

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

SUPREME COURT
FILED

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

DEC 12 2011

Honorable Dana M. Sabraw, District Judge
(DC No. CV-07-1738-DMS (JMA), Southern California, San Diego) ~~Deputy~~
Frederick K. Ohlrich Clerk

RESPONDENT'S BRIEF ON THE MERITS

Alvin M. Gomez, Esq. SBN: 137818
GOMEZ LAW GROUP
853 Camino Del Mar, Ste. 100
Del Mar, California 92014
Telephone: (858) 552-0000
Facsimile: (858) 755-3364

Attorney for Plaintiff/Appellant/
Respondent, C.H., a minor by and
through her guardian ad litem,
DAVID J. HAYES

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)

RESPONDENT'S BRIEF ON THE MERITS

Alvin M. Gomez, Esq. SBN: 137818
GOMEZ LAW GROUP
853 Camino Del Mar, Ste. 100
Del Mar, California 92014
Telephone: (858) 552-0000
Facsimile: (858) 755-3364

Attorney for Plaintiff/Appellant/
Respondent, C.H., a minor by and
through her guardian ad litem,
DAVID J. HAYES

TOPICAL INDEX

Page

| | |
|---|----|
| TABLE OF AUTHORITIES | ii |
| I. QUESTION PRESENTED | 1 |
| A. Question as Presented by this Court | 1 |
| B. Respondent's Response | 1 |
| II. INTRODUCTION | 1 |
| III. STATEMENT OF FACTS | 2 |
| IV. SUMMARY OF THE ARGUMENT | 12 |
| V. PRE-SHOOTING NEGLIGENCE IS A VIABLE LEGAL THEORY FOR A JURY'S DETERMINATION | 13 |
| VI. A DUTY WAS CREATED AS A RESULT OF A SPECIAL RELATIONSHIP | 21 |
| VII. CONCLUSION | 31 |
| CERTIFICATE OF WORD COUNT | 33 |

TABLE OF AUTHORITIES

| | <u>Page</u> |
|---|--------------------|
| <i>Acosta v. City and County of San Francisco</i> (1996) 83 F.3d 1143 | 29 |
| <i>Adams v. City of Fremont</i> (1998) 68 Cal.App.4th 243 | 14, 22, 24 |
| <i>Alexander v. City and County of San Francisco</i> (1994) 29 F.3d 1355 | 26, 29 |
| <i>Allen v. Toten</i> (1985) 172 Cal.App.3d 1079 | 17 |
| <i>Ballard v. Uribe</i> (1986) 41 Cal.3d 564 | 18 |
| <i>Benavidez v. San Jose Police Dept.</i> (1999) 71 Cal.App.4th 853 | 22 |
| <i>Billington v. Smith</i> (2002) 292 F.3d 1177 | 26, 27, 29 |
| <i>Brenneman v. State of California</i> (1989) 208 Cal.App.3d 812 | 14 |
| <i>Brown v. Ransweiler</i> (2009) 171 Cal.App.4th 516 | 27 |
| <i>Davis v. City of Sacramento</i> (1994) 24 Cal.App.4th 393 | 21 |
| <i>Dillon v. Legg</i> (1968) 68 Cal.2d 728 | 18 |
| <i>Dutton v. City of Pacifica</i> (1995) 35 Cal.App.4th 1171 | 17 |
| <i>Fargo v. City of San Juan Batista</i> (1988) 857 F.2d 638 | 29 |
| <i>Grudt v. City of Los Angeles</i> (1970) 2 Cal.3d 575 | 18, 19, 20, 21, 25 |
| <i>Harris v. Roderick</i> (1997) 126 F.3d 1189 | 29 |
| <i>Jensen v. Minard</i> (1955) 44 Cal.2d 325 | 25 |
| <i>L. W. v. Grubbs</i> (1992) 974 F.2d 119 | 28 |
| <i>Ladd v. County of San Mateo</i> (1996) 12 Cal. 4th 913 | 13 |
| <i>Lugtu v. California Highway Patrol</i> (2001) 26 Cal.4th 703 | 22, 23 |

**TABLE OF AUTHORITIES
(Continued)**

| | <u>Page</u> |
|---|-------------|
| <i>McCorkle v. City of Los Angeles</i> (1969) 70 Cal.2d 252 | 25 |
| <i>Miller v. Kennedy</i> (1997) 196 Cal.App.3d 141 | 25 |
| <i>Munoz v. Olin</i> (1979) 24 Cal.3d 629 | 20, 21, 25 |
| <i>Parsons v. Crown Disposal Co.</i> (1997) 15 Cal.4th 456 | 18 |
| <i>Penilla v. City of Huntington Park</i> (1997) 115 F.3d 707 | 28 |
| <i>Peterson v. City of Long Beach</i> (1979) 24 Cal.3d 238 | 25 |
| <i>Robins v. Meecham</i> (1995) 60 F.3d 1436 | 29 |
| <i>Rowland v. Christian</i> (1968) 69 Cal.2d 108 | 14 |
| <i>Sparks v. City of Compton</i> (1976) 64 Cal.App.3d 592 | 26 |
| <i>Tarasoff v. Regents of University of California</i> (1976) 17 Cal.3d 425 | 18 |
| <i>Thompson v. County of Alameda</i> (1980) 27 Cal.3d 741 | 17 |
| <i>Williams v. State of California</i> (1983), 34 Cal.3d 18 | 21, 23 |
| <i>Wood v. Ostrander</i> (1989) 879 F.2d 583 | 28 |
| <i>Wright v. City of Los Angeles</i> (1990) 219 Cal.App.3d 318 | 13 |

**TABLE OF AUTHORITIES
(Continued)**

Page

STATUTES

42 U.S.C. § 1983 1

OTHER

California Civil Jury Instructions § 400 13

I.
QUESTION PRESENTED

A. Question as Presented 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. Respondent's Response:

Respondent proposes the following response to the Ninth Circuit: "Under California negligence law, a law enforcement officer owes a duty to use reasonable care in his/her tactical conduct and decisions preceding the use of deadly force."

II.
INTRODUCTION

C.H., a minor and daughter of decedent Shane Hayes, filed a Complaint in the district court against the County of San Diego and its Police officers, Sue Geer and Michael King on September 4, 2007, pursuant to 42 U.S.C. § 1983 and California law for 1) Violation of 42 U.S.C. § 1983; 2) Failure to Supervise; 3) Custom and Practice; 4) Wrongful Death; 5) Negligent Hiring, Supervision, and Management.

The Complaint alleges Fourth Amendment violations arising

from the entry of decedent's home and subsequent shooting that killed decedent. These acts violated California common law as well.

III. STATEMENT OF FACTS

The facts presented are either undisputed or are presented based upon Respondent C.H.'s version of the facts, as is appropriate here.

On September 17, 2006, Deputy King and Deputy Geer were acting under color of law and were required to be properly trained to follow and implement the Policy and Procedures of the San Diego County Sheriff's Department and the Constitution of the United States. The San Diego County Sheriff's Department Guidelines regarding the use of force reflect the importance of warning a suspect before using deadly force: "In situations where any force used is capable of causing serious injury or death, there is a requirement that, whenever feasible, the deputy was first warn the suspect that force will be used if there is not compliance."

On September 17, 2006 at 9:12:05 pm, Deputy King responded to a call for domestic violence. Deputy King was carrying a Glock, a taser, a Walther .380 backup, flashlight and handcuffs. Deputy King is certified to use the less lethal weapon of a bean bag shotgun; yet, he

did not carry it in his vehicle. At 9:13:09 pm, the Deputies were notified that "Boyfriend is 647...Shane..." which means intoxicated. Deputy King was not aware of this notification on his MDC box.

Approximately four (4) months prior, on May 2, 2006, the San Diego Sheriff's Department had responded to a suicide attempt at 8946 Singing Wood Way, Santee, California involving Shane Hayes. The County Sheriff's Department has the ability to cross check and verify incident information according to names and/or addresses. Here, Deputy King, Deputy Geer and the County Sheriff's Department failed to perform a cross check on address or name in properly assessing the situation before entering the residence for a "welfare check".

The situation of a person who is known to be suicidal is a situation Deputies would typically assess before entering the situation. The purpose of assessing is to determine if he is in fact suicidal or not, and the Deputies would typically talk to as many parties as possible. Deputy King (alone at the time) testified that he knocked at the front door and made contact with a 14 year old female, later identified as Jennifer Jones. An adult female, later identified as Ms. Geri Jones came to the door and told Deputy King she and her boyfriend, Mr.

Shane Hayes, had been involved in a verbal argument and no physical violence had occurred. Therefore, no crime had occurred or was in progress. Ms. Jones also told Deputy King that the verbal argument occurred because she had intervened earlier when Hayes tried to commit suicide by inhaling fumes from a vehicle (which was parked in the driveway). Deputy King, after listening to Ms. Jones, got the impression that Shane had attempted to commit suicide earlier that day.

Deputy Geer arrived at 9:16:51 p.m. Upon Deputy Geer's arrival at the front door, Deputy King ended his interview and briefed Deputy Geer that the subject was possibly suicidal. The interview with Ms. Jones lasted at most 38 seconds. In spite of Deputy King's knowledge of a potential suicidal situation that clearly involved a mentally ill person, Deputy King and Deputy Geer failed to perform their stated duty to assess the situation before entering an unknown situation. The proper assessment was important to ensure the safety of not only third parties, but the Deputies themselves and would have decreased the risk of entering into an uncertain situation. Clearly, knowledge is power.

The Deputies knew that Hayes had attempted suicide earlier in the day. Clearly, it should have been obvious to the Deputies that Hayes suffered from a mental illness. Neither Deputy King nor Deputy Geer asked the necessary follow up questions. They failed to obtain the necessary information to assess the situation. They failed to determine the nature of the situation and failed to determine if they could handle the situation or whether they should obtain back up from the more experienced Psychiatric Emergency Response Team (PERT). Arguably King and Greer simply ignored the information given to them and made the haphazard decision to enter the residence without important information when there was no emergency situation or other exigent circumstance. The Deputies carry less lethal weapons, such as a taser or a bean bag shotgun that can be used to address a suicidal person.

Deputy King admitted that he had the opportunity to ask questions and failed to ask the following important questions to assess the situation before entering the residence and the unknown situation, such as:

- Whether Hayes was under the influence of any alcohol or drugs;
- Whether there were other suicide attempts;

- The number of suicide attempts;
- Whether there were any other weapons in the home other than a gun;
- Whether any deputy had been called to the residence before that date;
- Did not ask follow up questions regarding the suicide attempt;
- The height and weight of Hayes; and
- Whether any one else was in the residence.

If Deputy King and Deputy Geer were properly trained, they knew or should have known that according to San Diego County Sheriff's Department Patrol Procedures Manual - "Mentally disordered or mentally ill persons are persons who as the result of a mental disorder, are a danger to others, to themselves or gravely disabled."

Moreover, Policy and Procedure 6.113 states:

"Accessing the PERT Team. When the communications Center receives a call involving a mentally disordered individual, the radio dispatcher will dispatch uniformed Deputies as necessary to handle the situation. Once on the scene, the patrol Deputies will determine if the PERT team is necessary..."

Deputy King and Deputy Geer had the opportunity to contact communications to request the assistance of an available PERT Team

or the equivalent; yet, each deputy neglected to do so. Contrary to Petitioner's argument, the situation was not an emergency.

Deputy King admittedly had the opportunity to contact dispatch to request a history concerning the person's name, whether or not calls had been made to the residence; yet, he failed to ask dispatch for this information. Deputy King failed to contact dispatch to assess or confirm whether there had been prior suicide attempts at this address. Deputy King failed to contact dispatch to confirm whether there had been prior suicide attempts involving Hayes. Neither Deputy King nor Deputy Geer contacted dispatch for a supervisor or guidance regarding the dealing with a person who is suicidal in spite of their limited or lack of training on dealing with suicidal persons or persons who were mentally ill.

Deputy King and Deputy Geer failed to properly assess the situation before entering into the home where there was a person with suicidal tendencies and who clearly suffered from mental illness. Deputy King and Deputy Geer knew or, in the exercise of due care, should have known that each lacked the requisite knowledge, training and skill to deal with a mentally ill and suicidal person such as Hayes.

Deputy King and Deputy Geer testified that they entered the residence for a welfare check. According to Deputy King, a welfare check is “to see if they’re physically or mentally able to care for themselves.” The Deputies created a special relationship when they made the decision to perform a welfare check on Hayes. There can be no dispute that before entering the home, there was no emergency situation. Moreover, no criminal activity was ongoing or had occurred. When the Deputies arrived, the situation had been resolved.

Deputy King and Deputy Geer, without obtaining further details from Ms. Jones regarding past suicide attempts of Hayes, made the decision to enter the home that was dark and without taking adequate precautions.

The lack of appropriate pre-shooting conduct in assessing the situation is evident by analyzing what happened after the Deputies entered the home. Based on the location of the rounds and shell casings, it appears that there was “contagious fire” by both Deputies. It is not clear whether Deputy King or Deputy Geer fired the first shot. When firing at a target, the officer is supposed to know where the round is supposed to impact. Deputy King and Deputy Geer violated Addendum Section F. Neither Deputy King nor Deputy Geer

prepared a written report regarding the use of force used on September 17, 2008.

Moreover, Deputy King and Deputy Geer created the situation that led to the death of Hayes. Deputy King and Deputy Geer placed themselves in a situation that may have created “suicide by cop.” The San Diego County Sheriff’s Department Training Bulletin on Victim Precipitated Suicide such as “Domestic violence calls comprised the largest percentage of SBC incidents (42%).”; “Suspects will normally choose a familiar place to commit their final act. In the LASO study 72% occurred in the home. It is very dangerous for police to ‘invade another man’s territory.’ A man’s home is his castle.”; “The best predictor of future behavior is past behavior.”

San Diego County Sheriff’s Department Addendum Section F states, “The preservation of order and the observance of law are best achieved through voluntary compliance rather than force or compulsion. The higher the level of public voluntary compliance and cooperation, the less need for the use of force. To that end, the use of force must always be considered secondary to the desirability of voluntary compliance to law.”

Upon seeing Hayes, Deputy King said there wasn't time for a command that if Hayes took one more step he would shoot. Deputy King stated that to make the command would take a "split second." Deputy King commanded that Hayes raise his hands. Hayes complied with the command. It is clear that based upon the testimony and statements of the Deputies and the physical evidence that Hayes did not have the knife in his hand when he was shot. This is corroborated by the location of the knife after the incident. The shooting of Hayes was unreasonable, unjustified, excessive and was created based upon the action, decisions, inactions, negligence and recklessness of Deputy King and Deputy Geer in failing to use reasonable care before entering the residence for a welfare check. The Deputies had other non-lethal and less lethal force options, such as verbal commands; bean bag shot gun; pepper spray; or taser that could have been used, rather than the lethal force that was used. Had Deputy King and/or Deputy Geer performed a proper assessment and obtained knowledge and information, they could have gone into the residence without "uncertainties." They could have had the pepper, taser and/or bean bag shotgun ready to use if necessary.

Moreover, a proper assessment by either Deputy King or Deputy Greer would have revealed that the PERT should have been called before entering the residence. The lack of judgment by King and Geer and the tactical decision to go into an unknown situation clearly increased the risk of harm that led to the death of Hayes.

San Diego County Sheriff's Department Addendum Section F states, "In situations where any force used is capable of causing serious injury or death, there is a requirement that, whenever feasible, the deputy must first warn the suspect that force will be used if there is not compliance." Here, no warning was given by either deputy to Hayes. The lack of warning is another factor that illustrates the lack of reasonable care by the Deputies.

Here, Deputy King and Deputy Geer undertook to come to the aid of Hayes by engaging in a welfare check. Once the decision was made to perform a welfare check on Hayes, Deputy King and Deputy Geer undertook the duty to exercise due care in the performance of their duties. Deputy King and Deputy Geer increased the risk of harm. Deputy King and Deputy Geer were aware that police officers often act and react in a milieu of criminal activity where every decision is fraught with uncertainty. It is the uncertainty created by

Deputy King's and Deputy Geer's decision to enter the residence without a proper assessment that increased the risk of harm not only to the Deputies but to Hayes and those present at the residence.

IV. SUMMARY OF THE ARGUMENT

The obligation of any law enforcement officer is to "Protect and Serve". Here, Deputy King and Deputy Geer owed decedent a duty, but failed in their duty as law enforcement personnel to properly assess the situation before entering the residence on September 17, 2006, and preceding the use of deadly force. Deputy King's and Deputy Geer's failure to properly assess the situation created a situation which increased the risk of harm and ultimately led to the use of deadly force. Had the Deputies done their job in assessing the situation before entering the residence, they would have determined that Hayes was mentally ill with a risk for suicide, was under the influence of alcohol, had suicidal ideations and that there had been prior calls to the residence for prior at least one prior suicidal attempt. The Deputies further would have determined what conditions they were facing when entering the house: such as weapons, if any, lighting, layout of the house, and any obstacles. Had the Deputies

properly assessed the situation, they would have realized that the most reasonable action would be to contact the PERT team rather than enter the home for a welfare check which haphazardly increased the risk of harm.

Moreover, the Deputies' decision to perform a welfare check on Hayes created a special relationship with Hayes that required them to use due care.

**V.
PRE-SHOOTING NEGLIGENCE IS A VIABLE LEGAL
THEORY FOR A JURY'S DETERMINATION**

The individual Deputies are liable to decedent for negligence.

The essential elements of negligence are:

(1) the defendants had a legal duty to conform to a standard of conduct to protect the plaintiff, (2) the defendants failed to meet this standard of conduct, (3) the defendants' failure was the proximate or legal cause of the resulting injury, and (4) the plaintiff was damaged.

Wright v. City of Los Angeles (1990) 219 Cal. App.3d 318, 344; *Ladd v. County of San Mateo* (1996) 12 Cal. 4th 913, 917, see also *CACI* § 400.

Where a legal duty is not created by statute, the question of whether a legal duty exists is analyzed under general principles of tort

law. (See, e.g., *Brenneman v. State of California* (1989) 208 Cal.App.3d 812, 818 [256 Cal.Rptr. 363])” (*Adams v. City of Fremont*, 68 Cal.App.4th 243, 264)

The negligence analysis starts with the factors set forth by the California Supreme Court in *Rowland v. Christian* (1968). In *Rowland v. Christian* (1968) 69 Cal.2d 108, 70 Cal.Rptr. 97, 443 P.2d 561, the court identified a number of elements to be assessed in deciding whether a defendant owed a tort duty to a plaintiff. These factors include:

“(1) the foreseeability of harm to the injured party; (2) the degree of certainty that the injured party suffered harm; (3) the closeness of the connection between the defendant’s conduct and the injury suffered; (4) the moral blame attached to the defendant’s conduct; (5) the policy of preventing future harm; (6) the extent of the burden to the defendant; and (7) the consequences to the community of imposing a duty to exercise care, with resulting potential liability.”

(*Rowland, supra*, 69 Cal.2d at pp. 112–113 [70 Cal.Rptr. 97, 443 P.2d 561].)

Here, all the *Rowland* factors are present. There was a foreseeability of harm to Hayes. The Deputies knew that Hayes suffered from a mental disorder of being suicidal. The Deputies knew

that Hayes had attempted suicide earlier in the day. The Deputies knew that Hayes was under the influence of alcohol. The Deputies were responding to a domestic violence call which put them on notice of violence.

Hayes was shot at the hands of law enforcement officers. The conduct of the Deputies is clear. They failed to assess the situation and entered the residence for a welfare check that led to the death of Hayes. Had the Deputies not entered the residence, Hayes would not have been shot. There was no indication that the situation was emergent. Rather, the situation had been resolved.

Here, the moral blame is quite evident. The policies of the police department clearly illustrate that deadly force is the last resort. The Deputies are trained to go through a mental checklist before resorting to the use of deadly force. As stated above, the Deputies from the moment they arrived at the residence, had the time and resources to obtain "knowledge" to empower them before entering the residence. The "knowledge" would have given the Deputies the necessary tools to reduce the risk of an uncertain situation. The moral blame clearly rests with the Deputies for their decision, actions and omissions.

The obtaining of “knowledge” in assessing a situation would clearly prevent future harm. The policies of the Sheriff’s Department are there for a reason. There are reasons behind the obligation of a deputy obtaining important information before entering a situation. The information not only reduces the risk of harm of a law enforcement official and the public, but lessens the uncertainty and unpredictability of a situation. Had the Deputies properly assessed the situation, they would have realized that the lighting conditions in the house were poor, there was clutter all over the house which prevented the ability to move and could cause tripping, and there was a disabled person in the residence. Furthermore, the Deputies would have realized that suicidal individuals and those under the influence of alcohol are unpredictable. These factors should have prompted the Deputies to be prepared with a non-lethal or less lethal option. Moreover, had the Deputies performed a proper assessment, they would have realized that they needed to contact dispatch and request PERT.

As stated above, there was no burden to the Deputies to take the time to obtain more information or to contact dispatch.

The consequences to the community of imposing a duty to exercise care, with resulting potential liability, would actually benefit the community. The imposition of a duty would insure that Deputies are properly trained. The imposition of a duty would let the public know that each deputy would properly assess a situation before entering an unknown situation. The “knowledge” would reduce the risk of harm to the deputy and the public at large. Moreover, the potential liability would be reduced as the Deputies would simply follow their own guidelines and in non-emergency situations, obtain the necessary information that would reduce liability and harm to the Deputies and the public which it is sworn “To Protect and Serve.”

Where a public entity is involved, the court considers the following additional factors: the availability, cost, and prevalence of insurance for the risk involved; the extent of the agency’s powers; the role imposed on it by law; and the limitations imposed on it by budget. *Thompson v. County of Alameda* (1980) 27 Cal.3d 741, 750, 167 Cal.Rptr. 70, 614 P.2d 728; *Dutton v. City of Pacifica* (1995) 35 Cal.App.4th 1171, 1175, 41 Cal.Rptr.2d 816; *Allen v. Toten* (1985) 172 Cal.App.3d 1079, 1086–1087, 218 Cal.Rptr. 725. “[W]hen addressing conduct on the part of a defendant that is ‘deliberative, and

... undertaken to promote a chosen goal, ... [c]hief among the factors which must be considered is the social value of the interest which the actor is seeking to advance.’ [Citations omitted]” (*Parsons, supra*, 15 Cal.4th at p. 473, 63 Cal.Rptr.2d 291, 936 P.2d 70).

Here, there would be no additional cost to the agency. All the resources were already at the disposal of the Deputies. They could have called dispatch. Each deputy was trained on the non-lethal and less lethal force options.

The existence of a duty of care is a question of law to be determined by the court alone. *Ballard v. Uribe* (1986) 41 Cal.3d 564, 572, fn.6. This is because “legal duties” are... merely conclusory expressions that, in cases of a particular type, liability should be imposed for damages done. *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 434. Duty is simply a shorthand expression for the sum total of policy considerations favoring a conclusion that the plaintiff is entitled to legal protection. *Dillon v. Legg* (1968) 68 Cal.2d 728, 734.

In *Grudt v. City of Los Angeles* (1970) 2 Cal.3d 575, 86 Cal.Rptr. 465, 468 P.2d 825, Grudt, who was slightly hard of hearing, was driving in a high crime area when plain clothes police officers in

an unmarked vehicle unsuccessfully attempted to stop him and observed him reach under the front seat of the car. Two other plain clothes officers who had heard a broadcast about the pursuit intercepted Grudt at an intersection and one of them tapped loudly on Grudt's window with a loaded shotgun. According to the officer, he shot Grudt when Grudt suddenly accelerated, brushed past one officer and struck the other in the leg; according to other evidence, Grudt's car had not moved at the time the shots were fired. Grudt died within seconds. At the time of the shooting, marked police vehicles were converging on the intersection from north and south. Grudt's wallet was found under the seat of the car. (*Id.* at pp. 581–582, 86 Cal.Rptr. 465, 468 P.2d 825.)

The *Grudt* court found the trial court erred in removing the issue of negligence from the jury, as the evidence most favorable to the plaintiff could have supported a view that Grudt, driving in a high crime area late at night and hailed to stop by men in plain clothes, thought he was going to be robbed, tried to elude the robbers, hid his wallet under his seat and was shot when his car stopped at an intersection. Questions of negligence were presented by the officers' decisions to arrest Grudt without waiting for uniformed officers to

arrive, to tap on the window with a shotgun, and to use deadly force. “At the very least, the evidence favorable to plaintiff raised a reasonable doubt whether [the officers] acted in a manner consistent with their duty of due care when they originally decided to apprehend Grudt, when they approached his vehicle with drawn weapons, and when they shot him to death.” (*Grudt, supra*, 2 Cal.3d at p. 587, 86 Cal.Rptr. 465, 468 P.2d 825.) (*Grudt, supra*, 2 Cal.3d at p. 587, 86 Cal.Rptr. 465, 468 P.2d 825.)

Similarly, in *Munoz v. Olin* (1979) 24 Cal.3d 629, 156 Cal.Rptr. 727, 596 P.2d 1143, police officers investigating arson incidents in Munoz’ neighborhood shot Munoz in the belief he was the person they had seen igniting a fire by a local business. The court stated, “Defendants do not dispute that an officer’s lack of due care can give rise to negligence liability for the intentional shooting death of a suspect. In *Grudt* [, *supra*,] 2 Cal.3d 575 [86 Cal.Rptr. 465, 468 P.2d 825] ... this court expressly so held.” (*Munoz v. Olin, supra*, 24 Cal.3d at p. 634, 156 Cal.Rptr. 727, 596 P.2d 1143.) The *Munoz* court went on to find substantial evidence to support the jury’s finding of negligence in that defense evidence suggested Munoz was innocently on his way home, the officers were mistaken in their determination he

was the arsonist they had seen, and the officers failed to warn Munoz or attempt to apprehend him by other means. (*Id.* at pp. 635–637, 156 Cal.Rptr. 727, 596 P.2d 1143.)

Grudt and *Munoz* implicitly recognize a duty on the part of police officers to use reasonable care in deciding to use and in fact using deadly force. (See also *Davis v. City of Sacramento* (1994) 24 Cal.App.4th 393, 404–406, 29 Cal.Rptr.2d 232 [upholding jury verdict of no negligence in police shooting of man during investigation of domestic disturbance; issue in dispute was whether officer used reasonable care, with no discussion of duty].)

VI. A DUTY WAS CREATED AS A RESULT OF A SPECIAL RELATIONSHIP

A duty can be created when a special relationship exists. In *Williams v. State of California* (1983), 34 Cal.3d 18, 23-24, the court stated:

“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.).”

Here, a special relationship was created when Deputy King and Deputy Geer made a decision to perform a welfare check on Hayes.

Clearly, California courts have not been persuaded to adopt a limiting approach, and still receive and consider evidence offered to show that “tactical choices” of police officers induced reliance or increased the risk of harm and therefore created a “special relationship” giving rise to a duty of care. (See, e.g., *Benavidez v. San Jose Police Dept.* (1999) 71 Cal.App.4th 853, 84 Cal.Rptr.2d 157, which, without reference to *Adams*, found the proffered evidence relevant to the legal question whether a “special relationship” was created by strategic law enforcement decisions but found it insufficient.)

In *Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 110 Cal.Rptr.2d 528, 28 P.3d 249 (*Lugtu*), the Supreme Court held that a law enforcement officer has a duty to exercise reasonable care for the safety of persons whom the officer stops. Relying on its earlier

opinion in *Williams*, the Supreme Court emphasized that “a duty of care does arise when an officer engages in ‘*an affirmative act which places the person in peril or increases the risk of harm....*’ ” (*Lugtu*, at p. 717, 110 Cal.Rptr.2d 528, 28 P.3d 249, quoting *Williams, supra*, 34 Cal.3d at p. 24, 192 Cal.Rptr. 233, 664 P.2d 137, italics added in *Lugtu* by the Supreme Court.) In the course of its opinion, the majority in *Lugtu* addressed the defendants’ argument “that the application of ordinary negligence principles ... will impair the ability of CHP officers to carry out their responsibilities and will result in an inordinate financial liability to the state, *because juries will be too ready to second-guess police officers in the exercise of their discretion in making traffic stops.*” (*Lugtu*, at p. 721, 110 Cal.Rptr.2d 528, 28 P.3d 249, italics added.) The court rejected this argument, pointing out, among other things, that the numerous considerations a law enforcement officer is required to take into account in the performance of his or her duties “are not beyond the understanding or experience of most jurors, and there is little reason to suspect that juries in general will not grant an officer engaged in law enforcement duties appropriate leeway in assessing the reasonableness of the officer’s conduct.” (*Id.* at p. 722, 110 Cal.Rptr.2d 528, 28 P.3d 249.)

Here, the evidence presented illustrates that Deputy King and Deputy Greer as law enforcement officers underwent extensive training, which includes training in how to reasonably respond to situations involving mentally ill persons. Deputy King and Deputy Greer admitted that they went into the home for a “welfare check” which implies that there was a concern for the safety of decedent Hayes. Once they had this awareness, the Deputies had a duty to follow the agency’s protocol on assessing a situation before entering the home.

As in *Adams* and the present case, citizens typically request police intervention in such situations and the police invariably respond. Members of the public who seek rescue assistance justifiably expect the police to know what they are doing and to act reasonably in the circumstances. Imposition of liability for unreasonable “tactical choices” that conflict with approved police procedures (whether mandated by law or not), which induce reliance or increase the pre-existing risk of harm, and which proximately cause injury, would not only meet the societal goal of compensating injured tort victims, but would act as an incentive to police officers to provide better police services and also encourage police departments and municipalities to

hire competent officers and to train them well.

Both Deputy King and Deputy Geer owed a duty to Hayes to act as a reasonable person, and follow all laws of California and the United States as well as the Constitution of California and the United States Constitution.

Under California law, it is well established that a police officer's lack of due care can give rise to negligence liability for the shooting of a suspect or civilian. *Munoz v. Olin* (1979) 24 Cal.3d 629; *Grudt v. City of Los Angeles* (1970) 2 Cal.3d 575. A police officer who possesses and uses a firearm must use the amount of care in handling a loaded weapon as would a reasonably prudent person. *Miller v. Kennedy* (1997) 196 Cal.App.3d 141, 145. By reason of the dangerous nature of firearms, a person handling them is held to a high degree of care and is required to exercise a high degree of caution. *Id.*; *Jensen v. Minard* (1955) 44 Cal.2d 325. The violation of police procedures or regulation by its officers constitutes negligence per se. *Peterson v. City of Long Beach* (1979) 24 Cal.3d 238. Negligence may also be found where police officers create the danger or increase the peril to the plaintiff by the officer's affirmative acts. *McCorkle v.*

City of Los Angeles (1969) 70 Cal.2d 252; *Sparks v. City of Compton*
(1976) 64 Cal.App.3d 592.

The Court in *Billington* stated:

“In *Alexander v. City and County of San Francisco*, we reversed summary judgment in favor of police officers who shot a mentally ill man in the course of forcibly entering his house to arrest him. Public health inspectors had gotten a forcible entry inspection warrant, to investigate a sewage leak. When officials went to execute the warrant, they heard the man threaten, “I’m going to get my gun and use it,” and called the police, who brought in a SWAT team. The SWAT team broke into the house and shot and killed him after he twice tried to shoot his gun at them (it misfired both times).”

“The plaintiffs did not claim that the police used unreasonable force at the moment of shooting; instead, their “excessive force claim turn[ed] on the force the officers used in entering the house, not the force they used or didn’t use once they had entered.” We held that, without an arrest warrant or exigent circumstances, “the police had no right to enter[his] house” to arrest him, and that the inspection warrant didn’t count as an arrest warrant. Thus, the reasonableness of the forcible entry turned on whether the officers entered to arrest the man (and whether exigent circumstances supported the warrantless entry), or whether they entered to execute the inspection warrant, in which case the “massive disproportionality of the response to the problem of a leaky sewer pipe” would render the forcible entry unreasonable. **We held that if the police committed an independent Fourth Amendment violation by using unreasonable force to enter the house, then they could be held liable for shooting the man—even though they reasonably shot him at the moment of the shooting—because they “used excessive force in creating the situation which caused [the man] to take the actions he did.”**

(Emphasis added) *Billington v. Smith* (2002) 292 F.3d 1177, 1188.

Brown v. Ransweiler (2009) 171 Cal.App. 4th 516 can be distinguished because it was an emergency situation where law enforcement officers were attempting to apprehend a murder suspect when an officer fell to the ground in front of the vehicle the murder suspect was in and reasonably fearing the vehicle would run over his fellow officer, an officer fired shots one of which hit the Plaintiff bystander.

Brown states that tactical negligence is a viable claim to pursue, but under the facts of that case the Officer's actions were reasonable as a matter of law. In determining whether Deputy King and Deputy Geer were negligent, the court should take into consideration the circumstances from the time the Deputies arrived until the shooting. Secondly, this was not an emergency situation and no exigent circumstances existed. Thirdly, Hayes was under the influence of alcohol, and the officers are trained that if a person is under the influence of alcohol, it affects their mind and perceptions and how an officer should communicate with them. Clearly, there exists evidence

that the Deputies pre-shooting tactics and decisions created the situation and increased the risk of harm to everyone.

The Deputies, upon arrival to the private residence regarding a possible domestic violence situation, were informed by Ms. Jones that she and her boyfriend, Hayes, had been involved in a verbal argument and no physical violence occurred. No crime had occurred or was in progress. The situation had stabilized. Ms. Jones told Deputy King that the verbal argument occurred because she had intervened earlier when Hayes tried to commit suicide by inhaling fumes from a vehicle (which was parked in the driveway).

A police officer in the Ninth Circuit has a constitutional duty under the due process clause to protect an individual where that officer places the individual in danger through affirmative conduct. *Penilla v. City of Huntington Park* (9th Cir. 1997) 115 F.3d 707; *L. W. v. Grubbs* (9th Cir. 1992) 974 F.2d 119; *Wood v. Ostrander* (9th Cir. 1989) 879 F.2d 583. When a police officer places a person in peril with deliberate indifference to their safety, a constitutional claim is created under the Fourteenth Amendment, section 1983. *Id.* Thus, a police officer may be liable for the use of excessive force even where the plaintiff points his gun at the officer and the officer justifiably

shoots the plaintiff, if the officer used excessive or unreasonable force in creating the situation which caused the plaintiff's injury. *Alexander v. City and County of San Francisco* (9th Cir. 1994) 29 F.3d 1355. Moreover, if the officer shoots an individual when the officer is in a position to avoid the danger presented by that individual, such a shooting may constitute excessive force. *Acosta v. City and County of San Francisco* (9th Cir. 1996) 83 F.3d 1143, overruled on other grounds. A law enforcement officer may commit a constitutional violation when he discharges his firearm and the bullet strikes an unintentional victim. *Robins v. Meecham* (9th Cir. 1995) 60 F.3d 1436. A violation of police procedures is relevant in determining whether the officer has committed a constitutional violation. *Fargo v. City of San Juan Batista* (9th Cir. 1988) 857 F.2d 638, overruled on other grounds. Furthermore, the mere fact alone that a person possesses a deadly weapon does not justify the use of deadly force. *Harris v. Roderick* (9th Cir. 1997) 126 F.3d 1189, 1202.

In *Billington v. Smith* (9th Cir. 2002) 292 F.3d 1177, the court stated:

“[T]hat courts must judge the
“reasonableness of a particular use of force
... from the perspective of a reasonable
officer on the scene, rather than with the

20/20 vision of hindsight.” That goes for the events leading up to the shooting as well as the shooting. Our precedents do not forbid *any* consideration of events leading up to a shooting. But neither do they permit a plaintiff to establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided.”

“[W]here an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force.” *Id.* at 1189.

Petitioners should not be allowed to ignore their training in creating a situation which led them to take the life of a person by asserting that it was defensive. The Deputies created the situation by failing to use reasonable care in his/her tactical conduct and decisions and increased the risk of harm by failing to “Protect and Serve” when they entered the residence without a proper assessment of the situation. Petitioners admit at page 9 of their opening brief that the “totality of the circumstances” is considered in addressing the reasonableness of an officer’s conduct. Under this scenario, the “totality of the circumstances” would start from the time the call was received by the Deputies to the time the force was used. This would

impose a duty on the Deputies to act in a reasonable manner and it would be for a jury to decide the reasonableness of the officers' conduct.

VII. CONCLUSION

Under California negligence law, a law enforcement officer owes a duty to use reasonable care in his/her tactical conduct and decisions preceding the use of deadly force. It should be left within the purview of a jury to make the determination as to whether liability should rest with a law enforcement officer after listening to and weighing the evidence. Petitioners simply wish to create a broad brushstroke rule that would extinguish liability of a law enforcement officer without consideration of his tactical conduct and decisions in a non-emergent situation. To deny a duty of care would have terrible implications in that a law enforcement officer could essentially ignore his training and simply go into any situation haphazardly and without risk of any consequences for increasing the risk to not only to himself, but to the public at large.

It is requested that this court once and for all state unequivocally that a law enforcement officer owes a duty to use

reasonable care in his/her tactical conduct and decisions preceding the use of deadly force.

Dated: December 8, 2011

Respectfully submitted,
GOMEZ LAW GROUP

By:  _____

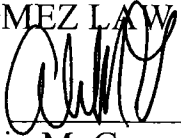
Alvin M. Gomez

Attorney for Respondent C.H.,
a minor by and through her
guardian ad litem David J.
Hayes

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.204(c)(1), I hereby certify that this brief contains 6,481 words, including footnotes. In making this certification, I have relied on the word count of Microsoft Word used to prepare the brief.

Respectfully submitted,
GOMEZ LAW GROUP

By:  _____
Alvin M. Gomez
Attorney for Respondent C.H.,
a minor by and through her
guardian ad litem David J.
Hayes

1 **IN THE SUPREME COURT OF CALIFORNIA**

2
3 C.H., a minor by and through her
guardian ad litem, DAVID J. HAYES,

Case No.: S193997

4 Plaintiff/Appellant/Respondent,

9th Cir. No. 09-55644

5
6 v.

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

Certificate of Service

8 Defendants/Appellees/Petitioners.
9
10
11
12

13 I, the undersigned declare under penalty of perjury that I am over the age of
14 eighteen years and not a party to the within action; my business address is 853 Camino
Del Mar, Suite 100, Del Mar, California 92014.

15 On December 8, 2011, I served the foregoing document(s) described as:

16 **Respondent's Brief on the Merits**

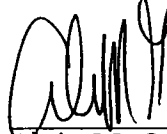
17 (X) **BY MAIL.** I served in a sealed envelope(s) the above-described
18 document(s) as follows: I am readily familiar with the firm's practice of
19 collection and processing correspondence for mailing. Under that
20 practice, it would be deposited with the United States postal service on
21 that same day in the ordinary course of business. I am aware that upon
motion of party served, service is presumed invalid if postal cancellation
date or postage meter date is more than one (1) day after date of deposit
for mailing in affidavit.

22 on the following interested party(ies) in this action:

23 **See Attachment A**

24 Executed on December 8, 2011 in Del Mar, California.

25 I declare under penalty of perjury under the laws of the State of California, that
26 the foregoing is true and correct.

27 

28 _____
Alvin M. Gomez

ATTACHMENT A

Morris G. Hill, Esq.

Thomas E. Montgomery, County Counsel
1600 Pacific Highway, Room 355
San Diego, California 92101
Email: morris.hill@sdcounty.ca.gov
Telephone: (619)531-5244
Facsimile: (619)531-6005
Attorneys for Petitioners

Clerk's Office

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

David J. Hayes

5651 Fontaine Street
San Diego, California 92120