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. POLICE LIABILITY—EXCESSIVE FORCE, SEARCH AND SEIZURE, QUALIFIED IMMUNITY.

A. *District of Columbia v. Wesby*, ___ U.S. ___, 138 S. Ct. 577 (2018).

- **Wrongful arrest and qualified immunity.**

In *District of Columbia v. Wesby*, __U.S. __, 138 S.Ct. 577 (2018), the Supreme Court clarified what constitutes probable cause for arrest and emphasized that officers have broad discretion in undertaking investigations and making credibility assessments in making a decision to arrest. The Court also reaffirmed that qualified immunity must be granted to officers in the absence of clearly established law imposing liability under circumstances closely analogous to those confronted by the defendant.

In *Wesby*, District of Columbia police officers responded to a complaint about loud music and illegal activities in a vacant house. *Id*. at 583. They entered and found the house nearly barren and in disarray. *Id.* Officers smelled marijuana, and there were beer bottles and cups of liquor on the floor, which was dirty. *Id.* There was a make-shift strip club in the living room, a used condom on a window sill, and a naked woman and several men in an upstairs bedroom. *Id.* Several partygoers scattered when they saw the uniformed officers, and others hid. *Id.* The officers questioned everyone and got inconsistent stories. Some partygoers said they were there for a bachelor party, but did not know the name of the bachelor. *Id.* Others did not know who had invited them. *Id.* Two women identified "Peaches" as the house's tenant and said that she had given the partygoers permission to have the party. *Id.* However, Peaches was not there. *Id.* Officers spoke by phone to Peaches, and she seemed nervous, agitated, and evasive. *Id.* at 583-84. She claimed that she was renting the house and had given the partygoers permission to have the party, but eventually admitted that she did not have permission to use the house. *Id.* The police reached the owner, who confirmed that he had not given anyone permission to be there. *Id.* at 584. The officers then arrested 21 partygoers for unlawful entry. Id. The charges were subsequently dismissed. *Id.*

Sixteen partygoers sued the police officers for unlawful arrest. The district court granted summary judgment to the plaintiffs, finding that there was no probable cause for arrest given that officers had no reason to believe that the plaintiffs knew that Peaches was not authorized to grant them entry, and denied qualified immunity, finding the law concerning probable cause to be clearly established. *Id*. at 584. A jury awarded the plaintiffs $680,000 in damages, and the court awarded attorneys' fees of nearly $1 million. *Id*. at 585. Defendants appealed, and the D.C. Circuit affirmed.

The Supreme Court reversed on both issues. Writing for the Court, Justice Thomas noted that the test for probable cause here was whether, "[c]onsidering the totality of the circumstances, the officers made an 'entirely reasonable inference' that the partygoers were knowingly taking advantage of a vacant house as a venue for their late-night party." *Id.* at 586. He observed that there was plenty of evidence for the officers to conclude that the partygoers were knowingly there without permission. As a threshold matter, police had been told by neighbors that the house had been vacant for months, and although partygoers said that Peaches had just moved in, there were no moving boxes or clothes showing anyone had moved in. *Id*.

In addition, the way the partygoers treated the house did not seem consistent with invited guests. As Justice Thomas observed: "Most homeowners do not live in near-barren houses. And most homeowners do not invite people over to use their living room as a strip club, to have sex in their bedroom, to smoke marijuana inside, and to leave their floors filthy. The officers could thus infer that the partygoers knew their party was not authorized." *Id.* at 587.

Moreover, the behavior of the partygoers indicated they knew they did not have permission to be there. Many initially fled the police or hid. Partygoers also gave vastly different accounts as to how they came to be there. "Based on the vagueness and implausibility of the partygoers' stories, the officers could have reasonably inferred that they were lying and that their lies suggested a guilty mind." *Id.* Similarly, the evasive

and contradictory statements Peaches made about having authority to grant permission for entry supported the officers' actions. "[T]he officers could have inferred that Peaches told the partygoers (like she eventually told the police) that she was not actually renting the house, which was consistent with how the partygoers were treating it." *Id.* at 588.

The Court noted that the lower court had erred in failing to evaluate the totality of the circumstances confronting the officers and instead improperly focused on each bit of evidence individually—erroneously concluding that if no single piece of evidence by itself constituted probable cause, none existed. *Id.* The Court emphasized that the lower court "mistakenly believed that it could dismiss outright any circumstances that were 'susceptible of innocent explanation.'" *Id.* The Court observed that "[P]robable cause does not require officers to rule out a suspect's innocent explanation for suspicious facts. As we have explained, 'the relevant inquiry is not whether particular conduct is "innocent" or "guilty," but the degree of suspicion that attaches to particular types of noncriminal acts.'" *Id.* The lower court "should have asked whether a reasonable officer could conclude—considering all of the surrounding circumstances, including the plausibility of the explanation itself—that there was a 'substantial chance of criminal activity.'" *Id.*

Although it did not need to reach the issue, the Court also addressed qualified immunity. Once again noting that it had not yet specifically stated what constitutes clearly established law other than its own decisions (*id*. at 591 n.8), nonetheless, the Court found that the law concerning probable cause in the situation confronting the officers here was not clearly established. The Court again emphasized that other than in the most obvious cases, a robust consensus of cases imposing liability under factually analogous circumstances so as to put the lawfulness of defendant's conduct beyond debate, would be necessary to constitute clearly established law in order to defeat qualified immunity. Here, the lower court only identified only a single, inapposite case

from its own circuit purportedly addressing the issue, which was insufficient to render the law clearly established for purposes of qualified immunity. *Id*. at 591.

Wesby is a major victory for law enforcement and municipalities in the area of wrongful arrest claims. By making it clear that an officer need not accept every innocent explanation for a suspect's conduct, and underscoring the fact that officers may view the available evidence in light of the totality of the circumstances *Wesby* greatly aids defendants in defending wrongful arrest claims. This is especially true given the Ninth Circuit's somewhat equivocal case law on the issue of probable cause and the nature and extent of an officer's obligation to make credibility determinations in the arrest context. *Wesby* also reaffirms the Court's direction that qualified immunity should be granted unless the plaintiff can point to a line of cases imposing liability under very similar circumstances.

B. *Kisela v. Hughes*, __U.S.__, 2018 WL 1568126 (2018)

- **Officer entitled to qualified immunity for use of force based on perceived threat of harm to third party because no prior case law imposed liability under closely analogous circumstances.**

In *Kisela v. Hughes*, __U.S. __. 2018 WL 1568126 (2018), the defendant police officer and his partner received a 911 call and report that a woman was hacking a tree with a kitchen knife. Id. at *1 They were flagged down by the 911 caller who gave them a description of the woman and told them that she was acting erratically. *Id.* The officers saw a woman standing in a driveway of a nearby house, with a chain link fence separating her from the officers. *Id.* A woman matching the description given to the officers by the 911 caller emerged from the house carrying a knife, and advanced towards the woman, stopping six feet from her. *Id.* The officers drew their weapons and twice ordered the woman to drop the knife, but she did not even acknowledge the officers' presence. *Id.* Believing she was about to stab the other woman, the defendant officer fired four shots, wounding her. *Id.*

The plaintiff sued for excessive force, and the district court granted summary judgment to the officer based on qualified immunity. *Id.* the Ninth Circuit reversed, holding that there was a factual issue as to whether the force was excessive under the Fourth Amendment, and that prior Circuit precedent gave fair warning that the conduct in question would violate the constitution and hence qualified immunity was inapplicable. *Id.* at *2.

In an 8-2 per curiam opinion, the Supreme Court summarily reversed the Ninth Circuit. The Court again emphasized that excessive force cases are generally fact specific, and as a result officers are entitled to qualified immunity unless existing precedent "squarely governs the specific facts at issue." *Id.* at *3. The Court noted that in order to defeat qualified immunity, existing case law must "provide an officer notice that a *specific use of force* is unlawful." *Id.;* emphasis added. Noting that "[t]his is far from an obvious case," the Court held that the officer was entitled to qualified immunity. *Id.*

Kisela is the most recent of a steady drumbeat of reversals – including summary reversals – admonishing the Circuit courts, and particularly the Ninth Circuit, for failing to adhere to the Supreme Court's command that qualified immunity must be granted unless the law is clearly established in light of the specific factual circumstances confronting an officer. Indeed, *Kisela*'s description of clearly established law as case law that "*squarely* governs the *specific facts* at issue," is probably the Court's most stringent application of qualified immunity. *Kisela* should strongly bolster qualified immunity arguments for officers, particularly in excessive force cases.

C. *Bonivert v. City of Clarkson*, 883 F.3d 865 (9th Cir. 2018).

- **Unlawful entry where only one occupant of a residence consents to search; "Integral Participation" liability does not require officer to have actually committed an unconstitutional act.**

In *Bonivert v. City of Clarkson,* 883 F.3d 865 (9th Cir. 2018), the Ninth Circuit clarified that where one resident of jointly occupied premises refuses permission to enter,

absent exigent circumstances, police must obtain a warrant, even if the other occupant of the premises gave the police permission.

In *Bonivert*, police responded to a domestic disturbance call at the home of the plaintiff, Bonivert. *Id*. at 869. Bonivert occupied the residence with his girlfriend, Ausman, and their nine year old daughter. *Id.* Police were advised that Ausman had told Bonivert that she was leaving with their daughter, he became angry, tried to physically stop her from leaving, but was restrained by others in the residence. *Id.* Police found Ausman with the child in a car at the scene, and when they went to speak with Bonivert, he refused them entry into the home. Desiring to assess his mental state, they asked Ausman for permission to enter the residence and she agreed. *Id*. at 870. When Bonivert refused to allow them to enter, they waited for back up, formulated a plan, eventually forced their way in and ultimately subdued Bonivert with a Taser. *Id.* at 870-71.

Bonivert sued the officers for unlawful entry and excessive force. The district court granted summary judgment to the officers based on qualified immunity. *Id*. at 871. The Ninth Circuit reversed.

With respect to the warrantless entry, citing *Georgia v. Randolph*, 547 U.S. 103 (2006), the court found that it was clearly established at the time of the events that where a co-occupant of jointly occupied property grants consent, but another occupant refuses to allow entry, police cannot enter without a warrant, absent recognized exceptions to the warrant requirement. *Id*. at 874-76. The court observed that none of exceptions applied here, as there were no exigent circumstances in that Ausman and the child were outside, and there was no indication Bonivert was a danger to himself or others. *Id.* at 876-79.

In holding that two officers who arrived at the scene after the decision to enter had been made and only provided "back up" could nonetheless be held liable, the court re-affirmed the Ninth Circuit's "Integral Participation" doctrine. Under the Ninth Circuit rule, an officer whose own conduct did not rise to the level of a constitutional violation

can nonetheless be held liable as an "integral participant" so long as they are an "active participant" in the underlying activity. *Id.* at 879.

The court also reversed summary judgment on the excessive force claim, concluding that the district court had improperly ignored sharply conflicting evidence on whether Bonivert had physically resisted the officers in a manner that would justify the use of force employed by the officers. *Id*. at 880-81.

Bonivert further clarifies a principle that is fairly well-established, but often ignored—that every occupant of a residence (at least permanent resident) has the right to refuse entry to law enforcement, and that a single occupant cannot give effective consent when others at the scene refuse it. The case also reaffirms the Ninth Circuit's unique and questionable "Integral Participation" doctrine which would seem ripe for Supreme Court review in an appropriate case.

D. *Smith v. City of Santa Clara,* 876 F.3d 987 (9th Cir. 2017).

- **Special needs exception to warrant requirement allows entry of probationer's home for investigation of recent crime, even where co-occupant of the property does not consent to entry.**

In *Smith v. City of Santa Clara*, 876 F.3d 987 (9th Cir. 2017), the court addressed the scope of the Fourth Amendment as applied to a very common scenario—a residence shared with a person on probation who has consented to a search as a condition of probation.

In *Smith*, the plaintiff's daughter was on probation for a serious felony and one of the conditions of her probation was consent to a search her residence. *Id.* at 989. Officers had information the daughter was involved in a recent auto theft and stabbing, and went to the address she listed as her residence in her last probation report. *Id*. Police found her mother there, who denied her daughter lived there, and refused to allow police to enter, even though they announced that they were conducting a probation search. *Id*.

When the officers stated they would enter by force unless admitted, plaintiff relented. The daughter was not there. *Id.*

Plaintiff sued the officers for violation of the Fourth amendment under 42 U.S.C. § 1983, and the Bane Act, Cal. Civ. Code § 52.1. *Id*. at 989-90. The district court granted summary judgment to the officers on the section 1983 claim based on qualified immunity, and a jury eventually found for the defendants on the Bane Act claim. *Id*. at 990.

Plaintiff appealed only on the Bane Act claim. She asserted that the trial court erred in refusing to instruct the jury that the entry violated the Fourth Amendment as a matter of law, in that it was based on the daughter's consent to search as a condition of probation, and that in *Georgia v. Randolph*, 547 U.S. 103 (2006), the Supreme Court had held that where premises were jointly occupied, consent by one occupant did not allow the police to make a warrantless search where the other occupant had denied permission to enter. *Id*. at 990-91.

The Ninth Circuit affirmed, finding that the warrantless search was proper under the special needs exception. It acknowledged that the California Supreme Court had analyzed probation related searches as consent searches, but noted that the Supreme Court itself had never upheld such searches on that basis. Instead, the high court had viewed probation related searches as an aspect of the special needs doctrine i.e. that the reasonable suspicion of recent criminal activity, coupled with a probationer's diminished expectation of privacy, justified a search without need of a warrant. *Id*. at 991-95. "[O]nce the government has probable cause to believe that the probationer has actually reoffended by participating in a violent felony, the government's need to locate the probationer and protect the public is heightened. This heightened interest in locating the probationer is sufficient to outweigh a third party's privacy interest in the home that she shares with the probationer." *Id.* at 994.

Although helpful to law enforcement in that it underscores the propriety of probation related searches, nonetheless there is some tension between *Smith* and the decisions of the California Supreme Court as to the rationale for such searches. If, as the California courts have indicated, such searches are justified by a consent rationale, there may be some tension with *Randolph*. On the other hand, if such searches are not conducted on a routine basis, but only when police are investigating a probationer's possible involvement in recent criminal activity, then they should be upheld under *Smith's* analysis.

E. *Zion v. County of Orange,* 874 F.3d 1072 (9th Cir. 2017).

- **Continued use of force against a suspect who is no longer resisting, constitutes excessive force violating the Fourth Amendment and Due Process, even if initial use of force was justified.**

In *Zion v. County of Orange*, 874 F.3d 1072 (9th Cir. 2017), police were called when Connor Zion suffered several seizures, after which he bit his mother and cut her and his roommate with a kitchen knife. *Id.* at 1075. One deputy arrived and was promptly stabbed in the arms by Zion. *Id.* Another deputy, Higgins, saw the attack, and when Zion attempted to flee towards an apartment complex, Higgins fired nine shots from a distance of 15 feet. *Id.* Zion fell to the ground, and Higgins came to within 4 feet of Zion and fired another nine rounds into him, emptying his weapon. *Id.* As Zion lay writhing and curled up on the ground, Higgins slowly walked in a circle for several seconds and then took a running start and stomped Zion in the head three times. *Id.* Zion died at the scene. *Id.*

Members of Zion's family filed suit, asserting an excessive force claim under the Fourth and Fourteenth Amendments. *Id.* The trial court granted summary judgment to the defendants. *Id.*

The Ninth Circuit reversed, holding that the law was clearly established, insofar as it was plain that an officer cannot use force against a suspect that is no longer resisting, and that a jury could conclude that the second set of nine shots, as well as the head stomps, were excessive in that a video recording of the incident indicated that Zion was no longer capable of resistance at the time the force was employed. *Id.* at 1076.

Although the officer had testified that he perceived that Zion was attempting to get up, the court noted that the video belied the officer's testimony. *Id.* It concluded that in light of what appeared to be Zion's inability to further resist arrest or pose any threat, the subsequent use of force—the second volley of shots and/or the head stomps constituted unreasonable use of force for purposes of the Fourth Amendment claim. *Id*. As to the Fourteenth Amendment claim, the court noted that liability could only be imposed if the officer had time to reflect on his actions, and given that the second volley followed almost immediately after the first, a jury could not find a Due Process violation. *Id.* at 1077. However, the court concluded that given the lapse in time between the second volley and the head stomping, a jury could find that the latter action was taken after reflection, and was unrelated to any legitimate law enforcement purpose, and therefore supported a Due Process claim by surviving family members. *Id.*

Although *Zion* largely reaffirms existing law, the basis for the court's decision is important. The video evidence is highly compelling, given the point blank range of the second set of shots, and the relatively long period of reflection before the officer took a running start and inflicted three head stomps on a prone figure. It is a reminder that strong, although somewhat technical arguments, often yield to the intuitive pull of facts. In addition, *Zion* also underscores the clear distinction the Ninth Circuit draws in analyzing use of force claims under the Fourth and Fourteenth Amendments, with the latter generally requiring plaintiffs to overcome a tougher standard of liability, i.e., that the defendant's conduct was unrelated to any legitimate law enforcement purpose.

F. *Thompson v. Rahr,* No. 16-35301, 2018 WL 1277400 (9th Cir. March 13, 2018).

- **Defendant police officer entitled to qualified immunity for pointing loaded weapon at head of unresisting, complacent felony suspect where plaintiff could not identify clearly established law in the form of appellate decisions addressing a directly analogous factual situation.**

In *Thomas v. Rahr*, 2018 WL 1277400 (9th Cir. March 13, 2018), the plaintiff was pulled over by the defendant for reckless driving. *Id*. at *1. The defendant ran plaintiff's license plate and determined he was a convicted felon driving on a suspended license, whose last conviction was for unlawful possession of a firearm. *Id.* at *2. Defendant decided to arrest the plaintiff for driving on a suspended license and to impound the vehicle. *Id.* Plaintiff exited the vehicle and defendant gave him a pat down search, finding no weapons. Defendant called for backup, and had plaintiff sit on the car bumper. *Id.* During an inventory search the defendant found a pistol in the car. Drawing his pistol, he pointed it at the plaintiff's head and told him he was under arrest. *Id.*

Plaintiff filed suit, asserting excessive force under the Fourth Amendment. The district court granted summary judgment for defendant, finding that the amount of force used was reasonable, and that in any event the officer was entitled to qualified immunity because the law was not clearly established with respect to the right to employ such force in the course of an arrest. *Id.*

The Ninth Circuit affirmed. The court concluded that pointing a loaded weapon at the head of a compliant arrestee who was not armed and posed no risk of flight, was not an objectively reasonable use of force under the Fourth Amendment. *Id.* at *3-4. However, the court agreed that the defendant was entitled to qualified immunity because the law was not clearly established with respect to the specific circumstances confronted by the defendant. *Id*. at *4. Although a number of Ninth Circuit cases had held that

weapons should not be pointed at persons who did not pose a threat, the court stated that "we cannot say that every reasonable officer in Copeland's position would have known that he was violating the constitution by pointing a gun at Thompson. Thompson's nighttime, felony arrest arising from an automobile stop, in which a gun was found, coupled with a fluid, dangerous situation, distinguishes this case from our earlier precedent." *Id.*

Thompson is among the strongest of recent Ninth Circuit cases which apply the Supreme Court's decision in *White v. Pauly*, __ U.S. __, 137 S. Ct. 548 (2017) with vigor in requiring a plaintiff to point to highly analogous case law in order to show that the law was clearly established for purposes of overcoming qualified immunity.

G. *Estate of Lopez v. Gelhaus,* 871 F.3d 998 (9th Cir. 2017).

- **Officer not entitled to qualified immunity for shooting teenager who turned towards officer while raising the barrel of what appeared to be an assault rifle.**

In *Estate of Lopez v. Gelhaus*, 871 F.3d 998 (9th Cir. 2017), patrolling Deputies Gelhaus and Schemmel observed a male who appeared to be in his mid to late teens (Mr. Lopez) walking on the sidewalk away from them in a dark hooded sweatshirt. *Id*. at 1002. Lopez carried what appeared to be an AK-47 assault weapon in his hand, held by the pistol grip, with the barrel pointed toward the ground. *Id*. Gelhaus knew this neighborhood had a history of violent gang and weapon related crimes, he had previously confiscated that type of weapon nearby and knew about the destructive capabilities of an AK-47—it could discharge its 30-round magazine in seconds, the bullets capable of penetrating car doors and armored vests. *Id*.

Gelhaus radioed "Code 20," the highest emergency call to request immediate assistance by other units. *Id*. Schemmel, the driver, "chirped" the siren and activated all emergency lights/flashers to alert the individual to their police presence. *Id*. Schemmel proceeded through the intersection and stopped the patrol car at an angle, approximately

40 feet from Lopez. *Id*. When slowing, Gelhaus opened his door, drew his firearm and positioned himself outside his open passenger door when they stopped, preparing to confront the individual. *Id*.

Lopez, still holding the pistol grip of the weapon, continued to walk away from the patrol car. *Id*. at 1002-03. Now outside of the car, Gelhaus gave at least one loud command (or more per witnesses) to Lopez to "Drop the gun!" *Id*. Rather than dropping the gun, Lopez turned his body towards the deputies in a clockwise direction while simultaneously bringing the barrel of the AK-47 up and towards them. *Id*. at 1003. In response, believing he was about to be shot, Gelhaus fired eight rapid gunshots—seven of which hit Lopez from a distance of around 60 feet. *Id*. After the shooting, it was determined that the gun was a plastic pellet gun made to look identical to an AK-47, but missing the legally mandated orange tip on the barrel. *Id*.

The Estate of Andy Lopez filed suit against Gelhaus and the County of Sonoma, alleging various claims, including a claim against Gelhaus under 42 U.S.C. § 1983 premised upon a violation of the Fourth Amendment through use of excessive force. *Id*. at 1004. Gelhaus filed a motion for summary judgment, asserting that the Fourth Amendment claim was barred by qualified immunity. *Id*. The district court denied the motion, finding that there were triable issues of fact as to whether Gelhaus had reasonably perceived a serious threat of harm from Lopez, noting that while it was undisputed that Lopez started to turn towards the deputies, with the barrel of the gun rising, a reasonable jury could conclude that the barrel had not risen far enough up to present a threat to the officers. *Id*. The district court also found that the law was clearly established that an officer could not use force as against someone who was not immediately threatening the officer or others. *Id*.

Gelhaus appealed, and in a 2-1 decision, the Ninth Circuit affirmed. The majority emphasized that it would follow the Ninth Circuit's general principle that "'summary judgment should be granted sparingly in excessive force cases,'" particularly where, as

here, "'the only witness other than the officers was killed during the encounter'" noting that the court has to "'ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story—the person shot dead— is unable to testify.'" *Id*. at 1006 (citing *Gonzalez v. City of Anaheim*, 747 F.3d 789, 795 (9th Cir. 2014) (en banc)). In concluding that a jury could find that Gelhaus's use of force was unreasonable, the majority found that there was a triable issue of fact as to whether or not Lopez had turned his head in response to the "chirp" of the police vehicle siren, which may have indicated Lopez had not heard the siren, which would somehow make Lopez's subsequent turn towards the officers "less aggressive" in that he may have simply been confused about what he was hearing. *Id*. at 1006-07. The majority also opined that there was a factual dispute as to the number of times that Gelhaus shouted—it could be only once or multiple times—and that if a jury determined there was only one command, Lopez might have been wondering if it was directed at him, or could have been "processing Gelhaus's order" before he was shot. *Id*. at 1007.

The majority also concluded there was an issue of fact as to whether Lopez was holding the gun in his right or left hand, asserting it would make a difference whether Lopez turned the one way or the other, without explaining why that would be so. *Id.* Indeed, the majority asserted that the officers' dispute on this issue "provides an important basis for a jury to question the credibility and accuracy of the officers' accounts," *id.*—without explaining what other relevant inference a jury could draw, in light of the fact that the officers both testified the barrel of the weapon was moving upwards as Lopez turned.

As to the barrel of the gun moving upwards as Lopez turned, the majority acknowledged that the district court had found that it was undisputed that "'the rifle barrel was beginning to rise,'" but agreed with the district court that given that it started in a position where it was pointed down to the ground, it could have been raised to a slightly higher level (although not specifying what that might be), without posing any

threat to the officers. *Id*. at 1008. The majority noted that neither officer ever stated "how much the barrel 'began' to rise" as Lopez commenced his turn, and speculated that "one would expect the barrel to rise an inch or so as the momentum of Andy's clockwise turn moved his left arm slightly away from his body" and "that incidental movement alone would not compel a jury to conclude that Gelhaus faced imminent danger giving the starting position of the gun." *Id*.

The majority found it significant that Gelhaus never testified that he knew where the barrel of the rifle was pointing at the time he shot Lopez, but at most, that the barrel of the rifle was being raised towards him. *Id*.

The majority also stated that although "ambiguous," *id*. at 1003 n.4, a reenactment Gelhaus performed in his videotaped deposition somehow contravened his statements that he fired with the barrel of the weapon coming up, *id*. at 1009—even though review of the cited deposition establishes that Gelhaus was simply simulating Lopez's turning movement, and not the movement of the rifle, and indeed noted that he could not reproduce that movement because a table was in the way, *id*. at 1003 n.4.

The majority also found it significant that a witness who had encountered Lopez earlier and drove within 50 feet of him thought the gun looked fake. *Id*. at 1009. It also found it important that Gelhaus had previously encountered individuals with replica guns, and that Lopez had been carrying the weapon in broad daylight in a residential neighborhood at a time when children of his age—mid to late teens—could reasonably be expected to be playing. *Id*. at 1010.

Based on these facts, the majority concluded a jury could find that the force used by Gelhaus was excessive. *Id*. In addition, the court found that the law was clearly established that officers could not use deadly force unless they reasonably perceived that they were about to be attacked, and here there was an issue of fact as to the threat posed by Lopez. *Id*. at 1011, 1021.

Significantly, the Honorable Judge Clifford Wallace dissented, noting that the multiple purported factual disputes identified by the majority were irrelevant to the qualified immunity analysis. *Id.* at 1022-23. Judge Wallace observed that the key, and undisputed fact, was that the gun barrel was beginning to rise as Lopez turned towards the officers, with no evidence that it had stopped, or would stop at any particular point. *Id.* at 1023-24. As Judge Wallace noted, "the most natural reading of the district court's finding, and the only reasonable one, is that the gun was beginning to rise (i.e., in the process of rising) immediately before Deputy Gelhaus shot Andy." *Id*. at 1023. The dissent noted that the "majority has thus identified no evidence that even suggests that the gun had stopped rising at the time Deputy Gelhaus resorted to deadly force." *Id.* at 1024.

As Judge Wallace observed, with respect to the clearly established law on qualified immunity, none of the cases cited by the majority addressed a situation where "the victim's gun 'was beginning to rise' towards the officer." *Id*. at 1025.

Estate of Lopez is a troubling decision for law enforcement defendants in several respects. First, it reaffirms the Ninth Circuit's unique approach to deadly force cases where officers are the only witnesses—applying an extremely stringent review of the evidence and an almost total disregard of evidence submitted by the officers. As the dissent notes, this approach essentially requires a defendant moving for summary judgment to not only prove his or her version of what occurred, but affirmatively negate any other version, no matter how hypothetical the alternative version might be. *Id.* at 1024.

Second, it underscores the Ninth Circuit's wildly inconsistent application of the Supreme Court's decision in *White v. Pauly*, 137 S. Ct. 548 (2017), in terms of requiring a plaintiff to identify case law imposing liability in factual circumstances highly analogous to those confronted by the defendant in order to overcome qualified immunity.

H. *Byrd v. Phoenix Police Department,* No. 16-16152, 2018 WL 1352916 (9th Cir. March 16, 2018).

- ***Heck v. Humphrey,* 512 U.S. 477 (1994) does not bar civil rights suit for excessive force or unlawful search where plaintiff plead guilty to an offense unrelated to the use of force or the evidence unlawfully seized.**

In *Byrd v. Phoenix Police Department*, No. 16-16152, 2018 WL 1352916 (9th Cir. March 16, 2018) police officers stopped the plaintiff while he was riding a bike without a headlight at night— a violation of local law. *Id.* at *1. According to plaintiff, the officers searched his belongings and then "beat the crap" out of him, resulting in a 70% vision loss. *Id.* Plaintiff eventually pled guilty to conspiracy to commit possession of a dangerous drug. *Id.*

Plaintiff filed a pro se complaint asserting claims for excessive force and wrongful search against the officers and their employer. The district court eventually dismissed the action for failure to state a claim. It found that the allegations of excessive force were too vague and hence inadequate, and that the unlawful search claim was barred by the Supreme Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994) which prohibits section 1983 claims where success on the merits would necessarily imply the invalidity the plaintiff's state court criminal conviction. *Id.*

The Ninth Circuit reversed. It found that plaintiff had adequately alleged that he had been the victim of excessive force: "We disagree with the district court that the allegation that the officers 'beat the crap out of' Byrd was 'too vague and conclusory' to support a legally cognizable claim. Byrd's use of a colloquial, shorthand phrase makes plain that Byrd is alleging that the officers' use of force was unreasonably excessive; this conclusion is reinforced by his allegations about the resulting injuries." *Id.* at *3.

The court also found that plaintiffs' claims were not barred by *Heck*. *Id.* *3-4. The excessive force claim had nothing to do with the crime to which plaintiff plead

guilty—conspiracy to possess drugs. Moreover, the allegedly unlawful search occurred after the defendants had found the evidence which formed the basis of the criminal charge. *Id*. at *4. The court observed that *Heck* will generally not bar an action asserting claims for unlawful search where the underlying conviction is the result of a plea agreement, because no evidence is introduced in such cases. *Id.*

Byrd continues a trend both in the Ninth Circuit and other courts across the nation, of narrowing application of *Heck* in cases where the underlying conviction is premised on a plea agreement. A consensus appears to be growing that *Heck* will not bar a claim based on unlawful search and seizure unless the plea agreement itself specifies the factual basis of the plea and the record unmistakably demonstrates that the allegedly unlawfully seized evidence forms the basis of the charges.

I. *Cornell v. City & County of San Francisco*, 17 Cal. App. 5th 766 (2017).

- **Penal Code section 847(b) does not immunize an officer from liability for an arrest without probable cause nor incorporate the federal doctrine of qualified immunity; where an unlawful arrest is properly pleaded and proved, the "Threat, Intimidation, or Coercion" element of a Bane Act claim under California Civil Code section 52.1 requires a specific intent to violate protected rights.**

In *Cornell v. City & County of San Diego*, 17 Cal. App. 5th 766 (2017), the plaintiff, an off-duty police officer trainee dressed in street clothes, went for a morning run in Golden Gate Park, stopping for a brief rest on a knoll called Hippie Hill. *Id.* at 771. Two uniformed patrol officers in the area spotted him, thought he looked "worried," and grew suspicious because the bushes on Hippie Hill are known for illicit drug activity. *Id.* As the patrolmen began to approach Cornell, but before they reached him or said anything to him, he resumed his run. *Id.* The officers chased him, joined in pursuit by two other officers who responded to a call for backup. *Id.* One of the officers, with his

gun drawn, eventually caught up to Cornell on a trail in some nearby woods. *Id.* Cornell claims he had no idea he was being chased or that the officers wished to speak with him. On the trail, he says he heard a shout from behind, "I will shoot you," and looked over his shoulder to see a dark figure pointing a gun at him. *Id.* He darted away, ultimately finding what he thought was refuge with a police officer awaiting his arrival some distance away at the top of a stairway in AIDS Memorial Grove. *Id.* However, he was surprised when that officer ordered him to the ground. *Id.* He was arrested at gun-point and searched, taken in handcuffs to a stationhouse for interrogation, and eventually to a hospital for a drug test, which was negative. *Id.* No evidence of any crime was found at the park. He was charged with violation of Penal Code section 148—interference with a police officer—and although the charges were dismissed, he was terminated from his probationary position as a police trainee. *Id.*

Cornell sued the City and officers for violation of the Bane Act, Cal. Civ. Code § 52.1, negligence, assault and battery, false arrest and imprisonment, and tortious interference with contract and/or economic advantage. *Id.* at 776. The trial court submitted the case to the jury in two phases. In the first phase the jury found for defendants on the assault claim, but were otherwise deadlocked on the remaining substantive question and made specific findings that alternatively favored one side or the other. *Id.* at 777-78. Based on the jury's findings, the trial court ruled as a matter of law that defendants did not have reasonable suspicion to detain Cornell and that he was arrested without probable cause. *Id.* at 778. Defendants then stipulated to liability on the negligence claim. *Id.* The tortious interference and section 52.1 claims then went to the jury, which found in favor of the Cornell on both claims, and awarded over $575,000 in damages. *Id.* The trial court subsequently awarded more than $2 million in attorneys' fees on the 52.1 claim. *Id.* Defendants appealed.

In affirming the judgment, the Court of Appeal found that the trial court had correctly concluded that the officers had no probable cause to arrest Cornell, and that

indeed, there was no evidence to support even a reasonable suspicion that Cornell was engaging in any unlawful activity in the first place. *Id.* at 781-82.

The Court of Appeal also rejected defendants' contention that they were shielded from liability for an unlawful arrest under Penal Code section 847(b). That provision immunizes police officers from liability where the "arrest was lawful, or the peace officer, at the time of the arrest, had reasonable cause to believe the arrest was lawful." Cal. Penal Code § 847(b)(1). The defendants contended that even if there was no probable cause to arrest Cornell, they could have reasonably *believed* that there was probable cause and hence were entitled to immunity under section 847—essentially contending that the provision incorporated the qualified immunity doctrine of federal law. 17 Cal. App. 5th at 785-86. The court noted that neither the language of the statute nor its legislative history indicated that it was designed to shield officers from liability for an arrest made without probable cause, and that the case law used the terms "probable cause" and " reasonable cause" interchangeably. *Id.* at 788-90.

The court upheld the judgement on the Bane Act claim, rejecting defendants' contention that because the jury found for defendants on the assault claim, that there was no "threat, intimidation or coercion" accompanying the underlying constitutional violation of unlawful arrest, which would be a requirement for liability under section 52.1. *Id.* at 793-94. It concluded that there were various acts of force by the officers short of assault that could be coercive—display of a weapon for example—and that in any event, at the time the jury decided the assault claim, the trial court had not yet correctly concluded that the arrest was unlawful, thus rendering any use of force improper. *Id.*

The court also noted that this was more than a false arrest claim and that plaintiff had submitted evidence showing that the officers acted with a specific intent to demean him and cause him to lose his job. *Id.* at 794-95. In so holding, the court rejected the notion that section 52.1 requires proof of some coercive or intimidating act separate from

the underlying constitutional violation, in order to impose liability. Instead, a plaintiff need only introduce evidence sufficient to show that the defendants had the specific intent to threaten, intimidate or coerce the plaintiff by virtue of the unconstitutional conduct. *Id.* at 799-800. Here, plaintiff satisfied that burden: "Considering the evidence surrounding Cornell's arrest in its full context, it seems to us a rational jury could have concluded not only that Officer Brandt and Sergeant Gin were unconcerned from the outset with whether there was legal cause to detain or arrest him, but that when they realized their error, they doubled-down on it, knowing they were inflicting grievous injury on their prisoner." *Id.* at 804.

The *Cornell* court's holding on the section 52.1 claim creates even more confusion concerning the elements of a Bane Act claim. As the court noted, federal courts in California often confront such claims coupled with federal claims under section 1983, and have varied widely in interpreting California law with respect to requiring proof of an act of intimidation, threat or coercion, separate from the underlying unconstitutional act. *See id.* at 801. And the *Cornell* court distinguished *Shoyoye v. County of Los Angeles* (2012) 203 Cal. App. 4th 947, which had held that proof of a separate act was required, on the ground that it involved an over-detention after a lawful arrest. 17 Cal. App. 5th at 797. Although the California Supreme Court denied review in *Cornell*, at some point the Court will have to address the issue, given the large number of section 52.1 claims being litigated throughout the state.

II. CLAIMS STATUTE.

A. *Santos v. Los Angeles Unified School District*, 17 Cal. App. 5th 1065 (2017).

- **Concealment of involvement in underlying incident may estop public entity from asserting claim presentation requirement to bar lawsuit.**

In *Santos v. Los Angeles Unified School District*, 17 Cal. App. 5th 1065 (2017), the plaintiffs were injured when their vehicle was struck by a Los Angeles School Police Department (LASPD) vehicle. Plaintiffs' attorney initially filed a claim with the City of Los Angeles, which rejected the claim, noting that LASPD was a separate public entity and not part of the City. *Id*. at 1068. Plaintiffs' counsel then contacted the LASPD and was told it was an independent public entity, and that a claim form could be downloaded from the Department website and submitted to the LASPD. *Id*. The attorney submitted a claim to the LASPD, which was denied, and then filed suit, naming the Department as a defendant. *Id.*

Shortly thereafter, plaintiffs' attorney received a copy of the accident report, which noted that the owner and insurer of the LASPD vehicle was the Los Angeles Unified School District (LAUSD). Counsel then filed an amended complaint naming the LAUSD as a defendant. *Id.* at 1069. The LAUSD successfully moved for summary judgment on the ground that plaintiffs had failed to file a claim with LAUSD as required by Government Code sections 911.2 and 945.6, and that submitting claim to LASPD was ineffective because the latter was simply a department of LAUSD. *Id.* at 1069-72.

The Court of Appeal reversed, holding that a jury could determine that LASPD employees may have misrepresented the nature of the Department and concealed LAUSD responsibility for the actions of LASPD officers, thus estopping the LAUSD from asserting the claims statute to bar the action. *Id.* at 1075-77.

Santos is a reminder that public entities need to be careful in terms of their public communications concerning the nature of public agencies. A key fact in *Santos* was that the LASPD website indicated it was an independent agency, and not an arm of the LAUSD—even going so far as to provide a claim form that could be downloaded from the LASPD website. It is not difficult to imagine a similar estoppel claim arising where a plaintiff submits a claim to a municipal agency or department, which then fails to forward the claim to the City clerk for processing.

III. IMMUNITIES.

A. *Arvizu v. City of Pasadena*, __Cal.App. 5th __, 2018 WL 1452235 (2018).

- **Trail immunity of Government Code section 831.4(b) shields City from liability for failure to provide a guard rail on a retaining wall adjacent to an unpaved trail in a City park.**

In *Arvizu v. City of Pasadena*, __Cal.App. 5th __, 2018 WL 1452235 (2018) the plaintiff and his friends decided to go ghost-hunting in a closed city park at approximately 3:00 am. *Id.* at *3. As the group descended a slope to get to an unpaved trail in the park, the plaintiff lost his footing, slid down the slope, across the trail and off the edge of a retaining wall adjacent to the trail, resulting in severe injuries. *Id.* Plaintiff sued the City, asserting that the absence of a guard rail on the retaining wall constituted a dangerous condition on public property, because people using the property with due care would not perceive that the wall and drop-off were there, thus creating a hazard. *Id.* at *4. The trial court granted the City's motion for summary judgment, finding that the suit was barred by the trail immunity of Government Code section 831.4 (b), and that, in any event, the property was not in a dangerous condition. *Id.*

The Court of Appeal affirmed. The court declined to reach the dangerous condition issue, as it concluded that the suit was clearly barred by section 831.4(b). *Id.* The court noted that the provision shielded public entities from any liability arising from use of an unpaved trail used for hiking and access to recreational and scenic areas, and

that the trail in question squarely fell within the immunity. *Id.* It rejected plaintiff's contention that he was not using the trail, and that his injuries arose not as a result of any condition of the trail, but stemmed from the condition of the retaining wall next to the trail. *Id.* The court observed that plaintiff had been trying to get to the trail, and that his lawsuit was ultimately premised on the proximity of the retaining wall to the trail. *Id.* at *5-6. As a result, under section 831.4(b), the City "is immune from claims that warnings or guardrails are required to protect against falls from the Trail over the concrete retaining wall, or that the Trail should be relocated to a safer location, because these claims concern the location and design of the trail." *Id.* at *6.

Arvizu, is a very helpful case in clarifying the broad scope of section 831.4(b) immunity and underscoring the strong public policy considerations underlying the immunity. It is also useful in that it distinguishes *Garcia v. American Golf Corp.* (2017) 11 Cal.App.5th 532 which held that a plaintiff who was injured by an errant golf ball while walking on a trail adjacent to a City owned golf course, could recover, notwithstanding the immunity of section 831.4(b). The *Arvizu* court noted that the plaintiff's injury in *Garcia* stemmed from the lack of safeguards at the commercially run golf course and not the trail itself. 2018 WL 1452235 at *7-8.