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Public Entity Liability Case Law Update

Paul Caleo **September, 2010**

Public Entity Liability Case Law Update as presented at the 2010 CAJPA Fall Conference with Bill Henderson, Risk Manager, City of Livermore and Caryn Siebert, President and CEO, Carl Warren and Associates

A. Claim and Pleading Cases

1. Barragan v. County of Los Angeles (2009) 184 Cal. App. 4th 1373.

Issue: Severely injured plaintiff sought leave to file a late claim under Government Code § 946.6 based on the fact that her physical and mental injuries prevented her from realizing she might have a claim and/or retaining an attorney.

Holding: The rule mandating an injured party's attempt to obtain counsel within six months of accident to establish excusable neglect is not absolute. see Munoz v. State of California (1995) 33 Cal. App. 4th 1776.

2. SM v. Los Angeles Unified School District (2010) 184 Cal. App. 4th 712.

Issue: Whether a 4th Grade minor's claim of sexual molestation by her teacher starts to accrue at the end of the school year in which the acts took place, if the minor herself knew that what the teacher did was wrong at the time that it was done, and that his conduct made her scared and nervous.

Holding:

1. Based on the facts of this case, the minor, who was 10 years old at the time, knew the generic elements of her claim, i.e. that she had been injured by the teacher's wrongdoing, and therefore her cause of action accrued at that time. Suspicion of one of more of the elements of the claim, coupled with knowledge of any remaining elements, will generally trigger the applicable limitations.
2. To support the plaintiff's argument that the school district should be estopped from asserting the claim issue, because the plaintiff was afraid to accuse the teacher of wrongdoing, the plaintiff must present evidence of an affirmative act of intimidation or violence intended to deter the child from speaking up.

B. School Liability

3. Sanchez v. San Diego County of Education (2010) 182 Cal. App. 4th 1580.

Issue: Whether the immunity under Education Code § 35330 from liability for injuries on a field trip is limited to just the student's own school district.

Holding: The immunity under Education Code § 35330 is not limited to the student's home district but includes any school district that is a significant participant in conducting the field trip.

4. Agbeti v LAUSD (2010) 183 Cal. App. 4th 123.

Statement: This is the notorious "kissing club" case.

Issue: The extent of the duty to supervise under Education Code § 44807 and CCR Title 5 § 5552 and the proximate cause of injuries under Government Code § 815.2.

Holding: Students participating in a voluntary afterschool program is sufficient to create the "special relationship" between the students and the school district necessary to trigger the statutory duty to supervise.

Holding: Reaffirmed the holding in Daly that neither the mere involvement of a third party, nor that party's wrongful conduct is sufficient in itself to absolve the defendants of liability, once a negligent failure to provide adequate supervision is shown.

C. Public Employees/Immunities

5. Conn v. Western Placer Unified School District (2010) Cal. App. Lexis 1192.

Issue: The extent of the immunity in favor of employees of school districts for alleged violations under the Education Code whistleblower statute, Sections 44110 through to 44114.

Holding: The whistleblower statute, § 44113 of the Education Code, supersedes Government Code § 820.2, and the immunity extends only to management employees and not to those employees who exercise supervisory authority over personnel.

6. Garcia v. WNW Community Development, Inc. (2010) 186 Cal. App. 4th 1038.

Issue: Whether a state licensed foster family agency is performing a governmental function and therefore should have the same immunity from liability as a county.

Holding: Without deciding whether the foster care agency has immunity for the actions of its employees like a county, in this case the foster care agency is not liable for the alleged negligence of the foster parent because due to the terms and conditions of the contract between the two parties, the foster parent was an independent contractor and not an employee, therefore there is no vicarious liability.

7. Blair v. Bethel School District (2010) 608 F.3d 540.

Issue: Whether the former vice president of a school board had a First Amendment retaliation claim against his fellow board members for voting to remove him as vice president.

Holding: Political speech lies at the core of the First Amendment's protections, and voting on legislative resolutions expressing political viewpoints may itself be protected speech. However, a legislative body does not violate the First Amendment when some members cast their votes in opposition to other members out of political spite or for partisan, political, or ideological reasons.

8. M.P. v. City of Sacramento (2009) 177 Cal. App. 4th 121.

Issue: Whether the holding in the prior California Supreme Court case of Mary M. v. City of Los Angeles (1991) 54 Cal.3d 202 that the city was vicariously liable for a rape committed by a police officer against a woman he detained while on duty, can be applied to the circumstances of this case that involved a sexual assault by two fire fighters on a woman in a fire truck at a costume ball.

Holding: The court rejected applying the holding in Mary M. to the facts of this case. The court concluded that the Mary M. holding is, at best, limited to such acts by an on duty police officer and does not extend to any other form of employment, including fire fighting. Accordingly, the alleged sexual assault by fire fighters was not conduct within the scope of their employment and cannot support a finding that their employer, the City of Sacramento, was vicariously liable for the harm.

There was a strong dissent in this case by the state's new Chief Justice of the Supreme Court who concluded that the alleged city policy created a triable issue of fact that should defeat the dispositive motion.

D. Whistleblower Statutes

9. Ohton II v. California State University of San Diego (2010) 180 Cal. App. 4th 1402.

Issue: The correct standard that a public entity should apply in its internal investigation when determining whether a protected disclosure was made in good faith. Education Code § 8547.

Holding: Whether the disclosure is made in good faith is properly determined based on whether the complainant believed it was true or had reason to believe it was true at the time it was made. It is the investigator's role to act on the complaint and ascertain the truth or falsity of the complaint, and a post-investigation conclusion that the complaint was unfounded does not necessarily mean the complaint was made in bad faith.

10. Ruynon v. Board of Trustees of the California State University (2008) 48 Cal. 4th 760. Decision of the California State Supreme Court.

Issue: When an employee of the California State University claims he or she suffered retaliation for making a protected disclosure under California's Whistleblower Protection Act (Government Code § 8547), and CSU, after an internal investigation, rejects the employee's claim of retaliation, must the employee obtain a writ of mandate overturning CSU's decision before he or she may bring an action for damages under Government Code § 8547.12.

Holding: CSU employees, like employees of state boards and agencies, need not exhaust the judicial remedy of a mandate petition before pursuing the judicial remedy of an action for damages which the act expressly provides for. The decision disapproved the holding in Ohton I (2007) 148 Cal. App. 4th 749, to the extent it holds otherwise.

E. Individuals with Disabilities Education Act Cases

11. N. D. v. State of Hawaii Department of Education (2010) 600 F.3d 1104.

Issue: Whether or not a lawsuit alleging violations of section 1415(j), the Stay Put Provision, of the Individuals With Disabilities Education Act (IDEA), requires an exhaustion of all administrative remedies.

Holding: In a case of first impression, the Ninth Circuit adopted the holding from the Second Circuit decision of *Murphy v. Arlington* Central School Dist. Board of Education (2002) 297 F.3d 195, that the exhaustion of administrative remedies was not required because of the time-sensitive nature of the right that section 1415(j) was designed to protect, i.e., the right to remain in the current educational placement.

12. Compton Unified School District v. Addison (2010) 598 F.3d 1181.

Issue: Whether a school district's choice to ignore a student's disabilities and take "no action" can amount to an affirmative "refusal to act," thereby triggering the notice provisions of IDEA § 1415(b)(3) and a potential due process hearing under California Education Code § 56301(a) when there is a proposal or refusal to initiate or change "the identification, assessment, or educational placement" of a child.

Holding: Claims based on a local educational agency's failure to meet the "child find" requirement are cognizable under IDEA.

There is a strong dissenting opinion to this holding.

F. Police Liability Cases

13. Bryan v. McPherson (2009) 590 F.3d 767.

Issue: Whether the actions of plaintiff presented an "immediate danger" to a city police officer that would justify his use of the X26 taser to effect plaintiff's arrest, and, therefore, trigger qualified immunity.

Holding:

1. The amount of force used can be unreasonable, even without physical blows or injuries.
2. Tasers fall into the category of non-lethal force.
3. Rather than relying on broad categorizations of force, the court must evaluate the nature of the specific force employed in a specific factual situation.
4. Just because a taser results only in the "temporary" infliction of pain, it does not mean that its use does not constitute a non-intrusive level of force.
5. The use of the X26 taser and similar devices constitutes an intermediate, significant level of force that must be justified by "a strong government interest" that compels the employment of such force.
6. An evaluation of the government's interest in the use of force based on the factors in Graham v. Connor (1999) 490 U.S. 386 allows an objective determination of "the amount of force that is necessary in a particular situation."
7. The most important factor under the Graham analysis is whether the suspect posed an "immediate threat to the safety of the officers or others," and a simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern.

14. Catsouras v. Department of the California Highway Patrol (2010) 181 Cal. App. 4th 856.

This case involves the posting of ghastly accident photographs on the internet.

Issue: Whether or not investigating officers have a duty of care to prevent the dissemination of death images of the decedent to the surviving family members, and whether those surviving family members have a cognizable common law right of privacy regarding those death images.

Holding:

1. Applying the Rowland v. Christian factors, the investigating officers do owe plaintiffs a duty of care not to place the decedent's death images on the internet for the purposes of vulgar spectacle.
2. Family members have a common law privacy right in the death images of a decedent, subject to certain limitations.
3. The immunity under Government Code § 821.6 does not apply to the investigating officers in this case because the sending of emails with the photographs attached was not done "in the furtherance of the investigation."

15. Camp v. State of California (2010) 184 Cal. App. 4th 967.

Issue: Whether the fact that a highway patrol officer who arrived at an accident site and gathered information about the accident and those involved in it, was sufficient to create a "special relationship" and a corresponding duty of care towards one of the people involved in the accident who, unknown to the officer, was injured.

Holding:

1. The general rule that a law enforcement officer has a duty to exercise reasonable care for the safety of those persons whom the officer stops, includes the obligation not to expose such persons to an unreasonable risk of injury by third parties. This affirmative conduct or misfeasance may create a special relationship between the officer and the other person that may support a finding of duty. In contrast however, no such special relationship exists where the officer's failure to act or non-feasance does nothing to alter the risk of harm to the other person.
2. A duty of care may arise where the evidence demonstrates the requisite factors that support a finding of special relationship, namely detrimental reliance by the Plaintiff on the officer's conduct, or on statements made by them which induced a false sense of security and thereby worsened the plaintiff's position. A special relationship is not established simply because a police officer responded to a call for assistance and took some action at the scene. Nor is it enough to assert that the law enforcement officer took control of the situation.

16. Wilkinson v. Torres (2010) 610 F. 3d 546

Issue: The reasonableness of the deadly force used by an officer and whether the officer had probable cause to believe that the suspect posed a threat of serious physical harm, either to the officer or to others.

Holding:

1. An order from the denial of a motion for summary judgment seeking qualified immunity is immediately appealable.
2. The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20-20 vision of hindsight.
3. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain and rapidly evolving about the amount of force that is necessary in a particular situation.
4. We must view the facts from the officer's perspective at the time he decided to fire.
5. The critical inquiry is what the officer perceived.

17. Guy v. City of San Diego (2010) 608 F.3d 582.

Issue: Whether a successful verdict in an excessive force case under 42 U.S.C. § 1983 that resulted in only nominal damages to Plaintiff and no punitive damages, could support an award of attorney's fees under 42 U.S.C. § 1988.

Holding: A prevailing part in a § 1983 action that resulted in the jury awarding only nominal damages, is still eligible for an award of attorney's fees if the lawsuit achieved other tangible results, such as sparking a change in policy or establishing a finding of fact with potential collateral estoppel effects. In this case, arguably, the verdict which awarded only nominal damages sent a message to the police department that the force used was excessive and that justification for reasonable use of force did not excuse excessive use of force.

G. First Amendment Cases

18. Christian Legal Society Chapter of the University of California Hastings College of Law v. Martinez (2010) 130 S.Ct. 795.

A decision of the U.S. Supreme Court.

Issue: Whether Hastings Law School's "accept all comers' policy" impairs the Christian Legal Society's First Amendment rights to free speech by prompting it to accept members who do not share the organization's core beliefs about religion and sexual orientation.

Holding: Hastings Law School's "all comers' policy" is a reasonable viewpoint neutral condition on access to the student organization forum. In requiring the Christian Legal Society to choose between welcoming all students and foregoing the benefits of official recognition, Hastings did not transgress constitutional limitations.

19. International Society for Krishna Consciousness of California, Inc. v. City of Los Angeles (2010) 44 Cal. 4th 446.

A decision of the California Supreme Court.

Issue: Whether the Los Angeles International Airport is a public forum under the Liberty of Speech Clause of the California Constitution.

Holding: Whether or not Los Angeles International Airport is a public forum for free expression under the California Constitution, the City's ordinance prohibiting persons from soliciting funds at the airport is valid as a reasonable time, place and manner restriction of expressive rights to the extent that it prohibits soliciting the immediate receipt of funds.

20. City of Ontario California v. Quon (2010) 130 S.Ct. 2619.

A decision of the U.S. Supreme Court.

Issue: Whether the City's obtaining and reviewing the transcripts of a police officer's pager messages violated the officer's Fourth Amendment Right and constituted an unreasonable search and seizure.

Holding: The City did not violate the police officer's Fourth Amendment Rights by obtaining and reviewing transcripts of text messages sent to him on the pager provided by the City because the search was justified, as there were reasonable grounds for suspecting that the search was necessary for a non-investigatory work-related purpose, and the search was permissible in its scope.

H. Dangerous Condition of Public Property Cases

21. PUC v. Superior Court (Millan) (2010) 181 Cal. App. 4364.

Issue: In a case arising out of a fatal accident at a railroad crossing, whether that railroad crossing constituted a dangerous condition under Government Code § 830 because of a 1989 PUC recommendation to upgrade the crossing's warning devices by installing a gate was not implemented.

Holding: Based on decisional law, a public entity's ability to regulate property it neither owns nor possesses is not equivalent to a public entity having control of the property within the meaning of Government Code § 830.

22. Ida Lane v. City of Sacramento (2010) 193 Cal. App. 4th 1337.

Issue: The legal sufficiency of the evidence in support of the City's successful motion for summary judgment, based on the argument that the center divider of a road was not a dangerous condition because there was an absence of any other claims relating to the center divider.

Holding:

1. The City's evidence did not establish a "complete absence of any similar accidents" involving the diver in the previous seven years. What the City's evidence established was that someone acting on behalf of its claims administrator had searched a computerized database of claims submitted to the City involving the center divider, but found none other than the plaintiff's. The City offered no evidence, however, on how the database was created or maintained or how the searched of the database was conducted. Therefore, there was no evidentiary basis for determining that the database constituted a complete and accurate record of claims submitted to the City, let alone for determining that the search the person conducted retrieved all of the pertinent records within the data base.
2. Even assuming the City's evidence was sufficient to establish an absence of claims other than plaintiff's, a tort claim filed with the City is not the same thing as an accident, and an absence of claims is not the same thing as an absence of accidents.
3. There is no authority cited for the proposition that the absence of other similarly accidents is dispositive of whether a condition is dangerous, or that it compels a finding of non-dangerousness
4. absent other evidence.

23. Avedon v. State of California (2010) 184 Cal. App. 4th 1336

Issue: Whether the state can be liable for a dangerous condition of public property under Government Code §835 for the property damaged caused by a fire that was ignited as a result of a bonfire started in a cave in a state park.

Holding:

1. The property owner plaintiffs failed to state a cause of action under Government Code § 835 because the dangerous condition alleged in this case was access to the cave. However, the owners did not allege facts to establish a defect in the cave itself, and in the absence of a defect in the property the plaintiffs could not allege facts establishing a causal connection between the defect and the damages sustained.
2. For similar reasons the nuisance cause of action could not proceed because it was also premised on the state maintaining a dangerous condition of public property that allowed a severe fire risk to persist. In addition, the nuisance claim was also precluded by Civil Code § 3482 as the state's operation of the park fell squarely within its statutory authority.

24. Alvis v. County of Ventura (2009) 178 Cal. App. 4th 536.

Issue: Whether, in an opposition to a motion for summary judgment based on Government Code § 830.6 immunity, evidence that contradicts the "reasonableness" of the subject plan or design, is sufficient to defeat the motion.

Holding: The third element of § 830.6 immunity, substantial evidence of reasonableness, requires only evidence of solid value that reasonably inspires confidence. Courts are not concerned with whether the evidence of reasonableness is undisputed. Government Code § 830.6 can provide immunity even if the evidence is contradicted.

I. Employment/ADA Cases

25. Brownfield v. City of Yakima (2010) U.S. App. LEXIS 15324.

Issue: On a case of first impression, whether the City violated its employee's rights under the Americans With Disabilities Act by requiring a Fitness For Duty Exam (FFDE) as a business necessity under 42 U.S.C. 12112 (2)(4)(A).

Holding:

1. On a case of first impression in the Ninth Circuit, the Court adopted the holdings from an Eleventh Circuit decision that prophylactic psychological examinations can sometimes satisfy the business necessity standard, particularly when the employer is engaged in dangerous work.
2. The Court cautioned that it must guard against the potential for employer abuse of such prophylactic FFDEs.

26. Milan v. City of Holtville (2010) 186 Cal. App. 4th 1028.

Issue: In an action brought under the Fair Employment and Housing Act (FEHA), Government Code § 12940, et. seq., whether the employer had a duty to offer any accommodation when the injured employee never expressly requested it or otherwise indicated that she wanted to continue working.

Holding: Given the circumstances where the employee failed to express any meaningful or definitive interest in retaining her job, FEHA did not require that her employer discuss with or offer her accommodations for her disability.

Paul Caleo is a partner and one of Burnham Brown's premier trial lawyers. He has extensive experience in complex tort and catastrophic injury cases involving premises liability, product liability, government and public entity defense, retail theft and battery cases, commercial trucking and construction site accidents. Mr. Caleo is a very experienced trial lawyer that has completed 14 jury trials and two binding arbitrations in the past nine years. Mr. Caleo can be reached at 510.835.6809 or pcaleo@burnhambrown.com.

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