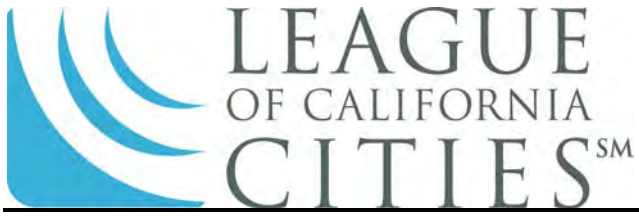

Municipal Tort and Civil Rights Litigation Update

Friday, September 7, 2012 General Session; 9:00 – 10:15 a.m.

Eugene P. Gordon, Office of the City Attorney, San Diego

Notes . . .

League of California Cities
City Attorneys' Department
Annual Conference
September 2012

MUNICIPAL TORT AND CIVIL RIGHTS LITIGATION UPDATE

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MUNICIPAL TORT AND
CIVIL RIGHTS LITIGATION UPDATE

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A CROSSWALK WITHOUT STREETLIGHTS OR A TRAFFIC SIGNAL IS NOT A DANGEROUS CONDITION BECAUSE A PUBLIC ENTITY HAS NO DUTY TO PROVIDE SUCH FEATURES

1. *Mixon v. State of California,* 207 Cal. App. 4th 124 (2012).

FACTS AND PROCEDURAL BACKGROUND

On February 14, 2006, around 7:40 p.m., a father and his three children were walking across a street in a marked crosswalk when a motorist failed to yield to the pedestrians and struck one of the children. The particular intersection had a marked crosswalk but no signal lights and no street lights directly overhead.

The father told the police that the family stopped at the southeast corner of the intersection and waited for north and southbound traffic to stop before entering the crosswalk. A northbound car stopped and the father and his children entered the intersection together in front of the stopped car. The family started to cross the street from east to west. One southbound car passed as they started to cross the street and another southbound vehicle, a pickup truck, approached the crosswalk as the family was walking across the street. The truck failed to stop and struck one of the children, a four-year old boy. The boy sustained major personal injuries.

The injured boy and his siblings sued the motorist and others for personal injury and emotional distress. Plaintiffs also sued the State, alleging that the intersection was in a dangerous condition due to a faulty lighting configuration, lack of traffic control signals and signs, placement of signs, the type of crosswalk marking, and the grade of the intersection.

The trial court granted summary judgment in favor of the State. The court found that the intersection was not in a dangerous condition and that there was no duty to provide lighting at the intersection with overhead street lights. Plaintiffs filed a timely notice of appeal.

CALIFORNIA COURT OF APPEAL DECISION

The Court of Appeal affirmed the judgment of the trial court which granted summary judgment to the State. Plaintiffs identified five factors that allegedly made the intersection dangerous, but the Court of Appeal concluded that the intersection was not in a dangerous condition whether the factors are considered alone or in combination.

A. Lighting

Plaintiffs contended that the lighting at the site of the accident was inadequate and made especially dangerous because the poorly lit intersection contrasted sharply with better lit areas surrounding it. Nearby areas were more brightly lit than the intersection, and, according to Plaintiffs' electrical engineer and lighting expert, this contrast in lighting made it harder for southbound motorists to perceive pedestrians at the intersection.

It is well settled that a public entity has no general duty to light its streets, and that the absence of street lighting is itself not a dangerous condition. *City of San Diego v. Superior Court,* 137 Cal. App. 4th 21, 23 (2006); *Plattner v. City of Riverside,* 69 Cal. App 4th 1441, 1443 (1999); and *Antenor v. City of Los Angeles,* 174 Cal. App. 3d 477, 483 (1985).

However, Plaintiffs argued that even if the State had no duty to provide lighting, it may be held liable because it undertook to provide lighting and did so negligently by lighting the surrounding areas more brightly than the intersection. The court rejected Plaintiffs' argument, stating that the argument "is no more than a variant of the long-rejected claim that a public entity is negligent for failing to provide street lights."

According to the court, "[a] public entity, which has no general duty to light its streets, cannot be held liable for failing to provide a consistent level of lighting between one street and the next."

B. Traffic Control Signal

Plaintiffs contended that the lack of a traffic control signal made the intersection dangerous. However, California Government Code section 830.4 provides that a condition is not a dangerous condition merely because of the failure to install a described traffic control device.

Here, according to the court, there were no additional features of the property to combine with the lack of a traffic control signal to make the intersection dangerous. Therefore, the lack of a traffic signal at the intersection does not constitute proof of a dangerous condition.

C. Warning Signs

Plaintiffs contended that the intersection was in a dangerous condition due to the lack of a pedestrian crossing sign. However, California Government Code section 830.8 provides that a public entity is not liable for injury caused by the failure to provide such a sign, unless a sign was necessary to warn of a concealed dangerous condition. The absence of a warning sign itself is not a dangerous condition. Here, according to the court, the absence of a pedestrian crossing sign at the intersection does not prove a dangerous condition.

Plaintiffs also contended that the presence of a signal ahead sign and roadway marking pertaining to the next intersection beyond the subject intersection diverted drivers' attention to the next intersection and thus distracted them from focusing on the subject intersection. However, the court concluded that the sign and marking failed to prove a dangerous condition as they were accurate in warning drivers of a signal light at the next intersection. The court explained that "[a]n accurate, reasonably placed warning sign does not create a dangerous condition just because it focuses a driver's attention on one roadway feature among many. It remains the driver's duty to attend to the roadway as a whole."

D. Crosswalk Marking

The subject crosswalk was marked with white parallel lines. Plaintiffs argued that the State used a "minimalist approach to delineating the crosswalk" that was less visible than alternate forms such as the "zebra stripe," "piano key," or "ladder" paint patterns. However, according to the court, "[a] public entity is not required to go beyond the elimination of danger and maximize every safety precaution." Here, there was no evidence that the crosswalk pattern used, although perhaps not the safest possible, created a dangerous condition.

Accordingly, the court concluded that the fact a crosswalk is painted with parallel lines rather than with a zebra stripe, piano key, or ladder pattern does not create a dangerous condition.

E. Road Grade

The roadway has a 5 percent downgrade for southbound traffic approaching the subject intersection. Just north of the intersection there is a 1.88 percent upgrade as the road passes through the intersection. Plaintiffs claimed that this change in elevation created "a dip or hollow" at the intersection that impaired the visibility of the crosswalk. However, the court noted that the less than two percent grade change at the location of the accident was slight, and that the intersection's crosswalk markings are visible to motorists approaching the intersection from the north.

CONCLUSION

The court held that the evidence presented here failed to raise a triable issue of fact that the intersection was in a dangerous condition. Therefore, the trial court properly granted summary judgment to the State.

A POLICE OFFICER WHO TASERED AND PUNCHED AN IN-CUSTODY SUSPECT WAS NOT ENTITLED TO QUALIFIED IMMUNITY UNDER § 1983 WHEN THE SUSPECT DIED OF ASPHYXIATION AFTER BEING PINNED BY MULTIPLE OFFICERS

2. *Mendoza v. City of West Covina,* 206 Cal. App. 4th 702 (2012).

FACTS AND PROCEDURAL BACKGROUND

David Mendoza, 42, died of asphyxiation on March 17, 2007, while in police custody in the emergency room of a hospital. In the days leading up to his death, Mendoza went to the hospital three times because of alcohol withdrawal sickness. The last two hospital visits took place the night before and the night of his death. On those two occasions, an intravenous needle was used. On the second occasion, at around 3:30 a.m., on March 17, Mendoza pulled the needle from his arm and walked out of the hospital.

A few hours later, Mendoza walked into the backyard of a nearby home, tried to open a window and asked to use a telephone. The homeowner called the police,

who found Mendoza seated on a curb not far away. Mendoza told one of the officers, Officer Enrique Macias, that he went to the house to ask if he could use the phone to call his family. Mendoza asked Macias to help him, but Macias arrested Mendoza on suspicion of burglary and took him to a holding cell. Mendoza complained that he had stomach pains and was hearing voices, and told Macias that he also had diabetes and high blood pressure. Macias took Mendoza to the hospital so Mendoza could be medically cleared for booking.

Once at the hospital, Mendoza submitted to a physical examination and gave a urine sample. His right arm was then handcuffed to the arm of a chair which was designed as a seat for drawing blood samples for testing blood alcohol content. A nurse applied a tourniquet to Mendoza's arm in order to draw a blood sample, but although Mendoza had been cooperative, nonthreatening, and noncombative, he said he did not want a needle in his arm. At this point, the events leading to Mendoza's death were very much in dispute at trial.

OFFICER MACIAS'S ACCOUNT

According to Officer Macias, Mendoza became increasingly agitated and struggled to get out of the chair. Mendoza refused to remain seated and stood up several times. Officer Macias asked a sheriff's deputy to help watch Mendoza while Macias called his watch commander. Mendoza then moved toward the deputy who pushed Mendoza against the wall. According to the deputy, Mendoza resisted and kept pushing against her. Officer Macias went back to help the deputy, and tried to get Mendoza to sit back down.

Mendoza continued to resist, and because Officer Macias believed Mendoza might use the chair as a weapon, Macias decided to use his taser on Mendoza. Macias warned Mendoza for about 30 seconds that he would tase Mendoza unless he sat back down, and pressed the taser against Mendoza's torso. When Mendoza did not comply, Macias activated the taser in the drive-stun mode. Mendoza came toward Officer Macias, and they both fell to the ground. A prolonged struggle followed, during which, according to Macias, Mendoza swung the chair that was handcuffed to his wrist and flipped it from side to side. Officer Macias applied the taser to Mendoza three or four more times in an attempt to subdue him. Mendoza was yelling and screaming and kept grabbing Macias. Officer Macias punched Mendoza in the face five or six times.

In response to Officer Macias' radio call for help, three more police officers arrived and helped Macias subdue Mendoza. The four officers rolled Mendoza over on to his stomach, held him down, and handcuffed him. At that point, Mendoza was not breathing. Efforts to revive him were futile, and Mendoza died.

PLAINTIFFS' ACCOUNT

Officer Macias conceded that between the time when he pressed the taser against Mendoza's body and the first time he deployed it, Mendoza did not try to hit Macias or the sheriff's deputy. A nurse who had tried to draw blood from Mendoza, testified that Mendoza was seated when Macias first tasered him.

Another witness testified that she heard Officer Macias tell Mendoza to calm down and that he would be fine. She then heard the sound of a chair moving around, followed by the snapping sounds of a taser. She saw Mendoza lying face down on his stomach with his right hand still cuffed to the chair. Mendoza was screaming in pain and repeatedly cried out for help. The witness stated that she never saw Mendoza touch or resist anyone or lift or swing the chair. One officer had a foot near Mendoza's head, and another had a foot on his back.

Mendoza's brother-in-law arrived at the hospital and heard a commotion in the emergency room. He testified that he saw Mendoza lying down on the floor. The sheriff's deputy had an arm around Mendoza's neck and Officer Macias was on top of Mendoza's right hip. Macias had a stun gun in his left hand and was alternately punching and tasering Mendoza.

The brother-in-law stated he did not count how many times Officer Macias punched Mendoza but Macias "did not stop from the time that I was there." According to the brother-in-law, Macias used the taser on Mendoza five or six times, sometimes for as long as seven seconds. Mendoza was lying on the floor during this time and did not lift up the chair to which he was handcuffed. The brother-in-law testified that Mendoza never hit anyone and did not try to take Macias's taser. Mendoza made no movements except for flinching in response to pain from the beating. According to the brother-in-law, by the time the three additional officers arrived, Mendoza was weak and "completely subdued," but the three officers together with Macias all got on top of Mendoza.

A forensic pathologist testified for Plaintiffs that Mendoza died due to '"restraint asphyxiation" from the force of being pinned by Officer Macias and the three other officers. He explained that the stress of being beaten and stunned, combined with Mendoza's obesity and hypertension, made Mendoza more susceptible to the restraint force used on him.

A police use of force expert testified that Officer Macias's initial use of the taser was unnecessary and excessive because Mendoza had merely expressed his refusal to submit to the intravenous blood draw and was not making any threatening moves. The expert testified that the taser was not used properly by Macias and that excessive force was used, as the computerized log from the taser showed it was discharged 14 times, with one discharge lasting upwards of 30 seconds. Furthermore, according to the expert, Macias was in charge of the incident and thus had an obligation to direct the other officers to make sure Mendoza's airway was kept open so he could breathe. According to the expert, there was no evidence that Macias took such steps.

Mendoza's two sons sued the City and Officer Macias for wrongful death, alleging that Macias used excessive force in violation of their father's constitutional rights.

A jury found that Officer Macias caused the death of David Mendoza through the unconstitutional use of excessive force. The jury awarded each son $750,000 for the wrongful death of their father, but determined that Mendoza was 30 percent

at fault. The jury found that Officer Macias had acted with "malice, oppression and/or fraud," and in a bifurcated proceeding before the trial court, the court assessed punitive damage against Macias in the amount of $4,500.

The trial court denied Officer Macias's motion for nonsuit based on qualified immunity for his conduct.

CALIFORNIA COURT OF APPEAL DECISION

The Court of Appeal affirmed the judgment of the trial court denying Officer Macias's motion for nonsuit based on qualified immunity. According to the court, viewing the evidence in the light most favorable to Plaintiffs, substantial evidence supported the jury's verdict that Officer Macias's use of force was excessive.

The court also concluded that at the time of the constitutional violation in March 2007, the law was sufficiently clear that every reasonable official would have known that Officer Macias's use of force violated Mendoza's constitutional rights. According to the court, numerous federal court decisions made it clear before 2007 that using various types of force, including tasers, on a non-resistant, non-threatening individual constituted excessive force. Thus, Officer Macias was not entitled to qualified immunity for his actions.

TWO SECRET SERVICE AGENTS WERE ENTITLED TO QUALIFIED IMMUNITY BECAUSE THE LAW WAS NOT CLEARLY ESTABLISHED THAT AN ARREST SUPPORTED BY PROBABLE CAUSE COULD VIOLATE THE FIRST AMENDMENT

3. *Reichle v. Howards*, -- U.S. --, 132 S. Ct. 2088 (2012).

FACTS AND PROCEDURAL BACKGROUND

Defendants were members of a Secret Service detail protecting Vice President Richard Cheney while he visited a shopping mall. Plaintiff was also at the mall. He was engaged in a cell phone conversation when he noticed the Vice President greeting members of the public. One of the agents overheard Plaintiff say, during this conversation, "I'm going to ask [the Vice President] how many kids he's killed today." When Plaintiff approached the Vice President, he told him that his "policies in Iraq are disgusting." The Vice President simply thanked Plaintiff and moved along, but the agents saw Plaintiff touch the Vice President's shoulder as the Vice President was leaving. Plaintiff then walked away.

One of the agents approached Plaintiff, displayed his badge, identified himself, and asked to speak with him. Plaintiff refused and attempted to walk away. The agent stepped in front of Plaintiff and asked if he had assaulted the Vice President. Plaintiff denied assaulting or even touching the Vice President. After completing his interview of Plaintiff, the agent arrested Plaintiff, who was charged with harassment in violation of state law. The charge was eventually dismissed.

Plaintiff brought a *Bivens* action in federal district court against two of the agents. Plaintiff alleged that he was arrested and searched without probable cause in

violation of the Fourth Amendment. He also alleged that the arrest violated the First Amendment because it was made in retaliation for Plaintiff's criticism of the Vice President. The agents moved for summary judgment on the ground that they were entitled to qualified immunity, but the district court denied the motion. On appeal, the Tenth Circuit reversed the immunity ruling with respect to the Fourth Amendment claim because the court concluded that the agents had probable cause to arrest Plaintiff for making a material false statement to a federal official when Plaintiff falsely denied touching the Vice President. Thus, the court concluded that neither Plaintiff's arrest nor search incident to the arrest violated the Fourth Amendment.

However, the Tenth Circuit denied the agents qualified immunity from Plaintiff's First Amendment claim. According to the court, the law was clearly established that a retaliatory arrest violates the First Amendment even if supported by probable cause, and therefore, the agents were not entitled to qualified immunity.

The U.S. Supreme Court granted certiorari on two questions: whether a First Amendment retaliatory arrest claim may lie despite the presence of probable cause to support the arrest, and whether clearly established law at the time of Plaintiff's arrest so held.

U.S. SUPREME COURT DECISION

The Supreme Court reversed the judgment of the Tenth Circuit denying the agents qualified immunity. The Court held that the Secret Service agents were entitled to qualified immunity because, at the time of Plaintiff's arrest, it was not clearly established that an arrest supported by probable cause could give rise to a First Amendment violation.

The Court did not address the first question raised by the Court when it granted certiorari--whether a First Amendment retaliatory arrest claim may lie despite the presence of probable cause to support the arrest. Instead, the Court skipped to the second prong of a qualified immunity analysis, namely, assuming a violation of a purported constitutional right occurred, was that right "clearly established" at the time of the violation.

Courts may grant qualified immunity to government officials on the ground that a purported right was not "clearly established" by prior case law. *Pearson v. Callahan,* 555 U.S. 223, 236 (2009). To be clearly established, a right must be sufficiently clear "that every 'reasonable official would [have understood] that what he is doing violates that right.'" *Ashcroft v. al-Kidd,* 563 U.S. --, 131 S. Ct. 2074, 2078 (2011) (quoting *Anderson v. Creighton,* 483 U.S. 635, 640 (1987)).

Here, according to the Supreme Court, the "clearly established" standard was not satisfied. The Court has never recognized a First Amendment right to be free from a retaliatory arrest that was supported by probable cause. Appellate courts are divided on the issue of whether an arrest supported by probable cause could give rise to a First Amendment violation. As the Supreme Court previously observed, "[i]f judges thus disagree on a constitutional question, it is unfair to

subject police to money damages for picking the losing side of the controversy." *Wilson v. Layne,* 526 U.S. 603, 618 (1999).

Accordingly, the agents were entitled to qualified immunity.

WITNESSES, INCLUDING POLICE OFFICER WITNESSES, IN GRAND JURY PROCEEDINGS ARE ABSOLUTELY IMMUNE FROM SUIT UNDER § 1983 BASED ON THE WITNESS' TESTIMONY

4. *Rehberg v. Paulk,* -- U.S. --, 132 S. Ct. 1497 (2012).

FACTS AND PROCEDURAL BACKGROUND

Plaintiff, a certified public accountant, sent anonymous faxes to several recipients, including the management of a hospital in Albany, Georgia, criticizing the hospital's management and activities. In response, the local district attorney's office, with the assistance of its chief investigator, Defendant James Paulk, initiated a criminal investigation of Plaintiff, allegedly as a favor to the hospital.

The investigator testified before a grand jury, and Plaintiff was then indicted for aggravated assault, burglary, and six counts of making harassing telephone calls. The indictment charged that Plaintiff had assaulted a hospital physician after unlawfully entering the doctor's home. Plaintiff challenged the sufficiency of the indictment, and it was dismissed.

A few months later, the investigator returned to the grand jury, and Plaintiff was indicted again, this time for assaulting the same doctor, and for making harassing phone calls. On this occasion, both the doctor and the investigator testified. Again, the indictment was dismissed.

While the second indictment was still pending, the investigator appeared before the grand jury for a third time, and yet another indictment was returned. Plaintiff was charged with assault and making harassing phone calls. This final indictment was ultimately dismissed as well.

Plaintiff then brought a § 1983 action against the investigator. Plaintiff alleged that the investigator conspired to present and did present false testimony to the grand jury. The investigator moved to dismiss, arguing, among other things, that he was entitled to absolute immunity for his grand jury testimony. The district court denied the investigator's motion to dismiss, but the Court of Appeals for the Eleventh Circuit reversed, holding that the investigator was absolutely immune from a § 1983 claim based on his grand jury testimony.

The Court of Appeals noted that the investigator was the sole "complaining witness" before the grand jury, but the court declined to recognize a "complaining witness" exception to grand jury witness immunity.

The U.S. Supreme Court granted certiorari to resolve a Circuit conflict regarding the immunity of a "complaining witness" in a grand jury proceeding.

U.S. SUPREME COURT DECISION

The Supreme Court affirmed the judgment of the Court of Appeals, holding that a grand jury witness is entitled to the same immunity as a trial witness. According to the Court, "[t]he factors that justify absolute immunity for trial witnesses apply with equal force to grand jury witnesses." In both contexts, without absolute immunity, witnesses might be reluctant to testify, and even a witness who took the stand might not be candid and totally truthful for fear of being sued.

The Supreme Court did not see a reason to distinguish law enforcement witnesses from lay witnesses in § 1983 actions. The Court explained that police officers appearing as witnesses before a grand jury may reasonably be viewed like any other witness sworn to tell the truth.

Plaintiff's main argument was that certain grand jury witnesses - namely, those who qualify as "complaining witnesses" - are not entitled to absolute immunity. However, the Supreme Court observed that at common law at the time § 1983 was enacted, the term "complaining witness" was used to refer to a party who applied for an arrest warrant and initiated a criminal prosecution. A "complaining witness" might or might not testify, either before a grand jury or at trial, but testifying was not a necessary characteristic of a "complaining witness" at common law.

Thus, according to the Court, a law enforcement officer who testifies before a grand jury is not at all comparable to a "complaining witness." The officer, unlike a complaining witness at common law, does not make the decision to press criminal charges, rather, it is the prosecutor who is actually responsible for the decision to prosecute. A "complaining witness" cannot be held liable for perjurious *trial* testimony. *Briscoe v. LaHue,* 460 U.S. 325, 326 (1983). And, according to the Court, "there is no more reason why a complaining witness should be subject to liability for testimony before a grand jury."

Accordingly, the Supreme Court concluded that grand jury witnesses, including police officer witnesses, are entitled to the same immunity as trial witnesses.

THE DISCHARGE OF PEPPERBALLS INTO A CROWD OF PARTYGOERS WHO DID NOT POSE A THREAT TO POLICE OFFICERS OR OTHERS VIOLATED THE FOURTH AMENDMENT RIGHTS OF AN INDIVIDUAL WHO WAS HIT IN THE EYE BY A PROJECTILE

5. *Nelson v. City of Davis,* 685 F.3d 867 (9th Cir. 2012).

FACTS AND PROCEDURAL BACKGROUND

On April 16, 2004, approximately 1,000 people congregated at an apartment complex in Davis, California for what was termed by one participant as "the biggest party in history," for the annual Picnic Day festivities at U.C. Davis. Plaintiff, a U.C. Davis student, was among the attendees. Due to the size of the party, the street in front of the apartment complex became gridlocked and

partygoers began to park illegally. The police issued parking tickets to vehicles illegally parked and cited students for underage drinking. Officers saw individuals rocking a car and heard the sound of bottles breaking. The owner of the apartment complex requested that Sgt. John Wilson order non-residents to leave the complex.

Officers informed individuals around the fringes of the crowd that they were trespassing and that it was necessary for them to leave. This method to disperse the nearly 1,000 partygoers proved to be ineffective. Bringing a police vehicle to the scene which Sgt. Wilson hoped would have the effect of motivating partygoers to depart of their own volition also proved unsuccessful. The vehicle was soon overwhelmed by the crowd, including some individuals who threw bottles at the vehicle. The officers cleared a path for the police car by foot so that they could leave the complex and return to the police station to regroup.

Officers from other law enforcement agencies responded to a request for assistance from the City of Davis Police Department and 30 to 40 officers assembled in riot gear at a location near the apartment complex in preparation to disperse the crowd. Three of the Defendants, U.C. Davis police officers, were among those officers and were armed with pepperball guns. The court explained that pepperball guns are, in essence, paintball guns that fire rounds containing oleoresin capsicum ("OC") powder, also known as pepper spray. These rounds are fired at a velocity of 350 to 380 feet per second, with the capacity to fire seven rounds per second. They break open on impact and release OC powder into the air, which has an effect similar to mace or pepper spray.

Upon entering the complex, the officers issued unamplified verbal orders to disperse. The officers formed a skirmish line and moved through the crowd giving dispersal orders, but the majority of the crowd neither heard the orders nor dispersed. The officers formed a second skirmish line, and prepared again to disperse the crowd. This time, the officers armed with pepperball guns assembled under Sgt. Wilson's command in front of the other officers Their purpose was to use their weapons in order to "disperse" the remaining students and make way for the advancing "skirmish line."

The officers gathered in front of a breezeway in the apartment complex that was described as a "very narrow and confined space." A group of 15-20 individuals had gathered in this breezeway on the ground floor, including Plaintiff and his friends. The students were attempting to leave the party but according to the students, the police blocked their means of egress and did not provide any instructions for leaving the complex. The students testified in their depositions that they stood in the breezeway waiting for instructions from the police. At various times they called out to the police, asking the officers to inform them what they wanted the students to do. Scattered bottles were thrown throughout the complex, but the officers testified that no one from Plaintiff's group threw bottles at the police. The officers testified that they gave an audible warning to the students to disperse, but the students claimed that they did not hear any commands until after shots had already been fired. When the partygoers failed

to disperse, Sgt. Wilson ordered his team to "disperse them," at which point the three defendant officers shot pepperballs towards Plaintiff's group from a distance estimated by various parties to have been 45-150 feet away.

A pepperball fired from one of the officers' guns struck Plaintiff in the eye. As a result of his injury, Plaintiff suffered temporary blindness and a permanent loss of visual acuity. He endured multiple surgeries to repair the damage to his eye.

Plaintiff filed a § 1983 action, alleging, among other things, a violation of his Fourth Amendment right to be free from unreasonable seizure. The City of Davis, two police chiefs, Sgt. Wilson, and the three officers who fired pepperballs were named as defendants. Neither the students nor the officers identified which of the officers shot the projectile which struck Plaintiff.

The district court denied summary judgment to the officers, concluding that, under Plaintiff's version of the events, an unreasonable seizure under the Fourth Amendment had occurred. The court also held that the officers were not entitled to qualified immunity.

The officers filed a timely appeal.

NINTH CIRCUIT DECISION

The Ninth Circuit affirmed the order of the district court denying summary judgment to the officers. The court held that Plaintiff alleged facts which, if true, would support a finding that the officers' conduct constituted a violation of clearly established law.

A. Plaintiff was Intentionally Seized by the Police Under the Fourth Amendment

"A person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer by means of physical force or show of authority terminates or restrains his freedom of movement through means intentionally applied." *Brendlin v. California,* 551 U.S. 249, 254 (2007). The court in this case stated that "[t]o constitute a seizure, the governmental conduct must be purposeful, and cannot be an unintentional act which merely has the effect of restraining the liberty of the plaintiff. "

Here, the officers contended that Plaintiff was not "seized" under the Fourth Amendment, because he was not individually targeted by officers; therefore, his shooting was unintentional and incapable of causing a Fourth Amendment violation. The court disagreed, noting that the officers took aim and intentionally fired in the direction of a group of people of which Plaintiff was a member. Plaintiff was hit in the eye by a projectile and, after being struck, was rendered immobile until he was removed by an unknown individual. According to the court, such willful conduct should be contrasted with the unknowing and unintentional act of the accidental pinning of a fleeing felon to a wall by a police car when the brakes of the unoccupied police car failed. Here, Plaintiff "was both an object of intentional governmental force and his freedom of movement was

limited as a result." Thus, the actions of the officers amounted to an unconstitutional seizure of Plaintiff.

According to the court, Plaintiff was "seized" even though he may have been struck in the eye with a pepperball that was intended to impact some other part of his body, or was physically hit by the projectile when the officers sought only to spray him with its contents. "The precise manner in which the officers' intentional use of force was ultimately experienced by [Plaintiff] does not affect the determination that a seizure has occurred."

The court also concluded that the actions of the officers constituted a seizure of Plaintiff even though the intent of the officers was to disperse the crowd. The Supreme Court has repeatedly held that the Fourth Amendment analysis is not a subjective one. *See, e.g., Ashcroft v. al-Kidd,* -- U.S. --, 131 S. Ct. 2074, 2080 (2011). Here, according to the court, whether the officers intended to encourage the partygoers to disperse has no bearing on whether a seizure occurred.

B. The Officers' Use of Force Against Plaintiff Was Unreasonable

The court undertook an analysis under *Graham v. Connor,* 490 U.S. 386 (1989), to determine whether the seizure of Plaintiff was reasonable. Here, the court concluded that pepperballs are capable of causing serious bodily injury and "must be justified by substantial government interests." In the evaluation of the need, if any, for the officers' use of force against Plaintiff, the court considered a number of factors, including the severity of the crime at issue, whether Plaintiff posed an immediate threat to the safety of the officers or others, and whether Plaintiff actively resisted arrest or attempted to evade arrest by flight.

The court believed that the first factor, the severity of the crime at issue, weighed heavily in favor of Plaintiff and against the use of the force employed by the officers. Plaintiff had not committed a crime (with the possible exception of the minor offense of trespassing), and there was no need to quickly clear the apartment complex. Thus, the lack of serious criminal behavior by Plaintiff, and the absence of exigency involved in the officers' desire to clear the apartment complex "provid[ed] only minimal, if any, justification for the use of force under *Graham."*

With respect to the threat analysis, the court concluded that the undisputed facts established that the officers did not reasonably believe Plaintiff or any of his companions posed a threat. None of the officers saw Plaintiff or any of the other students gathered in the breezeway throw bottles or other debris at the officers, or engage in any other threatening or dangerous behavior. There was no indication that Plaintiff and his friends who were taking cover in the breezeway represented a threat to anyone's safety. According to the court, under these circumstances, "the general disorder of the complex cannot be used to legitimize the use of pepperball projectiles against non-threatening individuals."

According to the court, the third factor considered in the *Graham* analysis, whether Plaintiff actively resisted arrest or attempted to evade arrest by flight, also weighed in favor of Plaintiff. The officers never attempted to place Plaintiff or any of his friends under arrest. Thus, the degree of force employed may only be justified by a failure to comply with orders given by the officers. However, according to Plaintiff and his associates, the police did not give orders to the group until after the discharge of the pepperballs had already occurred. Accordingly, there was no justification for the use of force under the third *Graham* factor.

Additionally, according to the court, the officers failed to give sufficient warnings that force would be used against the students unless they dispersed. The students testified that they did not hear any orders given until Plaintiff had already been shot, and the group was not told prior to the shooting how they should comply with the dispersal orders. Thus, the failure to give sufficient warnings also weighs against the government's decision to use force against Plaintiff and his associates.

The court noted that POST guidelines relating to the deployment of pepperball guns were not followed. Those guidelines specified that officers should avoid the head, face and groin due to the risk of causing serious injury. Officers were warned that pepperball projectiles could not be accurately targeted beyond 30 feet, and they were advised not to shoot pepperballs indiscriminately or at individuals that were not posing a threat.

In the final analysis, according to the court, the only governmental interest involved in the application of force to Plaintiff and his friends was the officers' desire to clear the complex of the party-going individuals. There was no exigency motivating the officers' actions. Accordingly, the court concluded that the use of force that might lead to serious injury against non-threatening individuals who had committed no serious crime was unreasonable.

C. The Officers Were Not Entitled To Qualified Immunity

The court also concluded that at the time of the incident in 2004, the law was sufficiently established that a reasonable officer would have been on notice that the deployment of pepperball projectiles directed toward Plaintiff and his friends, given the minimal governmental interests at stake, was unreasonable under the circumstances. According to the court, while there was no binding precedent that had specifically addressed the use of pepperball projectiles, Circuit cases were consistent in holding that the use of force which is capable of causing serious bodily injury on individuals suspected of, at most, minor crimes, who posed no threat to the officers or others, and who engaged in only passive resistance, was unreasonable.

Accordingly, the court held that the officers were not entitled to qualified immunity for their actions.

A WITNESS STATEMENT OBTAINED THROUGH AN ATTORNEY-DIRECTED INTERVIEW IS ENTITLED TO AT LEAST QUALIFIED WORK PRODUCT PROTECTION

6. *Coito v. Superior Court (State of California),* 54 Cal. 4th 480 (2012).

FACTS AND PROCEDURAL BACKGROUND

A 13-year-old boy drowned in the Tuolumne River in Modesto, California. His mother filed a complaint for wrongful death naming several defendants, including the State of California.

Six other juveniles witnessed what happened. There were allegations that all of the juveniles, including the decedent, were engaged in criminal conduct immediately before the drowning. After co-defendant City of Modesto had noticed the depositions of five of the six juvenile witnesses, counsel for the State sent two investigators, both special agents from the Bureau of Investigations of the Department of Justice, to interview four of the juveniles. The State's counsel provided the investigators with questions he wanted asked. Each interview was audio-recorded and saved on a separate compact disc.

The City of Modesto took the deposition of one of the four interviewed witnesses. The State's counsel used the content of the witness's recorded interview in questioning the witness at the deposition.

Plaintiff then served the State with supplemental interrogatories and document demands. The interrogatories included Judicial Council Form Interrogatory No. 12.3, which sought the names, addresses, and telephone numbers of individuals from whom written or recorded statements had been obtained. The document demands sought production of the audio recordings of the four witness interviews. The State objected to the requested discovery based on the work product privilege.

Plaintiff filed a motion to compel an answer to Form Interrogatory No. 12.3 and the production of the recorded interviews. The trial court denied Plaintiff's motion except as to the recording used by the State to examine the witness at the earlier deposition. As to that recording, the court reasoned that the State had waived the work product privilege by using the interview to examine the witness during the deposition.

Plaintiff petitioned for a writ of mandate that the Court of Appeal granted. A divided court reversed, concluding that work product protection did not apply to any of the disputed items. The Court of Appeal issued a writ of mandate directing the trial court to grant the motion to compel discovery.

The California Supreme Court granted review.

CALIFORNIA SUPREME COURT DECISION

The Supreme Court reversed the judgment of the Court of Appeal. The Court held that:

(1) The recordings of witness interviews conducted by investigators employed by Defendant's counsel are entitled as a matter of law to at least qualified work product protection. The witness statements may be entitled to absolute protection if Defendant can show that disclosure would reveal its "attorney's impressions, conclusions, opinions, or legal research or theories." Cal. Civ. Proc. Code § 2018.030, subd. (a). If not, then the items may be subject to discovery if Plaintiff can show that "denial of discovery will unfairly prejudice [her] in preparing her claim . . . or will result in an injustice." *Id.* at subd. (b).

(2) The identity of witnesses from whom Defendant's counsel has obtained statements is not automatically entitled as a matter of law to absolute or qualified work product protection. In order to invoke the privilege, Defendant must persuade the trial court that disclosure would reveal the attorney's tactics, impressions, or evaluation of the case (absolute privilege), or would result in opposing counsel taking undue advantage of the attorney's industry or efforts (qualified privilege).

In California, an attorney's work product is protected by statute. Cal. Civ. Proc. Code § 2018.010 *et. seq.* Absolute protection is afforded to writings that reflect "an attorney's impressions, conclusions, opinions, or legal research or theories." Cal. Civil Proc. Code § 2018.030, subd. (a). Such writings "[are] not discoverable under any circumstances." *Id.* All other work product receives qualified protection; such material "is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice." *Id.* at subd. (b).

The Legislature has not defined or described "work product," leaving it to the courts to resolve whether particular materials constitute work product on a case-by-case basis. *City of Long Beach v. Superior Court,* 64 Cal. App. 3d 65, 71 (1976).

WITNESS STATEMENTS

A. Absolute Privilege

In the instant case, the Supreme Court concluded that "witness statements obtained as a result of an interview conducted by an attorney, or by an attorney's agent at the attorney's behest, constitute work product protected by section 2018.030." However, according to the Court, witness statements procured by an attorney are not automatically entitled as a matter of law to absolute work product protection. Instead, the applicability of absolute protection must be determined case by case. Thus, an attorney resisting discovery of a witness statement based on absolute privilege must make a foundational showing that disclosure would reveal the "impressions, conclusions, opinions, or legal research or theories" of the attorney. Upon an adequate showing, the trial court should then

determine, by conducting an in camera inspection if necessary, whether absolute work product protection applies to some or all of the material.

B. Qualified Privilege

Although witness statements obtained through an attorney-directed interview may or may not reveal the attorney's thought process, the Supreme Court concluded that such statements are nevertheless, as a matter of law, entitled to at least qualified work product protection under section 2018.030, subdivision (b). The Court believed that when an attorney obtains through discovery a witness statement obtained by opposing counsel through his or her own initiative, such discovery undermines the Legislature's policy to "[p]revent attorneys from taking undue advantage of their adversary's industry and efforts." Cal. Civ. Proc. Code § 2018.020, subd, (b). Further, according to the Court, a rule authorizing the discovery of witness statements procured by an attorney would likely result in fewer statements being recorded and potentially unfavorable matters not being thoroughly investigated.

Accordingly, a party seeking disclosure of a witness statement obtained by an attorney has the burden of establishing that denial of discovery will unfairly prejudice the party in preparing its case or defense or will result in an injustice.

IDENTITY OF WITNESSES

In the instant case, in Form Interrogatory No. 12.3, Plaintiff sought the disclosure of the identity of the witnesses from whom the State's attorney had obtained recorded statements. According to the Court, the disclosure of a list of such witnesses may, in some instances, reveal the attorney's impressions of the case. Such information may be entitled to absolute privilege under section 2018.030, subdivision (a). If absolute privilege is not applicable, such a list may still be entitled to qualified privilege under section 2018.030, subdivision (b) to the extent it reflects the attorney' s industry and effort in selecting which witnesses to ask for a recorded statement.

CONCLUSION

The Court concluded that information responsive to Form Interrogatory No. 12.3 is not automatically entitled as a matter of law to absolute or qualified work product privilege. "Instead, the interrogatory must usually be answered." However, an objecting party may be entitled to protection if it can make a preliminary or foundational showing that answering the interrogatory would reveal the attorney's tactics, impressions, or evaluation of the case, or would result in opposing counsel taking advantage of the attorney's industry or efforts. Upon such a showing, the trial court should then determine, by conducting an in camera hearing if necessary, whether absolute or qualified work product protection applies to the material in dispute.

The Supreme Court reversed the judgment of the Court of Appeal and remanded the matter for further proceedings to determine whether the disputed materials should be produced.

EXPERT TESTIMONY IS NOT NECESSARILY REQUIRED IN POLICE EXCESSIVE FORCE CASES

7. *Allgoewer v. City of Tracy,* 207 Cal. App. 4th 755 (2012).

FACTS AND PROCEDURAL BACKGROUND

Plaintiff's ex-wife complained to a police officer that Plaintiff had violated a child custody order by failing to return the parties' child to the ex-wife the day before. The officer and a second officer contacted Plaintiff at his home where Plaintiff was gardening in the yard. Plaintiff advised the officers that he had submitted a letter through his lawyer for a 30-day vacation period with the child but was unable to provide the officers with a copy of the letter from a folder of documents he had brought from the house.

Eventually, the first officer went to talk with the ex-wife, who was parked about a block away, about whether she had received the letter. She told the officer she had no knowledge of the letter, and a man on the telephone whom she claimed was her lawyer told the officer the same thing. The officer went back to Plaintiff and relayed the information to him, and Plaintiff began to get upset. The officer told him that he was in violation of the custody order and was going to have to give the child to the ex-wife. Plaintiff started raising his voice and eventually squatted down to pick up the documents he had brought from the house, along with a hand rake he had been using to garden. The officer told Plaintiff to put the rake down because it was making him nervous, but Plaintiff did not comply. He told the officers he was not going to hurt them and invited them into the house. When Plaintiff started walking toward the backyard gate, the second officer told him not to go into the backyard.

The second officer also told Plaintiff to put the rake down or the officer would "tase" him. Then, without either officer telling Plaintiff he was under arrest, the second officer moved toward Plaintiff, grabbed his right arm, and attempted to kick the hand rake out of his hand. The officer then drove Plaintiff to the ground with a leg sweep. The first officer rushed in to assist.

The second officer got on Plaintiff's back, applying pressure on the side of Plaintiff's face with the back of his tricep in an effort to get Plaintiff's arm out from under him. Plaintiff told the officers that he had an injured shoulder and some crushed vertebrae, and he yelled in pain, but refused to comply with the officer's command to put his arms behind his back. Meanwhile, the first officer who was yelling at Plaintiff to give the other officer his hand, reached down and tried to pull Plaintiff's hand back. When that did not work, the officer deployed his taser on Plaintiff twice. After the second deployment, the second officer was able to get Plaintiff's left hand behind his back, and Plaintiff then put his right hand behind his back as well.

The officers arrested Plaintiff for violating a court order, brandishing a weapon, and resisting arrest.

Plaintiff claimed that as a result of the incident, he suffered a broken wrist, torn rotator cuff muscles, and a torn bicep.

Plaintiff filed a § 1983 action and an action under state law against the officers, alleging, among other things, that the officers used excessive force in arresting him.

The case proceeded to trial. The officers filed a motion for nonsuit on the ground that expert testimony was necessary to establish an objective reasonableness standard for the officers' actions, and the failure of Plaintiff to provide such testimony would make it impossible for the jury "to assess what actions are characteristic of a reasonable police officer." The trial court agreed. The court explained that Plaintiff could not prevail without offering expert testimony on "what force a reasonable law enforcement officer would have used under the same or similar circumstances," as the jury would have no evidence to determine what force a reasonable officer would have used. The court found that it would be necessary to have that kind of testimony, and accordingly, the court granted the officers' motion for nonsuit.

Plaintiff filed a timely appeal.

CALIFORNIA COURT OF APPEAL DECISION

The Court of Appeal reversed the judgment of dismissal by the trial court. The court concluded that the trial court prejudicially erred in concluding that expert testimony on the issue of reasonable force was required in this case.

"Generally, the opinion of an expert is admissible when it is '[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact . . . '." *PM Group, Inc. v. Stewart,* 154 Cal. App. 4th 55, 63 (2007)(quoting Cal. Evid. Code section 801, subd. (a)). "If the matter in issue is one within the knowledge of experts *only* and not within the common knowledge of laymen, it is necessary for the plaintiff to introduce expert opinion evidence in order to establish a prima facie case." *Miller v. Los Angeles County Flood Control Dist.,* 8 Cal. 3d 689, 702 (1973). The need for expert testimony is usually the case in medical malpractice actions, as the standard of care in such actions is generally a matter peculiarly within the knowledge of experts. *Johnson v. Superior Court,* 143 Cal. App. 4th 297, 305 (2006).

Here, "[the officers] took the position—and the trial court agreed—that the 'standard of conduct' in an excessive force case is like the standard of care in a medical malpractice case in that, in all but the most egregious cases, the degree of force a reasonable officer would use under a particular set of circumstances is peculiarly within the knowledge of experts." There is no California authority directly on point, however, several out-of-state authorities were found by the court to be persuasive, although they did not support the officers' position.

Under *Graham v. Connor,* 490 U.S. 386 (1989), the question in police excessive force cases is whether the amount of force the officers used in making the arrest was objectively unreasonable under the particular circumstances. The

"reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene." *Kofp v. Skyrm,* 993 F.2d 374 (4th Cir. 1993), stands for the proposition that expert testimony can be admissible on the issue of reasonable force under *Graham. Thompson v. City of Chicago,* 472 F.3d 444 (7th Cir. 2006), stands for the proposition that it is not always admissible. Both of these cases indirectly support the proposition that expert testimony is not required in an excessive force case.

In *Robinson v. City of West Allis,* 239 Wis. 2d 595 [619 N.W. 2d 692] (2000), the Wisconsin Supreme Court observed that determinations of excessive force generally are not beyond the realm of ordinary experience and lay comprehension. *Id.* at pp. 695, 699. The facts of each case will determine whether expert testimony would assist the jury.

Here, the court concluded that there was no need for expert testimony. According to the court, there was nothing about the particular use of force in this case "that was so far removed from the comprehension of a lay jury as to necessitate expert opinion on the applicable standard of conduct or on what amount of force was reasonable under the circumstances that confronted the officers who arrested [Plaintiff]." The fact that the average lay person does not have training or experience in police practices and procedures does not mean that expert testimony is required for a jury to determine whether a particular amount of force was unreasonable under the circumstances. Thus, the trial court erred in concluding otherwise.

A PRIVATE ATTORNEY TEMPORARILY RETAINED BY A CITY TO CARRY OUT ITS WORK IS ENTITLED TO SEEK QUALIFIED IMMUNITY UNDER SECTION 1983

8. *Filarsky v. Delia,* -- U.S. --, 132 S. Ct. 1657 (2012).

FACTS AND PROCEDURAL BACKGROUND

Plaintiff, a firefighter employed by the City of Rialto, California, was suspected by the City of feigning an illness. The City hired a private investigation firm to conduct surveillance on him. The investigators observed Plaintiff purchasing building supplies from a home improvement store and surmised that Plaintiff was missing work to do construction on his home rather than because of illness.

The City initiated a formal internal affairs investigation of Plaintiff, and he was ordered to appear for an administrative investigation interview. The City hired Defendant to conduct the interview. Defendant was an experienced employment attorney who had previously represented the City in several investigations. At the interview, Plaintiff acknowledged buying the supplies, but denied having done any work on his home. To verify Plaintiff's claim, Defendant asked Plaintiff to allow a fire department official to enter his home and view the unused materials. On the advice of counsel, Plaintiff refused. Defendant then asked Plaintiff if he would be willing to bring the materials out onto his lawn so that the official could

observe them without entering Plaintiff's home. Plaintiff again refused to consent. Defendant then ordered Plaintiff to produce the materials for inspection.

Plaintiff's counsel objected to the order, asserting that it would violate the Fourth Amendment. The attorney threatened to sue the City and Defendant for a violation of civil rights. Nonetheless, after the interview concluded, officials followed Plaintiff to his home, where he brought out the unused materials.

Plaintiff brought a § 1983 action against the City, the Fire Department, the City's attorney (Defendant) and other individuals, alleging that the order to produce the building materials violated his rights under the Fourth and Fourteenth Amendments. The District Court granted summary judgment to all the individual defendants on the basis of qualified immunity. The Ninth Circuit affirmed with respect to all individual defendants except the City's attorney, concluding that he was not entitled to seek qualified immunity because he was a private individual, and not a public employee.

The U.S. Supreme Court granted a petition for certiorari.

U.S. SUPREME COURT DECISION

The Supreme Court in a unanimous decision reversed the judgment of the Ninth Circuit denying qualified immunity to Defendant. The Court concluded that immunity under § 1983 should not vary depending on whether an individual working for the government does so as a permanent or full-time employee, or on some other basis.

The Court noted that the common law as it existed in 1871, when Congress enacted § 1983, did not draw a distinction between full-time public servants and private individuals engaged in public service in according protection from suit to individuals carrying out government responsibilties. According to the Court, there is no reason for not carrying forward the common law rule. First, the government interest in avoiding "unwarranted timidity" on the part of those engaged in the public's business is the same regardless of whether the individual sued as a state actor works for the government full-time or on some other basis.

Second, affording immunity to those acting on the government's behalf will ensure that talented individuals are not deterred by the threat of damages suits from entering public service.

Third, the public interest in ensuring performance of government duties free from the distractions that can accompany lawsuits is the same whether those duties are discharged by private individuals or permanent government employees.

Fourth, distinguishing among those who carry out the public's business based on the nature of their particular relationship with the government "creates significant line-drawing problems" and can deprive state actors of the ability to reasonably anticipate when their conduct may give rise to liability for damages.

The common law did not draw a distinction for liability purposes between work performed by permanent, full-time employees of a city and government work

performed by private individuals. The Supreme Court did not see a justification for doing so under § 1983.

Accordingly, the Court held that private individuals performing work for a city, like formal employees of the city, are entitled to seek the protection of qualified immunity.

UPDATE

In *Mattos v. Agarano* and *Brooks v. City of Seattle*, 661 F.3d 433 (9th Cir. 2011), the Ninth Circuit en banc consolidated for purposes of appeal, two § 1983 cases involving the use of tasers. The court held in both cases that (1) the use of the tasers under the circumstances constituted excessive force, but (2) at the time of the incidents (Brooks—2004; Mattos—2006), the law was not clearly established that tasing Brooks and Mattos constituted excessive force. Thus, the officers were entitled to qualified immunity.

In *Brooks,* a woman who was seven months pregnant was stopped for driving 12 miles-per-hour over the speed limit. Brooks denied that she had been speeding and refused to sign the traffic citation. After several attempts to talk her out of the car failed, an officer displayed his taser and warned her that he would use it. The officers tried to pull Brooks out of her car, but she resisted by stiffening her body and grabbing the steering wheel. An officer then tasered her three times over the course of less than one minute in drive-stun mode.

In *Mattos,* officers were called to a home in Maui in response to a domestic dispute call. The officers eventually ended up inside the family home. One officer informed the husband that he was under arrest, but the wife was standing between the officer and her husband at that point. When the officer moved in to take the husband into custody, the wife put out her arm to prevent the officer from pressing up against her. Without warning, the officer deployed his taser at the wife in dart-mode.

On May 29, 2012, the U.S. Supreme Court denied certiorari.