

MUNICIPAL TORT AND CIVIL RIGHTS LITIGATION UPDATE



GREINES, MARTIN, STEIN & RICHLAND LLP

Tim Coates

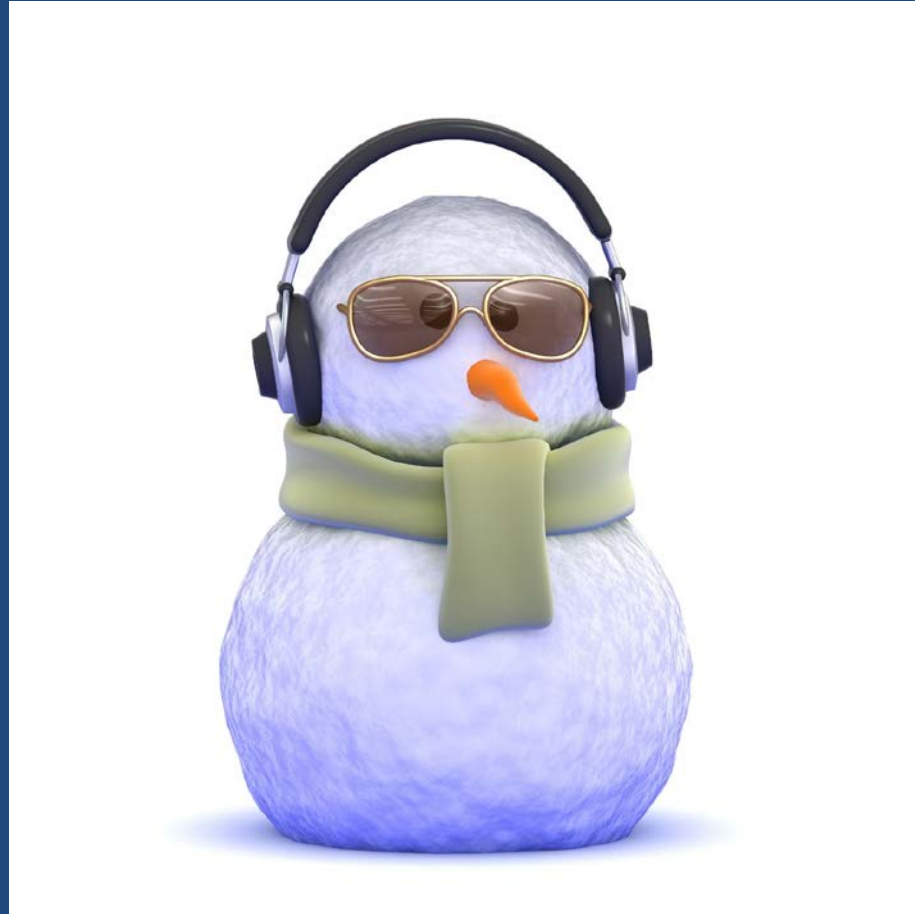
tcoates@gmsr.com

310.859.7811

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Civil Rights Law Enforcement Liability

Nieves v. Bartlett, __U.S.__,
139 S. Ct. 1715 (2019)



Nieves v. Bartlett --Facts

- Plaintiff arrested at Arctic Man Festival in Alaska.
- Asserts officer arrested him in retaliation for telling another festival visitor not to talk to the officer, and refusing to cooperate with the officer.
- According to Bartlett, Officer Nieves said as he arrested him “bet you wish you would have talked to me now.”

Nieves v. Bartlett –Lower Court Decisions

- Bartlett files section 1983 action asserting First Amendment claim for retaliatory arrest.
- District court grants summary judgment for the officers -- existence of probable cause to arrest Bartlett bars his claim.
- Ninth Circuit reverses, holds that probable cause does not defeat such a First Amendment claim.

Nieves v. Bartlett – Supreme Court

- Supreme Court reverses.
- Probable cause will normally defeat a retaliatory arrest claim.
- However, possible First Amendment claim where the plaintiff can show that the offense for which he or she was arrested did not typically result in arrest.

Nieves v. Bartlett – Impact

- Good news and bad news.
- Good: Probable cause will defeat a First Amendment claim in most instances.
- Bad: The exception is likely to swallow up the rule, as most retaliation claims arise from borderline arrest situations.
- Might prompt agencies to limit officer discretion in making arrests in crowd control situations, and routinely make arrests in situations where they might not otherwise do so, just to guard against future retaliation claims.

McDonough v. Smith, __ U.S. __,
139 S. Ct. 2149 (2019)



McDonough v. Smith

Facts And Lower Court Decisions

- Plaintiff indicted for voter fraud and subjected to two trials based on evidence fabricated by defendant.
- First trial results in hung jury. Second trial plaintiff is acquitted.
- Files suit for violation of due process.
- District court dismisses claim based on statute of limitations and Circuit court affirms.
- Cause of action accrued at the time of the first trial when plaintiff first realized fabricated evidence had been used against him.

McDonough v. Smith – Supreme Court

- Supreme Court reverses.
- Cause of action did not accrue until conclusion of the second trial which resulted in a favorable decision for the plaintiff, i.e., an acquittal.
- The Court analogizes to the tort of malicious prosecution, which requires a favorable termination of the underlying action before any statute of limitations could commence.
- Delaying accrual is consistent with *Heck v. Humphrey*, 512 U.S. 477 (1994), which bars a civil rights claim that might undermine the basis for plaintiff's criminal conviction unless and until the conviction was reversed, i.e., the action was resolved in their favor.

McDonough v. Smith – Impact

- Clarifies accrual of claims based on misconduct before and after a criminal trial.
- Will likely extend the statute of limitations for any alleged constitutional misconduct during the prosecutorial process.

Nehad v. Browder,
929 F.3d 1125 (9th Cir. 2019)



Nehad v. Browder – Facts

- Officer Browder receives call that an individual armed with a knife had threatened the caller and was in a nearby alley.
- Browder pulls police car into the alley, illuminating the suspect—Nehad—who walks towards him.
- Browder exits car, weapon drawn, and orders Nehad to stop.
- Nehad keeps walking towards him, and when Nehad is approximately 17 feet away, Browder fatally shoots him.
- No weapon found, but Nehad had been carrying a metallic pen.
- Browder's attorney refuses to allow him to answer questions at the scene.
- Five days later, after reviewing surveillance tape of the incident with his attorney, Browder says he believed Nehad had a knife.

Nehad v. Browder – Lower Court Decisions

- District court grants summary judgment on parents' due process claim because no evidence that the use of force was unrelated to any legitimate law enforcement purpose.
- District court finds that estate's excessive force claim is barred because Browder was entitled to qualified immunity given the absence of any case law addressing use of force in the particular circumstances faced by Browder.

Nehad v. Browder – Ninth Circuit

- Ninth Circuit affirms judgment on due process claim, reverses on excessive force claim.
- A jury could doubt Browder's account of the incident, given his failure to give a reason for shooting Nehad at the scene and only claiming self-defense days later after reviewing video and consulting with an attorney.
- Jury could also conclude that Browder should have seen that Nehad only had a pen, and that Browder unnecessarily exposed himself to attack.
- Browder never identified himself as a police officer, had not given a warning before shooting, and could have used a lesser level of force—a taser.

Nehad v. Browder – Impact

- Very troubling decision.
- Factors that court identifies as key to denying qualified immunity in excessive force cases—the availability of less intrusive levels of force, an officer's access to counsel at the scene and afterwards, and tactical decisions to confront a suspect rather than retreat—are present in most, if not all cases.
- *Nehad* will likely have a direct, adverse impact on litigation of excessive force cases.

West v. City of Caldwell
931 F.3d 978 (9th Cir. 2019)



West v. City of Caldwell – Facts

- Plaintiff's grandmother phones police and tells them plaintiff's boyfriend, Salinas, a known gang member with a history of violence and firearms theft, was at plaintiff's house, suicidal, and threatening plaintiff with a BB gun.
- Officers have a felony warrant for Salinas's arrest, go to plaintiff's house to execute the warrant, calling her cell phone several times, and receiving no answer.
- Officers question plaintiff when she approaches the house, and she confirms that Salinas was there when she left earlier. Officers note she could be charged with harboring a felon. She eventually consents to entry of the house and leaves.
- SWAT team arrives, calls for Salinas; receiving no answer and being unable to enter with plaintiff's key, they fire tear gas into the house and eventually break in, causing substantial damage rendering house uninhabitable for two months for plaintiff and her pets.



West v. City of Caldwell – Trial Court Decision

- Plaintiff asserts Fourth Amendment violation: 1) Consent coerced; and 2) search exceeded scope of consent –did not agree to a search that would trash the house.
- District court denies summary judgment based on qualified immunity –issues of fact on coercion and scope of consent.

West v. City of Caldwell – Ninth Circuit

- 2-1 decision reverses.
- Officers entitled to qualified immunity because no clearly established law would put them on notice that the consent might be ineffective, or that search was beyond scope of consent.

West v. City of Caldwell – Impact

- Extremely helpful case in defending Fourth Amendment claims against police officers.
- Emphasizes need to stringently apply the Supreme Court's admonition that officers are entitled to qualified immunity absent specific case law involving highly analogous facts.
- One of the most rigorous applications of the Supreme Court's "clearly established law" standard in the Ninth Circuit.

Nicholson v. City of Los Angeles
___F.3d___, 2019 WL 3939352 (9th Cir. 2019)



Nicholson v. City of Los Angeles – Facts

- Plaintiffs were a group of teenagers who would meet in an alleyway near their school to listen to and sing rap music.
- One of the teenagers is shot by LAPD Officer Gutierrez after the officer mistook a plastic replica gun held by one of the other teenagers for an actual weapon.
- Gutierrez initially handcuffs several of the plaintiffs, but is separated from them as part of the investigation into the shooting.
- Plaintiffs were held five hours before finally being released.

Nicholson v. City of Los Angeles

Trial Court Decision

- The district court denied Gutierrez's motion for summary judgment based on qualified immunity.
- Triable issue of fact on whether Gutierrez was responsible for prolonged detention, and whether he should have known that gun was only a replica.

Nicholson v. City of Los Angeles

Ninth Circuit

- Ninth Circuit affirms in part and reverses in part.
- Trial court properly denied summary judgment on the prolonged detention claim because Gutierrez had initially taken the plaintiffs into custody and was therefore an “integral participant” in the prolonged detention, even if he was not otherwise involved in determining how long they would be detained.
- Gutierrez entitled to qualified immunity on the excessive force claim because there was no existing case law involving closely analogous facts that would have put him on notice that his conduct could potentially subject him to liability.

Nicholson v. City of Los Angeles--Impact

- Somewhat mixed opinion.
- Reaffirms the Ninth Circuit's "integral participant" doctrine which expands potential civil-rights liability to almost every law enforcement officer who is involved in a particular incident.
- On the other hand, strongly reaffirms the Supreme Court's command that in the absence of an obvious constitutional violation, officers are entitled to qualified immunity in excessive force cases unless the plaintiff can cite to existing case law involving highly analogous facts.

Rodriguez v. City of San Jose
930 F.3d 1123 (9th Cir. 2019)



Rodriguez v. City of San Jose – Facts

- Plaintiff calls police, asking them to conduct a welfare check on her husband, who suffers from mental illness.
- Officers find him in a highly agitated and delusional state; detain him under Welfare & Institutions Code section 5150.
- Officers determine there were guns in the house, and seize 12 weapons—one of which was plaintiff's personally registered firearm—pursuant to Welfare & Institutions Code section 8102, subdivision (a) which requires law enforcement officers to confiscate any firearm or other deadly weapon that is owned, possessed, or otherwise controlled by an individual who has been detained under section 5150.
- City files a petition in state court seeking forfeiture of the guns under Welfare & Institutions Code section 8102, subdivision (c) based on a determination that returning the guns would likely endanger plaintiff's husband and the general public, given that he could potentially access the guns notwithstanding the fact that he would be prohibited by law from owning a gun.
- Plaintiff opposed the petition, arguing that confiscation would violate her rights under the Second Amendment. The trial court granted the petition, and the California Court of Appeal subsequently affirmed the trial court order.

Rodriguez v. City of San Jose – Trial Court

- Plaintiff files suit, argues that the confiscation violated her rights under the Second Amendment, and that the initial seizure of the weapons violated the Fourth Amendment.
- The district court grants summary judgment to the City.

Rodriguez v. City of San Jose – Ninth Circuit

- Affirms.
- Plaintiff's Second Amendment claims were barred by principles of issue preclusion, because the California Court of Appeal had previously rejected the claims and its decision was a final judgment which the federal courts were required to recognize under the Full Faith and Credit Clause.
- Fourth Amendment claim is barred because the initial warrantless seizure of the firearms was justified under the community care-taking exception, which allows seizure of persons or property in order to safeguard the public.

Rodriguez v. City of San Jose – Impact

- Very helpful case for public entities.
- Provides a clear discussion of issue preclusion based on prior state court adjudication, and reaffirms that federal courts must give preclusive effect to state court proceedings. This is important because many federal suits are preceded by state court administrative proceedings, which should be examined for potential preclusive effect.
- Although the Ninth Circuit emphasized that its determination of the Fourth Amendment issue was based on the particular facts of the case, nonetheless the opinion appears to broaden the community-caretaking exception, which had previously been confined largely to vehicle seizures.

Guillory v. Hill
36 Cal.App.5th 802 (2019)



Guillory v. Hill – Facts And Trial Court Decision

- 13 plaintiffs sue for execution of a search warrant that caused them to be detained for several hours.
- Over the course of the litigation various theories of recovery and defendants were dropped, ultimately resulting in a trial against a single defendant on a single claim.
- Jury finds for the plaintiffs, awarding less than \$5,400 total to be divided among them.
- Plaintiffs' counsel files a 392 page application for attorney fees, seeking \$3.8 million.
- Trial court denies the motion and refuses to award any fees or costs, noting that plaintiffs had sought millions of dollars in damages but received only trivial award, and that the fee application was excessive and indeed “cringeworthy” in terms of the amount of inflated billing.

Guillory v. Hill – Court Of Appeal

- Court of Appeal affirms.
- In evaluating the reasonableness of a fee request the key factor is the degree of success obtained, and here plaintiffs had been unsuccessful in prosecuting their claims for damages, as the jury only awarded them minor amounts.
- Plaintiffs established no new legal principle, nor had they obtained any injunctive relief or change in policy.
- Given the lack of success, plaintiffs were not entitled to fees.
- Denial of fees also warranted given the grossly excessive amount of fees sought.

Guillory v. Hill – Impact

- Very good case for public entities.
- Strong authority in opposing excessive fee requests, particularly in cases where the plaintiff has obtained only a de minimis damage award.

Civil Rights

First Amendment

American Legion v. American Humanist Assn.
___ U.S. ___, 139 S. Ct. 2067 (2019)



American Legion v. American Humanist Assn.

Facts And Lower Court Decisions

- Cross erected to honor local soldiers who died during World War I. Eventually located on public traffic median.
- Plaintiff sues, arguing violation of the Establishment Clause.
- District court dismisses the action, but the Fourth Circuit reverses, applying test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

American Legion v. American Humanist Assn.

Supreme Court

- Supreme Court reverses: No violation of Establishment Clause.
- Memorial erected for largely secular purposes, i.e., to honor local soldiers.
- Over the decades it had become an important historical memorial.
- Viewed in context, it did not convey any endorsement of religion, and hence did not violate the Establishment Clause.

American Legion v. American Humanist Assn.

Impact

- Still no clear, single test to apply in Establishment Clause cases.
- Reasonable observer test best suited to public religious display cases.
- Suggests that state may violate the First Amendment by discriminating against religious imagery in otherwise secular displays. This could have a major impact on cases under the California Constitution which have struck down such displays.

Tschida v. Motl
924 F.3d 1297 (9th Cir. 2019)



Tschida v. Motl

Facts And Trial Court Decision

- State statute bars disclosure of an ethics complaint against an unelected official or employee until a state regulatory agency disposes of the complaint.
- Statute does not prohibit a complainant from discussing the complaint's contents, nor limit disclosure once the complaint is resolved.
- District court upholds statute: No First Amendment violation.

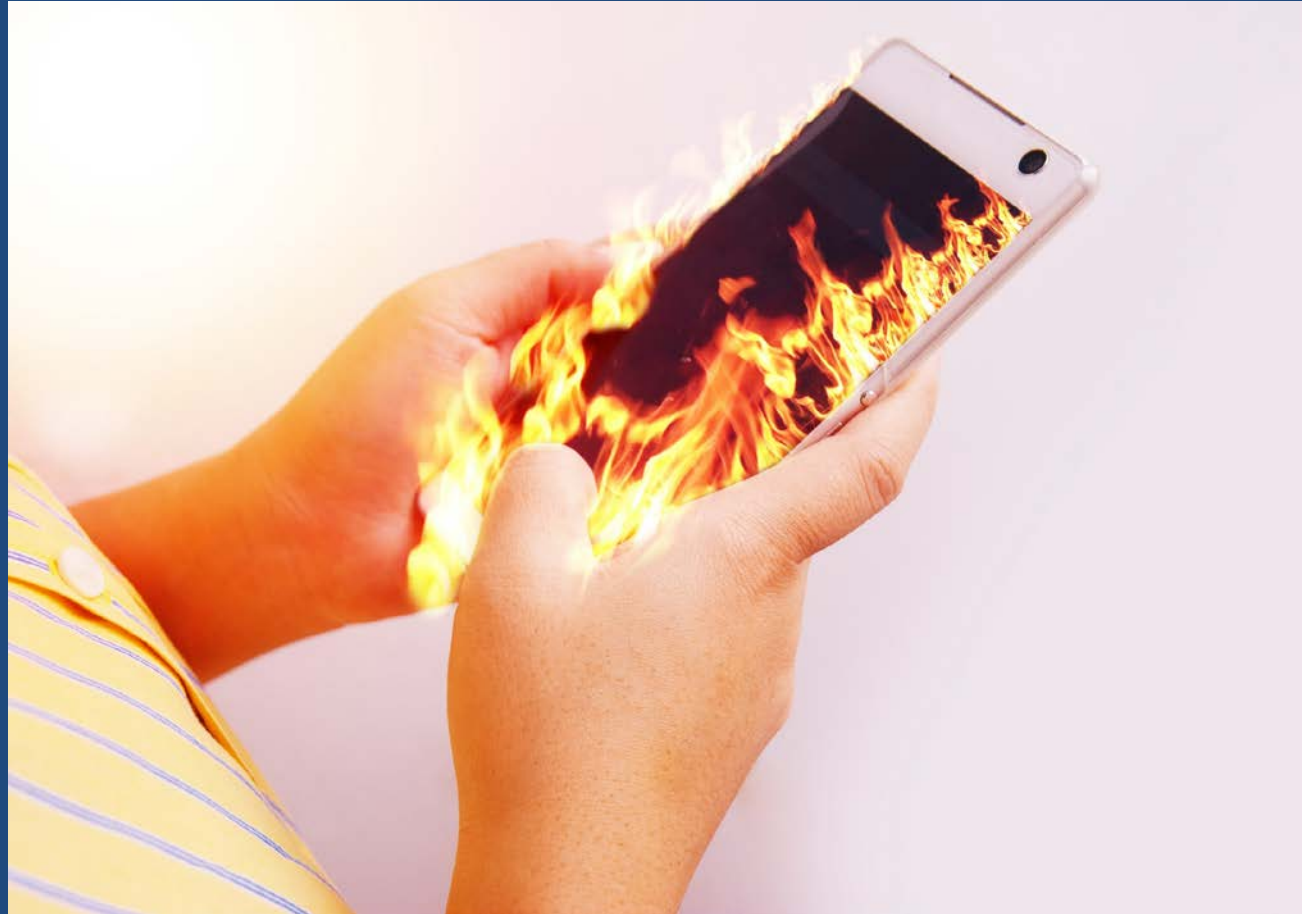
Tschida v. Motl – Ninth Circuit decision

- Reverses: Statute is overbroad and violates the First Amendment.
- Unelected officials and public employees have a right to privacy with respect to some highly personal information, but statute prohibits disclosure of a complaint regardless of the nature of the information contained in the complaint.
- Given that complainant can disclose anything in the complaint, no public interest served in barring disclosure of the complaint itself.

Tschida v. Motl – Impact

- Reminder that any regulation of speech must be strictly scrutinized to avoid a First Amendment challenge.
- Many local entities have regulations limiting disclosure of certain personnel complaints or related matters, and as a result, are at least potentially subject to a First Amendment claim unless the provision is very narrowly drawn and directly advances an important public interest.

CTIA - The Wireless Association v. City of Berkeley, 928 F.3d 832 (9th Cir. 2019)



CTIA - The Wireless Association v. City of Berkeley – Facts And Lower Court Ruling

- City enacts ordinance requiring cell phone vendors to provide warnings that carrying a cell phone in a particular manner might expose purchasers to radiation in excess of levels deemed safe by the FCC.
- Cell phone trade organization sues to enjoin ordinance as violating the First Amendment by compelling certain speech.
- District court denies injunction, the Ninth Circuit affirms, but SCOTUS grants cert and remands in light of *National Institute of Family and Life Advocates v. Becerra*, ___ U.S. ___, 138 S. Ct. 2361 (2018)

CTIA - The Wireless Association v. City of Berkeley – Ninth Circuit Decision

- Once again affirms the judgment: No First Amendment violation.
- In *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), SCOTUS held that the government could compel truthful disclosure in commercial speech so long as the disclosure was reasonably related to a substantial government interest.
- In *Zauderer*, the public interest was prevention of deceptive advertising, but compelled speech could be justified by other governmental interests, such as public safety, as here.
- Nothing controversial about the information that was subject to disclosure -- merely FCC regulations.
- Ordinance not unduly burdensome -- merely requires display of a letter size poster containing the information, or providing customers with a 5 x 8 inch handout.

CTIA - The Wireless Association v. City of Berkeley – Impact

- Helpful road map for local entities seeking to require vendors of potentially hazardous products or service to disclose public safety information to consumers, without running afoul of the First Amendment.

*Capp v. County of San Diego, __F.3d__,
2019 WL 4123515 (9th Cir. 2019)*

SOCIAL SERVICES

Capp v. County of San Diego

Facts and Lower Court Decision

- Plaintiff sues various social workers and a county.
- Asserts that the social workers urged his wife to seek sole custody of their children and had him listed on a child abuse reporting data base, in retaliation for complaining about them interviewing his children without his consent and treating him in a rude manner.
- Plaintiff contends that interviewing the children violated the Fourth Amendment, and listing him in the data base violated due process.
- District court dismisses the action -- plaintiff failed to allege sufficient facts to state any claims, and in any event defendants are entitled to qualified immunity.

Capp v. County of San Diego – Ninth Circuit

- Affirms dismissal of Fourth and Fourteenth Amendment claims, but reverses on First Amendment retaliation claim.
- Under *Nieves*, plaintiff adequately pled that the allegations were groundless, and that even if there was some basis for the social workers to urge his wife to seek sole custody, to the extent plaintiff's protected conduct was a factor in the defendants' decision, he can proceed on his claim.
- No qualified immunity --clearly established that the First Amendment bars public employees from taking retaliatory action in response to protected activity.
- No need to identify a case involving similar acts of retaliation, because the conduct –retaliation –was clearly wrongful, regardless of its specific form.

Capp v. County of San Diego -- Impact

- Very troubling case.
- Applies *Nieves's* exception very broadly. Although the court acknowledges there might have been the equivalent of probable cause for the investigation, it concludes that the plaintiff sufficiently pled differential treatment.
- Court's reliance on the general proposition that retaliation is barred by the First Amendment, runs afoul of recent Supreme Court authority requiring application of qualified immunity in the absence of cases involving highly similar facts.
- Reaffirmation of a general causation standard for retaliation cases – retaliatory motive need only be *a* factor, not the only factor in order to state a claim – makes such claims much easier to assert in the face of even valid actions by public employees.

Municipal Tort Liability

Quigley v. Garden Valley Fire Protection Dist.
7 Cal.5th 798 (2019)



Quigley v. Garden Valley Fire Protection Dist.

Facts And Lower Court Decisions

- Plaintiff, a U.S. Forrest Service firefighter, is run over and injured while sleeping at a fire camp.
- Sues the defendant public entity for dangerous condition of public property.
- Defendant moves for nonsuit, for the first time arguing that suit was barred based on the immunity for failure to maintain firefighting equipment under Government Code section 850.4.
- The trial court grants nonsuit, noting that governmental immunity is jurisdictional and could not be waived.
- The Court of Appeal affirms.

Quigley v. Garden Valley Fire Protection Dist.

Supreme Court

- Reverses and remands.
- Immunities of the Government Code are not jurisdictional, but merely affirmative defenses that can be waived if not properly preserved.
- Expressly disapproves more than 30 years of case law to the contrary.

Quigley v. Garden Valley Fire Protection Dist.
Impact

- CHECK THOSE AFFIRMATIVE
DEFENSES!!!!!!!

La Mere v. Los Angeles Unified School District
35 Cal.App.5th 237 (2019)



La Mere v. Los Angeles Unified School District

Facts and Lower Court Decision

- Plaintiff asserts various causes of action against a school district arising from alleged retaliation for engaging in protected activity as an employee.
- Trial court ultimately sustains demurrer without leave to amend and dismisses action. Recently added cause of action for Labor Code violation barred because plaintiff unable to allege compliance with the claims statute, Government Code section 911.2.

La Mere v. Los Angeles Unified School District

Court of Appeal

- Affirms.
- Rejects plaintiff's contention that because defendant had actual knowledge of facts underlying new cause of action via the existing lawsuit, no claim was required.
- Reaffirms that compliance with the claims statute is required even if a public entity is already aware of the potential claim and that the filing of a complaint is not the equivalent of filing a claim.

La Mere v. Los Angeles Unified School District

Impact

- Very helpful case.
- Reaffirms that the claim presentation requirements must be followed, even if a public entity is involved in ongoing litigation that might otherwise put it on notice of a potential ground for liability.

Huckey v. City of Temecula
37 Cal.App.5th 1092 (2019)



Huckey v. City of Temecula

Facts And Lower Court Decision

- Plaintiff trips and falls on a city sidewalk.
- Sues city for dangerous condition because the sidewalk had a height differential ranging from 9/16 of an inch to one inch.
- Trial court grants summary judgment to the city, concluding that the sidewalk height differential constituted a “trivial defect” under Government Code section 831.2.

Huckey v. City of Temecula

Court Of Appeal

- Affirms.
- The minor height differential in the sidewalk, coupled with the absence of similar accidents supports the conclusion that the height differential was a “trivial defect” under section 831.2.
- Rejects contention that alleged lack of compliance with ADA standards has any relevance to whether the sidewalk height differential was a “trivial defect” for purposes of dangerous condition liability.

Huckey v. City of Temecula -- Impact

- Very helpful in an area of major exposure – sidewalk defects.
- Provides guidance on how to successfully assert a “trivial defect” argument, including emphasis on the absence of prior accidents as strongly indicating that any defect is trivial.
- Rejection of ADA standards as defeating a defense of “trivial defect” cuts off a potential end run around the statute.

Lee v. Department of Parks and Recreation
38 Cal. App.5th 206 (2019)



Lee v. Department of Parks and Recreation

Facts And Lower Court Decision

- Plaintiff slips and falls on a stairway connecting a campground to a parking lot.
- Trial court grants summary judgment to the State. Government Code section 831.4 shields public entities from liability arising from the condition of a trail.
- Also grants motion for defense costs under Code of Civil Procedure section 1038.

Lee v. Department of Parks and Recreation

Court of Appeal

- Affirms summary judgment, but reverses fee award.
- Stairway constitutes an integral part of the trail, and hence falls within the immunity as it is a major access point for the trail.
- Nature of the stairway – crudely built with natural materials –also indicates that it is part of the trail system.
- Defense costs under Section 1038 unwarranted because no existing case law established that such stairways could fall within the trail immunity.

Lee v. Department of Parks and Recreation

Impact

- Strong case for trail immunity.
- Excellent analysis of the factors pertinent to determining whether a particular path or roadway falls within the trail immunity.
- Gives the statute a very broad reading, which will be helpful in defending actions arising from injuries on recreational property.

Fuller v. Department of Transportation
2019 WL 3933563 (2019)



Fuller v. Department of Transportation

Facts An Lower Court Decision

- Plaintiff is injured, and his wife killed, in a head-on collision when a driver crosses over the center line of the highway.
- Asserts two dangerous conditions caused the accident – inadequate sight lines, and the presence of a T-intersection leading from a vista point.
- Jury finds that the property was in a dangerous condition, but that the dangerous condition did not create a foreseeable risk that this kind of incident would occur.
- Trial court enters judgment for defendant.

Fuller v. Department of Transportation

Court Of Appeal

- Affirms.
- Verdict not inconsistent: Jury could conclude that the property was in a dangerous condition, but that the nature of the T intersection and the inadequate sight line had nothing to do with the accident, which was caused by a reckless driver who crossed over the center line.
- Court emphasizes that under Government Code section 835 mere general foreseeability is insufficient – a plaintiff must establish that the condition created the risk of the sort of accident that actually occurred.

Fuller v. Department of Transportation

Impact

- Excellent case for public entities.
- Very clear discussion on causation in dangerous condition cases.
- Emphasizes that Government Code section 835 standards must be rigorously enforced.

Wilson v. County of San Joaquin
38 Cal.App.5th 1 (2019)



Wilson v. County of San Joaquin

Facts And Lower Court Decision

- Plaintiffs sue the County of San Joaquin, asserting that their infant son died as a result of negligent medical care by City of Stockton Fire Department personnel, who had provided service in the County pursuant to a mutual aid agreement.
- Trial court grants summary judgment to the County -- suit barred by Government Code section 850.6 which provides public entities receiving “fire protection or firefighting service” from another public entity, with immunity from liability “for any act or omission of the public entity providing the service or for any act or omission of an employee of the public entity providing the service.”

Wilson v. County of San Joaquin

Court Of Appeal

- Reverses.
- Section 850.6 only applies to fire fighting activities, and not to emergency medical services rendered by Fire Department personnel.

Wilson v. County of San Joaquin – Impact

- Troubling decision.
- Expands potential liability arising from mutual aid agreements.
- Public entities might want to modify existing mutual aid agreements to provide for express indemnity and defense for emergency medical services.
- Possibly seek legislative action to broaden the scope of immunity in section 850.6.

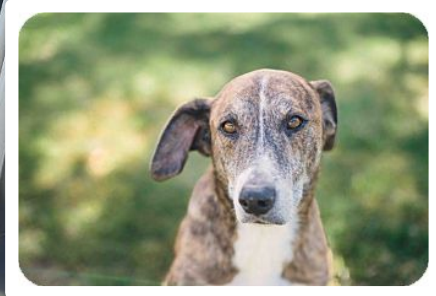
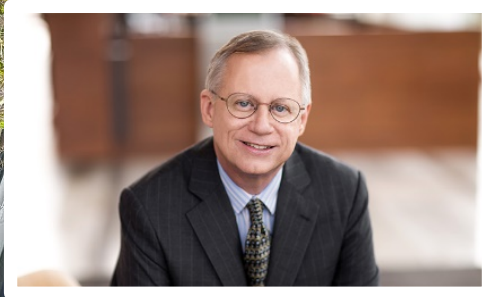
THANK YOU

Tim Coates

Greines, Martin, Stein & Richland

tcoates@gmsr.com

310.859.7811



Monty

The Couch or Big Comfy Chair

petmefeedme@gmail.com

555.555.5555