9th Cir. No. 09-55644

S193997

IN THE SUPREME COURT OF CALIFORNIA

En Banc

C.H., a minor by and through her guardian ad litem, DAVID J. HAYES,

Plaintiff/Appellant/Respondent,

v.

COUNTY OF SAN DIEGO dba San Diego County Sheriff's Department, et al.,

Defendants/Appellees/Petitioners.

On Appeal from the United States District Court
for the Southern District of California

Honorable Dana M. Sabraw, District Judge
(DC No. CV-07-1738-DMS(JMA), Southern California, San Diego)

PETITIONERS' OPENING BRIEF ON THE MERITS

THOMAS E. MONTGOMERY, County Counsel
County of San Diego

By MORRIS G. HILL, Senior Deputy (Bar No. 97621)
1600 Pacific Highway, Room 355
San Diego, California 92101-2469
Telephone: (619) 531-4877
Attorneys for Defendants/Appellees/Petitioners
County of San Diego, Mike King and Sue Geer

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I

QUESTION PRESENTED

A. The Question (Restated By This Court).

Whether under California negligence law, liability can arise from tactical conduct and decisions employed by law enforcement preceding the use of deadly force.

B. Petitioners' Proposed Response.

Petitioners propose the following response to the Ninth Circuit: "Under California negligence law, tactical conduct and decisions employed by law enforcement preceding the use of deadly force are part of the totality of circumstances if they are claimed to have caused or contributed to the subsequent use of deadly force. If a use of deadly force is lawful under the totality of circumstances, tactical conduct and decisions employed by law enforcement preceding the use of deadly force that are claimed to have caused or contributed to the subsequent use of deadly force may not be a basis of a separate cause of action for law enforcement negligence."

II

INTRODUCTION

A. The Parties.

This Court's order filed August 10, 2011 deemed the County of San Diego and Sheriff's Deputies Mike King and Sue Geer as the petitioners pursuant to Cal. Rules of Court, rule 8.520(a)(6). The respondent is Chelsey Hayes (misspelled "Chelsea" in this Court's order), who was plaintiff and appellant in the underlying federal proceedings. She is the daughter of the decedent Shane Hayes.

B. Question Stated by the Ninth Circuit.

The question of California law stated to this Court by the United States Court of Appeals for the Ninth Circuit was worded by it as follows:

"Whether under California negligence law, sheriff's deputies owe a duty of care to a suicidal person when preparing, approaching, and performing a welfare check on him."

(*Hayes v. County of San Diego,* 2011 U.S.App.LEXIS 11987 (9th Cir. 2011) *(Hayes II).*) This Court restated the Ninth Circuit's question, and agreed to decide the restated question.

III

FACTS

A. Brief Factual Summary.

The facts of this case (in the light most favorable to respondent) are set forth in the Ninth Circuit majority opinion that was withdrawn when the Ninth Circuit certified the now-restated question. (See *Hayes v. County of San Diego* (9th Cir. 2011) 638 F.3d 688, 690-691 *(Hayes I).*) Briefly, the incident started out as a residential domestic violence call. Resident Geri Neill told Deputy King (first to arrive) that her boyfriend Shane Hayes had attempted suicide earlier that evening, and that he had attempted suicide previously. Ms. Neill said there were no guns in the house, and that Mr. Hayes was in a bedroom. Deputy King, followed by Deputy Geer, walked towards the bedroom to check on his welfare, with their guns holstered. Before they got to the bedroom, Mr. Hayes emerged from the dimly-lit kitchen area with his right hand behind his back, saying something about being taken to jail or prison. Deputy King ordered Mr. Hayes to show his hands. He raised them to shoulder level, clenching a big knife in his right fist while advancing on Deputy King. Ms. Neill yelled at Mr. Hayes to drop the knife (an undisputed fact not mentioned in the Ninth Circuit opinion) and the deputies drew their guns and fired, striking Mr. Hayes three times. Mr. Hayes fell but remained conscious. He died in surgery a few hours later, never explaining his actions.

Respondent lives in another state; she was not present when her father was shot. She sued petitioners in United States District Court for the Southern District of California for money damages under 42 United States Code section 1983 and California law on various theories, including negligence. Petitioners moved for summary judgment, relying primarily on Ms. Neill's undisputed account, which corroborated the deputies' accounts in all material respects, and was supported by Ms. Neill's demonstration of how Mr. Hayes held the knife (a big meat-carving knife) at about a 45-degree angle in his right fist as he advanced within almost striking distance, while Deputy King retreated. The District Court granted defense summary judgment, and respondent appealed.

B. Negligence Discussion in Withdrawn Majority Opinion.

The Ninth Circuit panel majority discussed the negligence issue in its now-withdrawn opinion as follows:

> Appellant contends that Deputies King and Geer were negligent because they failed to gather all potentially available information about Hayes or request a PERT team[1] before confronting him. . . . After the district court granted summary judgment, however, the California Supreme Court indicated that law enforcement officers might be subject to negligence liability for certain preshooting conduct. . . . *Hernandez v. City of Pomona,* 46 Cal.4th 501, 515-22 (2009).
>
> In *Hernandez*, the court granted review to consider the following question: "When a federal court enters judgment in favor of the defendants in a civil rights claim brought under

[1] The withdrawn opinion did not explain the term "PERT team." In San Diego, the term "PERT team" refers to a "Psychiatric Emergency Response Team," described as "a law enforcement officer/deputy and a licensed mental health clinician who are called to the scene to provide rapid response and assist field officer requests for assistance with mentally disordered individuals or people in crisis. The PERT program is designed to return law enforcement officers to the field as soon as possible while the PERT team conducts an evaluation and assessment of the situation and/or individual. That individual is then referred to the proper treatment." See <http://www.sdcounty.ca.gov/cnty/bos/sup2/legislation/970715-pert.html> accessed August 23, 2011.

> 42 United States Code section 1983. . . , in which the plaintiffs seek damages for police use of deadly and constitutionally excessive force in pursuing a suspect, and the court then dismisses a supplemental state law wrongful death claim arising out of the same incident, what, if any, preclusive effect does the judgment have in a subsequent state court wrongful death action?" *Id.* at 505. The court held "that on the record and conceded facts here, the federal judgment collaterally estops plaintiffs from pursuing their wrongful death claim, even on the theory that the officers' preshooting conduct was negligent." *Id.* at 506. In doing so, the California Supreme Court did not hold that law enforcement officers owed no duty of care in regards to preshooting conduct, as the lower court in *[Munoz v.] City of Union City* [120 Cal.App.4th 1077, 1097 (2004)] had held. Instead, the court found that the officers' preshooting conduct did not breach applicable standards of care. *Id.* at 515-22.
>
> The court in *Hernandez* did not address *City of Union City* or *Adams [v. City of Fremont,* 68 Cal.App.4th 243, 276 (1998)], nor did it expressly determine that law enforcement officers owe a duty of care in regards to preshooting conduct. Nevertheless, the court's analysis of whether the officers' preshooting conduct independently constituted breach of a duty of care strongly indicates that California's highest court would not adopt a rule that officers owe no such duty. Indeed, in a concurring opinion, Justice Moreno argued that the court should not have reached the issue "because plaintiffs are entitled to amend their complaint to allege preshooting negligence." *Id.* at 522 (Moreno, J., concurring). The majority responded, stating "we find that plaintiffs have adequately shown how they would amend their complaint to allege a preshooting negligence claim, and that we must determine whether any of the preshooting acts plaintiffs have identified can support negligence liability." *Id.* at 521 n.18.
>
> This discussion strongly indicates that the California Supreme Court believes a duty of care is owed and that courts must address breach and causation. [Footnote omitted.]

(*Hayes I, supra,* 638 F.3d at 695-696.) After the opinion was issued, petitioners moved for panel rehearing and rehearing en banc. The Ninth

Circuit withdrew its published opinion and certified its question of California law to this Court. (*Hayes II, supra,* 2011 U.S.App.LEXIS 11987.)

IV

DISCUSSION

A. The Practical Issue.

Should law enforcement officers who defensively use deadly force in emergencies face civil liability to their assailants (or their assailants' beneficiaries) because those officers might have used different emergency tactics that might have avoided the need for them to defend themselves against those assailants?

If such emergency tactics can support law enforcement negligence liability, does such tactical negligence support a stand-alone cause of action that can independently result in civil liability for causing the use of defensive deadly force, even when the force was objectively reasonable and/or privileged from liability under the totality of circumstances?

Common sense teaches that law enforcement officers (like everyone except suicidal people) already have a self-preservation incentive to avoid life-threatening situations. However, law enforcement officers are expected to sometimes contact persons who might wish them harm, and who have the ability to act on such wishes. If law enforcement officers routinely avoid situations where they might have to defend against potential assaults, they will, at the same time, avoid situations where they might help or rescue those they serve.

For clarification, all criteria for "suicide-by-cop" were not present. Black's Law Dictionary defines "suicide-by-cop" as follows:

> ***Suicide-by-cop.*** *Slang.* A form of suicide in which the suicidal person intentionally engages in life-threatening behavior to induce a police officer to shoot the person. Frequently, the decedent attacks the officer or otherwise

> threatens the officer's life, but occasionally a third person's life is at risk. A suicide-by-cop is distinguished from other police shootings by three elements. The person must: (1) evince an intent to die; (2) consciously understand the finality of the act; and (3) confront a law enforcement official with behavior so extreme that it compels that officer to act with deadly force. -- Also termed *police-assisted suicide; victim-precipitated homicide.*

(*Black's Law Dictionary, 8th Edition*, Thomson West (1999).)

There is no evidence that Mr. Hayes had a desire to die at the hands of anyone else.

B. Federal Liability Theories.

In this case, respondent pursued two federal liability theories under 42 U.S.C. section 1983: (1) Fourth Amendment unreasonable seizure, and (2) Fourteenth Amendment substantive due process. It is helpful to compare those federal theories to California law negligence liability.

1. Fourth Amendment Unreasonable Seizure.

Federal Fourth Amendment liability can arise under section 1983 for a shooting that amounts to an unreasonable seizure. Only the person who was seized (or someone standing in the seized person's legal shoes) has standing to assert Fourth Amendment unreasonable seizure liability. In this case, the Ninth Circuit panel majority did not reach Fourth Amendment liability, stating that it was "unclear" whether respondent had Fourth Amendment standing. (*Hayes I, supra,* 638 F.3d at 692-693.) (From petitioners' perspective, it was respondent's burden to allege and prove that she had Fourth Amendment standing, and it was clear that she failed to meet her burden.)

Fourth Amendment liability under section 1983 is not available for negligent tactical decisions leading up to a use of physical force. (*Billington v. Smith* (2002) 292 F.3d 1177, 1190.) If an officer fails to exercise reasonable care, and that failure gets him into a dangerous

situation, his failure "will not make it unreasonable for him to use force to defend himself." (*Ibid.*) A plaintiff cannot "establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided." (*Ibid.*)

On the other hand, when "an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, [the officer] may be held liable for his otherwise defensive use of deadly force." (*Id.* at 1189.) "The basis of liability for the subsequent use of force is the initial constitutional violation, which must be established under the Fourth Amendment's reasonableness standard." (*Id.* at 1190.) That is not the same as the standard of "reasonable care" under tort law. Negligent acts do not incur constitutional liability. "An officer may fail to exercise 'reasonable care' as a matter of tort law yet still be a constitutionally 'reasonable' officer. Thus, even if an officer negligently provokes a violent response, that negligent act will not transform an otherwise reasonable subsequent use of force into a Fourth Amendment violation. But if . . . an officer intentionally or recklessly provokes a violent response, and the provocation is an independent constitutional violation, that provocation may render the officer's otherwise reasonable defensive use of force unreasonable as a matter of law. In such a case, the officer's initial unconstitutional provocation, which arises from intentional or reckless conduct rather than mere negligence, would proximately cause the subsequent application of deadly force." (*Id.* at 1190-1191.)

2. Fourteenth Amendment Substantive Due Process.

Respondent also pursued federal liability under a Fourteenth Amendment substantive due process theory. Such liability can be pursued directly by survivors, and in that respect, is somewhat analogous to a wrongful death cause of action under California tort law. For officers in

emergency situations to be liable on a Fourteenth Amendment substantive due process theory, they must have acted with a "purpose to harm" that was unrelated to legitimate law enforcement objectives. (*Porter v. Osborn* (9th Cir. 2008) 546 F.3d 1131, 1137.) The "purpose to harm" standard is not the same as "deliberate indifference," because "deliberate indifference" occurs "only when actual deliberation is practical. . . ." (*County of Sacramento v. Lewis* (1998) 523 U.S. 833, 851; citation omitted.) "Like prison officials facing a riot, the police on an occasion calling for fast action have obligations that tend to tug against each other." (*Id.* at 853.) In urgent situations, "a deliberate indifference standard does not adequately capture the importance of such competing obligations. . . ." (*Id.* at 852; citation omitted.) In fast-evolving situations, the "purpose to harm" standard applies, not the "deliberate indifference" standard. (*Id.* at 853-854.)

Officers do *not* act with purpose to harm that is unrelated to law enforcement objectives when they respond to an emergency in progress. (See *Bingue v. Prunchak* (9th Cir. 2008) 512 F.3d 1169, 1177.) Denial of substantive due process "is to be tested by an appraisal of the totality of facts in a given case." (*County of Sacramento v. Lewis*, *supra*, 523 U.S. at 850; citation omitted.) "[L]iability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." (*Id.* at 849; citations omitted.)

Standing to assert Fourteenth Amendment substantive due process liability is analogous to state law wrongful death standing, and therefore broader than Fourth Amendment standing. Respondent had standing on that claim, and the Ninth Circuit affirmed summary judgment for petitioners. (*Hayes I*, *supra,* 638 F.3d at 693-694.)

C. California Tort Liability.

In this case, respondent pleaded both federal and state law causes of action based on the same facts and injury. That practice is not uncommon in law enforcement civil liability cases. Federal causes of action are always a claimant's first priority, due to availability of attorneys' fees under 42 U.S.C. section 1988. A claimant cannot be compensated twice for the same facts and injury (once under federal law and once under California law), so California law causes of action seldom assume independent importance in a given case unless (or until) federal liability fails. For example, California law causes of action are sometimes invoked to justify a second bite at the litigation apple when federal claims fail to survive summary judgment or jury verdict.

1. California Intermediate Appellate Opinions.

In recent years, this Court has seldom addressed law enforcement negligence liability in the context of harms directly inflicted by officers on targeted individuals. On the other hand, California intermediate appellate courts have faced such issues frequently, resulting in a well-developed body of recent case law. The clear trend has been towards judging law enforcement uses of force during emergencies for reasonableness under the totality of circumstances, rather than burdening juries with divergent state and federal liability standards for judging the same ultimate injury.

a. Reasonableness Under Totality of Circumstances.

"Unlike private citizens, police officers act under color of law to protect the public interest. They are charged with acting affirmatively and using force as part of their duties. . . ." (*Edson v. City of Anaheim* (1998) 63 Cal.App.4th 1269, 1273; citation omitted.) A plaintiff must show that a law enforcement officer's use of force was unreasonable under the totality of the circumstances. (*Id.* at 1274; see also, *Martinez v. County of*

Los Angeles (1996) 47 Cal.App.4th 334, 349-350 [reasonableness of peace officer's use of force under federal law defeated state law battery claim].)

> Equally important, a police officer must have control over the manner and means of making an arrest or detention. The interests of the commonweal happily coincide here with sound logic. Both dictate that "[t]he 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.

(*Edson v. City of Anaheim*, *supra*, 63 Cal.App.4th at 1273; citation omitted.)

"We share the view . . . that 'the officer in the first instance is the judge of the manner and means to be taken in making an arrest. Unless a plaintiff can show that unnecessary force was used, courts will protect the officer.'" (*Edson v. City of Anaheim*, *supra*, 63 Cal.App.4th at 1274; citation omitted.) In recent years, California appellate courts have declined to recognize separate liability standards for federal and state claims arising from the same facts and resulting in the same injuries. See, e.g., *Munoz v. City of Union City* (2004) 120 Cal.App.4th 1077, 1102-1103; *Susag v. City of Lake Forest* (2002) 94 Cal.App.4th 1401, 1412-1413 [unsound to distinguish between Section 1983 conduct and state law claims arising from the same alleged misconduct].)

Relying on *Edson,* this Court agreed that the standard for judging the reasonableness of an officer's actions ought to be the same under both federal and state law. In *Yount v. City of Sacramento* (2008) 43 Cal.4th 885, this Court reviewed the claim of a suspect accidentally shot by an officer who mistakenly drew his service weapon instead of his Taser:

> [W]e cannot think of a reason to distinguish between section 1983 and a state tort claim arising from the same alleged misconduct and, as stated above, the parties offer none.

> Section 1983 'creates a species of tort liability' [citation omitted] and has been described as 'the federal counterpart of state battery or wrongful death actions.' (*Susag v. City of Lake Forest*, *supra*, 94 Cal.App.4th at p. 1413.) Indeed, Yount's common law battery cause of action, like his section 1983 claim, requires proof that Officer Shrum used unreasonable force.

(*Id.* at 902, citing *Edson v. City of Anaheim*, *supra*, 63 Cal.App.4th at 1273–1274.)

b. Privilege.

A law enforcement officer's use of force may be analyzed for privilege under California law:

> Unlike private citizens, police officers act under color of law to protect the public interest. They are charged with acting affirmatively and using force as part of their duties, because "the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." (*Graham v. Connor* 490 U.S. 386, 396 [. . .] (1989). They are, in short, not similarly situated to the ordinary battery defendant and need not be treated the same. In these cases, then, ". . . the defendant police officer is in the exercise of the privilege of protecting the public peace and order [and] he is entitled to the even greater use of force than might be in the same circumstances required for self-defense."

(*Edson v. City of Anaheim*, *supra*, 63 Cal.App.4th at 1273; citation omitted.)

When (as here) a plaintiff has joined federal and state theories in the same action based on the same facts and injury, it makes sense for jurors to look for guidance to the same standard.

> The federal practice is all the more significant because plaintiffs sometimes join federal and state claims against police defendants, either in federal or state court. [Citations omitted.] To avoid jury confusion and to ease judicial administration, it makes sense to require plaintiff to prove unreasonable force on both claims. California courts in such

> cases have articulated the same concerns that underlie our decision today . . . ."

(*Edison v. City of Anaheim, supra*, 63 Cal.App.4th at 1274.)

A defensive homicide is justifiable and privileged under Penal Code section 197. The privilege applies not only to the person defended against, but also to that person's heirs and beneficiaries. The family members of the person defended against cannot pursue a claim for damages that the person defended against could not have pursued.

> In our view, the rule is simply a recognition that an act resulting in justifiable homicide as defined by Penal Code section 197 is, in legal effect, a privileged act. A privileged act is generally defined as one that would ordinarily be tortious, but which, under the circumstances, does not subject the actor to liability. (Rest. 2d Torts, §§ 10, 890; 5 Witkin, Summary of Cal. Law (9th ed. 1988) § 278, p. 360; Prosser & Keeton, The Law of Torts (5th ed. 1984) § 16, pp. 108-109.)

(*Gilmore v. Superior Court* (1991) 230 Cal.App.3d 416, 420-421.)

Citing *Gilmore,* this Court subsequently decided in *Horwich v. Superior Court* (1999) 21 Cal.4th 272, that if the force used was privileged as against a claim that would have been brought by the decedent, that same privilege bars a claim brought by the decedent's relatives:

> The defendant can owe no greater duty to the heirs than to the decedent; thus the premise of any wrongful death action would fail at the outset. Similarly, when the defendant has been justified in the use of deadly force against the decedent, the privileged nature of the conduct is a defense to all civil liability regardless of the plaintiff's status. (See, e.g., *Gilmore v. Superior Court* (1991) 230 Cal.App.3d 416, 420-421 [281 Cal. Rptr. 343].

(*Horwich v. Superior Court, supra*, 21 Cal.4th at 285.)

Under California law, privilege defeats liability under any tort theory, including negligence. "A privileged act is by definition one for

which the actor is absolved of any tort liability, whether premised on the theory of negligence or of intent." (See, e.g., *Gilmore v. Superior Court, supra*, 230 Cal.App.3d at 421; citations omitted.) Thus, "if, in a particular case, the facts establish a justifiable [use of force] under the Penal Code, there is no civil liability." (*Id.* at 422; accord *Nakashima v. Takase* (1935) 8 Cal.App.2d 35, 38; *Brooks v. Sessagesimo* (1934) 139 Cal.App. 679, 679-681.) In the context of precluding wrongful death actions, "when the defendant has been justified in the use of deadly force against the decedent, the privileged nature of the conduct is a defense to all civil liability." (*Horwich v. Superior Court, supra*, 21 Cal.4th at 285.)

c. Pre-Force Tactics.

In *Munoz v. City of Union City, supra,* 120 Cal.App.4th 1077, the tactical decisions of law enforcement officers that preceded their use of force were not deemed a basis for negligence liability. The plaintiff's expert in that case testified that unreasonable officer strategy ultimately led to use of force. (*Id.* at 1097.) The appellate court ruled:

> [T]he conduct of the police – [Corporal] Woodward's decisions as to how to deploy his officers at the scene, the efforts made in an attempt to defuse the situation as safely as possible, and other such factors – cannot subject appellants [officers and their public entity employer] to liability. For these reasons, finding a tort duty and submitting to the jury the question of whether police decisions fell below the standard of care, was error.

(*Munoz v. City of Union City, supra,* 120 Cal.App.4th at 1097-1098.)

"Police officers often act and react in a milieu of criminal activity where every decision is fraught with uncertainty." (*Munoz v. City of Union City*, 120 Cal.App.4th at 1096, quoting *Adams v. City of Fremont* (1998) 68 Cal.App.4th 243, 270, internal quotation marks omitted.) "Protection of the physical safety of the police officers and other third parties is paramount." (*Munoz v. City of Union City, supra*, 120 Cal.App.4th at 1096, quoting

Adams v. City of Fremont, supra, 68 Cal.App.4th at 271, internal quotation marks omitted.) "[T]he need to protect the overall safety of the community by encouraging law enforcement officers to exercise their best judgment in deciding how to deal with public safety emergencies vastly outweighs the societal value of imposing tort liability for the judgments they make in emergency situations." (*Id.*)

d. Reasonableness and Pre-Force Tactics.

In *Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 537-538, the appellate court held that as long as an officer's conduct fell within a *range* of reasonable conduct, negligence liability does not result merely because the officer did not choose the most reasonable action, or the conduct least likely to cause harm while still resulting in apprehension of a violent suspect. "There will virtually always be a *range* of conduct that is reasonable." (*Id.* at 537; emphasis in original.)

> The Browns contend that judicial precedent demonstrates that an officer's duty to act reasonably extends to police decisions beyond simply the decision to use deadly force, and includes police tactics and the manner of apprehending suspects. The Browns refer to *Grudt v. City of Los Angeles*, 2 Cal.3d 575, (1970), and *Munoz v. Olin,* supra, 24 Cal.3d 629, to demonstrate that courts may look at an "officer's entire performance ... in determining negligence liability." In both *Grudt* and *Munoz v. Olin,* the Supreme Court permitted negligence claims to proceed against officers based on grounds extending beyond the officers' use of force. *Grudt* involved decisions by plainclothes officers to apprehend a victim without waiting for uniformed officers to arrive, and to tap on the victim's window with a shotgun despite being in plain clothes in a high crime area at night. (See *Grudt, supra,* 2 Cal.3d at p. 587.) *Munoz v. Olin* involved police officers' mistaken identification of the victim as a suspect, their failure to warn the victim before shooting him, and their failure to attempt other means of apprehending him. (See *Munoz v. Olin, supra,* 24 Cal.3d at p. 637.)

> The Browns maintain that the rule of no negligence for the tactical decisions of law enforcement officers, announced in *Munoz, supra,* 120 Cal.App.4th at pages 1096–1098, and *Adams v. City of Fremont* (1998) 68 Cal.App.4th 243 [. . .], a case on which Munoz heavily relies, applies only in situations like the ones officers faced in those cases, i.e., emergency situations (such as suicide attempts) to which police have been summoned by the public. Here, the officers were not responding to an emergency call from the public, but instead, the officers had initiated surveillance of a suspect and subsequently decided to make an arrest.
>
> We conclude that determining whether Ransweiler had a duty of reasonable care with respect to his pre-shooting tactical decisions is irrelevant in this case because even if we presume that the Browns are correct that Ransweiler *could* be held liable for tactical negligence, under the facts presented in the summary judgment proceedings, Ransweiler's conduct was objectively reasonable under the circumstances.

(*Brown v. Ransweiler, supra*, 171 Cal.App.4th at 535-536; emphasis in original.)

A very recent (2011) appellate opinion analyzed this Court's 1979 *Munoz v. Olin* opinion, and rejected a claim of law enforcement negligence liability that was premised on the manner in which law enforcement officers employed deadly force:

> Appellant's reliance on *Munoz v. Olin* (1979) 24 Cal.3d 629, is misplaced. In that case, the court explained: " ' "[T]he actor's conduct must always be gauged in relation to all the other material circumstances surrounding it and if such other circumstances admit of a reasonable doubt as to whether such questioned conduct falls within or without the bounds of ordinary care then such doubt must be resolved as a matter of fact rather than of law." ' [Citations.]" (*Id.* at p. 637.) In *Munoz v. Olin,* peace officers intentionally shot a suspected arsonist as he was fleeing. (*Id.* at p. 631.) The court found a triable issue of fact regarding negligence because one of the peace officers shot numerous times in addition to failing to

attempt other means to apprehend the suspect. (*Id.* at p. 637; see also *Tennessee v. Garner* (1985) 471 U.S. 1, 10, [use of deadly force improper to apprehend nonviolent suspect].)

This case is nothing like *Munoz v. Olin.* Pena was not attempting to flee. Instead, he was shooting directly at officers and holding his child hostage. When all of the material circumstances are considered, as required by *Munoz v. Olin,* the only reasonable conclusion is that the officers' use of force was reasonable.

(*Lopez v. City of Los Angeles* (2011) 196 Cal.App.4th 675, 690-691, reh'g denied (July 1, 2011), review filed (July 26, 2011).)

2. California Supreme Court Opinions.

Munoz v. Olin (1979) 24 Cal.3d 629, was cited by the Ninth Circuit panel majority as the starting point in its California law analysis. (See *Hayes I, supra,* 638 F.3d at 695.) In *Munoz v. Olin,* this Court ruled:

Considering the evidence in plaintiffs' favor to be true, the jury could have believed that Munoz spent the Friday evening in his usual manner with friends and went peacefully home along his usual alley route engaging in no criminal activity. Nothing in his background or in his activities that evening suggests an arsonist. After tapping on the window of his house on the walkway to awaken his wife, in his usual manner, he walked into the courtyard. The two investigators came down the quiet alley in an unmarked car. They stopped the car at the walkway where Munoz had turned and pursued him on foot. He was shot at in the courtyard. To escape the bullets he jumped over the gate and ran up the other walkway toward Alhambra. Olin followed and shot him as he ran into the street where he died almost instantly.

A jury taking that view of the facts could have found that under the circumstances the officers were negligent in identifying Munoz, the first man they saw in their rush, as the arsonist they had seen. Testimony and a jury visit to the scene indicated that Royal Upholstery was 300 feet down the alley from the investigators' observation point, with telephone poles and trash receptacles in between. The jury could have found negligence in the failure adequately to warn Munoz and

> to attempt other means to apprehend him, if they disbelieved the investigators' testimony regarding their lights, siren and shouts as they drove down the alley. Munoz' wife, who was dozing under a window very near to the walkway entrance where defendants stopped their car, heard nothing but her husband's tap and calm voice at the window, followed by shots. Neighbors also testified that they heard shots but no sirens or shouts.
>
> The jury also could have found negligence on Olin's part in interpreting the situation to require shooting at Munoz though Halstead could drive around to apprehend him on Alhambra, as indeed Halstead testified he did. They could have found Olin negligent in the way he used his weapon under the circumstances, particularly in view of plaintiffs' evidence that he fired not just three but several bullets.

(*Munoz v. Olin, supra*, 24 Cal.3d at 636-37.)

That same year, 1979, this Court decided *Peterson v. City of Long Beach* (1979) 24 Cal.3d 238, addressing whether law enforcement negligence liability could arise when officer conduct is privileged under the Penal Code. The plaintiff was allowed to proceed on a negligence theory against officers who shot and killed a felony burglary suspect. Although the shooting was privileged under Penal Code section 196, privilege was deemed trumped by the officers' alleged violation of a police department tactical manual, which the Court found created a presumption of negligence pursuant to Evidence Code section 669(a). (*Peterson v. City of Long Beach, supra*, 24 Cal.3d at 247, n.8.) The Legislature subsequently enacted Evidence Code section 669.1, which declared that negligence liability could not arise from manuals that had not been formally adopted as a statute, ordinance, or agency regulation. (Evid. Code § 669.1; see *Minch v. California Highway Patrol* (2006) 140 Cal.App.4th 895, 907 [confirming Legislature's intent to override *Peterson*]. Subsequently, this Court recognized that privilege may defeat negligence liability in a deadly force case. (*Horwich v. Superior Court, supra*, 21 Cal.4th at 285.)

This Court has also analyzed the nature of the duty of care owed by law enforcement officers when harm has been inflicted by third parties rather than directly by officers:

> As a general rule, one owes no duty to control the conduct of another, nor to warn those endangered by such conduct. Such a duty may arise, however, if "(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives the other a right to protection." [Citations omitted.] Plaintiffs urge that defendants are liable under both theories.
>
> In determining the existence of a duty of care in a given case, pertinent factors to consider include the "foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." [Citation omitted.] "When public agencies are involved, additional elements include 'the extent of [the agency's] powers, the role imposed upon it by law and the limitations imposed upon it by budget; ...' [Citations omitted.]

(*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 203.)

Davidson was followed by *Williams v. State of California*:

> In *Davidson* we referred to Professor Van Alstyne's summary of the problem in California Government Tort Liability Practice (Cont.Ed.Bar 1980) section 2.65: "Some of the cases represent an unnecessary effort to categorize the acts or omissions in question as immune discretionary functions, when the same result could be reached on the ground that the facts fail to show the existence of any duty owed to plaintiff or any negligence on the part of the police officers. [Citations omitted.] Absence of duty is a particularly

useful and conceptually more satisfactory rationale where, absent any 'special relationship' between the officers and the plaintiff, the alleged tort consists merely in police nonfeasance. [Citations omitted.]"

Accordingly, we turn first to the question of duty under general principles of tort law. As a rule, one has no duty to come to the aid of another. A person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another unless there is some relationship between them which gives rise to a duty to act. (Rest.2d Torts, § 314; 4 Witkin, Summary of Cal.Law (8th ed.) Torts, § 554, p. 2821.) Also pertinent to our discussion is the role of the volunteer who, having no initial duty to do so, undertakes to come to the aid of another—the "good Samaritan." He is under a duty to exercise due care in performance and is liable if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking. (Rest.2d Torts, § 323.) Application of these general principles in the area of law enforcement and other police activities has produced some confusion and conflict. To an extent, the concepts are muddied by widely held misconceptions concerning the duty owed by police to individual members of the general public.

(*Williams v. State of California* (1983) 34 Cal.3d 18, 23-24; fn. omitted.)

This Court has not always been consistent in its view that duty must be decided before privilege (or immunity) is addressed:

The issues with respect to the city are whether the officers owed a duty of care to plaintiff and, if so, whether the city is immune from liability.

In *Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 201-203, we held that in cases posing these two questions, logic suggests that unless the first is answered in the affirmative, the second does not even arise. Nevertheless, since in this case our views on the issue of duty are highly diversified, but we are in general agreement that the officers' conduct, if negligent, was immunized by the Government Code, we base our affirmance of the judgment in favor of the

> city on the latter ground—suggesting, perhaps, that the life of the law is not logic, but expedience.

(*Kisbey v. State of California* (1984) 36 Cal.3d 415, 418, fn. omitted.)

This Court again addressed law enforcement negligence liability in the context of third-party-harm in 2001:

> Accordingly, we conclude that, under California law, a law enforcement officer has a duty to exercise reasonable care for the safety of those persons whom the officer stops, and that this duty includes the obligation not to expose such persons to an unreasonable risk of injury by third parties.

(*Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 718.)

The following year, this Court addressed third-party-harm from the perspective of state-created danger and special relationships:

> It is settled that "[u]nder general negligence principles ... a person ordinarily is obligated to exercise due care in his or her own actions so as ... not to create an unreasonable risk of injury to others .... [Citations.] It is well established ... that one's general duty to exercise due care includes the duty not to place another person in a situation in which the other person is exposed to an unreasonable risk of harm through the reasonably foreseeable conduct ... of a third person. [Citations.]" [Citation omitted.] At the same time, however, past cases establish that police officers and other public security officers, like other persons, generally may not be held liable in damages for failing to take affirmative steps to come to the aid of, or prevent an injury to, another person. "As a rule, one has no duty to come to the aid of another. A person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another unless there is some relationship between them which gives rise to a duty to act." [Citation omitted.] More specifically, "law enforcement officers, like other members of the public, generally do not have a legal duty to come to the aid of [another] person...." [Citation omitted.] Liability may be imposed if an officer voluntarily assumes a duty to provide a particular level of protection, and then fails to do so [citations omitted], or if an officer undertakes affirmative acts that increase the risk of harm to the plaintiff. [Citations omitted.] As we have declared, "[a]s a general rule, one owes no duty to control the conduct of another, nor to warn those endangered by such conduct." [Citation omitted.] A duty to control the conduct of another or to warn persons endangered by such conduct may arise, however, out of what is called a "special relationship," a concept upon which the Court of

Appeal placed considerable reliance in the present case. Such a duty may arise if " '(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives the other a right to protection.' " [Citation omitted.] " 'This rule derives from the common law's distinction between misfeasance and nonfeasance, and its reluctance to impose liability for the latter.' " [Citation omitted.] In most instances, these general rules bar recovery when plaintiffs, having suffered injury from third parties who were engaged in criminal activities, claim that their injuries could have been prevented by timely assistance from a law enforcement officer. (See *Williams v. State of California, supra,* 34 Cal.3d at p. 25, and cases cited; *Benavidez v. San Jose Police Dept., supra,* 71 Cal.App.4th at pp. 859–862, [no liability when the police responded to domestic violence call but failed to protect victim after her subsequent call for assistance]; *Hernandez v. City of Pomona, supra,* 49 Cal.App.4th at pp. 1503–1505, [person who was aware of danger arising from his testimony at a criminal trial involving a gang was not entitled to damages for the failure of the police to warn the witness or supply special protection].) And the circumstance that an officer may have offered special protection on one occasion does not, by itself, give rise to a continuing special relationship and duty at a later date—or with other officers. [Citation omitted.] As the Court of Appeal's disposition of plaintiffs' seventh cause of action demonstrates, plaintiffs did not allege facts establishing that any peace officer or other nonpolicymaking employee of the county voluntarily undertook special duties to protect Eileen or to control the conduct of Harry on September 1, 1995, or that any officer or employee did anything on that date to induce Eileen in particular to rely upon a promise of special protection. At most, employees of the defendants county and sheriff's department failed to take affirmative steps to protect Eileen. There is no indication that her peril was created by their actions. As in the *Williams* case, "[t]he officers did not create the peril in which plaintiff found herself; they took no affirmative action which contributed to, increased, or changed the risk which would have otherwise existed; there is no indication that they voluntarily assumed any responsibility to protect [her] ...; and there are no allegations of the requisite factors to a finding of special relationship, namely detrimental reliance by the plaintiff on the officers' conduct, [or] statements made by them which induced a false sense of security and thereby worsened her position." *Williams v. State of California, supra,* 34 Cal.3d at pp. 27–28, fn. omitted.) Nor does the complaint allege facts demonstrating that any officer engaged in an affirmative act that increased the risk of harm to Eileen.

(*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1128-1130.)

In its withdrawn opinion in this case, the Ninth Circuit panel majority stated: "The approach taken by the California Supreme Court in *Hernandez* conflicts sharply with the holdings of the lower appellate courts in *City of Union City* and *Adams.*" (*Hayes I, supra,* 638 F.3d at 696.) However, the "approach" taken by this Court in *Hernandez* is exemplified by the following quotation:

> Consistent with these principles and the factors the high court has identified, the federal court in this case did not instruct the jury to conduct some abstract or nebulous balancing of competing interests. Instead, as noted above, it instructed the jury to determine the reasonableness of the officers' actions in light of "the totality of the circumstances at the time," including "the severity of the crime at issue, whether the plaintiff posed a reasonable threat to the safety of the officer or others, and whether the plaintiff was actively resisting detention or attempting to escape." The same consideration of the totality of the circumstances is required in determining reasonableness under California negligence law. (See *Commercial Union Assur. Co. v. Pacific Gas & Elec. Co.* (1934) 220 Cal. 515, 522, 31 P.2d 793 [jury's "duty" in a negligence action is to "determin[e] whether under all the facts and surrounding circumstances," the conduct in question "was that of persons of ordinary prudence and discretion"].) Moreover, California's civil jury instructions specifically direct the jury, in determining whether police officers used unreasonable force for purposes of tort liability, to consider the same factors that the high court has identified and that the federal court's instructions in this case set forth. (Judicial Council of Cal. Civ. Jury Instns. (2008) CACI No. 1305.) Thus, plaintiffs err in arguing that the federal and state standards of reasonableness differ in that the former involves a fact finder's balancing of competing interests.

(*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 514.)

In a footnote, this Court explained that it was not addressing duty of care, or addressing immunity:

> In light of our analysis and conclusion, we do not address defendants' claims that they owed no duty of care regarding their preshooting conduct and that they are immune under Penal Code section 196. We also do not consider the other immunity statutes discussed by amici curiae.

(*Id.* at 521, fn. 18.)

D. Argument.

Federal appellate jurists cannot agree on how to interpret this Court's near-unanimous recent opinion in *Hernandez v. City of Pomona, supra,* 46 Cal.4th 501, so clear direction from this Court is in order. (Compare the panel majority interpretation: "[t]he approach taken by the California Supreme Court in *Hernandez* conflicts sharply with the holdings of the lower appellate courts in *City of Union City* and *Adams,*" *Hayes I, supra,* 638 F.3d at 696, with the dissenter's interpretation: "[i]t would stand to reason that if the California Supreme Court was inclined to overrule the holdings of *Munoz [v. City of Union City]* and *Adams,* it would have done so." (*Id.* at 702.)

The negligence identified by the Ninth Circuit panel majority consisted of the deputies' failure to gather "all potentially available information about Hayes or request a PERT team. . . ." (*Hayes I, supra,* 638 F.3d at 695.) It is difficult to imagine any situation in which such omissions could be independently actionable -- in which they could independently injure anyone -- not even by inflicting emotional distress. Such omissions are only worth talking about if they allegedly resulted in the use of deadly force. And if that was their only alleged consequence, why are they not part of the totality of circumstances?

The ultimate outcome of the deputies' acts and omissions in this case was their defensive use of deadly force. That outcome was not compelled by their failure to gather "all potentially available information about Hayes or request a PERT team. . . ." The outcome was compelled solely by how Mr. Hayes reacted to Deputy King's mere presence -- approaching uninvited while clutching a big knife in his upraised right fist.

The ability to foresee is one thing; the gift of prophesy is another. Accurately predicting Mr. Hayes' unprovoked reaction would have required more than superhuman foresight. It is unrealistic to argue whether Mr.

Hayes may have been mentally ill, or whether he intended suicide-by-cop. Even today there is no evidence he had ever been deemed mentally ill, or that he ever genuinely intended to commit suicide. As a practical matter, he had the apparent free will, the apparent means, and the apparent physical ability to injure or kill Deputy King within another split second. Whether he would have actually done so, no one knows. A coiled snake may strike, or it may not. All can speculate, but no one truly knows what Mr. Hayes would have done next. He had free will, and even if he had a plan, he could have changed his mind in a split second. The reasonableness of a defensive use of deadly force in an emergency cannot reasonably be judged by speculating about an assailant's state of mind.

Suppose, hypothetically, that Mr. Hayes had not been in the kitchen. Suppose he had really been in the bedroom, where the deputies had been told he would be found. Suppose he had used the knife on himself and was bleeding in the bedroom, as in his earlier apparent suicide attempt. Suppose quick rescue had saved him from self-destruction, again as earlier happened. Would anyone have criticized the deputies for not pausing to gather "all potentially available information" or not requesting a PERT team?

The allegedly-negligent omissions identified by the Ninth Circuit panel majority can only be deemed faulty because they were followed by a shooting. It is unreasonable to argue that the deputies should have ignored Mr. Hayes' reported suicide attempt and abandoned him to his probable self-imposed fate, because law enforcement officers are tasked with community caretaking and rescue functions. Using foresight without hindsight, no reasonable officer would have delayed a potential rescue simply because of the remote (but ever-present) possibility that the person to be saved might, with no provocation or advance warning whatsoever, initiate an apparently-homicidal assault.

V

CONCLUSION

No one knew at the time (no one knows today) why Mr. Hayes acted as he did. The Ninth Circuit correctly noted that "there is no evidence that the deputies fired their weapons for any purpose other than self-defense." (*Hayes I, supra,* 638 F.3d at 694.) The liability question ought to be whether a use of deadly force is objectively reasonable under the totality of circumstances. Law enforcement tactics that allegedly result in a use of deadly force are unavoidably, and appropriately, part of the totality of circumstances.

No officer facing a sudden deadly threat pauses to ponder whether federal law analyzes liability for a defensive use of deadly force differently than California law. Those individuals (and their beneficiaries) who assault officers without provocation should be financially compensated for the consequences of their free-will actions only if the force used to stop them is objectively unreasonable or unprivileged under the totality of circumstances. Law enforcement officers should not face liability under any legal theory for an objectively reasonable or privileged use of defensive deadly force.

For these reasons, petitioners request that this Court answer the Ninth Circuit's restated question as follows:

"Under California negligence law, tactical conduct and decisions employed by law enforcement preceding the use of deadly force are part of the totality of circumstances if they are claimed to have caused or contributed to the subsequent use of deadly force. If a use of deadly force is lawful under the totality of circumstances, tactical conduct and decisions employed by law enforcement preceding the use of deadly force that are

claimed to have caused or contributed to the subsequent use of deadly force may not be a basis of a separate cause of action for law enforcement negligence."

DATED: 09/09/2011 Respectfully submitted,

THOMAS E. MONTGOMERY, County Counsel

By 

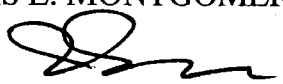
MORRIS G. HILL, Senior Deputy
Attorneys for Defendants/Appellees/Petitioners
County of San Diego, Mike King, and Sue Geer
E-mail: morris.hill@sdcounty.ca.gov

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.204(c)(1))

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that the text of this brief consists of 8,333 words as counted by the Microsoft Word 2007 word-processing program used to generate the brief.

DATED: 09/09/2011 THOMAS E. MONTGOMERY, County Counsel

By 

MORRIS G. HILL, Senior Deputy
Attorneys for Defendants/Appellees/Petitioners
County of San Diego, Mike King, and Sue Geer
E-mail: morris.hill@sdcounty.ca.gov

Proof of Service by Mail

I, the undersigned, declare: I am over the age of eighteen years and not a party to the case; I am employed in, or am a resident of, the County of San Diego, California where the mailing occurs; and my business address is: 1600 Pacific Highway, Room 355, San Diego, California.

I further declare that I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business.

On September 9, 2011, I caused to be served the following document(s): **Petitioners' Opening Brief On The Merits** by placing a true copy of each document in a separate envelope addressed to each addressee, respectively, as follows:

Alvin M. Gomez, Esq.
853 Camino Del Mar, Suite 100
Del Mar, California 92014
(858) 552-0000; (858) 755-3364 (fax)
E-mail: amglawyers@yahoo.com
(Attorney for Plaintiff/Appellant/Respondent C.H., a minor, by and through her guardian ad litem, David J. Hayes)

Clerk's Office, United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, California 94103-1526

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Executed on September 9, 2011, at San Diego, California.

_____
LAURA COMETA