



Municipal Tort and Civil Rights Litigation Update

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MUNICIPAL TORT AND CIVIL RIGHTS LITIGATION UPDATE

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**MUNICIPAL TORT AND
CIVIL RIGHTS LITIGATION UPDATE**

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**THE DUTY OF POLICE OFFICERS TO ACT
REASONABLY WHEN USING DEADLY FORCE
EXTENDS TO TACTICAL CONDUCT AND DECISIONS
PRECEDING THE USE OF DEADLY FORCE**

1. *Hayes v. County of San Diego*, 5193997, 2013 WL 4413281 (Cal. August 19, 2013).

FACTS

San Diego County Sheriff's Deputy Michael King arrived at the residence of Shane Hayes in Santee shortly after 9:00 p.m. on September 17, 2006, in response to a call from a neighbor who said she had heard screaming. Shane's girlfriend, Geri Neill, met Deputy King at the front door. Neill said that Shane had tried to kill himself earlier that evening by inhaling exhaust fumes from his car, Shane had tried to harm himself on other occasions, and she was concerned for his safety. She said there were no guns in the house. Deputy King did not ask whether Shane was under the influence of alcohol or drugs.

A few minutes later, Deputy Sue Geer arrived and leaned from Deputy King that a potentially suicidal man was in the house. The two deputies entered to determine whether Shane was a danger to himself. They were unaware that Shane had been drinking heavily and that four months earlier he had been taken into custody after a suicide attempt with a knife. The deputies did not call for a psychiatric team. With their guns holstered, the deputies walked into the living room and saw Shane standing in the kitchen.

Deputy King ordered Shane to show his hands. As Shane did so, he walked toward the deputies, holding in his raised right hand a large knife. The deputies simultaneously drew their guns and fired two shots each at Shane, who was then between two and eight feet away. Shane died from the gunshot wounds.

PROCEDURAL BACKGROUND

Chelsey Hayes, Shane's daughter, who was 12 years-old when the shooting took place, acting through a guardian ad litem, filed a complaint in federal district court alleging three federal law claims and two state law claims. The three federal claims were against the County and the two deputies, asserting a violation of Shane's Fourth Amendment right to be free from unreasonable searches and seizures, and Chelsey's right under the Fourteenth Amendment not to be deprived of liberty without due process of law.

Of the two claims asserted under state law, one was against the County and the two deputies, alleging negligence as regards the confrontation with Shane; the other state claim was against the County only, alleging negligent hiring, training, retention, and supervision of its employees.

The district court granted summary judgment in favor of the deputies and the County on all claims. With respect to the deputies, the court determined that under the circumstances, "it was objectively reasonable for the Deputies to

conclude that [S]hane posed a significant threat of death or serious bodily injury to themselves or others,” and therefore “their use of deadly force was reasonable and did not violate the Fourth Amendment.” In addition, the court found that the deputies’ *pre-shooting conduct* did not “rise to the level of an independent Fourth Amendment violation.” The district court rejected Chelsey’s assertion that the deputies violated her due process rights under the Fourteenth Amendment, as it found no evidence of “a purpose to harm that was unrelated to legitimate law enforcement objectives.” Finally, in light of its rulings as to the two deputies, the court rejected Chelsey’s related federal claims against the County.

With respect to Chelsey’s state claim against the deputies, the district court ruled as a matter of law that the deputies’ use of deadly force was reasonable in light of Shane’s threatening conduct with the large knife, and that therefore the deputies were not negligent in using such force. The court rejected Chelsey’s argument that the deputies negligently provoked the dangerous situation in which the use of deadly force was justified, as the court ruled that the deputies did not owe a duty of care to Shane with regard to their pre-shooting conduct and decisions.

With respect to Chelsey’s state claim against the County, which sought to hold the County liable for negligent hiring, training, and retention of the two deputies, the court stated that Chelsey had failed to identify any statute that supported such a theory of recovery against a governmental entity, and it therefore rejected the claim.

Chelsey appealed. The Ninth Circuit issued a decision that it later withdrew. The court then filed an Order requesting the California Supreme Court to exercise its discretion and decide a matter of state law: “Whether under California negligence law, sheriff’s deputies owe a duty of care to a suicidal person when preparing, approaching, and performing a welfare check on him.” In granting the Ninth Circuit’s request, the Supreme Court restated the issue as “[w]hether under California negligence law, liability can arise from tactical conduct and decisions employed by law enforcement preceding the use of deadly force.”

CALIFORNIA SUPREME COURT DECISION

The California Supreme Court, in a unanimous decision, concluded that under California negligence law, liability of police officers can arise from the use of deadly force “if the tactical conduct and decisions leading up to the use of deadly force show, as part of the totality of the circumstances, that the use of deadly force was unreasonable.” The Court emphasized that the duty to act reasonably extends to the “totality of the circumstances” surrounding the use of deadly force, including the officers’ conduct prior to the use of deadly force.

The Supreme Court has long recognized that police officers have a duty to act reasonably when using deadly force. *Munoz v. Olin*, 24 Cal. 3d 629, 634 (1979); *Grudt v. City of Los Angeles*, 2 Cal. 3d 575, 588 (1970). It is also established that the evaluation of an officer’s use of force, deadly or non-deadly, must take

into account the “totality of the circumstances” surrounding the use of force. *Graham v. Connor*, 490 U.S. 386 (1989).

No Separate Pre-Shooting Duty

The Supreme Court rejected Chelsey’s argument that the deputies’ potential liability for negligence be split into two separate, isolated parts: (1) the actions of the deputies that preceded the shooting of Shane; and (2) the actions of the deputies in using deadly force. According to the Court, “pre-shooting conduct is included in the totality of circumstances surrounding an officer’s use of deadly force, and therefore the officer’s duty to act reasonably when using deadly force extends to pre-shooting conduct.” Thus, according to the Court, “the deputies’ pre-shooting conduct should not be considered in isolation, rather it should be considered as *part of the totality of circumstances* surrounding the fatal shooting of Shane.”

According to the Court, to permit a plaintiff to litigate each decision made by police officers “in isolation” preceding the use of deadly force, (here, the deputies’ decision not to call for a psychiatric expert before entering Shane’s house, their decision to enter the house, their decision to speak to Shane, their decision to use deadly force) when “each is part of a continuum of circumstances surrounding a single use of deadly force by the deputies,” would be “both inefficient and confusing.”

Conclusion

Accordingly, the Supreme Court concluded that the duty of police officers to act reasonably when using deadly force extends to the totality of the circumstances surrounding the use of that force, including the officers’ conduct preceding the use of deadly force.

SHOOTING A TERMINALLY ILL ELDERLY MAN WITHOUT OBJECTIVE PROVOCATION WHILE HE USED HIS WALKER, WITH HIS GUN TRAINED ON THE GROUND, COULD BE FOUND BY A REASONABLE JURY TO BE EXCESSIVE FORCE IN VIOLATION OF THE FOURTH AMENDMENT

2. *George v. Morris*, 11-56020, 2013 WL 3889157 (9th Cir. July 30, 2013).

FACTS

At 7:51 a.m., three Santa Barbara County Sheriff’s deputies were dispatched to a residence in response to a 9-1-1 emergency call from a hysterical and frightened woman who was screaming that her husband had a gun. The deputies arrived at 7:56 a.m. They had been advised by dispatch that a domestic violence incident was in progress, that a firearm was involved, that Donald George, age 64, had a terminal case of brain cancer, and that he was in possession of a firearm.

The woman, Carol George, met the deputies at the front door. She asked them to be quiet and not to scare her husband, Donald George, while also advising

that he was on the patio with his gun. She told the deputies that her husband was depressed and that he had taken the keys to the couple's truck from the nightstand and went downstairs. Concerned for his well-being, Carol followed him and witnessed him retrieve his pistol from the truck and load it with ammunition.

The deputies decided to establish a perimeter around the house. They carried two AR-15 rifles in addition to their service revolvers. One of the deputies lay down in ice plants at the bottom of a steep slope near the house. From his position on the ground, the deputy could see the back of the house, which had an outdoor balcony on the second floor.

At 8:08 a.m., Donald opened the door to the balcony. Once he appeared in view of the deputies, one of the deputies identified himself as law enforcement and instructed Donald to show him his hands. Four minutes later, dispatch was told that Donald had a firearm in his left hand. One of the deputies testified to seeing Donald carrying a pistol in his left hand while holding what he described "as a walker or a buggy." Another deputy stated that when Donald came into view, he was holding a gun with the barrel pointed down to the ground. A deputy warned Donald to drop the gun. Evidence presented by Carol suggested that Donald never manipulated the gun, or pointed it directly at the deputies.

Soon after the deputies broadcast that Donald had a firearm, the dispatch log recorded "shots fired." Donald fell to the ground. Together, the deputies fired approximately nine shots. They then ran to assist him, applied first aid, and called an ambulance. Donald died two hours later at the hospital.

PROCEDURAL BACKGROUND

Carol George filed a § 1983 action against the three deputies alleging, among other things, that the deputies used excessive force in violation of the Fourth Amendment when they shot her husband, Donald George. The district court denied summary judgment to the deputies on Carol's unreasonable seizure claim.

The deputies timely appealed the denial of summary judgment.

NINTH CIRCUIT DECISION

The Ninth Circuit affirmed the order of the district court denying summary judgment to the deputies. According to the court, given Carol George's version of the events, a reasonable fact-finder could conclude that the deputies' use of force was constitutionally excessive.

In evaluating the deputies' use of force under the factors listed in *Graham v. Connor*, 490 U.S. 386 (1989), the court determined that two of the factors "unmistakably weighed in Carol's favor." First, it was undisputed that Donald George had not committed a crime, and second, George was not actively resisting arrest or attempting to evade arrest by flight. Thus, the third *Graham*

factor (did Donald pose an immediate threat to the safety of the officers or others) is the key issue in this case.

In determining that a jury could reasonably find that the deputies' use of force was constitutionally excessive, the court explained that while the deputies stated they felt threatened before they shot Donald George, such a statement "is not enough; there must be objective factors to justify such a concern." The Ninth Circuit has explained in prior cases that a suspect armed with a deadly weapon who does not threaten anyone does *not* render the officer's response of shooting him per se reasonable under the Fourth Amendment. *Glenn v. Washington County*, 673 F.3d 864, 873-878 (9th Cir. 2011). However, when an individual points his gun in the officers' direction, the officers obviously are entitled to respond with deadly force. *Long v. City & Cnty. of Honolulu*, 511 F.3d 901, 906 (9th Cir. 2007). Moreover, as the court emphasized in the instant case, officers are not required to delay their fire until a suspect turns his weapon on them. "If the person is armed—or reasonably suspected of being armed—a furtive movement, harrowing gesture, or serious verbal threat might create an immediate threat."

Here, given Carol George's version of the incident, for purposes of the summary judgment motion, the court could not give credence to the deputies' testimony that Donald turned and pointed his gun at them, nor assume that he took other actions that would have been objectively threatening. Since a reasonable jury could conclude, based on Carol's evidence, that the use of force was constitutionally excessive, the Ninth Circuit held that the trial court properly denied the deputies' motion for summary judgment.

**POLICE OFFICERS' USE OF FORCE IN A
STRUGGLE THAT LED TO THE DEATH OF
A PERSON SUSPECTED OF POSSESSING
ILLEGAL DRUGS WAS REASONABLE
AS A MATTER OF LAW**

3. *Gonzalez v. City of Anaheim*, 715 F.3d 766 (9th Cir. 2013).

FACTS

Two City of Anaheim police officers, Daron Wyatt and Matthew Ellis, were responding to a call at 2:00 a.m. to check on a transient when they were cut off by a van driven by Adolf Anthony Sanchez Gonzalez. Gonzalez made an illegal left turn in front of them and pulled into a gas station. The officers had to brake aggressively to avoid a collision, but they continued on their way to complete the call. Unable to locate the transient, the officers headed back the way they had come only a minute or two earlier, and noticed that Gonzalez's van was still at the service station.

Their suspicions aroused by the near collision, the officers ran a check of the van's license plate and discovered that the van had been involved in a prior narcotics stop. The officers decided to follow the van for a short distance, and

after a few blocks they observed the van weaving within its lane. At that point, the officers decided to pull the van over.

After the officers turned on their lights, the van continued moving for about 200 feet before making a wide-sweeping turn to pull over. The officers pulled in behind the van and approached the vehicle from both sides. Ellis approached on the driver's side and Wyatt on the passenger's side. As Wyatt approached, he saw Gonzalez reach back with his right hand toward the area between the driver and the passenger seats. Wyatt drew his gun and yelled at Gonzalez, warning that if Gonzalez reached back again, he would shoot him.

Gonzalez clenched his hands tightly in his lap. Ellis told him to turn off the engine at least twice, but Gonzalez did not respond or comply. Ellis noticed that Gonzalez appeared to be concealing a plastic baggy in his right hand, which he believed could contain drugs. Both officers told Gonzalez to open his hands.

Gonzalez continued to ignore the officers' orders. The officers reached through Gonzalez's open windows to unlock the driver-and passenger-side doors. Wyatt reached through the now-open door and struck Gonzalez on the arm with his flashlight three times.

At this point, Gonzalez moved his right hand toward his mouth, and his left hand toward the area between the seat and the door. Ellis believed Gonzalez was trying to swallow whatever was in his hand. According to Wyatt, Ellis—reaching through the driver-side window—appeared to make an attempt to apply a carotid restraint on Gonzalez. However, Ellis stated that he was only attempting to gain control of Gonzalez's arms.

As Ellis struggled with Gonzalez, Wyatt radioed for assistance. Wyatt believed Gonzalez was attempting to strike Ellis, although Ellis himself testified that Gonzalez never attempted to hit him. Wyatt entered the van from the passenger side and, with both of his knees on the seat, began punching Gonzalez in the head and face.

Still struggling with the officers, Gonzalez tried to shift the van into gear. Ellis, in an attempt to stop Gonzalez from shifting the van into gear, hit him on the back of the head three times with his flashlight. However, Gonzalez managed to put the van into drive and pulled away with Wyatt still in the passenger seat.

According to Wyatt, Gonzalez "floored the accelerator." This acceleration was fast enough to slam the door shut, trapping Wyatt in the vehicle. Wyatt moved from his knees to a sitting position and yelled at Gonzalez to stop. Wyatt then attempted to knock the vehicle's gearshift out of gear, but Gonzalez slapped his hands away. Without giving another warning, Wyatt pulled out his gun and shot Gonzalez in the head. After the shot, the van hit a parked vehicle and came to a stop. Other officers then arrived and removed Gonzalez from the van. He died shortly thereafter.

PROCEDURAL BACKGROUND

Gonzalez's father and daughter sued the officers and the City under § 1983 for violation of their Fourteenth Amendment right of familial association and of Gonzalez's Fourth Amendment right to be free from excessive force.

The district court granted summary judgment in favor of the officers and the City. The court determined that the force used by the officers throughout the encounter was not excessive and that the officers' conduct did not violate the Fourteenth Amendment.

Plaintiffs filed a timely notice of appeal.

NINTH CIRCUIT DECISION

The Ninth Circuit affirmed the order of the district court granting summary judgment to the officers and the City. The court concluded that excessive force was not used by the officers at any time during their encounter with Gonzalez, thus, Gonzalez's constitutional rights were not violated.

Plaintiffs contended that the officers applied excessive force on the following five different occasions during their attempt to subdue Gonzalez, however, the court determined that the officers did not use excessive force at any time:

(1) Officer Wyatt's flashlight strikes to Gonzalez's arm:

According to the court, striking Gonzalez on the arm was not excessive force given his stubborn refusal to follow the officers' commands. Officers may use a reasonable level of force to gain compliance from a resisting suspect who poses a minor threat;

(2) Officer Ellis's attempt to place Gonzalez in a carotid restraint;

(3) Officer Wyatt's punches to Gonzalez's head and face while Officer Ellis was attempting to restrain him;

(4) Officer Ellis's strikes to the back of Gonzalez's head with the flashlight:

According to the court, the three factors listed in *Graham v. Connor*, 490 U.S. 386 (1989), weighed in the officers' favor in the evaluation of the various types of force used. (A) The officers had reason to believe that Gonzalez possessed illegal drugs and was trying to destroy evidence, both felony offenses; (B) Gonzalez posed an immediate threat to the officers and others due to the possibility of a hidden weapon and the threat the running vehicle posed; and (C) Gonzalez engaged in active resistance in his motions with his hands, by struggling with the officers, further, when he attempted to put the van in drive, his active resistance became attempted flight.

Because all three *Graham* factors supported the officers' actions, the court concluded that the officers were justified in applying significant force in attempting to subdue Gonzalez.

- (5) Officer Wyatt's close-range shot to Gonzalez's head:

According to the court, Officer Wyatt, as a passenger in a rapidly accelerating vehicle driven by an escaping and noncompliant suspect, had probable cause to believe that Gonzalez posed a significant threat of death or serious physical injury to Officer Wyatt himself or others. This was not a case where Officer Wyatt had time to deliberate and consider the most measured response. Hesitation may have been fatal, thus, even though the evidence was in dispute in regard to the speed of the van as it accelerated away from the scene, given the speed with which the events occurred, Officer Wyatt's resorting to deadly force was objectively reasonable.

**THE REASONABLENESS OF A SEARCH
MAY DEPEND ON *HOW* IT IS CARRIED OUT**

4. *Cameron v. Craig*, 713 F.3d 1012 (9th Cir. 2013).

FACTS

A sheriff's deputy obtained a search warrant to search Plaintiff's residence for items purchased with an unauthorized credit card. Plaintiff was suspected of fraudulently using her ex-boyfriend's credit card to obtain valuable property worth nearly \$9,000. The property included beds, tables, chairs, and other furnishings for herself and her two young children.

At 7:00 a.m. (a time the ex-boyfriend knew Plaintiff would have custody of the two children); the deputy who obtained the warrant and six to ten other deputies executed the search warrant at Plaintiff's residence. Upon arrival, the deputies knocked, announced themselves, and demanded entry. One of Plaintiff's roommates admitted the deputies. The deputies were armed and had their weapons drawn. They were dressed entirely in black, with bulletproof vests and helmets. The deputies went upstairs, where they encountered Plaintiff in a hallway outside her bedroom. Several deputies aimed their weapons at Plaintiff, who was trying to alert the deputies to the presence of her children in an adjacent bedroom. She repeatedly implored the deputies not to scare her small children, and pointed toward the children's bedroom. In response, the deputies grabbed Plaintiff by her arms and shoulders and pushed her in the back to force her out of the hallway. The deputies pushed Plaintiff into the living room, where her arms were pulled behind her back and she was handcuffed. Plaintiff testified that the handcuffs were applied tightly enough to leave a bruise that lasted for a few days. Plaintiff was then seated on a couch while the deputies conducted their search.

Plaintiff was interviewed in the house. She explained that she believed she was an authorized user on the credit card, that she had used her ex-boyfriend's credit card frequently in the past, and that she thought he had given her permission to use the credit card to purchase the disputed items. At the conclusion of the interview, Plaintiff was arrested for identity theft, grand and petty theft, and

fraudulent use of an access card. The District Attorney declined to prosecute Plaintiff.

PROCEDURAL BACKGROUND

Plaintiff brought suit against the County and the sheriff's deputies, contending that her Fourth Amendment rights were violated when the deputies unlawfully searched her home pursuant to a warrant that lacked probable cause, arrested her without probable cause, and used excessive force in the execution of the warrant. The district court granted summary judgment in favor of the County and the deputies on all claims.

Plaintiff filed a timely notice of appeal.

NINTH CIRCUIT DECISION

The Ninth Circuit affirmed the judgment of the district court in favor of the deputies on Plaintiff's claims of obtaining a warrant to search her home without probable cause and arresting her without probable cause. However, the Ninth Circuit determined that disputed issues of material fact remained regarding Plaintiff's excessive force claim. The court reversed as to that claim and remanded to the district court for further proceedings consistent with this opinion.

1. Probable Cause Existed for the Issuance of the Search Warrant

Plaintiff contended that her home was unlawfully searched pursuant to an invalid search warrant. Although the warrant was facially valid, Plaintiff argued that the search was unconstitutional because the sheriff's deputy who obtained the search warrant had a duty to investigate Plaintiff's version of events before obtaining the warrant. According to Plaintiff, if the deputy had learned Plaintiff's version of events (i.e., that Plaintiff believed she was authorized to use the credit card), and had included that information in the warrant application, the search warrant would never have been issued.

Plaintiff's argument was unavailing. According to the court, "[t]he fact that a suspect denies an essential element of a crime does not automatically negate probable cause. While best practices may dictate that the police obtain both sides of a story where practicable, the law simply does not mandate such diligence. Once probable cause is established, 'an officer is under no duty to investigate further or to look for additional evidence which may exculpate the accused.'" *Broam v. Bogan*, 320 F.3d 1023, 1032 (9th Cir. 2003).

2. A Jury Must Resolve Disputed Issues of Fact Regarding Plaintiff's Excessive Force Claim

Plaintiff contended that the deputies used "SWAT-like" tactics in order to intimidate her, and that a jury could find that the level of force employed was constitutionally excessive. The Ninth Circuit agreed. Even when a valid search warrant is supported by probable cause, "a search or seizure may be invalid if

carried out in an unreasonable manner.” *Franklin v. Foxworth*, 31 F.3d 873, 875 (9th Cir. 1994).

Here, according to the court, a jury could properly find that the force used was greater than was necessary under the circumstances. Plaintiff asserted that deputies pointed their guns at her head and that the deputy who obtained the search warrant was liable for directly participating in the raid and in organizing it to take place at such a time when Plaintiff’s children would be present and in such a manner as to be “clearly intimidating.” Plaintiff’s suspected crimes were relatively minor and non-violent, the deputies had no reason to suspect Plaintiff or any of her known roommates would pose a threat to officer safety, and Plaintiff did not resist arrest. Thus, the three specific factors articulated in *Graham v. Connor*, 490 U.S. 386 (1989), that courts should typically consider did not support the level of force used by the deputies during the execution of the search warrant.

Furthermore, according to the court, a rational jury could easily determine that the deployment of up to ten heavily armed officers was unnecessary to execute a search warrant looking for stolen property, particularly in a case where, as here, there is no concern that the property might be moved or destroyed in the time it took to secure the scene. Unlike drug seizures where a quick entry by multiple officers may be desirable to prevent the destruction of evidence, the property at issue here included a six-drawer dresser and a mattress.

Thus, viewing the evidence in the light most favorable to Plaintiff, and drawing all reasonable inferences therefrom, the Ninth Circuit concluded that Plaintiff’s excessive force claim should go to the jury.

**THREE POLICE OFFICERS SUED IN A § 1983 ACTION
FOR EXCESSIVE FORCE WERE NOT ENTITLED TO
QUALIFIED IMMUNITY FOR APPLYING A “CHOKEHOLD”
AND PEPPER SPRAY TO A NON-RESISTING SUSPECT**

5. *Barnard v. Theobald*, 721 F.3d 1069 (9th Cir. 2013).

FACTS

Around 11:30 p.m., three officers of the Las Vegas Metropolitan Police Department (Greg Theobald, Gary Clark, and Steven Radmanovich) arrived at the home of Charles and Rita Barnard to execute an arrest warrant. The warrant called for the arrest of David Barnard, Charles’ brother, who was staying with Charles and Rita.

Upon arrival at the Barnard residence, the officers knocked on the door, announced themselves as police officers, and demanded entry. Charles opened the door and came out on the landing. The officers immediately confronted him. All of the officers had their weapons drawn, and Officer Clark had his weapon pointed at Charles. According to Charles, the officers screamed at him to put his hands up, and he put up his hands.

The officers explained that they had a warrant to arrest David. Charles told the officers that David was his brother and that he was asleep inside the house. The officers ordered Charles to turn around and put his hands on the wall. Again, Charles complied.

Officer Theobald then seized Charles' right arm and handcuffed his right wrist. Before Theobald could handcuff Charles' other arm, however, Theobald tripped on a flower pot that was on the landing. Theobald fell backward, still holding onto the handcuff that was attached to Charles' right wrist. Officer Radmanovich, who had been standing to Charles' left, grabbed for Charles' left (free) arm as Charles was being pulled down by Theobald, but Radmanovich tripped over one of Charles' legs, and all three men came crashing down; Radmanovich on top of Charles, and Charles on top of Theobald.

Officer Clark then joined the fracas. Clark came over to Charles, who was still lying on top of Officer Theobald, and put Charles in a "chokehold." Clark then tried to lift Charles up by his neck. Officer Theobald, however, still had hold of the handcuff around Charles' right wrist. The other officers yelled at Theobald to release the cuff, which he did. Still holding Charles by the neck, Officer Clark then lifted Charles even higher off the ground and spun Charles around so that he was on his hands and knees with Clark straddling his back.

Officer Clark kept Charles in a chokehold as he rode Charles to the floor. While Clark was sitting on Charles' back restraining him in a chokehold, Officers Theobald and Radmanovich ordered Charles to give them his arms. With Clark on top of him, however, Charles could not comply with the officers' orders. Theobald then instructed Clark to use pepper spray to gain Charles' compliance. While still sitting on Charles' back, Officer Clark released the chokehold and sprayed pepper spray into Charles' face. Clark then dropped the spray canister, and one of the other officers immediately picked up the can and pepper-sprayed Charles a second time.

Soon thereafter, Officer Clark got off of Charles' back, and the other officers handcuffed Charles' arms. Finally, David came to the front of the house, and Officer Radmanovich got off of Charles in order to secure David. Officer Theobald then slid his knee up Charles' back towards his neck and kept his knee pressed firmly into the back of Charles' neck and shoulders while the other two officers secured the scene. Charles repeatedly asked Officer Theobald to get off his neck and told the officer that he was in considerable pain. However, the officer refused to release his knee from the back of Charles' neck until David was secured in the back of a police car. Charles was taken to a county jail facility, where he was held for three days on charges of battery on a police officer, resisting an officer, and obstructing a public officer.

The same morning Charles was released from jail, he sought medical treatment. He complained to the attending physician of severe pain in his hip, neck and shoulders. A week later, the pain had still not subsided and he was referred to a specialist, who further referred Charles to physical therapy. Physical therapy

was not enough to alleviate Charles' pain and other symptoms. Ultimately, over the course of many years, Charles underwent nine spinal surgeries in an effort to relieve the various symptoms he claimed were caused by his encounter with the officers. Trial was held ten years after the incident and Charles' symptoms had still not subsided.

PROCEDURAL BACKGROUND

Charles brought a § 1983 action against the Police Department and the three officers, alleging that he was arrested without probable cause and that excessive force was used in making the arrest. The district court granted summary judgment in favor of the officers and the Police Department. In an unpublished opinion, a panel of the Ninth Circuit affirmed the grant of summary judgment on the false arrest claim based on qualified immunity. The panel also affirmed the grant of summary judgment to the Police Department on the basis that municipal liability in § 1983 actions cannot be based on vicarious liability.

However, the panel reversed the district court's grant of summary judgment to the officers on Charles' excessive force claim. The panel determined that the officers were not entitled to qualified immunity as, according to the panel, at "the time of the incident at issue here, a reasonable officer would have known it violated clearly established law to use a choke hold on a non-resisting arrestee who had surrendered, pepper-spray him, and apply such knee pressure on his neck and back that it would cause the collapse of five vertebrae in his cervical spine." The panel thus remanded Charles's excessive force claim for trial.

After a seven-day trial, a jury found the officers' use of force constitutionally excessive and awarded Charles over \$2 million in compensatory damages. A number of post-trial motions were filed by the officers, including one which contended that the jury verdict could not stand because the officers were entitled to qualified immunity as a matter of law. The district court denied the officers' motion for judgment as a matter of law.

The officers filed a timely notice of appeal.

NINTH CIRCUIT DECISION

The Ninth Circuit held that the district court properly denied the officers' motion for judgment as a matter of law on the excessive force claim because the verdict was supported by substantial evidence, and the officers were not entitled to qualified immunity.

The officers contended that their use of force was objectively reasonable as a matter of law, and thus no Fourth Amendment violation occurred. The court previously rejected that argument. In reversing the district court's grant of summary judgment, the Ninth Circuit concluded that a triable issue of fact existed on the excessive force claim, and that if the jury believed Charles, the evidence presented at trial could establish a constitutional violation "because the officers' conduct was not *per se* reasonable." The court declined to revisit that decision.

Furthermore, according to the court, the propriety of a particular use of force is generally an issue for the jury. Here, the jury found by special interrogatory that based on the evidence presented by Charles, all three officers used an unreasonable amount of force against Charles. Charles had presented that very same evidence at the summary judgment stage. Thus, the court declined to overturn the jury verdict because it was supported by substantial evidence.

The officers also contended that if Charles was actually resisting, or if the officers could have reasonably believed that he was resisting, then the officers were entitled to qualified immunity as a matter of law. In this case, the jury specifically found that the officers made a reasonable mistake of fact that Charles was forcibly resisting arrest. However, the court explained that the officers were mistaken in their understanding of the law.

“Resistance, or the reasonable perception of resistance, does not entitle police officers to use *any* amount of force to restrain a suspect.” See *LaLonde v. City of Riverside*, 204 F.3d 947, 959 (9th Cir. 2000). Rather, police officers who confront actual or perceived resistance “are only permitted to use an amount of force that is *reasonable* to overcome that resistance.”

The Ninth Circuit held that the district court properly denied the officers’ motion for judgment as a matter of law because the verdict was supported by substantial evidence, and the officers were not entitled to qualified immunity.

**“COERCION” (EXCESSIVE FORCE) SEPARATE
AND APART FROM THE COERCION INHERENT
IN AN UNLAWFUL ARREST MAY VIOLATE THE
BANE ACT**

6. *Bender v. County of Los Angeles*, 217 Cal. App. 4th 968 (2013).

FACTS

Evidence at trial established that Plaintiff lived at and managed an apartment complex. The tenants were mostly African-American and Hispanic. Some tenants believed the police were “harassing people” in the complex because a police officer had been shot there earlier in the year.

One evening, three deputy sheriffs, Sorrow, Chavez, and Hicks, entered the complex, went up the stairs inside the gate and came back down the stairs with two African-Americans in handcuffs. The man had been drinking alcohol and the woman had been smoking marijuana. Deputy Sorrow accused Plaintiff of “smoking with those people,” but Plaintiff replied he did not smoke marijuana and had not been smoking.

Deputy Sorrow asked Plaintiff his name, and when Plaintiff gave his name, Sorrow said, “Shut the [f--] up.” Sorrow told Plaintiff that another deputy had told Sorrow to arrest Plaintiff because Plaintiff was “protecting these [N word].” Deputy Sorrow then told Plaintiff that he was under arrest and handcuffed him with his arms behind his back. Sorrow walked Plaintiff over to a police vehicle

and although Plaintiff did not resist arrest in any way, the deputy sprayed Plaintiff in the face with pepper spray.

Deputy Chavez ran around the patrol car and he and Deputy Sorrow slammed Plaintiff to the ground. Since Plaintiff was in handcuffs, he could not break the fall and went down on his face. Both deputies then began “kneeing and kicking and beating him while he was on the ground.” One of the deputies hit Plaintiff in the head with a flashlight.

During the beating, Deputy Sorrow said, “F-ing [N word] lover, you’re getting what you deserve”. At no time did Plaintiff attempt to fight or struggle with the deputies. During the beating, witnesses heard Plaintiff screaming in pain and pleading for the deputies to stop. After the beating was over, a deputy once again pepper-sprayed Plaintiff in the face.

A witness stated that Plaintiff looked “bloody and just beat up. He had red marks all over.” Another witness stated, “I just know he was, got his ass whooped, that’s it. And it was very bad, that’s all I know.” During the beating, Plaintiff’s glasses were knocked from his head, and afterward Deputy Sorrow intentionally crushed the glasses with the heel of his foot. Plaintiff was then put in the back of a patrol car. He testified that he was in a lot of pain, mostly in the ribs, face, and wrist. He had no feeling in his hands.

Plaintiff was told that he would not be allowed to go to the hospital until he was interviewed on videotape by a sheriff’s supervisor even though paramedics at the scene advised the deputies that Plaintiff should be taken to the hospital for further evaluation. After he was interviewed at the scene, he was transported to the hospital where he was handcuffed to a chair. After Plaintiff was treated for his injuries, he was again interviewed on videotape by a supervisor. Plaintiff described what had happened, that he did not resist the deputies in any way and was not aggressive toward any deputy.

PROCEDURAL BACKGROUND

Plaintiff was prosecuted and acquitted of all charges at his criminal trial. He filed a civil action under state law against the three deputies and the County, alleging causes of action for assault and battery, intentional infliction of emotional distress, false arrest, and violation of the Bane Act. The jury found in favor of Plaintiff and against Deputy Sorrow and the County and awarded Plaintiff more than \$525,000 in damages. In addition, the jury awarded punitive damages in the amount of \$6,000 against Deputy Sorrow. The jury found in favor of Deputies Chavez and Hicks.

The trial court also awarded nearly \$900,000 in attorney’s fees under the Bane Act to Plaintiff.

Deputy Sorrow and the County filed a timely appeal.

CALIFORNIA COURT OF APPEAL DECISION

The California Court of Appeal concluded that the evidence at trial established a violation of the Bane Act. The court also held that the trial court did not abuse its discretion with respect to the amount of the attorney's fees that it awarded to Plaintiff under the Bane Act.

The Bane Act

California Civil Code section 52.1, commonly referred to as the Tom Bane Civil Rights Act or the "Bane Act," authorizes a civil action against anyone, whether or not acting under color of law, who interferes, or attempts to interfere, by "threats, intimidation, or coercion," with an individual's exercise or enjoyment "of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state." *Jones v. Kmart Corp.*, 17 Cal. 4th 329, 331 (1998). Subdivision (h) authorizes the court to award a prevailing plaintiff reasonable attorney's fees.

Here, Plaintiff brought a lawsuit under the Bane Act based on his unlawful arrest and the beating administered by sheriff's deputies during that arrest, while he was in handcuffs and not resisting arrest. The jury found a Bane Act violation.

Nevertheless, Deputy Sorrow and the County contended, as a matter of law, the Bane Act did not apply here because "coercion is inherent in an unlawful arrest." Thus, according to Defendants, in a false arrest/excessive force case, the Bane Act requires a showing that "threats, intimidation, or coercion" caused a violation of some right other than the plaintiff's Fourth Amendment rights. The Court of Appeal disagreed.

Here, according to the court, the Bane Act applied because the arrest was unlawful *and* was accompanied by the beating and pepper spraying of an unresisting, already handcuffed Plaintiff, i.e., coercion that was in no way inherent in an arrest, either lawful or unlawful. That conduct, the court explained, was coercion independent from the coercion that was inherent in the wrongful arrest itself and thus was actionable under the Bane Act.

Accordingly, the Court of Appeal held that an unlawful arrest that is "accompanied by the requisite threats, intimidation, or coercion" -- coercion independent from the coercion that was inherent in the unlawful arrest itself -- is a violation of the Bane Act.

Attorney's Fee Award

The Court of Appeal held that the trial court did not abuse its discretion when it awarded attorney's fees close to \$900,000 under the Bane Act. In arriving at that amount, the trial court used a 1.2 multiplier to the lodestar amount. The court explained that the case was a "double contingency," requiring proof both of excessive force claims and of liability on a statutory cause of action authorizing recovery of legal fees. The court noted "counsel put both their time and their purse at risk, investing capital to pay trial expenses, that the time invested limited

trial counsel's availability for other cases, that counsel achieved a trial victory against the united testimony of three deputy sheriffs, and over a vigorous defense, and that their prosecution of the case was tenacious, skillful and effective."

The Court of Appeal concluded that "[w]hile defendants attack use of the contingency and skill factors, their arguments do not amount to a showing that the trial court's analysis was 'clearly wrong.'"

COMMENT

The Bane Act and related statutes dealing with discriminatory threats and violence were enacted in 1987 in response to the alarming increase in hate crimes in California. The Act authorizes a person to file a civil action against those who interfere or attempt to interfere by "threats, intimidation, or coercion" with the person's exercise or enjoyment "of rights secured by the Constitution or laws of the United States or of the rights secured by the Constitution or laws of this state."

The courts originally interpreted the Bane Act to require plaintiffs who claimed interference with their rights that the interference was due to their membership in a protected class, such as "race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute," as set forth in Civil Code section 51.7. (See, e.g., *In re Michael M.*, 86 Cal. App. 4th 718 (2001). The failure of a plaintiff to allege membership in a protected class as the basis for the interference with plaintiff's rights constituted a failure to state a cause of action under the Bane Act. *Boccatto v. City of Hermosa Beach*, 29 Cal. App. 4th 1797, 1809 (1994).

However, in 2000, in response to the Court of Appeal opinion, the Legislature amended the Bane Act statutes to eliminate the requirement of membership in a protected class as an element of a cause of action under the Act.

Thus, today it is clear that in pursuing relief for constitutional or statutory violations under the Bane Act, plaintiffs need not allege that they are members in a protected class or that defendants acted with discriminatory animus or intent, so long as the subject acts were accompanied by the requisite "threats, intimidation, or coercion." The statutes apply to all affected persons without regard to their membership in a specified protected class. *Venegas v. County of Los Angeles*, 32 Cal. 4th 820, 843 (2004).

The Bane Act is California's equivalent to the Federal Civil Rights Statute, 42 U.S. Code § 1983. However, there are four important differences between the two statutes:

(1) State Action:

Section 1983 is limited to actions brought against a person(s) who acted "under color of state law." There is no "state action"

requirement in section 52.1. The statute applies to private actors as well as governmental agents.

(2) Violations of Federal Constitutional or Statutory Rights:

Section 1983 provides a remedy for violations of rights protected by the federal constitution and statutes. It does not provide a remedy for violations of the California constitution or state statutes. Section 52.1, on the other hand, applies to violations of either or both federal or state rights.

(3) “Threats, Intimidation, or Coercion”:

Liability under section 52.1 for violations of constitutional or statutory rights is limited to violations that were accompanied by “threats, intimidation, or coercion.” There is no such limitation under § 1983.

(4) Qualified Immunity:

The doctrine of qualified immunity applicable in § 1983 actions does not apply to actions brought under section 52.1.

PRACTICE POINTER

An early evaluation of all cases brought under § 1983 and/or section 52.1 should be undertaken to determine the merits of the lawsuits. In the event a determination is made that a defense verdict would be problematic, attempts should be made to reach an early settlement. Statutory offers to settle may be appropriate in some cases. Prevailing plaintiffs are entitled to recover attorney’s fees in these cases, and the longer a case is allowed to proceed, the greater the amount of attorney’s fees that will be sought by prevailing plaintiffs.

**THE NATURAL DISSIPATION OF ALCOHOL IN
THE BLOOD STREAM DOES NOT PRESENT A
PER SE EXIGENCY IN EVERY DRUNK-DRIVING
CASE SUFFICIENT TO JUSTIFY CONDUCTING A
BLOOD TEST WITHOUT A SEARCH WARRANT**

7. *Missouri v. McNeely*, 133 S.Ct. 1552 (2013).

FACTS

A Missouri highway patrol officer stopped a truck operated by Tyler McNeely at approximately 2:08 a.m. after observing it exceed the posted speed limit and repeatedly cross the center line. The officer noticed several signs of intoxication, including McNeely’s bloodshot eyes, his slurred speech, and the smell of alcohol on his breath. McNeely acknowledged to the officer that he had consumed “a couple of beers” at a bar, and he appeared unsteady on his feet when he exited the truck. After McNeely performed poorly on a battery of field-sobriety tests and

declined to use a portable breath-test device to measure his blood alcohol concentration, the officer placed him under arrest.

The officer began to transport McNeely to the station house, but when McNeely indicated that he would again refuse to provide a breath sample, the officer took McNeely to a nearby hospital for blood testing. The officer did not attempt to obtain a search warrant. McNeely refused to consent to the blood test, but the officer directed a hospital lab technician to take a sample. The sample was secured at approximately 2:35 a.m. Subsequent laboratory testing measured McNeely's blood alcohol level at 0.154 percent, which was well above the legal limit in the State of Missouri of 0.08 percent.

PROCEDURAL BACKGROUND

McNeely was charged with driving while intoxicated (DWI). He moved to suppress the blood test result, arguing that taking his blood without a warrant violated his Fourth Amendment rights. The trial court agreed. It concluded that the exigency exception to the warrant requirement did not apply because, apart from the fact, that, as in all cases involving intoxication, McNeely's blood alcohol was naturally dissipating, there were no circumstances suggesting that the officer faced an emergency in which he could not practicably obtain a warrant.

The Missouri Supreme Court affirmed. The court held that the nonconsensual warrantless blood draw under the facts of this case violated McNeely's Fourth Amendment right to be free from unreasonable searches of his person. The court pointed out that this was "unquestionably a routine DWI case" in which no factors other than the natural dissipation of blood-alcohol suggested there was an emergency. According to the court, exigency depends heavily on the existence of additional "special facts" that would justify an exception to the warrant requirement in drunk-driving cases.

The U.S. Supreme Court granted certiorari "to resolve a split of authority on the question whether the natural dissipation of alcohol in the bloodstream establishes a *per se* exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk-driving investigations."

U.S. SUPREME COURT DECISION

The U.S. Supreme Court affirmed the decision of the Missouri Supreme Court which held that the nonconsensual warrantless taking of McNeely's blood violated the Fourth Amendment.

The Court concluded that in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream alone does not present a *per se* exigency in every case sufficient to justify conducting a blood test without a warrant. Rather, "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." This case involved a routine DWI investigation where no factors other than the natural dissipation of blood alcohol suggested that there was an emergency, and thus,

according to the Court, the nonconsensual warrantless blood draw violated McNeely's Fourth Amendment rights.

***Schmerber v. California*, 384 U.S. 757 (1966)**

Forty-seven years ago, the U.S. Supreme Court decided *Schmerber v. California*, 384 U.S. 757 (1966). In that case, an individual had suffered injuries in an automobile accident and was taken to the hospital. While he was there receiving treatment, a police officer arrested him for driving while under the influence of alcohol and ordered a blood test over his objection. The Court upheld the warrantless blood test of the suspect because the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence."

The Court explained that evidence could have been lost because "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." 384 U.S., at 770. The Court added that "[p]articularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant." *Id.*, at 770-771. "Given these special facts," the Court found that it was appropriate for the police to act without a warrant. *Id.*, at 771.

In finding the warrantless blood test reasonable in *Schmerber*, the Supreme Court considered all of the facts and circumstances and carefully based its holding on those specific facts. Here, however, there were no "special facts" which resulted in the existence of an emergency that would justify an exception to the warrant requirement for nonconsensual blood testing in the drunk-driving investigation of Tyler McNeely.

Conclusion

The Supreme Court was unwilling to adopt a categorical *per se* rule for blood testing in drunk-driving cases. The Court explained that while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber*, it does not do so categorically. According to the Court, the reasonableness of a warrantless blood test of a drunk-driving suspect under the exigency exception to the warrant requirement must be evaluated case by case based on the totality of the circumstances.

**PUBLIC ENTITIES ARE IMMUNE
FROM LIABILITY FOR INJURIES
CAUSED BY PHYSICAL DEFECTS
OF A “RECREATIONAL TRAIL”**

8. *Montenegro v. City of Bradbury*, 215 Cal. App. 4th 924 (2013).

FACTS AND PROCEDURAL BACKGROUND

Plaintiff allegedly sustained injuries as a result of falling over a protruding tree root while walking along a pathway in the City of Bradbury. Plaintiff brought suit against the City for negligence, willful failure to warn of a dangerous condition, and dangerous condition of public property, claiming that the exposed tree root and inadequate lighting created a dangerous condition on public property.

The City moved for summary judgment, contending that the pathway was a “recreational trail” within the meaning of Government Code section 831.4, subdivision (a). That section provides that public entities are not liable for injuries caused by the condition of trails used for certain recreational purposes or for access to such recreation.

The trial court granted summary judgment to the City. The court concluded that the City had designed the pathway as a trail and that it had been treated as a trail by the public. The uncontroverted evidence established that members of the public regularly used the pathway for at least two of the recreational purposes listed in the statute—horseback riding and hiking—and as an access route to other recreational trails located nearby. Therefore, according to the trial court, the City was immune from liability.

Plaintiff filed a timely notice of appeal.

CALIFORNIA COURT OF APPEAL DECISION

The Court of Appeal affirmed the judgment of the trial court granting summary judgment to the City of Bradbury. The court concluded that the pathway on which Plaintiff was injured was a “recreational trail” within the meaning of section 831.4, and thus the City was immune from liability.

Section 831.4 precludes governmental liability for injuries caused by the condition of “(a) Any unpaved road which provides access to fishing, hunting, camping, hiking, riding, water sports, recreational or scenic areas” or “(b) Any trail used for the above purposes,” referring to the purposes listed in subdivision (a).

Plaintiff submitted the following arguments in support of her position that the immunity in section 831.4 was not applicable; however, the court rejected all of them:

1. The City is Liable for Injuries Caused by Physical Defects on the Pathway

Plaintiff contended that the area where she fell was maintained in a dangerous condition due to physical defects—insufficient lighting and a protruding tree trunk. However, it is settled that public entities are absolutely immune from liability for injuries caused by the condition of any trail described in section 831.4. *Prokop v. City of Los Angeles*, 150 Cal. App. 4th 1332, 1337 (2007).

2. The Pathway Is a Sidewalk, Not a Trail

Plaintiff contended that she presented sufficient evidence that the pathway was a sidewalk to raise a triable issue of fact about its nature. She pointed out that the pathway was only 0.6 miles long, ran entirely along a street, was elevated above the street, was separated from the street by a curb, and seemed to meet the definition of “sidewalk” in Vehicle Code section 555: “that portion of a highway, other than the roadway, set apart by curbs, barriers, markings, or other delineation for pedestrian travel.”

Whether a pathway is a trail or a sidewalk “depends on a number of considerations, including accepted definitions of the property [citations], the purpose for which the property is designed and used, and the purpose of the immunity statute” *Amberger-Warren v. City of Piedmont*, 143 Cal. App. 4th 1074, 1078-1079 (2006).

Here, the pathway where Plaintiff fell was designated by the City Council as a park and recreational trail when it approved construction of the improvements to the site. It was designed for use by joggers, hikers, bicyclists, and equestrians, and the uncontroverted evidence showed that the public regularly used the pathway for those purposes. Accordingly, the court concluded that the pathway was a “recreational trail,” not a “sidewalk.”

3. The Immunity in Section 831.4 Should be Limited to Unimproved or Natural Areas

Plaintiff contended that the pathway did not fall under section 831.4 because it was not in a natural or unimproved state and was located in a residential neighborhood. However, the courts have concluded that the immunity in section 831.4 applies to any trail or path specifically set aside and developed for recreational uses, without regard to its unnatural condition or urban location. *Astenius v. State of California*, 126 Cal. App. 4th 472 (2005). According to the court, the Legislature did not intend to limit governmental immunity in section 831.4 to unimproved property.

4. The Immunity in Section 831.4 Does not Apply Because Plaintiff was Not Engaged in Recreation, but was Acting as an Ordinary Pedestrian Seeking to Avoid Traffic

Plaintiff pointed out that she was not engaged in recreation, but was acting as an ordinary pedestrian seeking to avoid traffic at the time of her accident. She

contended that many people would use the pathway for a similar purpose. However, the fact that a trail has a dual use--recreational and non-recreational—does not undermine section 831.4 immunity. *Hartt v. County of Los Angeles*, 197 Cal. App. 4th 1391, 1400 (2011).

CONCLUSION

The court concluded that the pathway on which Plaintiff was injured was designed to be used by the public for multiple recreational purposes. Uncontroverted evidence established that it was used for one or more of the listed recreational purposes. Therefore, the Court of Appeal held that the trial court correctly concluded that the pathway was a “recreational trail.”

THE STATUTORY ABSOLUTE TORT IMMUNITY CONFERRED UPON CITY COUNCIL MEMBERS FOR THEIR LEGISLATIVE DISCRETIONARY, POLICY-MAKING DECISIONS IS NOT LOST WHEN THAT DECISION-MAKING IS ALSO ALLEGED TO HAVE INVOLVED MISREPRESENTATIONS MOTIVATED BY ACTUAL FRAUD, CORRUPTION OR ACTUAL MALICE

9. *Freeny v. City of San Buenaventura*, 216 Cal. App. 4th 1333 (2013).

FACTS

Plaintiffs Robert and Linda Freeny owned two adjacent parcels of land in the City of Buenaventura. For three years, they worked with their own architect and consulted with City staff to design a living facility for senior citizens. The City’s planning commission eventually approved a 44-unit, 42,172 square-foot facility, and granted a conditional use permit.

A group of 35 persons living near the proposed facility appealed the Planning Commission’s decision to the City Council. Following a public hearing, on a five-to-two vote, the City Council overturned the Planning Commission’s approval and approved the neighbors’ appeal. The City Council stated that the Freenys “need[ed] to rethink the entirety of the project,” as a facility of the size proposed by them was “incompatible” with the “existing residential neighborhood.”

PROCEDURAL BACKGROUND

The Freenys sued the City and the five City Council members who voted to reject the project. The complaint included a petition for administrative mandamus seeking an order (1) commanding the City to approve the project, or (2) requiring a new hearing before the City Council. The complaint also sought \$1.8 million in compensatory damages and additional punitive damages arising from tort claims for fraud, misrepresentation and, because the Freenys were in their 70s, elder abuse.

The trial court sustained Defendants’ demurrers without leave to amend. Among other things, the court concluded that Defendants were statutorily immune from liability for adopting laws; for denying permits; and for exercising their discretion.

Plaintiffs filed a timely appeal.

COURT OF APPEAL DECISION

The Court of Appeal affirmed the trial court's order sustaining Defendants' demurrers without leave to amend and dismissing the Freenys' suit against the City and the five City Council members.

City Council Defendants

The court held that with respect to the liability of the Defendant city council members for tort damages, Defendants were immune from liability under the Government Claims Act. (Act) (Cal. Gov't Code § 810 et seq.)

Section 820.2 of the Act declares that "a public employee is not liable for any injury resulting from his act or omission where the act or omission was the result of the discretion vested in him, whether or not such discretion be abused." At the core of this immunity are "basic policy decisions." *Ogborn v. City of Lancaster*, 101 Cal. App. 4th 448, 460 (2002).

The Act also confers immunity upon public employees for failing to adopt an enactment (Cal. Gov't Code § 821); and for denying or refusing to issue permits and approvals (Cal. Gov't Code § 821.2).

The Court of Appeal concluded that the City Council defendants themselves were immune from tort damages under the Act because they were public employees "being sued for their discretionary legislative decision not to grant plaintiffs' application for building permits and variances."

The Freenys challenged the court's decision on the ground that the council members were not immune from liability for misrepresentations motivated by "actual fraud, corruption or actual malice." The Freenys contended that the Act's immunity for legislative policy-making is limited by the exception to the immunity conferred by a different provision of the Act, section 822.2. That section provides that "[a] public employee acting in the scope of his employment is not liable for an injury caused by his misrepresentation, whether or not such misrepresentation be negligent or intentional, unless he is guilty of actual fraud, corruption or actual malice." The Freenys asserted that section 822.2's exception should also operate as an exception to the immunities conferred by sections 820.2, 821, and 821.2 for legislative decision-making when that decision-making is alleged to involve the making of misrepresentations motivated by "actual fraud, corruption or actual malice." The Court of Appeal disagreed.

According to the court, it is clear that the Legislature intended the immunity from tort liability to apply in the context of legislators' discretionary, policy-making decisions even when legislators act with improper motives. In the instant case, the court was of the view that section 820.2 was "the critical immunity provision . . . because the City Council Defendants' discretionary decision was voting against a resolution and thereby denying permits and variances." Thus, "section 820.2's broader immunity embraces the more specific immunities for voting on

resolutions and denying permits and variances conferred by sections 821 and 821.2.”

The City

Government Code § 815.2, subd. (b), provides that “a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability.” Therefore, the court held that since the City Council defendants were themselves immune, the City was also immune.

A PARTY FILING A CROSS-COMPLAINT FOR INDEMNITY AGAINST A PUBLIC ENTITY IS REQUIRED TO PRESENT A TIMELY CLAIM FOR DAMAGES BEFORE INSTITUTING THE ACTION

10. *Southern California Edison Company v. City of Victorville*, 217 Cal. App. 4th 218 (2013).

FACTS AND PROCEDURAL BACKGROUND

Armanda Laabs alleged in her second amended complaint that she was a passenger in a car driven by James Dimeo. Dimeo’s car was struck by another car at an intersection, spun out of control, and hit a concrete light pole erected 18-inches away from the curb. Laabs was injured. The light pole was owned and maintained by Southern California Edison Company (SCE).

Laabs sued SCE on the theory that SCE acted negligently by installing and maintaining the light pole so close to the curb. She also sued the City of Victorville and the County of San Bernardino on the theory that they were negligent in designing and maintaining the highway and failed to “correct a dangerous road condition due to inadequate sight distance and lack of warning signs, devices and signals.”

Four years after SCE was served with Plaintiff’s complaint, SCE filed a cross-complaint against the City for equitable indemnity. The trial court sustained the City’s demurrer to the cross-complaint without leave to amend based on SCE’s failure to present a timely governmental claim to the City before filing its cross-complaint naming the City as a cross-defendant.

Following the entry of judgment for the City, SCE filed the present appeal.

CALIFORNIA COURT OF APPEAL DECISION

The Court of Appeal affirmed the decision of the trial court which held that SCE’s cross-complaint against the City for equitable indemnity was barred because of its failure to comply with the Government Claims Act.

Where a cross-complaint seeks indemnity from a governmental entity stemming from an underlying personal injury action, compliance with the claims statute is required. *State of California v. Superior Court*, 143 Cal. App. 3d 754, 757 (1983). A claim for money damages relating to a cause of action for injury to a person

must be filed not later than six months after the date of the accrual of the cause of action. (Cal. Gov't Code § 905, 911.2, subd. (a).) "[T]he date upon which a cause of action for equitable indemnity or partial equitable indemnity accrues shall be the date upon which a defendant is served with the complaint giving rise to the defendant's claim for equitable indemnity or partial equitable indemnity against the public entity." (Cal. Gov't Code § 901.)

Here, it was uncontroverted that SCE did not file its cross-complaint against the City within the six-month period after it was served with Plaintiff's complaint, and thus did not comply with the claim filing requirements.

However, SCE contended that it was excused from filing a claim with the City because its cross-complaint was solely a "defensive" pleading and as such the governmental claim requirements did not apply. SCE relied on *Krainock v. Superior Court*, 216 Cal. App. 3d 1473 (1990), in support of its contention that its cross-complaint was solely defensive in nature and thus compliance with the Government Claims Act was not necessary.

The Court of Appeal concluded that *Krainock* was inapplicable. In that case, *Krainock*, a defendant in a personal injury action, filed a cross-complaint against the defendant school district which had filed a cross-complaint against *Krainock*. *Krainock* did not file a governmental claim with the school district. His cross-complaint against the school district sought the same relief on the same set of facts relied upon by the district in its cross-complaint. Under those circumstances, the court determined that *Krainock's* cross-complaint was "defensive" in nature and thus he did not need to comply with the claims statute before filing his cross-complaint.

Here, not only did the City not file a cross-complaint in which SCE was a named cross-defendant but, according to the court, SCE's cross-complaint against the City "is clearly based on a set of facts different from the original complaint . . . To defend SCE's cross-complaint, the City would be required to perform investigation of facts beyond that which the City already performed in preparing its pleadings and participating in the original action."

Since the City did not file a cross-complaint in which SCE was a named cross-defendant and since SCE's cross-complaint, while arising out of the same accident, introduced claims unrelated to the facts upon which the City participated in the underlying action, the Court of Appeal concluded that SCE's cross-complaint was more than merely a defensive pleading. Therefore, SCE's cross-complaint against the City was not exempt from the claims requirements.

COUNTY WAS ENTITLED TO DESIGN IMMUNITY IN A DANGEROUS CONDITION OF PUBLIC PROPERTY CASE WHERE DRIVER CLAIMED COUNTY FAILED TO PROVIDE ADEQUATE SIGHT DISTANCE OF AN INTERSECTION TO AVOID COLLISION

11. *Hampton v. County of San Diego*, 218 Cal. App 4th 286 (2013).

FACTS AND PROCEDURAL BACKGROUND

In November 2009, a vehicle driven by Randall Hampton collided with another vehicle at an intersection in Valley Center in San Diego County. Hampton and his wife sued the driver of the other vehicle as well as the County. One of the claims against the County alleged a dangerous condition of public property. That claim alleged that the sight distance for vehicles approaching the subject intersection was “inadequate,” and that the intersection constituted “a dangerous condition for motorists and traffic”.

The County moved for summary judgment on the ground that the Hamptons’ claims were barred by the affirmative defense of design immunity. The trial court granted the County’s motion.

Plaintiffs filed a timely appeal, contending that the trial court erred in granting the County summary judgment.

CALIFORNIA COURT OF APPEAL DECISION

The Court of Appeal affirmed the trial court’s grant of summary judgment to the County. The court held that the trial court properly determined that the County established, as a matter of law, the affirmative defense of design immunity.

The Affirmative Defense of Design Immunity

In *Cornette v. Department of Transp.*, 26 Cal. 4th 63, 69 (2001), the Supreme Court explained the purpose of the design immunity defense as follows:

The rationale for design immunity is to prevent a jury from second-guessing the decision of a public entity by reviewing the identical questions of risk that had previously been considered by the government officers who adopted or approved the plan or design. [Citation.] ‘[T]o permit reexamination in tort litigation of particular discretionary decisions where reasonable men may differ as to how the discretion should be exercised would create too great a danger of impolitic interference with the freedom of decision-making by those public officials in whom the function of making such decisions has been vested’. [Citation.]

California Government Code section 830.6, which codifies the defense of design immunity, provides that a public entity claiming design immunity must establish

three elements: (1) a causal relationship between the plan or design and the accident; (2) discretionary approval of the plan or design prior to construction; and (3) substantial evidence supporting the reasonableness of the plan or design.

The Hamptons did not dispute that the County established a causal relationship between the plans and the accident.

With respect to the discretionary approval element, that element may be resolved as an issue of law if the material facts pertaining to the element are undisputed. *Grenier v. City of Irwindale*, 57 Cal. App. 4th 931, 940 (1997). The element “simply means approval in advance of construction by the legislative body or officer exercising discretionary authority.” *Ramirez v. City of Redondo Beach*, 192 Cal. App. 3d 515, 526 (1987).

The third element, substantial evidence supporting the reasonableness of the plan or design, *always* presents a question of law. See *Cornette, supra*, 26 Cal. 4th at p. 72. Further, the statute provides immunity when there is *any* substantial evidence of reasonableness, even if contradicted. *Grenier, supra*, 57 Cal. App. 4th at p. 940.

The Hamptons contended that the trial court erred in concluding that the County established the elements of discretionary approval of the plans and that substantial evidence supported the reasonableness of the plans.

Discretionary Approval of the Design or Plans Prior to Construction

Here, the evidence was undisputed that a licensed civil and traffic engineer working for the County approved the plans prior to the improvements made at the subject intersection. The Court of Appeal determined that the evidence presented by the County demonstrated the discretionary approval element, as a matter of law.

Nevertheless, the Hamptons argued that the County failed to establish the discretionary approval element of design immunity, because, where, as here, the design at issue violates the public entity’s own standards, the public entity cannot establish “discretionary approval” unless it shows that the engineer who approved the plans (1) knew they were substandard, (2) elected to disregard the standard, and (3) had the authority to do so. According to the Hamptons, a public entity attempting to establish the discretionary approval element of a design immunity defense must establish an exercise of “informed discretion,” and evidence that the public entity failed to adhere to standards pertaining to an element of a design plan constitutes evidence of a lack of discretionary approval of the design.

The court acknowledged that two cases, *Levin v. State of California*, 146 Cal. App. 3d 410 (1983), and *Hernandez v. Department of Transp.*, 114 Cal. App. 4th 376 (2003), supported Plaintiffs’ position. However, the court did not find either case persuasive, and declined to follow them with respect to the nature of the evidence that the governmental entity must present to establish the discretionary

approval element. According to the court, there is no requirement that a design conform to previously approved standards.

Here, a licensed civil and traffic engineer employed by the County approved the plans prior to construction, the engineer had the discretionary authority to approve the plans, and another licensed engineer employed by the County approved and signed the “as built” plans after construction of the improvements. Based on this undisputed evidence, the court concluded that the County had demonstrated the discretionary approval element of its design immunity defense as a matter of law.

Substantial Evidence of the Reasonableness of the Plans

The Hamptons also contended that the trial court erred in concluding that the County presented substantial evidence supporting the reasonableness of the plans. “Typically, ‘any substantial evidence’ consists of an expert opinion as to the reasonableness of the design, or evidence of relevant design standards.” *Laabs v. City of Victorville*, 163 Cal. App. 4th 1242, 1263-1264 (2008). Here, according to the court, the County presented substantial evidence of the reasonableness of the plans by offering expert testimony that the intersection provided adequate sight distance when such distance is properly measured under the applicable County guideline.

According to the court, the fact that the Hamptons presented conflicting testimony as to the reasonableness of the plans “does not demonstrate that the County failed to present substantial evidence of their reasonableness.” “[A]s long as reasonable minds can differ concerning whether a design should have been approved, then the governmental entity must be granted immunity.” *Sutton v. Golden Gate Bridge, Highway & Transportation Dist.*, 68 Cal. App. 4th 1149, 1158 (1998).

Accordingly, the court concluded that the trial court properly determined that the County established, as a matter of law, the affirmative defense of design immunity.

COUNTY IS NOT LIABLE FOR A DANGEROUS CONDITION OF PUBLIC PROPERTY WHERE THE DRIVER OF A VEHICLE CAUSES AN ACCIDENT BY INTENTIONALLY CROSSING THE DOUBLE YELLOW LINE INTO ONCOMING TRAFFIC

12. *Curtis v. County of Los Angeles*, 218 Cal. App. 4th 366 (2013).

FACTS AND PROCEDURAL BACKGROUND

On May 18, 2008, Andres Meza was driving eastbound on Sierra Highway, in the lane closest to the double yellow line. Paul Curtis was driving behind Meza, with his wife, Desiree Munoz, as his sole passenger. Meza crossed over into the westbound lanes, hitting a vehicle driven by Shaun Glendenning. The collision

caused Glendenning's vehicle to spin over into the eastbound lanes, hitting Curtis's vehicle head on.

Paul Curtis and his wife filed a complaint for damages, alleging a cause of action for dangerous condition of public property against the County of Los Angeles and a cause of action for negligence against Meza. Plaintiffs alleged they suffered severe and permanent injuries as a result of the multi-vehicle accident initiated by Meza. With respect to the County, Plaintiffs alleged that the property was in a dangerous condition for a number of reasons, including: (1) failure to install a median barrier at the accident location; (2) an improper design of the width of the road; (3) an improper design of the superelevation or banking of the road; and (4) failure to properly design the width of the shoulders.

The County filed an answer, generally denying the allegations in the complaint. The County asserted numerous affirmative defenses, including (1) that it was immune from liability for the design of the road under the defense of design immunity, and (2) that the sole cause of the accident was the negligence of Meza who negligently crossed over into an opposing lane of traffic.

The County filed a motion for summary judgment, contending that the road at the accident location was not in a dangerous condition because it was "safe to foreseeable users when used with due care," and that Meza had acknowledged his own negligence caused the multi-vehicle accident. The County argued in the alternative that even if the accident resulted from a dangerous condition of the road, it was immune from liability pursuant to California Government Code section 830.6, the design immunity statute.

The trial court granted summary judgment in favor of the County and Plaintiffs timely appealed.

CALIFORNIA COURT OF APPEAL DECISION

The Court of Appeal affirmed the judgment of the trial court granting summary judgment to the County. The court concluded that the alleged dangerous conditions of the highway (except for the lack of a center median space or barrier) were not the legal cause of the accident that resulted in Plaintiffs' injuries. According to the court, the evidence established that the accident was caused by Meza's intentional act of crossing the double yellow line into oncoming traffic to avoid a trailer that encroached into his lane. With respect to any harm arising from the lack of a center median, the court held that the County was entitled to design immunity.

Meza acknowledged that he crossed the double yellow line into oncoming traffic intentionally, not inadvertently, and not because any condition of the roadway caused him to lose control of his vehicle. In his deposition, Meza testified he intentionally swerved to the left to avoid a trailer that was in his lane. Meza never identified any condition of the road that caused him to lose control of his vehicle. No witness contradicted Meza's explanation for his actions. Thus, according to the court, the physical conditions of the road (aside from the lack of a median

space or barrier), were not substantial factors in causing the accident; rather “it was Meza’s volitional conduct—not any condition of the road—that caused the accident.”

With respect to liability for any injuries caused by the lack of a median separation or a median barrier, the court held that the County was immune from liability under section 830.6. The court determined that the County established the three elements necessary for design immunity. Plaintiffs did not dispute that there was a causal relationship between the lack of a median space or barrier and the accident; and the evidence established that an authorized official exercised his discretionary authority to approve plans for the highway that included neither a median space nor a barrier. As to the third element, Plaintiffs did not address the reasonableness of a lack of a median space or barrier.

Accordingly, the Court of Appeal concluded that the trial court properly granted summary judgment to the County.