Municipal Tort and Civil Rights Litigation Update

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MUNICIPAL TORT AND CIVIL RIGHTS LITIGATION UPDATE

FOR

THE LEAGUE OF CALIFORNIA CITIES

ANNUAL CONFERENCE

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I. CIVIL RIGHTS—LAW ENFORCEMENT LIABILITY

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

- **Probable cause defeats a retaliatory arrest claim, absent evidence that offense does not typically result in arrest.**

In *Nieves v. Bartlett*, __U.S.__, 139 S. Ct. 1715 (2019), plaintiff Bartlett was arrested by defendant police officers Luis Nieves and Bryce Weight for disorderly conduct and resisting arrest during "Arctic Man," a raucous winter sports festival held in a remote part of Alaska. Nieves was speaking with a group of attendees when a seemingly intoxicated Bartlett started shouting at them not to talk to the police. When Nieves approached him, Bartlett began yelling at the officer to leave. Rather than escalate the situation, Nieves left. Bartlett later approached officer Weight in an aggressive manner while he was questioning a minor, stood between Weight and the teenager, and yelled with slurred speech that Weight should not speak with the minor. When Bartlett stepped toward Weight, the officer pushed him back. Nieves saw the confrontation and initiated an arrest. According to Bartlett, Nieves said "bet you wish you would have talked to me now."

Bartlett sued under 42 U.S.C. § 1983, claiming that the officers violated his First Amendment rights by arresting him in retaliation for his speech—i.e., his initial refusal to speak with Nieves and his intervention in Weight's discussion with the minor. The district court granted summary judgment for the officers, holding that the existence of probable cause to arrest Bartlett precluded his claim. The Ninth Circuit reversed. It held that probable cause does not defeat a retaliatory arrest claim and concluded that Bartlett's affidavit about what Nieves allegedly said after the arrest could enable Bartlett to prove that the officers' desire to chill his speech was a but-for cause of the arrest.

The Supreme Court granted review and reversed. Writing for the Court, Chief Justice Roberts invoked the Court's prior decision in *Hartman v. Moore*, 547 U.S. 250 (2006), where the Court had held that probable cause would defeat a retaliatory prosecution claim. The Court concluded that the same policy concerns dictated a rule that probable cause would generally defeat a retaliatory arrest claim. However, the Court also created a major exception to the rule, holding that probable cause would not defeat a retaliatory arrest claim where the plaintiff was able to present evidence that the offense for which he or she was arrested did not typically result in arrest.

Although initially hailed as a major victory for law enforcement, *Nieves* is somewhat problematic given the clear exception it draws for the very sort of borderline arrest claims that usually spawn these sorts of lawsuits. In many respects it counsels law enforcement officials—and their employing public entities—to cabin officer discretion in making arrests in crowd control situations, ironically very likely prompting officers to routinely make arrests in situations where they might not otherwise do so, simply in order to guard against future claims of retaliation.

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

- **Claim for fabrication of evidence accrues when underlying proceeding terminates in favor of the plaintiff, not when evidence is first used against plaintiff.**

McDonough v. Smith, __ U.S. __, 139 S. Ct. 2149 (2019), arose from plaintiff's claim that defendant had fabricated voting fraud evidence against him, which he used to secure an indictment, leading to two criminal proceedings, one resulting in a hung jury and the latter in an acquittal. Plaintiff sued for malicious prosecution under state and federal law, as well as for fabrication of evidence in violation of due process. The lower trial and appellate courts held that the malicious prosecution claim was barred by prosecutorial immunity, and that the due process claim based on fabricated evidence was

barred by the statute of limitations. As to the latter issue, the courts held that the cause of action had accrued when the plaintiff was first aware that the evidence had been used against him.

The Supreme Court reversed. Writing for the majority, Justice Sotomayor held that the 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 analogized to the tort of malicious prosecution, which required a favorable termination of the underlying action before any statute of limitations could commence. In addition, the Court noted delaying accrual until favorable resolution of the underlying action was consistent with its decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), which held that a plaintiff could not pursue a civil rights claim that might undermine the basis for his or her criminal conviction unless and until the conviction was reversed, i.e., the action was resolved in their favor.

McDonough provides clarification on accrual of claims based on misconduct in the course of criminal proceedings. Rather than having to try and parse out different limitations periods for different acts occurring at different stages of criminal proceedings, *McDonough* suggests that virtually all such claims will not be ripe to adjudicate, i.e., will not accrue, until the underlying proceeding terminates with a favorable judgment for the plaintiff.

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

- **Officer not entitled to qualified immunity for firing on possibly armed suspect advancing on officer, given failure to find a weapon, absence of warning and availability of less intrusive alternatives to subdue suspect.**

In *Nehad v. Browder*, 929 F.3d 1125 (9th Cir. 2019), Officer Browder received a call shortly after midnight that an individual armed with a knife had threatened the caller

and was in a nearby alley. Browder pulled his police car into the alley and moved forward slowly, illuminating the suspect—Nehad—who began walking towards him. Browder got out of the car, weapon drawn, and ordered Nehad to stop, but Nehad kept walking towards him. When Nehad was approximately 17 feet away, Browder shot him. No weapon was found, but Nehad had been carrying a metallic pen. Nehad died.

Browder's attorney refused to allow him to answer questions at the scene. Five days after the shooting, Browder reviewed surveillance tape of the incident with his attorney, and then gave a statement explaining that Nehad had been moving towards him "aggressively," he believed Nehad had a knife, and he shot him because he thought he might be stabbed.

Nehad's parents filed suit on behalf of themselves and his estate, asserting claims for violations of due process and the Fourth Amendment. The district court granted summary judgment to Browder. It concluded that the parents' due process claim was barred because there was no evidence that the use of force was unrelated to any legitimate law enforcement purpose. The district court also found that the excessive force claim was 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.

The Ninth Circuit affirmed dismissal of the due process claim, but reversed the judgment on the excessive force claim, holding that if plaintiffs' evidence was properly credited, Browder would not be entitled to qualified immunity. The court concluded that 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. The jury could also conclude that Browder should have seen that Nehad only had a pen, and that Browder unnecessarily exposed himself to attack. In addition, the court noted that 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 is a very troubling decision. Several factors that it 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. The level of second guessing, and wholesale adoption of a police practices expert's opinion as setting the constitutional standard to be applied in such cases is extraordinary, even for the Ninth Circuit. *Nehad* will likely have a direct, adverse impact on litigation of excessive force cases.

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

- **Limited financial success and outrageously excessive fee request justifies denial of any attorney fees in wrongful detention action.**

Guillory v. Hill, 36 Cal.App.5th 802 (2019) arose from execution of a search warrant that caused the 13 plaintiffs 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. The jury found for the plaintiffs, but awarded a little less than $5,400 total to be divided among them. Plaintiffs' counsel then filed a 392 page application for attorney fees, seeking $3.8 million. The trial court denied the motion and refused 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. Plaintiffs appealed.

The Court of Appeal affirmed the denial of fees. The court noted that in evaluating the reasonableness of a fee request that key factor was the degree of success

obtained, and that here plaintiffs had been unsuccessful in prosecuting their claims for damages, as the jury only awarded them minor amounts. Moreover, 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. In addition, the Court of Appeal noted that the denial of fees was warranted given the grossly excessive amount of fees sought.

Guillory is an extremely helpful case that provides strong authority in opposing excessive fee requests, particularly in cases where the plaintiff has obtained only a de minimis damage award.

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

- **Community care-taking exception to Fourth Amendment permits police officers to briefly detain or seize items from a member of the public without a warrant, and state administrative review proceedings will be given preclusive effect in subsequent federal suit.**

In *Rodriguez v. City of San Jose*, 930 F.3d 1123 (9th Cir. 2019), the plaintiff made a 911 call to police asking them to conduct a welfare check on her husband, who suffered from mental illness. The officers found him in a highly agitated and delusional state and eventually detained him under Welfare & Institutions Code section 5150. Learning from plaintiff that there were guns in the house, officers seized 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.

The City then filed 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.

Plaintiff then filed suit in federal court, arguing 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 granted summary judgment to the City, and plaintiff appealed.

The Ninth Circuit affirmed, concluding that plaintiff's Second Amendment claims were barred by principles of issue preclusion, in that 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. As to the Fourth Amendment claim, the Ninth Circuit held that 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 is a helpful case for public entities in two respects. First, it 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, as many federal suits are preceded by state court administrative proceedings, which should be examined for potential preclusive effect. Second, 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.

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

- **Officers entitled to qualified immunity for warrantless entry of home and subsequent use of tear gas and destruction of property, because no clearly established law would have put them on notice that plaintiff's consent to enter was not voluntary or that the search exceeded the scope of any consent.**

In *West v. City of Caldwell*, 931 F.3d 978 (9th Cir. 2019), plaintiff's grandmother phoned police and advised them that 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 already had a felony warrant for Salinas's arrest, and arrived at plaintiff's house to execute the warrant. Officers called plaintiff's cell phone several times, but received no answer. They called plaintiff's grandmother, who repeated the threats made by Salinas, but noted that she thought that plaintiff might have left the house.

While the officers were discussing how to proceed, Sergeant Joe Hoadley noticed plaintiff walking down the sidewalk toward her house. Hoadley and Officer Richardson approached plaintiff. Richardson asked plaintiff where Salinas was; she responded that he "might be" inside her house. Richardson followed up: "Might or yes?" He told plaintiff that Salinas had a felony arrest warrant, so if Salinas was in the house and she did not tell the police, she could "get in trouble" for harboring a felon. "Is he in there?" At that point, plaintiff told Richardson that Salinas was inside her house, even though she did not know if he was still there; she had let Salinas into the house earlier in the day to retrieve his belongings, but she left the house while he was still there. Plaintiff felt

threatened when Richardson told her that she could get in trouble if she were harboring Salinas, because plaintiff's mother had been arrested previously for harboring him.

After plaintiff told Richardson that Salinas was in the house, Richardson walked away to confer with the other officers. They discussed whether to contact the SWAT team, but plaintiff did not know that the SWAT team might become involved. Richardson returned to Plaintiff about 45 seconds later. He said: "Shaniz, let me ask you this. Do we have permission to get inside your house and apprehend him?" Plaintiff nodded affirmatively and gave Richardson the key to her front door. Plaintiff knew that her key would not open the door because the chain lock was engaged, but it is unclear whether Richardson also knew that. After handing over the key, plaintiff called a friend to pick her up, and she left in the friend's car. Hoadley then called the local prosecutor's office and reported to the on-call prosecutor that plaintiff consented to having officers enter her house to arrest a person who was subject to a felony arrest warrant. The prosecutor told Hoadley that the officers did not need to obtain a search warrant.

A SWAT team arrived at plaintiff's house late in the afternoon. They made repeated announcements telling Salinas to come out of the house, but he did not appear. After waiting about 20 minutes, members of the team used 12-gauge shotguns to inject tear gas into the house through the windows and the garage door. After deploying the tear gas, the SWAT team continued to make regular announcements directing Salinas to come out of the house, but still he did not appear. After about 90 minutes the team entered the house. They used plaintiff's key to unlock the deadbolt on the front door, but they could not enter because of the chain lock. They then moved to the back door, which they opened by reaching through the hole created earlier by shooting the tear gas through the back door's window. The SWAT team searched the entire house without finding Salinas.

Plaintiff sued the officers for violations of the Fourth Amendment, asserting that her consent to entry was not voluntary in that it was coerced based on the threat to arrest her. She also contended that even if she consented to entry, the search was unreasonable in scope and unnecessarily destructive. The district court denied the officers' motion for summary judgment based on qualified immunity, concluding that if plaintiff's version of events was taken as true, no reasonable officer would have believed that plaintiff had voluntarily consented to entry without a warrant, much less an entry conducted in such a destructive fashion.

The officers appealed, and in a 2-1 decision the Ninth Circuit reversed. The majority held that the officers were entitled to qualified immunity because no clearly established case law would have put them on notice that plaintiff's consent was ineffective, or that the manner of entry would be beyond the scope of any consent. In so holding, the majority noted that the Supreme Court has emphasized that in the Fourth Amendment context a plaintiff must identify case law involving highly analogous facts in order to overcome qualified immunity, and that here no case involving similar facts suggested there could be liability. The majority emphasized that scattered decisions by other circuits, and district courts could not "clearly establish" the law for purposes of qualified immunity in the Ninth Circuit.

West is an extremely helpful case in defending Fourth Amendment claims against police officers. The opinion emphasizes the need to stringently apply the Supreme Court's admonition that officers are entitled to qualified immunity absent specific case law involving highly analogous facts. *West* represents one of the most rigorous applications of the Supreme Court's "clearly established law" standard in the Ninth Circuit.

G. *Nicholson v. City of Los Angeles*, __F.3d.__, 2019 WL 3939352 (9th Cir. 2019)

- **Officer could be liable for improperly prolonged detention of suspects based on initial detention, but is entitled to qualified immunity for excessive force claim based on absence of clearly established law.**

In *Nicholson v. City of Los Angeles*, __F.3d__, 2019 WL 3939352 (9th Cir. 2019), plaintiffs were among a group of teenagers who would meet in an alleyway near their school to listen to and sing rap music. One of the teenagers was shot by LAPD Officer Gutierrez after Gutierrez mistook a plastic replica gun held by one of the other teenagers for an actual weapon. Gutierrez initially handcuffed several of the plaintiffs, but was separated from them as part of the investigation into the shooting. The plaintiffs were then held five hours before finally being released.

The district court denied Gutierrez's motion for summary judgment based on qualified immunity. Gutierrez appealed, and the Ninth Circuit affirmed in part and reversed in part. The court held that the 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. However, the Ninth Circuit held that Gutierrez was 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 is a somewhat mixed opinion. It 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, it 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.

II. FIRST AMENDMENT

A. *American Legion v. American Humanist Assn.*, __ U.S. __, 139 S. Ct. 2067 (2019)

- **Longstanding commemorative cross on public land does not violate Establishment Clause.**

American Legion v. American Humanist Assn., __ U.S. __, 139 S. Ct. 2067 (2019) arose from a challenge to a large commemorative cross on a public traffic median. The cross had been erected to honor local soldiers who died during World War I. The district court dismissed the action, but the Fourth Circuit reversed, concluding that the cross violated the Establishment Clause, applying the Supreme Court's test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

The Supreme Court reversed. Writing for the plurality, Justice Alito noted that notwithstanding the fact that the cross is the preeminent symbol of Christianity, the memorial had been erected for largely secular purposes, i.e., to honor local soldiers who had died in World War I, and that 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.

The decision is notable, in that it extends the approach first taken by the Court in *Van Orden v. Perry*, 545 U.S. 677 (2005)—a Ten Commandments case—in evaluating religious symbols on public property based on how the symbol would be perceived by a reasonable observer. It also suggests that in some circumstances a decision to remove religious imagery from public property might constitute hostility to religion, and so violate the Establishment Clause. The latter point may have some impact in California,

where the Ninth Circuit has repeatedly held that such memorial crosses on public land violate the "No Aid" provision of the California Constitution. An interpretation of the California Constitution that suggests it requires removal of religious imagery from an otherwise secular memorial would seem to run afoul of *American Legion*.

B. *Perez v. City of Roseville*, 926 F.3d 511 (9th Cir. 2019)

- **Police officials entitled to qualified immunity for terminating probationary officer for engaging in extramarital affair with another officer while on duty.**

In *Perez v. City of Roseville*, 926 F.3d 511 (9th Cir. 2019), the plaintiff was fired from her position as a probationary police officer when it was determined that she had engaged in an extramarital affair with a fellow officer, and had engaged in inappropriate private cell phone use while on duty in connection with the affair. The plaintiff sued, asserting that the termination violated her right to intimate association under the First Amendment. The district court granted summary judgment to the defendants, and the Ninth Circuit initially reversed in a 2-1 decision, holding that plaintiff had asserted a valid claim under the First Amendment and that defendants were not entitled to qualified immunity.

However, shortly after the opinion was issued, and before disposition of any petition for rehearing, the author of the opinion, Judge Reinhardt, died. Judge Ikuta was selected to replace him on the panel, and then authored a 2-1 opinion affirming the judgment for defendants. Judge Ikuta concluded that the defendants were entitled to qualified immunity, because no clearly established law would have put defendants on notice that plaintiff's termination would constitute a First Amendment violation. Plaintiff was terminated based on her on duty conduct, i.e., the personal cell phone use in connection with the affair.

Perez is helpful in that it clarifies that otherwise protected conduct might still be the subject of discipline insofar as it impacts on duty performance.

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

- **Regulation barring disclosure of ethics complaint against unelected official or employee is overbroad and violates First Amendment.**

In *Tschida v. Motl*, 924 F.3d 1297 (9th Cir. 2019), a state official challenged a state statute that barred disclosure of an ethics complaint against an unelected official or employee until a state regulatory disposed of the complaint. The statute did not prohibit a complainant from discussing the complaint's contents, nor limit disclosure once the complaint was resolved.

The Ninth Circuit found that the statute violated the First Amendment in that it was overbroad. The court acknowledged that unelected official and public employees had a right to privacy with respect to some highly personal information such as medical conditions or social security numbers, However, the state statute prohibited disclosure of a complaint regardless of the nature of the information contained in the complaint and therefore improperly limited speech in violation of the First Amendment.

Tschida is a 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.

D. *Edge v. City of Everett,* 929 F.3d 657 (9th Cir. 2019)

- **Ordinances imposing dress code on employees at quick-service facilities and prohibiting lewd conduct are neither vague nor do they burden conduct protected by the First Amendment.**

Edge v. City of Everett, 929 F.3d 657 (9th Cir. 2019), arose from a challenge to ordinances enacted by the City of Everett to stringently regulate scantily clad baristas at quick-service coffee stands, which the City contended were encouraging prostitution and other sex crimes. Various baristas and coffee stands filed suit, asserting that the ordinance prohibiting lewd conduct was vague in that it was not clear precisely what was prohibited in terms of display of body parts, and that the dress code ordinance burdened their right of free expression under the First Amendment. The district court agreed and granted a preliminary injunction barring enforcement of the ordinances.

The Ninth Circuit reversed. It held that the ordinance barring lewd conduct was sufficiently specific in its description of what acts constituted improper conduct so that a person of reasonable intelligence could understand what conduct might subject them to criminal penalties. The Court also held that the statute did not burden any expressive conduct under the First Amendment, as merely being scantily clad in order to solicit tips at a commercial establishment selling coffee was not related to any ostensible message of "female empowerment."

Edge is a very helpful case with respect to providing clear guidelines on regulation of adult businesses. It has an excellent discussion of the vagueness doctrine that provides public entities with substantial leeway in attempting to regulate lewd conduct, and provides a straightforward analysis of precisely what sort of expressive conduct is subject to First Amendment protection.

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

- **Ordinance compelling vendors to provide truthful, uncontroversial statements concerning a commercial product does not violate First Amendment.**

In *CTIA - The Wireless Association v. City of Berkeley, California*, 928 F.3d 832 (9th Cir. 2019), a cell phone trade organization filed suit to enjoin an ordinance that required 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. The district court denied a preliminary injunction, and the Ninth Circuit affirmed the judgment, however the Supreme Court subsequently granted certiorari and remanded for reconsideration in light of its decision in *National Institute of Family and Life Advocates v. Becerra*, __ U.S. __, 138 S. Ct. 2361 (2018) ("*NIFLA*"). In *NIFLA*, the Court had struck down a statute requiring pregnancy counseling centers to display information concerning the availability of other pregnancy counseling options, including abortion, on the ground that compelled disclosure of controversial information violated the First Amendment.

On remand, the Ninth Circuit again affirmed the judgment, holding that the ordinance did not violate the First Amendment. The court noted that in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), the Supreme Court had 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 the Ninth Circuit held that compelled speech could be justified by other governmental interests, such as public safety, as was the case here. In addition, there was nothing controversial about the information that was subject to disclosure, as it merely

reflected federal regulations. The court also concluded that the ordinance was not unduly burdensome, in that it merely required display of a letter size poster containing the information, or providing customers with a 5 inch by 8 inch handout with the information.

CTIA provides a 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.

F. *Capp v. City of San Diego*, __F.3d __, 2019 WL 4123515 (9th Cir. 2019)

- ***Nieves* supports First Amendment retaliation claim against social worker for urging parent to seek sole custody and absence of similar cases does not entitle social worker to qualified immunity.**

In *Capp v. County of San Diego,* __F.3d__, 2019 WL 4123515 (9th Cir. 2019) the plaintiff sued various social workers and a county, asserting that the social workers had urged his wife to seek sole custody of their children and had him listed on a child abuse reporting data base in retaliation for his complaining about the social workers interviewing his children without his consent and treating him in a rude manner. Plaintiff also asserted that interviewing the children violated the Fourth Amendment, and that listing him in the data base violated his rights to due process. The district court dismissed the action with prejudice, concluding that plaintiff had failed to allege sufficient facts to state any claims, and that in any event the defendants were entitled to qualified immunity, because the law was not clearly established as to any of his claims.

The Ninth Circuit reversed as to the First Amendment retaliation claim. Applying the Supreme Court's recent decision in *Nieves,* the court held that 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 defendants' decision, then he was entitled to proceed on his claim. The court also held that the defendants were not entitled to qualified immunity, because it was clearly established that the First Amendment bars public employees from taking retaliatory action in response to protected activity. The court emphasized that there was no need to identify a case involving similar acts of retaliation, because the conduct – retaliation –was clearly wrongful, regardless of its specific form.

Capp is troubling in several respects. First, it 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. Second, the 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 a cases involving highly similar facts. Finally, the court's 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.

III. MUNICIPAL TORT LIABILITY

A. *Quigley v. Garden Valley Fire Protection District,* 7 Cal.5th 798 (2019)

- **Government Code immunities are not jurisdictional and may be waived by failure to raise them by way of affirmative defense.**

In *Quigley v. Garden Valley Fire Protection District*, 7 Cal.5th 798 (2019), plaintiff, a U.S. Forrest Service firefighter, was run over and injured while sleeping at a fire camp. She sued the defendant public entity for dangerous condition of public property. Following the plaintiff's opening statement at trial, defendant moved 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 granted the motion, noting that governmental immunity was jurisdictional and could not be waived. The Court of Appeal affirmed, and the Supreme Court granted review.

The Supreme Court reversed. The Court held that the immunities of the Government Code are not jurisdictional, in that they do not deprive a court of the power to adjudicate a case, and are merely affirmative defenses to liability that can be waived if not properly preserved. In so holding, the Court expressly disapproved more that 30 years of case law to the contrary. The Court remanded to the Court of Appeal to determine if the defense had been preserved via an affirmative defense.

Quigley represents a sea change in California law concerning governmental immunity. It makes it essential that all relevant governmental immunities be specifically pleaded as an affirmative defense in order to avoid a claim of waiver at some later date.

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

- **Timely claim must be submitted to a public entity, or claim relief obtained, even in the face of actual knowledge of the factual and legal basis for the suit.**

In *La Mere v. Los Angeles Unified School District*, 35 Cal.App.5th 237 (2019), plaintiff asserted various causes of action against a school district arising from alleged retaliation for engaging in protected activity as an employee. The trial court ultimately sustained a demurrer without leave to amend as to the Second Amended Complaint and dismissed the action, finding that plaintiff had failed to alleged facts sufficient to establish liability, and concluding that a recently added cause of action for violation of

the Labor Code was barred because plaintiff was unable to allege compliance with the claims statue, Government Code section 911.2.

On appeal, plaintiff asserted that since the lawsuit had been underway for more than a year before she added the Labor Code cause of action, the defendant was well aware of the factual and legal basis of any claim and hence compliance with the claims statute as to this newly added cause of action was unnecessary. The Court of Appeal disagreed and affirmed the judgment. The court noted that compliance with the claims statute was a prerequisite to bringing a tort suit against a public entity, and that it is well established that compliance with the claims statue was required even if a public entity is already aware of the potential claim. The court reaffirmed that the filing of a complaint is not the equivalent of filing a claim.

La Mere is a very helpful case given the opinion's reaffirmation 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.

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

- **Height differential in sidewalk ranging from 9/16 of an inch to one inch constituted "trivial defect" under Government Code section 831.2, and could not support liability for dangerous condition on public property.**

The plaintiff in *Huckey v. City of Temecula*, 37 Cal.App.5th 1092 (2019) tripped and fell on a city sidewalk. He sued the city, alleging the sidewalk was in a dangerous condition because the sidewalk had a height differential ranging from 9/16 of an inch to one inch. The trial court granted summary judgment to the city, concluding that the sidewalk height differential constituted a "trivial defect" under Government code section

831.2 and hence could not support a claim for liability for dangerous condition on public property. Plaintiff appealed.

The Court of Appeal affirmed, noting that the minor height differential in the sidewalk coupled with the absence of any similar accidents involving the sidewalk supported the conclusion that the height differential was a "trivial defect" under section 831.2 and precluded liability for dangerous condition. The court rejected the contention that alleged lack of compliance with ADA standards had any relevance to whether the sidewalk height differential was a "trivial defect" for purposes of dangerous condition liability.

Given how ubiquitous tort claims arising from trip and falls on sidewalks are, *Huckey* is a very helpful case. The court's rejection of ADA standards as defeating a defense of "trivial defect" cuts off a potential end run around the statute. In addition, the case provides helpful guidance on how to successfully assert a "trivial defect" argument, including the emphasis on the absence of prior accidents as strongly indicating that any defect is trivial.

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

- **Stairway leading to trail constitutes integral part of trail for purposes of immunity under Government Code section 831.4.**

In *Lee v. Department of Parks and Recreation*, 38 Cal. App.5th 206 (2019) the plaintiff was injured when she slipped and fell on a stairway connecting a campground to a parking lot. The trial court granted the State's motion for summary judgment, finding that the State was immune from liability under Government Code section 831.4, which shields public entities from liability arising from the condition of a trail. The trial court also granted the State's motion for defense cost under Code of Civil Procedure section 1038.

The Court of Appeal affirmed judgment for the State on liability, but reversed the order granting defense costs. The Court held that the stairway constituted an integral part of the trail, and hence fell within the immunity as it was a major access point for the trail. In addition, the nature of the stairway – crudely built with natural materials – suggested that it was part of the trail system. The court found that defense costs were not warranted, in that no existing case law had held that such stairways could fall within the trail immunity and hence plaintiff's lawsuit was not unreasonable as a matter of law.

Lee is a very helpful case in that it provides an excellent analysis of the factors pertinent to determining whether a particular path or roadway falls within the trail immunity. It also gives the statute a very broad reading, which will be helpful in defending actions arising from injuries on recreational property.

E. *Fuller v. Department of Transportation*, 2019 WL 3933563 (2019)

- **Liability for dangerous condition under Government Code section 835 requires a finding that the condition created a foreseeable risk of the kind of injury that occurred.**

In *Fuller v. Department of Transportation*, 2019 WL 3933563 (2019), plaintiff was injured, and his wife killed, in a head-on collision when a driver crossed over the center line of the highway. Plaintiff asserted two dangerous conditions caused the accident – inadequate sight lines, and the presence of a T-intersection leading from a vista point. The jury found that the property was in a dangerous condition, but also found that the dangerous condition did not create a foreseeable risk that this kind of incident would occur. The trial court entered judgment against the plaintiff.

On appeal, plaintiff argued that the jury verdict was fatally inconsistent in that having found that the property was in a dangerous condition, the jury necessarily had to find that this sort of roadway accident was foreseeable. The Court of Appeal rejected the

contention and affirmed the judgment. The court emphasized 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. The court noted that the jury could have concluded 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.

Fuller is an excellent case for public entities. It provides a very clear discussion on causation in dangerous condition cases, and emphasizes that Government Code section 835's standards must be rigorously enforced.

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

- **Statutory immunity afforded to a public entity receiving "fire protection" or "firefighting service" from another public entity under Government Code section 850.6 does not extend to conduct by firefighters unrelated to protecting public from, and fighting, fires.**

In *Wilson v. County of San Joaquin*, 38 Cal.App.5th 1 (2019) plaintiffs brought suit against 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. The trial court granted summary judgment to the County, finding that suit was 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."

The Court of Appeal reversed. The court held that section 850.6 only applies to fire fighting activities, and not to emergency medical services rendered by Fire Department personnel.

Wilson is somewhat troubling, in that it expands potential liability arising from mutual aid agreements. As the court notes, in the face of such expanded liability, public entities might want to modify existing mutual aid agreements to provide for express indemnity and defense. In addition, public entities might want to seek legislative action to broaden the scope of immunity in section 850.6.