers received a tip from a confidential informant that an armed and dangerous individual for whom they had an arrest warrant was seen on a bicycle outside a residence. The officers went to the residence, asked for and were initially denied entrance by the owner, but eventually entered and searched the premises without finding the suspect. Other officers searched the grounds and came upon various outbuildings, including a one-room shack. Unbeknownst to the officers, Mr. Mendez was sleeping on a futon with his wife, with a BB gun across his lap. The officers entered without giving "knock notice." As a result, when the officers entered, Mr. Mendez thought it was the owner of

the house and picked up the BB gun so he could stand up, which the officers perceived as a threat, thus causing them to shoot Mendez and his wife.

Following a bench trial, the district court found that the officers had reasonably perceived a threat to their safety and, therefore, the force employed was reasonable under *Graham v. Connor*, 490 U.S. 386 (1989). However, the district court found that defendants could still be liable for excessive force under the "provocation rule" because the defendants' search of the shack independently violated the Fourth Amendment due to the absence of a warrant and the failure to give "knock notice."

In its initial opinion, The Ninth Circuit affirmed, finding that although the officers were entitled to qualified immunity on the knock-and-announce claim, nonetheless, the warrantless entry of the shack violated clearly established law and under the "provocation rule" they could, therefore, be liable for excessive force.

The Supreme Court granted review and reversed, holding that the "provocation rule" improperly conflated two independent Fourth Amendment claims—an unreasonable seizure for purposes of excessive force, and unreasonable search. However, while the Court repudiated the "provocation rule" with its essentially automatic imposition of a liability on a defendant for a prior constitutional tort, nonetheless the Court expressly held that under some circumstances an earlier Fourth Amendment violation by a police officer could give rise to liability for injuries officers subsequently inflict as a result of the use of force in the course of a search. Thus, although the Supreme Court eliminated the Ninth Circuit's "provocation rule," for the first time it has held that police officers might be held liable for injuries caused by the lawful use of force under *Graham*, so long as that use of force could be said to be proximately caused by a prior Fourth Amendment violation. The Court remanded the matter to the Ninth Circuit for a clearer determination of precisely what Fourth Amendment violation proximately caused the officers' use of force. The Court observed that it was unclear from the Ninth Circuit's prior opinion whether it believed that the use of force was caused by the officers' violation of the

"knock and announce" rule—for which the officers had been found qualifiedly immune—or whether the mere absence of the warrant itself could be said to have proximately caused the use of force and subsequent injury.

On remand, the Ninth Circuit again affirmed the judgment. For purposes of Fourth Amendment liability, the court found that the violation consisted of the unlawful entry, and not the mere failure to obtain a warrant. It noted that although the officers' failure to knock and announce their presence may have been one cause of the plaintiffs' injuries, that the entry itself was a concurrent cause of the subsequent use of force, and hence could independently give rise to liability. The court also reinstated judgment for the plaintiffs on their state law negligence claim, noting that subsequent to the district court's decision the California Supreme Court issued its decision in *Hayes v. County of San Diego*, 57 Cal.4th 622 (2013), which held that an officer's actions prior to the use of force could be considered in determining whether the officer acted negligently.

Mendez greatly expands potential liability for warrantless entries. It reaffirms the broad state law negligence liability standard of *Hayes*, and more significantly, creates Fourth Amendment liability for even the otherwise lawful use of force, where such force is preceded by an unlawful entry.

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

• No qualified immunity from Due Process claim arising from increasing danger to counter protesters from attacks by other protesters.

In *Hernandez v. City of San Jose*, __F.3d__, 2018 WL 3597324 (9th Cir. 2018) pro-Trump protesters sued a city and its police officers, asserting they had been injured by other protesters at a campaign rally. Plaintiffs contended that the 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. The district court denied the officers' motion to

dismiss based upon qualified immunity, finding that the law was clearly established that officers may not increase the danger of someone being attacked through their affirmative conduct.

The Ninth Circuit affirmed. The court held there could be no qualified immunity, because the law was clearly established that police officers could be liable under the Due Process clause under those circumstances where they increased the potential danger to persons in their charge. Here, the plaintiffs' claim was not based upon a mere failure to protect them from the actions of other protesters, but rather affirmative conduct by the police officers in directing the plaintiffs to take a particular route which subjected them to attack by others.

Hernandez is significant, in that it clarifies the standards for imposing liability against police officers engaged in crowd control activities. It reaffirms that officers have no general duty to intervene, but that actions which may increase the likelihood of violence may give rise to liability.

III. MUNICIPAL TORT LIABILITY—RESPONDEAT SUPERIOR, WORKERS' COMPENSATION EXCLUSIVITY AND IMMUNITY.

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

- **Respondeat superior and the coming and going rule.**

In *Newland v. County of Los Angeles*, 24 Cal. App. 5th, 676 (2018), a County public defender injured the plaintiff in an auto accident while on his way home from work. Plaintiff argued that the County was responsible for the accident under the doctrine of respondeat superior, asserting that the County required public defenders to use their vehicles in performing their job-related functions, and hence the "coming and going" rule that generally barred respondeat superior liability for accidents occurring

during an employee's commute did not apply. A jury found for the plaintiff and awarded almost $14 million in damages. 234 Cal. Rptr. 3d at 374, 381.

In a 2-1 decision, the Court of Appeal reversed with directions to enter judgment for the County. The court observed that there was no evidence to support the jury's determination that the public defender was impliedly required to use a vehicle to perform his job-related functions on the day of the accident. *Id*. at 377. The court found that the undisputed evidence at trial demonstrated that the public defender had only used his car sporadically over the years to perform various tasks, such as making occasional appearances in branch courts, visiting jails, or viewing crime scenes, but there was no evidence he needed his vehicle to perform any of those tasks on the day of the accident. *Id*. at 389. Nor was there any evidence that he was required to have his car available to handle any sort of emergency situation. *Id*. Rather, he was simply driving a normal, routine commute. *Id*. Moreover, there was no evidence showing that the public defender's use of the car provided any direct or incidental benefit to his employer, as there was no evidence suggesting that the County relied on or expected the public defender to make his car available on the days he did not have outside tasks. *Id*. In fact, the evidence was that the public defender performed his job for years while commuting to work using public transportation. *Id*.

Newland is important in establishing the limited nature of the required vehicle and incidental benefit exceptions to the coming and going rule. Public employees, and particularly public attorneys, may perform various tasks in the course of their duties that might call for the occasional use of an automobile, but *Newland* underscores that simple occasional use is insufficient to establish a general exception to the coming and going rule.

B. *Gund v. County of Trinity*, 24 Cal. App. 5th, 185 (2018)

- **Workers' compensation exclusive remedy for citizens aiding law enforcement.**

In *Gund v. County of Trinity*, 24 Cal. App. 5th, 185 (2018), police received a 911 call with a whispered statement that an individual needed help. 234 Cal. Rptr. 3d at 188. A deputy called the neighbor of the 911 caller and asked for them to check on them to see if everything was alright. *Id*. The neighbor then unwittingly walked into a murder scene and was savagely attacked by the person who had apparently just murdered the neighbor and her boyfriend. *Id*.

The neighbor sued the County and the deputy for negligence and misrepresentation, alleging that defendants had created a special relationship and thus owed them a duty of care by withholding information known to the officers, i.e., that the caller had whispered "help me," which indicated a possible crime. *Id*

The trial court granted summary judgment based upon Labor Code section 3366, which provides that any person engaged in assisting any peace officer in active law enforcement service at the request of the peace officer, is deemed an employee of the public entity for purposes of workers' compensation. The plaintiff appealed, and the Court of Appeal affirmed. The court noted the broad scope of Labor Code section 3366, which necessarily encompassed any activity that aided a law enforcement officer in the performance of a law enforcement related function.

Although somewhat unique in its factual situation, *Gund* is useful in reaffirming the exclusivity of workers' compensation as a remedy, particularly in those narrow circumstances in which lay personnel may be called to assist law enforcement officers in performing their duties.

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

- **Immunity of Vehicle Code section 17004.7 shields public entity from liability arising from police pursuit so long as the policy provides that each officer certify that they have read and understand the policy, even if not all officers have done so.**

In *Ramirez v. City of Gardena*, __Cal.5th __, 2018 WL 3827236 (2018), the plaintiff sued a city for wrongful death, asserting that her son had died as a result of a collision caused by the city's police officers during a pursuit. The trial court granted summary judgment, finding that the city was shielded from liability under Vehicle Code section 17004.7 because it had a valid pursuit policy, which included the requirement that all officers certify that they had read and understood the policy.

After the Court of Appeal affirmed the judgment, plaintiff sought review in the California Supreme Court, arguing that the evidence demonstrated that although the policy required all officers to certify that they read and understood the policy, that in fact evidence indicated that not all officers had done so. The Supreme Court granted review to determine whether section 17004.7 merely required that the policy include a certification requirement, or whether the immunity only applied where the requirement was actually fulfilled by every officer.

In a unanimous opinion the Supreme Court affirmed the Court of Appeal. It held that by its plain terms, section 17004.7 merely required a policy to include a requirement that officers certify that they read and understood the city's pursuit policy, and did not require that a city actually demonstrate that in fact every officer had complied with the requirement.

Ramirez is a major victory for public entities in that it reaffirms the strong protections of section 17004.7 and recognizes the practical difficulties in assuring

individual compliance with every aspect of a pursuit policy. Significantly, however, the Supreme Court expressly left open the important questions of whether there may be circumstances where a lack of compliance with the certification requirement or meaningful implementation of a pursuit policy, may indicate that an agency is not satisfying the statute's requirements and hence forfeits any immunity.