



# Municipal Tort and Civil Rights Litigation Update

Thursday, October 6, 2016 General Session; 8:00 – 9:30 a.m.

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This image shows a full page of blank white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page, providing a template for writing or drawing. There are no margins, text, or other markings on the page.

**Municipal Tort Law Update**  
**for the League of California Cities Annual Conference**  
**October 6, 2016**  
**Presented by Walter C. Chung**

1. ***Hampton v. County of San Diego*** (Dec. 10, 2015) 62 Cal.4<sup>th</sup> 340

**LEGAL ISSUE OF THE CASE**

**UNDER GOV. CODE SECTION 830.6, DOES AN “IMPROPER EVALUATION” RESULT IN THE LOSS OF GOVERNMENTAL IMMUNITY?**

**FACTUAL BACKGROUND**

Plaintiff Randall Hampton was seriously injured in a collision between his vehicle and another that occurred at the intersection of Miller and Cole Grade Roads in San Diego County. Hampton alleged that the accident occurred when attempting a left turn from Miller Road, a rural side road, onto Cole Grade Road, a rural two-lane thoroughfare that had paved shoulders in addition to marked lanes of traffic. Hampton suffered brain damage. Hampton and his wife sued the other driver, alleging his negligence caused the accident. Hampton was unable to recall whether he had stopped at the stop sign at the intersection. The other driver stated that Hamptons’ vehicle entered the intersection “right in front of him leaving too little time to stop before the collision.”

The California Highway Patrol concluded that Hampton had caused the accident by failing to stop at the stop sign on Miller Road before proceeding into the intersection.

The Hamptons also filed an additional cause of action against the County of San Diego (“County”) for maintaining an allegedly dangerous condition of public property. The Hamptons’ principal claim against the County was that the design and construction of the subject intersection failed to provide adequate visibility under applicable County design standards for a driver turning left from Miller Road onto Cole Grade Road. According to the Hamptons, a high embankment covered with vegetation substantially impaired visibility for drivers turning left from Miller Road onto Cole Grade Road. They alleged that the County’s design drawings for the intersection did not depict or describe the embankment or take it into account as an impediment to visibility; nor did the design plan afford the visibility required by County standards.

**PROCEDURAL BACKGROUND**

The County moved for summary judgment arguing design immunity under Government Code section 830.6. The trial court concluded there was substantial evidence supporting each of the three elements of design immunity and granted summary judgment to the County on the basis of design immunity.

The Court of Appeal agreed with the trial court that the County had established the defense of design immunity for the purpose of summary judgment.

Plaintiffs petitioned the California Supreme Court for review. Plaintiffs framed the issues as follows: (1) Does a public official's approval of a design constitute an "exercis[e] of discretionary authority" under section 830.6 if, at the time of the approval of the design, the official did not realize the design deviated from governing standards? (2) Where a design deviates from governing standards, must the public entity show that the official who approved the design had the authority to disregard those standards?

### **DECISION OF CALIFORNIA SUPREME COURT**

The California Supreme Court unanimously affirmed the Court of Appeal's decision upholding the trial court's judgment granting the County's motion for summary judgment based on design immunity.

#### **1. The Defense of Design Immunity**

A public entity may be liable for injuries caused by dangerous conditions of public property. (Gov. Code §§ 830, 835.) An entity may avoid liability, however, through the affirmative defense of design immunity. (§ 830.6.) "A public entity claiming design immunity must establish three elements: (1) a causal relationship between the plan or design and the accident; (2) discretionary approval of the plan or design prior to construction; and (3) substantial evidence supporting the reasonableness of the plan or design." *Cornette v. Department of Transportation*, 26 Cal. 4th 63, 66 (2001).

The rationale of the design immunity defense is to prevent a jury from simply reweighing the same factors considered by the governmental entity which approved the design. *Cameron v. State of California*. 7 Cal. 3d 318, 326 (1972).

#### **2. Discretionary Approval Element of Design Immunity**

In the present case, the Hamptons conceded the first element of design immunity, causation. Neither did they challenge the trial and appellate courts' decisions concerning the reasonableness of the plan or design. Thus, according to the Supreme Court, this case concerned only the second element of section 830.6's design immunity - the discretionary approval element.

Here, the evidence was undisputed that a licensed civil and traffic engineer employed by the County had approved the relevant plans prior to construction. The plans showed, among other things, that County engineers had set out to improve visibility by lowering the grade on the thoroughfare and installing warning signs. However, the Hamptons argued that the County had failed to satisfy the discretionary approval element in the statute because it failed to establish that the employee who approved the plans was aware of existing standards or was aware that the plans deviated from those standards. Plaintiffs alleged, in essence, that the engineers applied the wrong design standards and

erred in their exercise of judgment because they were unaware of the correct standards.

The Supreme Court disagreed. According to the Court, the discretionary element of section 830.6 does not require a showing that the employee who approved the plans was aware of design standards or was aware that the plans deviated from those standards. In addition, the Court held that the discretionary approval element does not require the entity to demonstrate that the employee who had authority to and did approve the plans also had authority to disregard applicable standards.

According to the Court, plaintiffs' assertions simply claim an "improper evaluation" which cannot divest a discretionary policy decision of its immunity. The Hamptons' interpretation of the statute would lead a jury into "the sort of second-guessing concerning the wisdom of the design that the statute was intended to avoid."

As to the Hamptons' additional claim, that the County was required to establish that its employees who approved the plans had the authority to deviate from applicable visibility standards, the Court found that they had not offered any persuasive authority in support and did not decide the matter.

2. ***Burgueno v. The Regents of the University of California*** (December 15, 2015) 243 Cal.App.4th 1052

### **LEGAL ISSUE OF THE CASE**

**DOES THE USE OF A TRAIL FOR BOTH RECREATIONAL  
AND NON-RECREATIONAL PURPOSES PRECLUDE  
IMMUNITY UNDER GOVERNMENT CODE SECTION 831.4?**

### **FACTUAL BACKGROUND**

The Great Meadow Bikeway is a paved bike path that runs through a portion of the University of California, Santa Cruz campus known as the Great Meadow. Constructed in 1973, the purpose of the Bikeway is bicycle transportation to and from the central campus that is separate from automobile traffic. There have been a number of bicycle accidents on the Bikeway.

Some bicyclists use the Bikeway for recreation. Members of a county cycling club use the Bikeway to access mountain bike paths in the redwood forests above the university campus. The Bikeway ends at the university music center where the cycling club members then travel through the campus to reach the mountain bike paths.

Although automobiles and pedestrians are not allowed on the Bikeway, at times the Bikeway is accessed by university service vehicles and emergency vehicles. In addition, service vehicles and farm visitors in private automobiles occasionally cross the Bikeway.

Adrian Burgueno was a full-time student at the university. He lived in an off-campus apartment and commuted to the university on his bicycle. His route to campus included traveling on the Bikeway. One evening, as Adrian was leaving the campus on his bicycle, after attending his photography class, he was fatally injured in a bicycle accident on the downhill portion of the Bikeway.

### **PROCEDURAL BACKGROUND**

Adrian's mother and sister filed an action against the Regents of the University of California, alleging that the Regents were liable for Adrian's death due to the dangerous condition of public property and for wrongful death.

The cause of action against the Regents for dangerous condition of public property alleged that the Regents had actual knowledge that students used the bikeway for commuting to campus at night, and knew or should have known that the bikeway was unsafe due to its downward curve, sight limitations, lack of runoff areas, lack of adequate signage, lack of appropriate roadway markings, and lack of physical barriers to prevent nighttime use of the bikeway. Plaintiffs

also alleged that the Regents failed to warn the public and students of the bikeway's dangerous condition.

In the cause of action for wrongful death, Plaintiffs asserted that the Regents' negligence and recklessness was the proximate cause of Adrian's death. The trial court granted the Regents' motion for summary judgment. The court held that the Regents were entitled to immunity under Government Code section 831.4, the recreational trail immunity statute.

### **DECISION OF CALIFORNIA COURT OF APPEAL**

The Court of Appeal held that the causes of action for dangerous condition of public property and wrongful death were barred as a matter of law because the Regents have absolute immunity under the recreational trail immunity provided by section 831.4, and thus, affirmed the judgment.

#### **Dual or Mixed Uses—Recreational and Non-Recreational**

Plaintiffs argued that the Bikeway was not a trail within the meaning of section 831.4 because it was designed and used for bicycle commuting to the university campus, not recreation. Although Plaintiffs acknowledged that some bicyclists used the Bikeway to access recreational land adjacent to the campus, they argued that any such incidental use was insufficient to make it a recreational trail to which the immunity applies, as it did not change the primary character of the Bikeway.

The court disagreed with Plaintiffs' contention that a trail used for both recreational and non-recreational purposes precludes trail immunity under section 831.4. It is now well established that section 831.4 applies "to bike paths, both paved and unpaved, to trails providing access to recreational activities, and to trails on which the activities take place." *Prokob v. City of Los Angeles*, 150 Cal. App. 4th 1332, 1335 (2007). Here, the Bikeway was not intended and used for recreation; rather it was designed for its primary use as a "bicycle transportation corridor." According to the court, "[t]he fact that a trail has a dual use--recreational and nonrecreational--does not undermine section 831.4, subdivision (b) immunity." *Montenegro v. City of Bradbury*, 215 Cal. App. 4th 924, 932 (2013).

#### **Adrian was not using the Parkway for a Recreational Purpose at the Time of his Accident**

Plaintiffs argued that because Adrian was not engaged in a recreational activity when his accident occurred, the section 831.4 immunity did not apply. The court did not agree. According to the Court, it is immaterial that Adrian was not using the Great Meadow Bikeway for a recreational purpose at the time of his accident.



3. ***People v. Steele* (Apr. 25 2016) 246 Cal.App.4th 1110**

**LEGAL ISSUE OF THE CASE**

**MAY A DETENTION OF A PERSON BE REASONABLE  
UNDER THE FOURTH AMENDMENT IN THE ABSENCE  
OF REASONABLE SUSPICION OF CRIMINAL ACTIVITY  
ON THE PART OF THAT INDIVIDUAL?**

**FACTUAL BACKGROUND**

Shasta County Sheriff's Deputy Jerry Fernandez was on patrol in a marked patrol car with trainee Deputy Megan Bliss just after 10:00 p.m. The deputies were in full uniform and Deputy Bliss was driving.

Deputy Fernandez observed two vehicles that appeared to be traveling together. The lead vehicle was a dark colored SUV, the second vehicle was a white Jeep. There was no other vehicle traffic.

The deputies followed the two vehicles onto a rural dead end road with no streetlights. A records check on the license plates for the two vehicles revealed that the lead vehicle had an expired registration and the second vehicle was a rental car. Deputy Fernandez decided not to stop the lead vehicle because of the risk associated with stopping people at night in their own driveways without ambient light. Deputy Bliss began to make a U-turn while the two vehicles drove down a driveway off the dead end road.

As Deputy Bliss began to make a U-turn, dispatch advised the deputies that there was a felony arrest warrant for the registered owner of the lead vehicle. Deputy Fernandez decided to stop the lead vehicle based on the expired registration and the arrest warrant. As the two vehicles were coming to a stop at the end of the driveway, the patrol car entered the driveway, and Deputy Bliss activated the emergency lights. She stopped the patrol car behind and a little to the right of the second vehicle. The lead vehicle was directly in front of the second vehicle.

The deputies approached the second vehicle first for safety reasons, as they testified that they did not want "to walk past a vehicle in the middle of the night with a subject in it." Also, the deputies wanted to inform the driver of the vehicle that they were stopping the lead vehicle. Deputy Bliss contacted the driver of the second vehicle, Defendant Charles Steele, and a second or two later, Deputy Fernandez approached the vehicle and smelled the odor of marijuana emanating from the vehicle. He saw marijuana in plain sight on the backseat. A search of the vehicle resulted in the discovery of a bag of marijuana, two baggies of methamphetamine and other items.

Steele was arrested and charged with various narcotics offenses.

### **PROCEDURAL BACKGROUND**

Steele filed a motion to suppress the evidence found in his vehicle on the ground that it was obtained during an unlawful detention. The trial court denied the motion. The court determined that the sheriff's deputies did in fact detain Steele but that the detention was justified to assure that Steele did not present a danger to the deputies while they approached and investigated the lead vehicle and its occupant.

### **DECISION OF CALIFORNIA COURT OF APPEAL**

The Court of Appeal affirmed the judgment of the trial court denying Steele's motion to suppress the evidence.

#### **Detention of Steel for Fourth Amendment Purposes**

In this case, the court concluded that Steele was detained for purposes of the Fourth Amendment. According to the court, Steele was detained when the deputies followed the two vehicles at night onto a driveway out of sight from a nearby highway, stopping behind the two vehicles, and parking at night behind Steele's vehicle with the emergency lights activated. Under these circumstances, the court determined that a reasonable person would not have felt free to leave. Thus, the Fourth Amendment was implicated.

#### **Steele's Initial Detention was Constitutional**

Steele claimed the deputies did not have reasonable suspicion to detain him and thus his initial seizure was unconstitutional. The court did not agree. Officer safety is a weighty public interest, and accordingly, under *Steele*, "law enforcement officers may lawfully detain a defendant when detention is necessary to determine the defendant's connection with the subject of a search warrant and related to the need of ensuring officer safety."

According to the court, Steele was not detained for an independent investigatory purpose, rather the initial contact between the deputies and Steele was limited to the purpose of ensuring the deputies' safety.

The court acknowledged that the circumstances present here are "one of those rare situations" where although the deputies seized Steele when they stopped his vehicle, the initial approach of the deputies to Steele's vehicle and initial seizure were not for the purpose of arresting him or for an investigation directed at him. Rather, the court concluded the initial detention was justified for the limited purpose of protecting the deputies' safety.

The Steel court noted that both the U.S. Supreme Court and the California Supreme Court have recognized that officer safety is a “weighty government interest.” *Maryland v. Wilson*, 519 U.S. 408, 413, (1997); *People v. Glaser*, 11 Cal. 4th 354, 365 (1995).

Both courts have held that law enforcement officers may lawfully detain individuals when detention is necessary to determine a person’s connection with the subject of a search warrant and related to the need of ensuring officer safety.

In *Michigan v. Summers*, 452 U.S. 692 (1981), police officers executed a search warrant at a house thought to contain contraband and detained an individual during the search because he was seen leaving the premises when the officers arrived. The U.S. Supreme Court concluded that the officers lawfully detained the individual because “[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.”

The U.S. Supreme Court “has [also] recognized that officer safety during a traffic stop is a weighty government interest which can justify detaining the passengers of a stopped vehicle.” *Maryland v. Wilson*, 519 U.S. 408, 413 (1997). Accordingly, law enforcement officers may, consistent with the Fourth Amendment, order the passengers to exit a vehicle pending completion of a traffic stop.

The court also noted that the initial police encounter with Steele was a minimal intrusion upon Steele’s privacy and security interests. Steele was already parking his vehicle and the initial detention was not prolonged.

### **CONCLUSION**

The court concluded that viewing the totality of the circumstances and weighing the interests of the government and Steele, the initial detention was justified for the limited purpose of protecting the deputies’ safety.

4. ***Thomas v. C. Dillard and Palomar Community College District*** (9th Cir. 2016) 818 F.3d 864

### **LEGAL ISSUE OF THE CASE**

**CAN THE DOMESTIC VIOLENCE NATURE OF  
A POLICE INVESTIGATION ALONE BE SUFFICIENT  
TO ESTABLISH REASONABLE SUSPICION  
TO CONDUCT A *TERRY* FRISK FOR WEAPONS?**

### **FACTUAL BACKGROUND**

On September 21, 2010, the Palomar College Police Department dispatched Officer Dillard to the college's Escondido campus in response to a domestic violence call involving a black male. Dillard spoke to a college administrator but was unable to obtain any further details pertaining to the domestic violence incident that may have prompted the call.

Approximately 40 minutes later, while he was speaking with the administrator, Dillard received a call to investigate a male wearing a purple shirt pushing a female near some storage containers on the south side of the Escondido campus. When Dillard arrived on the scene, he first encountered a community service officer who had also responded to the call and who would remain at the scene. There was no further description of the "suspect," or of the alleged "pushing," and the call made no mention of domestic violence. Dillard then saw a male, wearing a purple shirt, and a female come out from behind the storage containers. The individuals turned out to be Correll Thomas, who is African-American, and his girlfriend, Amy Husky.

Dillard got out of his police car, telling Thomas and Husky that no one was in trouble. He stopped about 10 feet away from Thomas and Husky, who were standing next to each other. Dillard saw no indication that a crime had occurred. Husky exhibited no signs of domestic violence. She showed no signs of injury, and she had not been crying. She did not appear distraught. The area was open to the public.

Dillard asked Thomas and Husky whether they had identification. Thomas responded that he did. Husky responded that she did not. Dillard did not ask to see the identification. Instead, he asked Thomas whether he had any weapons on him. When Thomas responded that he did not, Dillard asked Thomas whether he would mind being searched for weapons. This was approximately 15 seconds into the encounter. Thomas responded that he did mind.

Dillard approached Thomas and asked again whether he would consent to a search for weapons. When Thomas declined, Dillard told Thomas he had received a call "about a guy in a purple shirt pushing around a girl." Thomas and

Husky both denied they had seen anything or had done anything wrong. They both denied they were fighting, or that Thomas was pushing Husky. Husky told Dillard they had just been kissing behind the storage containers. Thomas again refused to give Dillard permission to search Thomas for weapons. At that point, Dillard moved towards Thomas, attempting to grab him and place him in a controlled hold for the purpose of conducting a frisk. When Thomas stepped away to avoid being grabbed, Dillard backed off, pulled out his Taser, pointed it at Thomas and told Thomas he was going to search him. This occurred approximately 30-40 seconds into the encounter.

Thomas continued to respond to Dillard's questions but withheld his consent to being searched. He was not aggressive or belligerent. Dillard called for backup and kept his Taser pointed at Thomas. Dillard told Thomas to put his hands in the air, step forward and drop to his knees. Thomas refused to do so. However, when a backup officer told Thomas to put up his hands, he did so. Dillard told Thomas that if he did not get down on his knees by the count of three, Dillard would tase him. Dillard counted to three, and, when Thomas did not comply, tased Thomas. Dillard fired the Taser in dart mode which delivered an incapacitating surge of electrical current to the body. Thomas was handcuffed, searched (no weapons were found), and treated by paramedics. He was arrested and charged with a violation of Penal Code section 148. The charges were dismissed six months later.

### **PROCEDURAL BACKGROUND**

Thomas filed suit against Dillard under § 1983, alleging violations of his Fourth Amendment rights to be free from unlawful seizure and excessive force. He also alleged claims under California state law for negligence and violation of California Civil Code § 52.1.

Dillard moved for summary judgment but the district court denied the motion. The court ruled that Dillard lacked reasonable suspicion to believe Thomas was armed and dangerous, and thus, that Dillard unlawfully seized Thomas for the purpose of conducting a weapons search.

The court also denied qualified immunity to Dillard.

Dillard appealed.

### **THE NINTH CIRCUIT'S DECISION**

The Ninth Circuit held that Dillard unlawfully detained Thomas for the purpose of performing a *Terry* frisk because, according to the court, the domestic violence nature of a police investigation alone cannot be sufficient to establish reasonable suspicion for a frisk. However, the court reversed the trial court and held that Dillard was entitled to qualified immunity on that issue.

The court further held that Dillard used excessive force when he tased Thomas in order to force him to submit to the *Terry* frisk against his consent. Nevertheless, given the unsettled state of the law regarding the use of Tasers at the time, the court again held that Dillard was entitled to qualified immunity.

### **The Investigatory Stop**

Thomas did not challenge Dillard's initial decision to stop and question him and Husky for a brief period. Campus police dispatch had informed Dillard that a man wearing the same color shirt as Thomas had pushed a woman in the very location Thomas and Husky were found. According to the court, this created a reasonable suspicion Thomas might have committed a simple assault or battery, possibly in the context of a domestic relationship. Thus, Dillard was entitled to detain Thomas briefly to investigate the report of potential criminal activity—a so-called *Terry* stop.

In conducting the stop, Dillard was permitted to ask Thomas for consent to search for weapons. However, Thomas was free to decline Dillard's request. See *Florida v. Bostick*, 501 U.S. 429, 437 (1991). According to the court, at the point Dillard unholstered his Taser, pointed it at Thomas and ordered Thomas to submit to a frisk for weapons, Dillard "exceeded the justification and authority for the *Terry* stop—to investigate a potential battery." In order to continue detaining Thomas for the search for weapons, the court ruled that Dillard needed a reasonable basis for believing Thomas might be armed and dangerous.

Here, the court determined that Dillard had no justification for ordering Thomas to submit to a *Terry* frisk, and that detaining him in order to perform the frisk violated the Fourth Amendment. In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court fashioned the stop-and-frisk exception to probable cause, and in the interests of crime prevention and detection, held that a *Terry* stop is justified by the concern for the safety of the officer and others in proximity. However, the Court made it clear that a frisk of a suspect for weapons requires a reasonable suspicion that a suspect "is armed and presently dangerous to the officer or to others." *Id.* at 24. A suspicion must be reasonable and individualized, and must be based on the totality of the circumstances known to the officer.

In this case, Dillard contended that a reasonable officer would have been justified in believing Thomas was armed and dangerous based on the facts known to Dillard. Such facts included two dispatches regarding potential violence against a female; Dillard encountered Thomas and Husky in the location where the pushing incident had been reported; Thomas loosely matched the minimal descriptions of the suspects in both dispatches; Thomas was wearing clothing capable of hiding a weapon; Thomas's refusal to consent to a weapons search; and Thomas's stepping away after Dillard approached him and attempted to place him in a controlled hold.

The court disagreed with Dillard and determined that none of the circumstances at the scene of the encounter justified a reasonable suspicion that Thomas was armed and dangerous. However, Dillard maintained that he was justified in his belief Thomas was armed at the time he demanded the frisk because of “the perceived domestic violence nature of the crime he was investigating.”

### **Potential Domestic Violence Nature of the Call**

The court held that, “although the domestic violence nature of a police investigation is a relevant consideration in assessing whether there is reason to believe a suspect is armed and dangerous, it is not alone sufficient to establish reasonable suspicion for a weapons search.” According to the court, domestic violence is not a crime such as bank robbery or trafficking in large quantities of drugs that is, as a general matter, likely to involve the use of weapons. According to the court, “[d]omestic violence encompasses too many criminal acts of varying degrees of seriousness for an officer to form reasonable suspicion a suspect is armed from that label alone.” Thus, in this case. Dillard could not rely *solely* on the domestic violence nature of a call to establish reasonable suspicion for a frisk,” as according to the court, “the perceived domestic violence nature of the call did not automatically and categorically give Dillard reason to believe Thomas was armed and dangerous.”

The court concluded that under the Fourth Amendment, domestic violence suspects “are not presumed to be armed,” and rejected the notion that there is a blanket “domestic violence” exception to *Terry*’s requirement for particularized suspicion.

### **Excessive Force**

The court concluded that Dillard’s use of the Taser constituted excessive force in violation of the Fourth Amendment. However, according to the court, under the controlling law at the time of the incident, it would not have been apparent to an officer in Dillard’s shoes that using a Taser on a domestic violence suspect refusing to allow a frisk—whom the officer reasonably but mistakenly believed could be frisked—constituted excessive force. Therefore, Dillard was entitled to qualified immunity.

5. ***Lia Marie Lingo v. City of Salem*** (9th Cir. June 27, 2016) 2016 WL 4183128, amended on August 8, 2016

**LEGAL ISSUE OF THE CASE**

**SHOULD THE EXCLUSIONARY RULE APPLICABLE IN  
CRIMINAL CASES ALSO APPLY IN § 1983 CASES?**

**FACTUAL BACKGROUND**

Plaintiff Lia Lingo was engaged in an ongoing dispute with her neighbor, Suzanne Tegroen, regarding Tegroen's pet dog. In the course of the day on June 13, 2010, Lingo and Tegroen each contacted the Salem, Oregon, Police Department. That same night, Officer Steven Elmore was dispatched to Tegroen's residence to investigate.

Tegroen told Officer Elmore that she felt verbally abused by Lingo and felt the need to tread lightly around her. Officer Elmore responded that Lingo's actions did not sound like they were criminal, but that he would try to speak with Lingo to ease tensions.

Officer Elmore walked to Lingo's house and noticed that its rear outside light was on. Rather than go to the front door of the home, Elmore walked through Lingo's carport and knocked on the rear door located within. A visitor answered the door and went to get Lingo. Officer Elmore stated that as soon as the door was opened, he smelled marijuana. Another officer, Justin Carney, who arrived later, also smelled marijuana coming from the house. Lingo repeatedly refused to give the officers permission to search her home, and she was placed under arrest for endangering the welfare of a minor, namely, Lingo's two minor children who lived at the house. Following Lingo's arrest, the police obtained a warrant to search Lingo's home for controlled substances, based on an affidavit from Officer Elmore describing the marijuana odor he smelled at the house. Pursuant to the warrant, Salem police uncovered considerable evidence of marijuana usage.

**PROCEDURAL BACKGROUND**

Lingo was charged by the district attorney with two counts of child endangerment in violation of Oregon state law. She moved to suppress the evidence the police obtained in their search of her home, arguing that the officers violated the Fourth Amendment by entering her carport and approaching her home's back door. Lingo argued that any evidence collected by the police thereafter should be suppressed as the fruit of that initial search.

The trial court agreed and granted Lingo's motion to suppress. The charges against Lingo were later dropped.



Lingo then filed the instant suit under § 1983 against the two officers and the City of Salem, alleging that the officers violated her First, Fourth, and Fourteenth Amendments. The officers and the City moved for summary judgment and Lingo moved for partial summary judgment. The parties did not dispute the district court's conclusion that the officers violated Lingo's Fourth Amendment rights when they entered the curtilage of her home and approached the back door of her home.

The district court agreed with Lingo that the officers "had indeed violated the Fourth Amendment by entering her home's curtilage, but concluded that the exclusionary rule does not apply to § 1983 claims." The district court, therefore, held that the officers' initial violation of the Fourth Amendment did not taint their ultimate arrest of Lingo and found that, based on the marijuana they smelled at the house, the officers had clear probable cause to arrest her.

The district court granted summary judgment to both officers and the City. Lingo timely appealed.

### **THE NINTH CIRCUIT'S DECISION**

On appeal, Lingo challenged only the district court's ruling that her arrest was valid. Specifically, she contended that the district court erred in concluding that the officers had probable cause to arrest her. She argued that her arrest was unlawful because the officers may not establish probable cause through evidence they gathered as a result of their illegal entry into her carport. Thus, according to Lingo, the officers' unlawful entry into her home's curtilage necessarily tainted the arrest that followed.

Lingo contended that the exclusionary rule and its "fruit-of-the-poisonous tree" doctrine under *Wong Sun v. United States*, 371 U.S. 471, 487-488 (1963) which requires suppression of other evidence that is derived from-and is thus tainted by-the illegal search or seizure, applied in this case.

The Ninth Circuit did not agree. First, according to the court, the exclusionary rule itself should not be applied in a § 1983 case. The rule and its "fruit-of-the-poisonous-tree" doctrine are not constitutionally required, but instead are a "judicially created means of deterring illegal searches and seizures. *United States v. Calandra*, 414 U.S. 338, 348 (1974).

Second, the exclusionary rule is not "a personal constitutional right of the party aggrieved." *Calandra, supra*, at 348. It does not proscribe the introduction of illegally seized evidence in all proceedings or against all persons. According to the court, therefore, Lingo's suggestion that "probable cause may be supported only by information that was obtained in accordance with the Fourth Amendment should be rejected".

6. ***Utah v. Strieff* (June 20, 2016) 136 S.Ct. 2056**

**LEGAL ISSUE OF THE CASE**

**DOES THE EXCLUSIONARY RULE AUTOMATICALLY APPLY  
WHEN THERE IS A FOURTH AMENDMENT VIOLATION?**

**FACTUAL BACKGROUND**

An anonymous tipster called the South Salt Lake City police drug tip line to report “narcotics activity” at a particular residence. A narcotics detective investigated the tip, and over the course of about a week, the officer conducted intermittent surveillance of the home. He observed visitors who left a few minutes after arriving at the house. The visits were sufficiently frequent to raise the officer’s suspicions that the occupants were dealing drugs.

One of those visitors was Plaintiff Edward Strieff. The officer observed Strieff exit the house and walk toward a nearby convenience store. In the store’s parking lot, the officer detained Strieff, identified himself, and asked Strieff what he was doing at the residence. The officer requested Strieff’s identification and he produced his Utah identification card. The information on the card was relayed to a police dispatcher, who reported that Strieff had an outstanding arrest warrant for a traffic offense. The officer then arrested Strieff pursuant to that warrant. When the officer searched Strieff incident to the arrest, he discovered a baggie of meth and drug paraphernalia.

**PROCEDURAL BACKGROUND**

The State charged Strieff with unlawful possession of meth and drug paraphernalia. Strieff moved to suppress the evidence, arguing that the evidence was inadmissible because it was derived from an unlawful investigatory stop. The prosecutor conceded that the officer lacked reasonable suspicion for the stop and that the stop was illegal, but argued that the evidence should not be suppressed because the existence of a valid arrest warrant attenuated the connection between the unlawful stop and the discovery of the contraband.

The trial court agreed with the State and admitted the evidence. The Utah Court of Appeals affirmed but the Utah Supreme Court reversed. The U.S. Supreme Court granted certiorari “to resolve disagreement about how the attenuation doctrine applies where an unconstitutional detention leads to the discovery of a valid arrest warrant.”

**DECISION OF U.S. SUPREME COURT**

The Supreme Court held that the evidence the officer seized as part of his search incident to arrest is admissible because the discovery of the arrest warrant

attenuated the connection between the unlawful stop and the evidence seized from Strieff incident to arrest.

### **Attenuation Doctrine**

The exclusionary rule is the primary judicial remedy for deterring Fourth Amendment violations. The rule encompasses both the “primary evidence obtained as a direct result of an illegal search or seizure” and “evidence later discovered and found to be derivative of an illegality, the so-called “fruit of the poisonous tree.” *Segura v. United States*, 468 U.S. 796, 804 (1984).

The Supreme Court has recognized several exceptions to the rule. One exception is the attenuation doctrine, which evaluates the causal link between the government’s unlawful act and the discovery of evidence which may have had nothing to do with a defendant’s actions.

The Supreme Court considered three factors articulated in *Brown v. Illinois*, 422 U.S. 590 (1975) in determining whether the discovery of a valid arrest warrant was a sufficient intervening event to break the causal chain between the unlawful stop and the discovery of drug-related evidence on Strieff’s person: (1) the “temporal proximity” between the initially unlawful stop and the search; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.

7. ***Estate of Armstrong v. Village of Pinehurst* (4th Cir. Jan. 11, 2016)  
810 F.3d 892**

**CASE HOLDING**

The use of a Taser as a pain compliance device in response to resistance that does not raise a risk of immediate danger (apart from the fact of resistance alone) is unreasonable force in violation of the Fourth Amendment.

NOTE: The *Armstrong* decision applies in the five states in the Fourth Circuit: North Carolina, South Carolina, Maryland, Virginia, and West Virginia. The decision is not binding in the Ninth Circuit, but it would be highly persuasive in this circuit.

**SUMMARY OF THE FACTS**

Ronald Armstrong suffered from bipolar disorder and paranoid schizophrenia. On April 23, 2011, he had been off his prescribed medicine for five days and was poking holes through the skin in his leg “to let the air out.” His sister was worried by his behavior and convinced him to check into the hospital. However, during the evaluation procedure, Armstrong apparently became frightened and left the hospital. Based on his flight from the hospital and his odd behavior over the previous week, the examining doctor judged Armstrong a section 5150, a danger to himself, and issued involuntary commitment papers to compel his return. The doctor did not designate Armstrong a danger to others.

The local police were called as soon as Armstrong left the hospital, and an officer, a sergeant, and a lieutenant arrived within minutes. Armstrong was contacted near a busy intersection close to the hospital’s main entrance. The officers engaged Armstrong in conversation while they waited for the commitment order. At that point in time, Armstrong was calm and cooperative. However, Armstrong was acting in a strange manner. He had wandered across a busy highway and then proceeded to eat grass and dandelions and put cigarettes out on his tongue.

As soon as they learned that the commitment papers were complete, the three police officers surrounded and advanced toward Armstrong. Armstrong reacted by sitting down and wrapping himself around a four-by-four post that was supporting a nearby stop sign. The officers tried to pry Armstrong’s arms and legs off of the post, but he was wrapped too tightly and would not budge. Within a short period of time, Armstrong was encircled by six people—the three police officers who were struggling to remove Armstrong from the post, two hospital security guards, and Armstrong’s sister, who was pleading with him to return to the hospital.

Thirty (30) seconds after the officers told Armstrong his commitment order was final, the lieutenant instructed an officer to prepare to tase Armstrong. The officers did not attempt to engage in further conversation with Armstrong. The officer drew his taser, set it to “drive stun mode,” and announced that if Armstrong did not let go of the post, he would be tased. That warning had no effect, so the officer deployed the taser five separate times over a period of approximately two minutes. However, rather than have its desired effect, the tasing actually increased Armstrong’s resistance. After the tasing ceased, the two hospital guards jumped in to assist the three police officers who were trying to pull Armstrong off of the post. The group of five successfully removed Armstrong and laid him face down on the ground.

Armstrong was handcuffed, but even after being cuffed, he continued to kick the sergeant so the police shackled his legs. At that point, Armstrong was no longer moving and the officers administered CPR and called for the paramedics. Armstrong was taken to the hospital where he was pronounced dead shortly after admission.

### **PROCEDURAL BACKGROUND**

Armstrong’s Estate filed a complaint in state court under § 1983, alleging, among other things, that the three police officers used excessive force in violation of Armstrong’s Fourth and Fourteenth Amendment rights when seizing him. The officers removed the case to U.S. District Court and brought a motion for summary judgment based on qualified immunity. The district court granted the motion and the Estate filed a timely notice of appeal to the Fourth Circuit.

### **THE FOURTH CIRCUIT OPINION**

The Fourth Circuit concluded that viewing the facts in the light most favorable to Armstrong, the facts, as alleged, showed that the officers used excessive force in violation of the Fourth Amendment. However, according to the court, the officers were entitled to qualified immunity because Armstrong’s right not to be tased “while offering stationary and non-violent resistance to a lawful seizure” was not clearly established on April 23, 2011, the date of the incident.

#### ***Graham v. Connor* Factors**

The court analyzed the officers’ use of force under the Fourth Amendment’s “objective reasonableness” standard as set forth in *Graham v. Connor*. Among the factors considered by the court were: (1) Armstrong had not committed a crime; (2) the officers knew the individual they were confronting (Armstrong) was mentally ill; (3) the sole justification for the seizure was to prevent a mentally ill man from harming himself by preventing him from leaving; and (4) Armstrong’s non-compliance with lawful police orders and non-violent resistance to his seizure by not letting go of the pole justified only a limited degree of force in

response. These factors, according to the court, weighed in favor of Armstrong. The court was of the view that the situation would have been perceived by a reasonable officer as a “static impasse with few, if any, exigencies, and lacking much danger or urgency where the *Graham* factors would justify only a limited degree of force.”

### **Use of the Taser**

The court devoted a considerable portion of its opinion discussing the use of the Taser. According to the court, “deploying a Taser is a serious use of force.” “It is designed to cause excruciating pain, and application can burn a subject’s flesh.” The court cited cases from other circuits that have made similar observations. The leading Ninth Circuit case on the subject is *Bryan v. MacPherson*, 630 F.3d 805 (9th Cir. 2010). “The psychological effects, the high levels of pain and foreseeable risk of physical injury lead us to conclude that the X26 and similar devices are a greater intrusion than other non-lethal methods of force we have confronted.” P. 825

### **CONCLUSION**

The court concluded that “Taser use is unreasonable force when used in response to resistance that does not raise a risk of immediate danger.” The court stressed that it is the element of an immediate safety threat posed by a subject that would justify the use of the Taser. Accordingly, in this case, when the officer deployed his Taser, “Armstrong was a mentally ill man being seized for his own protection, was seated on the ground, was hugging a post to insure his immobility, was surrounded by three police officers and two hospital security guards, and had failed to submit to a lawful seizure for only 30 seconds. A reasonable officer would have perceived a static stalemate with few, if any, exigencies—not an immediate danger so severe that the officer must beget the exact harm the seizure was intended to avoid.”

The court determined that, viewing the evidence in the light most favorable to Armstrong, the officers used excessive force when seizing Armstrong. However, the court concluded that at the time the officers acted, the law was not clearly established that Armstrong had a constitutional right not to be tased “while offering stationary and non-violent resistance to a lawful seizure.” Accordingly, the officers were shielded from civil liability for their alleged unconstitutional actions under the doctrine of qualified immunity.