Municipal Tort and Civil Rights Litigation Update

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MUNICIPAL TORT AND CIVIL RIGHTS LITIGATION UPDATE

FOR

THE LEAGUE OF CALIFORNIA CITIES

SPRING CONFERENCE

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I. CIVIL RIGHTS—LAW ENFORCEMENT LIABILITY

A. *Torres v. Madrid*, __U.S.__, 2021 WL 1132514 (2021)

- **Application of physical force to the body of a person with intent to restrain is a seizure, even if the person does not submit and is not subdued.**

Torres v. Madrid, __U.S.__, 2021 WL 1132514 (2021), arose from the efforts of two New Mexico police officers to stop a car driven by Roxanne Torres. The officers, who were trying to execute an arrest warrant for another person, approached Torres and her parked car. When they attempted to speak with her, Torres began driving away. Claiming to fear for their safety, the officers shot at the car, injuring Torres, who then drove off. Torres subsequently sued the officers, asserting excessive force. The Tenth Circuit dismissed the case, holding that there had been no Fourth Amendment seizure because the shots had not actually stopped Torres, and hence she was not "seized."

The Supreme Court reversed. Citing both prior precedent, and common law, the Court held that application of physical force to the body of a person with intent to restrain is a seizure, even if the person does not submit and is not subdued. The Court emphasized that each application of force constituted a seizure, and rejected the notion of any sort of continuing seizure.

Although resolution of *Torres* seems straightforward, as the dissenting justices noted, the decision contains language that may muddy the waters for future claims concerning almost any type of coercive action by police officers, such as use of tear gas or pepper spray, or even physical contact simply designed to move a suspect from one place to another. The opinion raises issues about what constitutes a discrete application of force: If officers wrestle with a suspect over the course of several minutes, is each

physical contact during that struggle a separate application of force subject to evaluation for reasonableness on a minute by minute, or even moment by moment basis?

B. *Taylor v. Riojas,* __U.S__, 141 S.Ct. 52 (2020) (per curiam)

- **Correctional officers not entitled to qualified immunity for subjecting prisoner to deplorable conditions, because they had fair warning that such conduct would violate the Eighth Amendment, even in the absence of a specific case imposing liability under similar circumstances.**

In *Taylor v. Riojas*, __U.S__, 141 S.Ct. 52 (2020) correctional officers were sued for subjecting a prisoner to deplorable unsanitary conditions of confinement, including failure to afford proper toilet facilities. The Fifth Circuit held that the officers were entitled to qualified immunity given the absence of any clearly established law imposing liability under closely similar facts.

The Supreme Court reversed in a per curiam opinion. Citing its decision in *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) the Court noted that given the egregious nature of the alleged conduct –holding the prisoner for six days without toilet facilities, and "teeming in human waste" – the officers had fair notice that their conduct violated the Eighth Amendment, even in the absence of a case directly on point.

Taylor is significant, in that it is one of the rare Supreme Court reversals of a grant of qualified immunity over the past 20 years, and the only case other than *Hope* in which the Court has applied the fairly lax "fair warning" standard to reject qualified immunity. The case may well represent a response to growing dissatisfaction with the "clearly established law" prong of qualified immunity. *Taylor* will likely be cited with great frequency by plaintiffs in opposing defense arguments on qualified immunity.

C. *O'Doan v. Sanford*, 991 F.3d 1027 (9th Cir. 2021)

- **Officers entitled to qualified immunity for use of "reverse reap throw," tripping and lowering fleeing suspect to the ground, and subsequent use of force during struggle, as well as for arresting suspect and preparing report of the incident.**

In *O'Doan v. Sanford*, 991 F.3d 1027 (9th Cir. 2021) plaintiff's girlfriend called 911 and reported that the plaintiff was having an epileptic seizure, acting violently and had fled the residence naked. Paramedics found the couple grappling in the street and called for police back up. Plaintiff broke free and ran past the paramedics. When plaintiff encountered the officers on foot, he initially took up a fighting pose, but then attempted to flee. One of the officers grabbed him and applied a "reverse reap throw," basically tripping plaintiff while grabbing his arm and slowly pushing him to the ground. Plaintiff continued to resist, and the officers struggled with him on the ground until he was subdued. Plaintiff was taken to the hospital and examined, and after several hours appeared to return to normal. He was taken into custody for resisting arrest, but the charges were subsequently dropped.

Plaintiff sued the officers, asserting claims for excessive force and wrongful arrest, as a well as a due process claim premised on alleged omission of critical information in the arrest report, specifically, that he suffered from epilepsy. The district court granted summary judgment to defendants and plaintiff appealed.

The Ninth Circuit affirmed. The court held that the force claim was barred by qualified immunity in that no clearly established law would have suggested that the minimal use of force, i.e., the "reverse reap throw," or subsequent struggle on the ground,

were improper. The same was true with respect to the wrongful arrest claim –no case would have suggested that arresting plaintiff under the circumstances would violate the Fourth Amendment. Plaintiff's due process claim similarly failed, as no case law would have put the officers on notice that omission of plaintiff's condition from the arrest report would violate any clearly established right.

O' Doan is a very helpful case because it strongly reaffirms stringent application of the clearly established law standard for qualified immunity, and should be especially helpful in cases concerning moderate use of force against individuals suffering from some sort of mental impairment.

D. *Rice v. Morehouse,* 989 F.3d 1112 (9th Cir. 2021)

- **Officer not entitled to qualified immunity for use of non- trivial force against a suspect who is only passively resisting commands.**

In *Rice v. Morehouse*, 989 F.3d 1112 (9th Cir. 2021) the plaintiff was stopped by a state police officer for failing to signal for a full five seconds before changing lanes. Because he believed that there was no basis for the stop, plaintiff declined to give the officer his driver's license and car registration and repeatedly asked to speak to the officer's supervisor. The officer radioed for support, and over a dozen officers responded. Several officers pulled plaintiff out of the car. As they led him to the rear of the car, they tripped him so that he fell to the ground, pinned him down, and handcuffed him. The plaintiff sued the officers for excessive force and the district court granted summary judgment to defendants based on qualified immunity.

The Ninth Circuit reversed. The court held that there were material issues of fact whether plaintiff was actively resisting arrest, or only passively resisting arrest, i.e., simply failing to obey officer commands as opposed to physically resisting. The court

found that use of non-trivial force –holding plaintiff's arms behind his back and pushing him face-down on the pavement– could be deemed excessive as applied to a suspect who offered only passive resistance. The court found it important that the officers did not explore other options to compel compliance, and that plaintiff had committed only a trivial infraction.

Rice is problematic in that it continues a Ninth Circuit practice of categorizing levels of resistance, against which the reasonableness of the officer's conduct is measured, even though the lines between various categories may not be easily discerned in the field. The opinion also unduly emphasizes the existence of alternative tactics as a measure of reasonableness, even though case law makes it clear that officers need not use the least intrusive means to compel compliance.

E. *Ventura v. Rutledge*, 978 F.3d 1088 (9th Cir. 2020)

- **Officer entitled to qualified immunity for shooting knife-wielding suspect.**

In *Ventura v. Rutledge*, 978 F.3d 1088 (9th Cir. 2020) police received a 911 call from a woman, Andrade, reporting that the father of her children, Omar, had hit her, as well as her mother, and smashed a car window. Officer Rutledge responded to the 911 call, which was classified as a violent domestic disturbance. When Officer Rutledge arrived at the home, Omar was not there. While Officer Rutledge interviewed Andrade, Omar started walking up the street toward the home. Andrade identified Omar to Officer Rutledge, pointing to him and exclaiming "that's him." Andrade moved behind trash cans in the driveway as Omar continued to approach. Rutledge issued several orders for Omar to "stop." However, Omar continued to advance toward Andrade and took out a knife. Approaching Andrade with knife in hand, Omar asked, "Is this what you wanted?"

Officer Rutledge warned Omar to "[s]top or I'll shoot." When Omar did not stop, and was about 10-15 feet from Andrade, Rutledge fired two shots, killing Omar.

Omar's family filed suit for excessive force. The district court granted summary judgment to the officers based on qualified immunity and plaintiffs appealed.

The Ninth Circuit affirmed. The court held that the officers were entitled to qualified immunity because no clearly established law would have suggested that the use of force was unlawful under the circumstances. Indeed, the court noted that in *Kisela v. Hughes*, 138 S.Ct. 1148 (2018) the Supreme Court had found officers entitled to qualified immunity for shooting a knife-wielding suspect that arguably presented a lesser threat than Omar did here.

Ventura is an extremely helpful decision for excessive force cases. It strongly reaffirms and stringently applies the clearly established law test for qualified immunity.

F. *Hernandez v. Town of Gilbert,* 989 F.3d 739 (9th Cir. 2021)

- **Officer entitled to qualified immunity for reasonable use of force in deploying canine to bite actively resisting suspect, after lesser levels of force were unsuccessful.**

In *Hernandez v. Town of Gilbert*, 989 F.3d 739 (9th Cir. 2021) an officer, Robertson, activated his vehicle's lights when he saw plaintiff's car swerving. Although plaintiff saw the lights flashing behind him, he continued driving. Officer Robinson used the police vehicle's siren, but plaintiff ignored it, driving for approximately a minute and a half until he pulled into his driveway. Plaintiff opened the garage door remotely, pulled into the garage, and shut off his car. While remaining in the car, plaintiff tried to close the garage door remotely. Officer Robinson stopped the door from closing and waited for

back-up officers to arrive. Responding to assist in the arrest were Officer Justin Leach and canine Officer Gilbert accompanied by his partner, police dog Murphy.

Over the next two and a half minutes, Officer Robinson gave at least thirteen verbal orders for plaintiff to get out of the vehicle and warned plaintiff that he would be arrested for failing to obey a police officer if he did not. Plaintiff refused. Officers Robinson and Leach then approached the car with guns drawn since they did not know whether the recalcitrant suspect was armed. For over a minute, Officer Robinson tried to force plaintiff to get out of the car by using control holds, including grabbing plaintiff's left arm, left leg, his head, and his right ear. Plaintiff resisted the holds by tucking his arms close to his body and repeating, "No, I'm not under arrest." Officer Robinson observed that plaintiff's eyes were bloodshot, his speech was slurred, and his breath smelled of alcohol.

Officer Robinson then deployed pepper spray without effect. He warned plaintiff eight more times that he was under arrest and needed to get out of the car. He also warned plaintiff at least five times that a police dog would bite him if he did not step out of the car. Plaintiff responded, "I'm not going nowhere, dude," "You're on my property, bro. You can't do this shit," and "No, I am not."

Approximately eight minutes after Officer Robinson had first activated his vehicle's emergency lights, Officer Gilbert commanded police dog Murphy to bite plaintiff. As Officer Gilbert approached the car with Murphy on a leash, he had warned plaintiff that the dog would bite him if he did not step out of the car. Hernandez closed the open driver's side door and leaned to his right in an attempt to close the passenger door.

Before plaintiff could close the passenger door, Murphy entered and bit plaintiff's arm for fifty seconds in total. While Murphy was holding onto plaintiff, Officer Gilbert yelled at plaintiff to get out of the car. Officer Robinson also ordered Hernandez to crawl

forward out of the vehicle. Although plaintiff repeatedly yelled "alright," he did not move. Thirty-six seconds into the bite, Officer Gilbert commanded Murphy to release the hold and fourteen seconds later, Murphy obeyed and released his bite on plaintiff's arm. Murphy, however, held onto plaintiff's shirt for another twenty-two seconds before completely releasing the hold. While Murphy hung onto plaintiff's shirt, plaintiff held onto the front passenger headrest and told the officers that they were on his property.

After Murphy released plaintiff, he continued to cling to the headrest despite the officers' repeated orders to get out of the car. Officer Robinson asked, "should we let the dog go again?" The officers were ultimately able to pull plaintiff out of the car.

Plaintiff sued Officer Gilbert for excessive force, asserting that having the canine bite him was unreasonable. The district court granted summary judgment to the officer based on qualified immunity.

The Ninth Circuit affirmed. The court held that the use of force was reasonable as a matter of law, and that in any event, Officer Gilbert would be entitled to qualified immunity because no clearly established law would have indicated his conduct was improper. The court emphasized that multiple applications of lesser levels of force had been unsuccessful, the plaintiff was warned multiple times that the canine would bite him if he continued to physically resist, and the bite was relatively short in duration.

Hernandez is an excellent case, as it provides a road map for analyzing canine force claims for purposes of a qualified immunity.

G. *Villanueva v. State of California,* 986 F.3d 1158 (9th Cir. 2021)

- **Passenger struck by shot intended to hit driver is "seized" for purposes of a Fourth Amendment claim.**

Villanueva v. State of California, 986 F.3d 1158 (9th Cir. 2021) arose from the defendant officers' attempt to effectuate a traffic stop on a truck while in plain clothes

and driving an unmarked unit. The driver of the truck, Villanueva, purportedly did not know he was being stopped by police officers and sped away in his truck, along with his passenger, Orozco. After a short, high speed pursuit, Villanueva was blocked on a side street, and in an attempt to turn around and exit, began a three point turn, moving very slowly. The officers exited their vehicle and moved towards the truck, guns drawn. As Villanueva was finishing his turn, still moving slowly, the officers perceived he was going to hit them, and fired at Villanueva. Villanueva was fatally wounded, and Orozco was struck by one of the shots.

Orozco, along with Villanueva's family, filed an excessive force action against the officers. The district court denied summary judgment for the officers based on qualified immunity, and the officers appealed.

The Ninth Circuit affirmed. The court held that there were material issues of fact whether Villanueva was driving towards the officers at the time the shots were fired. The court emphasized that the truck was moving very slowly, and a jury could find that it did not present a threat justifying the use of deadly force. The court noted it was clearly established that officers could not shoot at a vehicle that posed no threat to themselves or others. The court also rejected the officers' argument that Orozco was not "seized" for purposes of the Fourth Amendment because the officers had not intended to shoot him. The court concluded that it was enough that the officers intended to shoot at the vehicle generally.

Villanueva is the most recent in a series of Ninth Circuit decisions denying qualified immunity where officers fire at a slowly moving vehicle, with the key factors being the extent to which the speed of the vehicle itself posed a threat, and where the officers were in relationship to the vehicle, i.e., in front, behind, or to the side. *Villanueva* also adds to the Circuit split on whether a passenger struck by fire directed at the driver of a vehicle is "seized" within the meaning of the Fourth Amendment. Several circuits

have held that such claims should be analyzed under the Fourteenth Amendment, with liability imposed only where the use of force was unrelated to any legitimate law enforcement purpose – a very difficult standard for plaintiffs to meet. There is currently at least one pending cert petition raising the issue. Moreover, *Villanueva*'s reasoning seems inconsistent with the Supreme Court's recent decision in *Torres v. Madrid*, __U.S.__, 2021 WL 1132514 (2021), which emphasizes an officer's specific intention to apply force to a particular target as the touchstone for a "seizure" under the Fourth Amendment.

H. *Estate of Anderson v. Marsh*, 985 F.3d 726 (9th Cir. 2021)

- **Appellate court lacks jurisdiction to review denial of summary judgment on qualified immunity based on disputed factual issue.**

In *Estate of Anderson v. Marsh*, 985 F.3d 726 (9th Cir. 2021), a Highway Patrol officer engaged in a high speed pursuit of a vehicle he had attempted to stop for a traffic violation. The pursuit ended when the vehicle left the roadway and ran into a fence. As the driver of the vehicle revved the engine in an effort to extricate it from the fence, the officer approached, gun drawn, and ordered the driver to stop and show his hands. According to the officer, the driver then suddenly reached down towards the floorboard, and the officer shot him twice, believing he was reaching for a weapon. No weapon was found. The driver subsequently died of unrelated causes, and his family filed suit, alleging the officer used excessive force. The district court denied summary judgment based on qualified immunity, finding a material issue of fact whether the driver had made a sudden reaching movement that would have justified the use of deadly force. The officer appealed.

The Ninth Circuit dismissed the appeal for lack of jurisdiction. Under *Mitchell v. Forsyth*, 472 U.S. 511 (1985), a denial of qualified immunity based solely on an issue of law is immediately appealable. However, the court noted that in *Johnson v. Jones*, 515 U.S. 304 (1995) the Supreme Court held that a denial of summary judgment on qualified immunity based on a disputed issue of fact was not immediately appealable. Here, the officer's appeal was based on the contention that it was undisputed that the driver had made a sudden movement, but the district court had denied summary judgment because it had concluded there was factual dispute about that issue. As a result, under *Johnson*, the order denying summary judgment was not immediately appealable.

Estate of Anderson highlights the lack of clarity as to when an order denying summary judgment based on qualified immunity is immediately appealable. As Judge Fletcher noted in a dissenting opinion, it is extremely difficult to apply the *Johnson* standard, and the circuits have been uniformly requesting guidance from the Supreme Court on the issue. Here for example, the officer was essentially raising an issue of law – whether the district court was *required* to accept his version of the facts, as the driver had died, and could not offer a contradictory account. However, by characterizing the denial as based on an issue of fact, the majority sidestepped the legal issue. As *Estate of Anderson* illustrates, there is likely to be ongoing litigation of issues of appealability until the Supreme Court clarifies the *Johnson* standard.

I. *Tabares v. City of Huntington Beach*, 988 F.3d 1119 (9th Cir. 2021)

- **Standards for assessing use of force for California negligence claims broader than standards applied to Fourth Amendment claims.**

Tabares v. City of Huntington Beach, 988 F.3d 1119 (9th Cir. 2021) arose when an officer observed an individual, Tabares, acting strangely in a parking lot. Tabares was twitching and muttering, and appeared to be on drugs. When the officer approached,

Tabares at first moved away, but then approached the officer with fists raised. The officer commanded him to stop, and when he refused, tasered Tabares several times, to no effect. The officer and Tabares started to grapple, eventually falling to the ground, where the officer felt Tabares trying to grab his gun. Tabares succeeded in pulling something from the officer's belt, and when he worked free, confronted the officer with something in his hand. Pulling his weapon, the officer shot Tabares six times in rapid succession, ordered him to stop, and then immediately fired a seventh round, killing Tabares. Tabares had been holding the officer's flashlight.

The Tabares family filed suit in federal court asserting a claim for excessive force under the Fourth Amendment and a negligence claim under California law. The district court granted summary judgment, finding the force reasonable under the Fourth Amendment, and dismissed the state law claim on the same grounds.

The Ninth Circuit reversed, holding that the state law claim could proceed. The court noted that California law was broader than federal law in determining the circumstances relevant to evaluating the reasonable use of force. The court emphasized that under California law an officer's tactical decisions prior to use of force could be considered in assessing the reasonableness of the conduct. Here, plaintiff's expert had opined that the officer should have realized that Tabares was mentally ill and de-escalated the incident, instead of confronting Tabares. The court also held that a jury could find that shooting Tabares six times in rapid succession was unreasonable, as the officer did not bother to assess the effect of each shot before firing again. The court also noted that the seventh shot was fired without giving Tabares a chance to comply with the final command to stop and get down on the ground.

Tabares is an extremely troubling decision. It is a reminder of how much greater the scope of liability is on a California negligence claim than a typical Fourth Amendment claim, as well as the ease with which a hired expert can get a case past

summary judgment simply by second guessing split-second tactical decisions made in the field. The opinion's very loose language concerning the number of shots fired, and the need to assess each shot, is also problematic, and it should be anticipated that plaintiffs will cite *Tabares* in cases involving multiple shots.

J. *Shuler v. City of Los Angeles*, __Cal. App.5th__, 2021 WL 1247964 (2021)

- **Defense judgment in federal suit for unreasonable search and seizure bars state suit for negligent search and seizure.**

In *Shuler v. City of Los Angeles*, __Cal. App.5th __, 2021 WL 1247964 (2021) plaintiff filed a federal civil rights action asserting that police officers unreasonably detained her and subjected her to a strip search. Plaintiff also included state claims in the federal action, but only the federal claims went to trial. The jury found for defendants, and the district court dismissed the state claims without prejudice. Plaintiff then refiled the state claims in state court. The defendants moved for judgment on the pleadings, arguing that under the doctrine of collateral estoppel, the judgment in the federal action barred the state claims. The trial court agreed and dismissed the case.

The Court of Appeal affirmed. The court noted that the jury in the federal action specifically found that the officers' action were reasonable. Since "unreasonable conduct" is the entire basis of a negligence claim, the jury's finding in the federal action necessarily barred the subsequent state suit based on the same conduct.

Shuler is a helpful case as it reaffirms that collateral estoppel applies when defendants prevail in a federal civil rights action. The key in such cases is whether the federal and state claims are virtually identical.

K. *Wright v. Beck*, 981 F.3d 719 (9th Cir. 2020)

- **Officer not entitled to qualified immunity for procuring court order for destruction of firearms ex parte, because need to provide notice to firearms owner to satisfy due process was obvious.**

In *Wright v. Beck*, 981 F.3d 719 (9th Cir. 2020) the plaintiff had spent decades amassing a collection of over 400 firearms, which, according to him, was worth over half a million dollars. In 2004, officers of the Los Angeles Police Department (LAPD) executed a search warrant and seized the collection. Plaintiff spent the next decade trying to recover it, asserting he owned the firearms lawfully. The LAPD voluntarily returned approximately eighty firearms, but kept the rest because, in its determination, plaintiff had not submitted sufficient proof that he owned them.

While the parties were still negotiating, an LAPD officer applied to the Los Angeles County Superior Court for an order granting permission to destroy the firearms. The officer did not give plaintiff notice that he intended to seek such an order. As a result, plaintiff did not have an opportunity to contest the officer's application, and the court granted it. Having obtained the order, the LAPD destroyed the firearms by smelting them. Plaintiff then sued various parties under 42 U.S.C. § 1983, asserting, among other claims, a violation of his Fourteenth Amendment right to due process. The district court granted summary judgment to all individual defendants based on qualified immunity and the absence of any constitutional violation.

The Ninth Circuit affirmed in part, and reversed in part. The court found that plaintiff had a clear due process right to notice before his firearms were destroyed. It agreed with the district court that there was no evidence that two of the defendants had anything to do with procuring the court order to destroy the firearms, and affirmed summary judgment as to them. However, the court reversed summary judgment as to the

officer who had procured the court order. The court acknowledged that there was no case law addressing this specific factual scenario, but held that the officer was not entitled to qualified immunity because the need for notice under basic principles of due process was so obvious.

Wright is another recent case where the Ninth Circuit has rejected qualified immunity based on the "obvious" nature of the constitutional violation, without pointing to existing case law addressing similar facts. It is part of a troubling trend, which will no doubt continue in light of the Supreme Court's decision in *Taylor v. Riojas*, __U.S__, 141 S.Ct. 52 (2020) applying the *Hope v. Pelzer* ,536 U.S. 730 (2002) "fair warning" standard in evaluating qualified immunity claims.

II. FIRST AMENDMENT

A. *Roman Catholic Diocese v. Cuomo*, 592 U.S __, 141 S.Ct. 630 (2020) (mem.); *South Bay United Pentecostal Church v. Newsom*, __U.S.__, 141 S.Ct. 716 (2021) (mem.) and *Tandon v. Newsom*, __U.S.__, 2021 WL 1328507 (2021) (per curiam)

- **Public health orders that single our religious sites for differential treatment are subject to strict scrutiny.**

Roman Catholic Diocese v. Cuomo, 592 U.S __, 141 S.Ct. 630 (2020), *South Bay United Pentecostal Church v. Newsom*, __U.S.__, 141 S.Ct. 716 (2021) and *Tandon v. Newsom*, __U.S.__, 2021 WL 1328507 (2021) (per curiam), arose from challenges to state-wide Covid-19 health orders that limited in person attendance at houses of worship and other indoor religious gatherings. In *Roman Catholic Diocese*, the plaintiff challenged New York regulations which allowed secular businesses to operate at a higher capacity than religious facilities. In *South Bay*, the plaintiff challenged California's ban on indoor, in person services. In Tandon, the plaintiff challenged California's restrictions

on indoor in-home religious gatherings. In each case the district courts denied injunctions, as did the respective appellate courts, thus spawning requests for injunctive relief in the Supreme Court.

In each case the Supreme Court issued an injunction pending appeal. Although the Court's orders in are summary in nature, and no single dispositive opinion was issued, a majority of the Court found that the regulations had to be reviewed under strict scrutiny, with each state required to provide a compelling justification as to why religious facilities were subject to greater restrictions than secular activities.

Roman Catholic Diocese and *South Bay* and *Tandon* are important because they signal a change in the manner in which courts should evaluate statutes of neutral application that may have an impact on religious practice. The opinions clearly state that a statute's specific reference to religious activity is sufficient to trigger strict scrutiny, even if the statute also applies to similarly situated secular activities. The decisions underscore the need to be extremely careful in drafting any ordinance or regulation that specifically refers to religious activity.

B. *Kennedy v. Bremerton School Dist.,* 991 F.3d 1004 (9th Cir. 2021)

- **Public employee can be disciplined for engaging in overt display of religious practice while on duty that would prompt a reasonable observer to perceive government endorsement of religion in violation of the Establishment Clause.**

In *Kennedy v. Bremerton School Dist.,* 991 F.3d 1004 (9th Cir. 2021) the plaintiff, a high school football coach, has been disciplined after kneeling to pray in the center of the football field immediately after games, often joined by players and members of the public. The plaintiff had previously been warned not to engage in the conduct as the

School District believed that such public prayer at an official school function could be deemed endorsement of religious and run afoul of the Establishment Clause of the First Amendment. The plaintiff filed suit, asserting that the discipline and limitation on his religious activities violated the First Amendment. The district court dismissed the action and plaintiff appealed.

The Ninth Circuit affirmed. The court noted that while public employees are not foreclosed from engaging in all religious practices while on duty, for example, a silent prayer or carrying a religious medal, the Establishment Clause prohibits overt displays of religious practice while engaged in official work. The court held that a reasonable observer would perceive that the plaintiff's highly public display of religious belief at a school sponsored function signaled the school's support for the activity, which would run afoul of the Establishment Clause.

Kennedy is a very useful opinion. It provides guidelines for accommodating or limiting the religious activities of public employees while on duty, and reaffirms application of the "reasonable observer" test in evaluating potential Establishment Clause violations.

C. *Uzuegbunam v. Preczewski,* __U.S.__, 141 S.Ct. 792 (2021)

- **Availability of nominal damages for violation of First Amendment rights avoids mootness, even if offending regulation is repealed and there is no likelihood of future injury.**

In *Uzuegbunam v. Preczewski,* __U.S.__, 141 S.Ct. 792 (2021), the plaintiff was handing out religious literature on a college campus when a campus police officer told him that he could only distribute literature by reserving one of two designated areas. Plaintiff followed that advice and reserved an area, but another police officer told him

that his speech was disturbing other people and therefore violating the college's ban on "disorderly conduct."

Plaintiff sued in federal court, asserting that the college's policies violated the First Amendment. After the college changed policies and plaintiff graduated, the trial court threw out the case. It ruled that although plaintiff had asked for nominal damages – an award that is small or largely symbolic, such as a dollar – in addition to his request for an order blocking the college from enforcing the now-rescinded policies, that was not enough to allow the case to continue. The 11th Circuit affirmed, agreeing that the case was moot, since there was no longer a live controversy.

The Supreme Court reversed. It held that so long as there was a completed constitutional violation and hence an injury, the availability of an award of nominal damages meant the case remained a live controversy, even if there was no likelihood the conduct would occur again.

Uzuegbunam arguably expands the availability of nominal damages as a means to maintain a lawsuit where it is difficult to quantify any constitutional injury, and the alleged unconstitutional conduct has ceased. It is especially significant in free speech cases where damages are difficult to quantify, but will have an impact in a broad range of cases challenging regulations that are quickly rescinded in the face of potential liability.

III. ADA LIABILITY

A. *C.L. v. Del Amo Hospital*, __F.3d__, 2021 WL 1183017 (9th Cir. 2021)

- **ADA does require official certification for service dogs.**

In *C.L. v. Del Amo Hospital*, __F.3d__, 2021 WL 1183017 (9th Cir. 2021), a hospital barred the plaintiff from entering the facility with her service dog, contending that the dog was not a qualified service animal as it lacked formal certification. The plaintiff sued for violation of the ADA, and after a bench trial the district court found in favor of defendant, concluding that without formal certification the dog did not qualify as a service animal under the ADA.

The Ninth Circuit reversed. The court noted that the ADA does not specify any certification procedure for an animal to qualify as a service animal. Under the ADA it is sufficient that an animal is trained, whether by the owner or someone else, to perform specific tasks to help a disabled owner. The court remanded for retrial so the district court could determine whether the animal had sufficient training to meet the ADA standard.

C.L. sets a broad standard for qualifying as a service animal under the ADA, and suggests caution in being overly restrictive in barring animals from public property that owners have specified as service animals.

IV. MUNICIPAL TORT LIABILITY

A. *Menges v. Department of Transportation*, 59 Cal.App.5th 13 (2020)

- **Design immunity established by expert testimony that plan was reasonable and that improvement as constructed substantially complied with plan.**

In *Menges v. Department of Transportation*, 59 Cal.App.5th 13 (2020) the plaintiff was seriously injured when her vehicle was struck by a truck exiting the

freeway. She sued the State, asserting that the accident was caused by the dangerous condition of the freeway and off ramp. The State successfully moved for summary judgment based on design immunity under Government Code section 830.6.

The Court of Appeal affirmed. The court held that the State had established that the plan was reasonable by submitting expert testimony to that effect. It rejected plaintiff's contention that submission of contrary expert opinion created a triable issue of fact on the issue. The court noted that there need only be substantial evidence that the plan was reasonable in order to establish the immunity. The court also rejected plaintiff's argument that the roadway was not constructed in substantial conformance with the plans, and hence not subject to the immunity. The court held that the testimony of plaintiff's expert on the issue was inadmissible as it lacked foundation and was based on speculation. The court also held, that even if taken at face value, the testimony was insufficient to overcome the immunity, because the expert merely identified minor deviations between the plan and the roadway as built. The court emphasized that the statute only required that the improvement be constructed in "substantial compliance" with design, not identical in every single aspect.

Menges is a very strong design immunity case. It reaffirms that the reasonableness of a design can be established as a matter of law by submission of substantial evidence that the design comported with professional standards, and that a mere conflict of the evidence on that point cannot overcome the immunity. The decision is also very helpful in rejecting conclusory expert opinion as sufficient to defeat the immunity and emphasizing that an improvement need not be built in perfect accordance with a plan in order for the immunity to apply.

B. *Tansavatdi v. City of Rancho Palos Verdes*, 60 Cal.App.5th 423 (2021)

- **Design immunity does not foreclose a dangerous condition claim based on failure to warn.**

In *Tansavatdi v. City of Rancho Palos Verdes*, 60 Cal.App.5th 423 (2021), the plaintiff 's son was killed after being struck by a vehicle while riding his bike on a city street. Plaintiff asserted that the street lacked a bicycle lane and was in a dangerous condition, and that the City should have provided a warning of the condition. The City successfully moved for summary judgment based on design immunity under Government Code section 830.6. The trial court did not separately address the plaintiff's failure to warn claim.

The Court of Appeal affirmed in part, reversed in part, and remanded for further proceedings. The court held that the City had properly established all the elements of design immunity. However, citing *Cameron v. State of California*, 7 Cal.3d 318 (1972), the court held that even if the City was entitled to design immunity, plaintiff could still assert a separate dangerous condition claim based on failure to warn. The court noted, however, that the claim could not be based on the failure to warn of an alleged dangerous condition that was included as part of the plan, such as the absence of a bike lane. The court remanded to the trial court to address the failure to warn claim.

Tansavatdi is helpful in that it has an extensive discussion of the elements of design immunity and provides clear guidance on how to establish the immunity. However, its discussion of the failure to warn issue, and difficultly in parsing out just what sort of failure to warn claim is viable where the public entity has established design immunity, is extremely confusing. The case is an open invitation for plaintiffs to assert muddled failure to warn claims in response to a design immunity defense. To be fair though, *Cameron* itself is very confusing, and guidance from the Supreme Court as to its meaning would be extremely helpful.

C. *Williams v. County of Sonoma*, 55 Cal.App.5th 125 (2020)

- **Public entity owes duty not to increase the inherent risks of long-distance, recreational bicycling by failing to repair pothole in road.**

In *Williams v. County of Sonoma*, 55 Cal.App.5th 125 (2020), the plaintiff was injured when she fell off her bike after striking a large pothole while practicing long-distance cycling for a race. Plaintiff sued the County, asserting that the extremely large pothole constituted a dangerous condition of property. The trial court rejected the County's argument that the doctrine of implied assumption of risk barred the action, and the jury found for plaintiff. The County appealed.

The Court of Appeal affirmed. The court held that even assuming the doctrine of implied assumption of risk applies to a claim for dangerous condition of public property, that there was an exception to the doctrine when a property owner increases the inherent danger of an activity. The court found that County's failure to fix the pothole increased the inherent risks of engaging in long distance cycling in preparation for competition, and hence the doctrine was inapplicable.

Williams is a very troubling decision as it broadens dangerous condition liability for public entities with respect to activities that are themselves risky. It is also inconsistent with decisions holding that the exception for increasing the inherent risks of an activity applies only to an entity that sponsors the activity. It should be noted, however, that *Williams* does not address the immunity for hazardous recreational activities of Government Code section 831.7 which might foreclose liability in many similar instances.

D. *Lowry v. Port San Luis Harbor District,* 56 Cal.App.5th 211 (2020)

- **Claims statute bars complaint where action filed before claim is denied.**

The plaintiff in *Lowry v. Port San Luis Harbor District*, 56 Cal.App.5th 211 (2020) was employed by the defendant and was injured on one of defendant's vessels. Realizing that the time to file a claim under Government Code section 911.2 had expired, plaintiff, who had already filed suit, submitted a late claim application, attaching a copy of the complaint. The defendant denied the late claim and then filed a demurrer, arguing that the complaint was premature as it had been filed before the late claim application was submitted. The trial court agreed and dismissed the action.

The Court of Appeal affirmed. The court observed that compliance with the Claims Act was a prerequisite to filing suit, and that it was improper to file a complaint unless and until a claim or late claim application has been denied. Here, the complaint was clearly filed before the late claim application was denied, and was therefore premature.

Lowry has very helpful language concerning the need for strict compliance with the Claims Act, albeit in the context of a highly formalistic interpretation of the statute.