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' REPLY BRIEF ON THE MERITS

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I

THE QUESTION

A. The Ninth Circuit's 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.[1]

II

EACH SIDE'S PROPOSED RESPONSE

A. Petitioners' *Revised* Proposed Response (Revised in Reply to Respondent's Brief on the Merits).

Petitioners' merits brief proposed a "totality of circumstances" response to the Ninth Circuit's question, but respondent's merits brief goes beyond "totality of circumstances" to argue that decisions made prior to the 9-1-1 emergency call (Deputy King not carrying a beanbag shotgun in his patrol car) and subsequent to Mr. Hayes' death (deputies not writing reports)[2] are actionable negligence. Such purely discretionary decisions cannot be addressed by duty alone. Petitioners propose a *revised* response that allows privileges and immunities to be factored in, as follows:

> "Under California negligence law, negligence liability cannot arise from discretionary tactical conduct and decisions of law enforcement officers preceding the use of deadly force during criminal or administrative investigations or emergencies unless the use of deadly force has been found to have been unreasonable, unprivileged or unprotected by immunity."

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[1] The Ninth Circuit phrased the question 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."

[2] Deputies do not write reports after fatal shootings; they are interviewed by homicide detectives, as are other witnesses.

B. Respondent's Proposed Response -- As Stated in Respondent's Brief On the Merits.

Respondent's merits brief proposed the following response:

> "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."

That response clashes with this Court's precedent denying recovery "for injuries caused by the failure of police personnel . . . to investigate properly, or the failure to investigate at all, where the police had not induced reliance on a promise, express or implied, that they would provide protection." (*Williams v. State of California* (1983) 34 Cal.3d 18, 25.) Most of respondent's negligence arguments involve failure to investigate further, as more fully discussed at section III. C. of this brief.

The deputies intended to perform a welfare check to investigate information from Ms. Neill (called Ms. Jones in respondent's merits brief) that might have justified initiation of administrative proceedings under Welfare and Institutions Code section 5150 -- involuntary detention for mental evaluation. Government Code section 821.6 provides that "[a] public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause." Section 821.6 is broadly construed. (*Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1048; accord, *Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1293.) Investigations are deemed part of judicial and administrative proceedings encompassed by section 821.6. (*Paterson v. City of Los Angeles* (2009) 174 Cal.App.4th 1393, 1405; *Richardson-Tunnell v. Schools Ins. Program for Employees (SIPE)* (2007) 157 Cal.App.4th 1056, 1062; *Amylou R. v. County of Riverside* (1994) 28 Cal.App.4th 1205, 1209-1210.) Although "'section 821.6 has primarily been applied to immunize prosecuting attorneys and other similar

individuals, this section is not restricted to legally trained personnel but applies to all employees of a public entity. [Citation.]' [Citation.] Section 821.6 'applies to police officers as well as public prosecutors since both are public employees within the meaning of the Government Code.' [Citation.]" (*Asgari v. City of Los Angeles* (1997) 15 Cal.4th 744, 756-757.)

In the law enforcement context, this Court has held that duty "'is only a threshold issue, beyond which remain the immunity barriers.'" (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 202, quoting *Whitcombe v. County of Yolo* (1977) 73 Cal.App.3d 698, 706.) Such "hurdles are not overcome by the existence of a special relationship." (*Davidson v. City of Westminster*, *supra*, 32 Cal.3d at 202.) Respondent's formulation ignores the effect of privileges and immunities, which are not jury questions but are legal barriers that should be overcome (if at all) before a case goes to a jury.

III

NEGLIGENCE OVERVIEW

A. *Rowland* Factors.

Respondent's merits brief recites the *Rowland* factors, the first of which is foreseeability of harm to the injured party. (*Rowland v. Christian* (1968) 69 Cal.2d 108, 112.) The *Rowland* factors work best for those whose jobs do not require risking personal safety. It is foreseeable that police activity during some investigations and emergencies may lead to defensive use of deadly force. Respondent's merits brief argues (at page 15) that: "Had the Deputies not entered the residence, Hayes would not have been shot." Why stop there? If deputies did not act as community caretakers, Mr. Hayes would not have been shot. If deputies did not respond to 9-1-1 emergency calls, Mr. Hayes would not have been shot. If deputies did not carry guns, Mr. Hayes would not have been shot.

B. *Thompson* Factors.

When public agencies are involved, this Court has added additional elements to the *Rowland* factors: the extent of the agency's powers, the role imposed upon it by law, and the limitations imposed upon it by budget. (*Thompson v. County of Alameda* (1980) 27 Cal.3d 741, 750.) In the law enforcement context, this Court has repeatedly declined to adopt the legal principle that if an actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, the actor is under a duty to exercise reasonable care to prevent the risk from taking effect, because "the assertion of a cause of action against the police defendants under this theory would raise difficult problems of causation and of public policy." (*Thompson v. County of Alameda, supra,* 27 Cal. 3d at 752.)

C. Respondent's View of Law Enforcement Negligence.

Respondent's merits brief goes beyond the material facts identified by the Ninth Circuit. Those facts were as follows: "During a three-minute conversation, Neill advised Deputy King that she and Hayes had been arguing about his attempt that night to commit suicide by inhaling [car] exhaust fumes . . . . Neill stated she was concerned about Hayes harming himself, indicating that he had attempted to do so on prior occasions. Deputy King did not ask Neill about the manner of Hayes's prior suicide attempts and was unaware that he had previously stabbed himself with a knife. Although Neill advised Deputy King that there were no guns in the house, she made no indication that Hayes might be armed with a knife. Hayes had been drinking heavily that night, but Deputy King did not asked [sic] Neill whether he was under the influence of alcohol or drugs. Deputy King also did not ask about Hayes's physical characteristics or if anyone

else was in the house. . . . Although the deputies had been sent a notification that Hayes was intoxicated, neither deputy checked . . . and both were unaware of this information. The deputies had also not checked whether there had been previous incidents involving Hayes and were unaware that he had been taken into protective custody four months earlier in connection with his suicide attempt involving a knife. Finally, the deputies did not discuss whether the department's Psychiatric Emergency Response Team ('PERT') should be called. Upon entry, both deputies had their guns holstered. Deputy King was also carrying a Taser, although it was not ready for immediate use. While moving in the dimly lit house, Deputy King advanced ahead of Deputy Geer and was using his sixteen-inch flashlight, which he had been trained to use as an impact weapon. Once in the living room, Deputy King saw Hayes in an adjacent kitchen area, approximately eight feet away from him. Because Hayes's right hand was behind his back when Deputy King first saw him, Deputy King testified that he ordered Hayes to 'show me his hands.' While taking one to two steps towards Deputy King, Hayes raised both his hands to approximately shoulder level, revealing a large knife pointed tip down in his right hand. Believing that Hayes represented a threat to his safety, Deputy King immediately drew his gun and fired two shots at Hayes, striking him while he stood roughly six to eight feet away from him. Deputy Geer simultaneously pulled her gun as well, firing two additional rounds at Hayes." (*Hayes v. County of San Diego*, (9th Cir. 2011) 658 F.3d 867, 869 *(Hayes II)*.)

Respondent's brief cites dozens of additional facts, most of which actually amount to argumentative conclusions. Page numbers refer to respondent's merits brief:

1. "Deputy King is certified to use the less lethal weapon of a bean bag shotgun[3]; yet, he did not carry it in his vehicle." (Pages 2-3.)

2. "Deputy King, Deputy Geer and the County Sheriff's Department failed to perform a cross check on address or name . . . before entering the residence for a 'welfare check.'" (Page 3.)

3. "The interview with Ms. Jones lasted at most 38 seconds." (Page 4.)

4. "Deputy King and Deputy Geer failed to . . . assess the situation before entering an unknown situation." (Page 4.)

5. "Neither Deputy King nor Deputy Geer asked the necessary follow up questions." (Page 5.)

6. "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)."[4] (Page 5.)

7. "King and Geer 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 circumstances." (Page 5.)

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[3] A twelve-gauge shotgun that uses cloth "beanbags" filled with lead shot -- may be fatal at less than fifty feet. See *Deorle v. Rutherford* (9th Cir. 2001) 272 F.3d 1272, 1277-79 and n.13.

[4] A San Diego "PERT" is "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.

8. "The Deputies carry less lethal weapons, such as a taser[5] or a bean bag shotgun that can be used to address a suicidal person." (Page 5.)

9. "Deputy King . . . had the opportunity to ask . . . [t]he number of suicide attempts." (Page 6.)

10. "Deputy King . . . had the opportunity to ask . . . [w]hether any deputy had been called to the residence before that date." (Page 6.)

11. "Deputy King . . . did not ask follow up questions regarding the suicide attempt." (Page 6.)

12. "Deputy King . . . had the opportunity to ask . . . the height and weight of Hayes." (Page 6.)

13. "Deputy King . . . had the opportunity to ask . . . [w]hether any one else was in the residence." (Page 6.)

14. "Deputy King admittedly had the opportunity to contact dispatch to request a history concerning the person's name,[6] whether or not calls had been made to the residence; yet, he failed to ask dispatch for this information."[7] (Page 7.)

15. "Deputy King failed to contact dispatch to assess or confirm whether there had been prior suicide attempts at this address." (Page 7.)

16. "Deputy King failed to contact dispatch to confirm whether there had been prior suicide attempts involving Hayes." (Page 7.)

17. "Neither Deputy King nor Deputy Geer contacted dispatch for a supervisor or guidance regarding the dealing with a person who is suicidal . . . ." (Page 7.)

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[5] "TASER" (for "Thomas A. Swift's Electric Rifle") is the trade name for a device that can stun with electric shocks, but is sometimes ineffective, as in the famous 1991 incident involving Rodney King.

[6] Mr. Hayes' prior incident was more than three months earlier, and for that reason, the 9-1-1 operator did not have such information readily available.

[7] The 9-1-1 caller did not report a suicide situation.

18. "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."[8] (Page 7.)

19. 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." (Page 7.)

20. "The Deputies created a special relationship when they made the decision to perform a welfare check on Hayes."[9] (Page 8.)

21. "There can be no dispute that that before entering the home, there was no emergency situation." "When the Deputies arrived, the situation had been resolved." (Page 8.)

22. "[T]here was 'contagious fire' by both deputies . . . [i]t is not clear whether Deputy King or Deputy Geer fired the first shot." (Page 8.)

23. "When firing at a target, the officer is supposed to know where the round is supposed to impact." (Page 8.)

24. "Neither Deputy King nor Deputy Geer prepared a written report regarding the use of force . . . ." (Page 8-9.)

25. "Deputy King and Deputy Geer created the situation that led to the death of Hayes."[10] (Page 9.)

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[8] Mr. Hayes was not known to have been mentally ill.

[9] This is a legal conclusion; this Court analyzed special relationships in the context of third-party harm in *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1128-1130.

[10] Another legal conclusion; this Court also analyzed danger creation in *Zelig v. County of Los Angeles, supra,* 27 Cal.4th at 1128-1130.

26. "Deputy King and Deputy Geer placed themselves in a situation that may have created 'suicide by cop.'"[11] (Page 9.)

27. "It is clear that . . . Hayes did not have the knife in his hand when he was shot."[12] (Page 10.)

28. "The shooting of Hayes was . . .based upon the . . . negligence and recklessness of Deputy King and Deputy Geer in failing to use reasonable care before entering the residence for a welfare check."[13] (Page 10.)

29. "The Deputies had other non-lethal and less lethal force options, such as verbal commands; bean bag shot gun; pepper spray;[14] or taser that could have been used . . . ." (Page 10.)

30. "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.'" (Page 10.)

31. "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."[15] (Page 11.)

32. "The lack of warning is another factor that illustrates the lack of reasonable care by the deputies."[16] (Page 11.)

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[11] Mr. Hayes never communicated an intention to provoke law enforcement officers (or anyone else) into killing him.

[12] Plaintiff's expert witness Roger Clark speculated that Mr. Hayes had a cigarette in his hand.

[13] The house was in an ordinary suburban neighborhood.

[14] Pepper spray is an aerosol device that shoots a stream of oleoresin capsicum (OC), an irritant that can temporarily blind someone.

[15] Welfare checks may involve unknown situations.

[16] Ms. Neill yelled at Mr. Hayes to drop the knife.

33. "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."[17] (Page 11.)

34. "Deputy King's and Deputy Geer's decision to enter the residence without a proper assessment . . . increased the risk of harm not only to the Deputies but to Hayes and those present at the residence."[18] (Page 12.)

35. "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 [sic] suicidal attempt. The Deputies further would have determined what decisions they were facing when entering the house: such as weapons, if any, lighting, layout of the house, and any obstacles."[19] (Page 12.)

36. "[T]he Deputies' decision to perform a welfare on Hayes created a special relationship with Hayes that required them to use due care."[20] (Page 13.)

37. "Had the Deputies not entered the residence, Hayes would not have been shot." (Page 15.)

38. "The moral blame clearly rests with the Deputies for their decision, actions and omissions."[21] (Page 15.)

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[17] The deputies did not suspect criminal activity.

[18] Mr. Hayes was the only person injured.

[19] Ms. Neill told deputies that Mr. Hayes was in a bedroom; Mr. Hayes was actually in the kitchen and used a kitchen knife.

[20] The deputies made no promises.

[21] The deputies had no prior history with Mr. Hayes or Ms. Neill.

39. "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." (Page 16.)

40. "[T]here was no burden to the Deputies to take the time to obtain more information or to contact dispatch." (Page 16.)

41. "[T]he Deputies had a duty to follow the agency's protocol on assessing a situation before entering the home." "The violation of police procedures or regulation by its officers constitutes negligence per se."[22] (Pages 24-25.)

42. "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." (Page 27.)

43. "The Deputies created the situation by failing to use reasonable care in his/her [sic] tactical conduct and decisions and increased the risk of harm by failing to 'Protect and Serve' . . . ."[23] (Page 30.)

D. California Law Regarding Discretionary Choices.

Government Code section 820.2 provides: "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the

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[22] A legally-inaccurate legal conclusion; see *Minch v. California Highway Patrol* (2006) 140 Cal.App.4th 895, 907, regarding the enactment of Evidence Code section 669.1. Factually, the Sheriff's Department did not find that the deputies violated any protocols, procedures or regulations.

[23] It is unclear whether respondent contends that law enforcement officers should not perform welfare checks or community caretaker tasks.

exercise of the discretion vested in him, whether or not such discretion be abused."

This Court has not afforded discretionary protection to ordinary operational decisions when public employees perform essentially the same functions as their private-sector counterparts. Examples include criminal defense attorneys,[24] psychiatrists,[25] and botanists.[26] As explained in the *Barner* opinion (dealing with criminal defense attorneys), not all acts requiring public employees to choose among alternatives entail the use of "discretion" within the meaning of section 820.2. "Immunity is reserved for those '*basic policy decisions* [which have] . . . been [expressly] committed to coordinate branches of government,' and as to which judicial interference would thus be 'unseemly.' Discretionary immunity "should be no greater than is required to give legislative and executive policymakers sufficient breathing space in which to perform their vital policymaking functions." An employee's decision may require the exercise of considerable judgmental skills without rising to the level of a basic policy decision for which Government Code section 820.2 provides immunity. An initial decision whether or not to provide services to an individual might involve the exercise of discretion pursuant to section 820.2, but an employee who undertakes to render such services is not immune for the negligent performance of professional duties that do not amount to policy or planning decisions. (*Barner v. Leeds* (2000) 24 Cal. 4th 676, 684-87.)

Law enforcement emergency investigations cannot be analyzed by the private-employee standard of care, because such functions require

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[24] *Barner v. Leeds* (2000) 24 Cal. 4th 676.

[25] *Tarasoff v. Regents of the University of California* (1976) 17 Cal.3d 425.

[26] See *Johnson v. State of California* (1968) 69 Cal.2d 782, 797.

governmental authority. Even railroad police officers must satisfy governmental training requirements and be commissioned by the Governor; see Penal Code section 830.33(e). A 9-1-1 caller is not given the option of a private-sector response. Law enforcement officers personify governmental authority. This Court's precedent does not preclude extending discretionary protection to them, as federal courts have done for federal law enforcement officers, as explained below.

E. Federal Negligence Liability For Discretionary Conduct.

The United States Supreme Court has ruled out negligence as a basis for law enforcement liability under 42 U.S.C. section 1983. "We . . . have held that the Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." (*County of Sacramento v. Lewis* (1998) 523 U.S. 833, 848-49.) However, the negligent conduct of federal law enforcement officers can be the basis for federal liability under the Federal Tort Claims Act (FTCA) -- with an important exception: there is no liability for conduct that is "based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." (28 U.S.C. § 2680(a).)[27]

Federal courts use a two-step analysis to determine whether a federal employee's conduct is discretionary, and would therefore be protected from federal negligence liability. First, did the challenged action involve an element of judgment or choice? If a federal statute, regulation, or policy specifically prescribed a course of action the federal employee had to follow, the employee had no rightful choice. But if the challenged conduct

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[27] Federal courts applying the FTCA lack jurisdiction over intentional torts; see *Koch v. United States* (D.D.C. 2002) 209 F. Supp.2d 89, 94.

involved an element of choice or judgment, courts go to the second step, asking if the federal employee's judgment was of the kind that the discretionary function exception was designed to shield. If the employee's judgment involved considerations of social, economic, or political policy, the discretionary exception to liability applies. (*Sabow v. United States* (9th Cir. 1996) 93 F.3d 1445, 1451-53.)

Regarding the first step, the *Sabow* opinion held that when a federal law enforcement procedural manual consists of a set of investigative guidelines to be followed at the discretion of federal investigating officers in light of the specific circumstances surrounding a particular investigation, decisions how to investigate and who to investigate are protected exercises of discretion. (*Sabow v. United States*, *supra*, 93 F.3d at 1452-53.) This is analogous to the effect of Government Code section 820.2 and Evidence Code section 669.1 for California public employees; negligence would not be presumed unless a non-discretionary mandatory course of conduct was officially prescribed.

Regard the second step (whether the federal employee's judgment involves considerations of social, economic, or political policy), the *Sabow* opinion approvingly cited *Flax v. United States* (D.N.J. 1994) 847 F.Supp. 1183, a case that resulted from a failed attempt by Federal Bureau of Investigation agents to keep kidnappers under surveillance after ransom was delivered. (The kidnapping victim was found shot to death the next day.) The FBI agents had to balance competing concerns, all grounded in considerations of public policy. The foremost concern was balancing the need to apprehend the kidnappers against the risk of harm to the victim. "[T]he surveillance came about as the result of a *sudden and unexpected emergency,* and had to be conducted in a major urban area with heavy traffic flow. Clearly, no policy guideline or regulation could dictate the exact course of pursuit the agents were to take, and *this situation demanded*

that the agents exercise their discretion throughout the entire surveillance. Additionally, it is equally clear that the agents, who were required to attempt to apprehend the kidnappers but minimize the risk of harm to the victim during the surveillance, did not abuse this discretion by losing track of [the kidnappers.] Therefore, this Court must conclude that the judgment exercised by the agents was the type that the Congress intended the discretionary function to shield." (*Flax v. United States*, *supra*, 847 F. Supp. at 1190-91, Italics added.)

F. California Mandatory Duty Liability.

California law implicitly provides protection to public entities against alleged negligence liability resulting from the entity's discretionary choices. Government Code section 815.6 provides: "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." For an entity to be liable under section 815.6, the relevant enactment must be *obligatory* (rather than merely discretionary or permissive) in its directions to the public entity; it must *require*, rather than merely authorize or permit, a particular action to be taken or not taken. It is not enough to create obligations to perform functions if the functions themselves involve exercises of discretion. The mandatory duty must have been "designed" to protect against the particular kind of injury the plaintiff suffered. The inquiry in that regard goes to the legislative *purpose* of imposing the duty. It is not enough that the enactment "confers some benefit" on the class to which a plaintiff may belong. (*Haggis v. City of Los Angeles* (2000) 22 Cal. 4th 490, 498-99.) A public entity is not liable for breach of mandatory duty by its alleged negligence in hiring and supervising a wrongdoer. "We conclude that a

direct claim against a governmental entity asserting negligent hiring and supervision, when not grounded in the breach of a statutorily imposed duty owed by the entity to the injured party, may not be maintained." (*de Villers v. County of San Diego* (2007) 156 Cal.App.4th 238, 255-56.) The net effect is that a public entity's discretionary choices are protected from negligence liability.

IV

ARGUMENT

A. Negligence As Fall-Back.

This case was pleaded and pursued much the same way as many law enforcement deadly force cases. Respondent sought recovery under federal and state law. (*Hayes v. County of San Diego* (9th Cir. 2011) 638 F.3d. 688, 691 *(Hayes I)*.) Federal law authorizes recovery of attorney's fees (42 U.S.C. section 1988), and punitive damages can be awarded against individual defendants under federal law and California intentional tort law. Attorney's fees and punitive damages are not recoverable on a negligence theory, however. A negligence claim has no independent litigation value in a multi-theory deadly force case, because a plaintiff can only be compensated once per injury, regardless the number of viable legal theories that may authorize recovery of compensatory damages. The only value of a negligence theory in a deadly force lawsuit is as fall-back when other claims fail at the summary judgment stage or at trial. Negligence theories are then used to try to get a second bite at the apple, even though "it would be anomalous to impose liability for negligence with respect to conduct that would not give rise to liability if committed intentionally." (*Coprich v. Superior Court* (2000) 80 Cal.App.4th 1081, 1089.)

Many of the instances of negligence posited by respondent -- failing to "assess the situation" or ask "necessary follow up questions" -- are so formless and shapeless that they could be argued in every deadly force

lawsuit without changing a word. However, when law enforcement officers use deadly force it is almost always defensive, under emergency conditions, without time to do more assessing or ask more questions. "The time-frame is a crucial aspect of excessive force cases. Other than random attacks, all such cases begin with the decision of a police officer to do something, to help, to arrest, to inquire. If the officer had decided to do nothing, then no force would have been used. In this sense, the police officer always causes the trouble. But it is trouble which the police officer is sworn to cause, which society pays him to cause and which, if kept within constitutional limits, society praises the officer for causing." (*Plakas v. Drinski* (7th Cir. 1994) 19 F.3d 1143, 1150.)

There are no one-size-fits-all emergency tactics. Otherwise someone would have written out a set of fail-safe tactics, like the script to inform arrestees of the right to remain silent. Respondent would not be vaguely arguing about "follow up questions" or assessing "the situation." Law enforcement officers are among the likely victims of their own negligent tactical conduct and decisions, so it is especially unfair to argue that they should have done more. Anyone can be a Monday-morning quarterback.

B. Comparison to *Brown v. Ransweiler*.

Respondent in this case has the same attorney (Alvin Gomez) and the same law enforcement expert witness (Roger Clark) as the plaintiffs in the recent case of *Brown v. Ransweiler* (2009) 171 Cal.App.4th 516. The compilation of supposedly-negligent discretionary tactical decisions set forth in section III. C. above resembles a similar laundry list from the *Brown* case, perhaps due to common imagination. A comparison shows the weaknesses in respondent's negligence argument.

In *Brown,* officers had been trying to apprehend a murder suspect in a strip mall parking area. The suspect was driving a Jeep while trying to evade apprehension. He drove his Jeep over the strip mall curb and onto the sidewalk, gunning his engine and driving in the direction of two officers. Several officers fatally shot him. Bullet fragments ricocheted and smashed the window of a dentist's office, striking one of the plaintiffs inside. The plaintiffs sued the officers on theories including negligence and battery. The Court of Appeal noted that plaintiffs' expert witness "Clark reaches a number of surprising conclusions," including that the two officers towards whom the murder suspect drove his Jeep "knowingly and willfully placed themselves in a situation where a vehicle was coming in their direction." The following "facts" were asserted as examples of the officers' negligence:

"(1) several stores in the strip mall were open and doing business;"

"(2) [an officer] placed himself in a situation where he could not see the suspect;"

"(3) there is a lack of evidence that [the officer] 'communicated his plans of approach' to other officers, from which one can infer that he 'unilaterally decided on an approach to the suspect, which placed him and his partner . . . in a situation of danger';"

"(4) [the officer] approached [the suspect's] vehicle with his gun drawn, from which one can infer that he was 'careless in that [he] greatly increased the tension of the situation';"

"(5) [the officer] failed to warn the suspect before shooting him and did not make 'any effort to warn . . . [the suspect] to stop the Jeep';"

"(6) [the officer] was right next to the driver's door when he shot at [the suspect], and [the officer] had moved around to that side of the vehicle and crouched behind a trash can, waiting for [the suspect to back up toward him, from which one can infer that he 'could have attempted some other

method of subduing [the suspect] before firing on him' or could have 'attempted . . . other means of apprehension';"

"(7) [the suspect's] Jeep was blocked in by at least one patrol car, and there was no evidence that [the suspect] could have escaped by driving on the sidewalk, from which one can infer that [the suspect] would not have been able to escape;"

"(8) there was no evidence that any civilians were present on the sidewalk and in danger;"

"(9) [the officer] 'abandon[ed]' [another officer] 'on the sidewalk in front of a potentially moving Jeep.'"

(Brown v. Ransweiler, supra, 171 Cal.App.4th at 531, 535-536, 520.)

In this case and that one, the ultimate success of discretionary tactical conduct and decisions depended on the free-will actions of someone who was *not* under the physical control of any officer. In that case it was the murder suspect; in this case it was Mr. Hayes. In hindsight, different tactics might have worked better, but no one knows what the uncontrolled person might have done next, if not stopped instantly. Hindsight is 20/20, but no one can read minds.

C. Emergency Discretionary Choices Should Be Protected.

In the *Brown* case, the plaintiffs' counsel argued: "The Browns maintain that the rule of no negligence for the tactical decisions of law enforcement officers . . . applies only in situations like . . . emergency situations (such as suicide attempts) to which police have been summoned by the public. (*Brown v. Ransweiler, supra,* 171 Cal.App.4th at 535-536, citations omitted.) That is not the argument the same counsel has made in this case.

A sound statutory basis for protecting emergency discretionary choices of law enforcement officers from negligence liability is already in place -- Government Code section 820.2. This Court has not yet applied

section 820.2 to law enforcement officers making discretionary tactical choices during investigations and emergency situations, the way that federal courts have applied the FTCA for federal employees. As noted in foregoing section III. E., the first step in the FTCA analysis does not preclude negligence liability in presumed negligence situations, where an appropriate authority has specifically mandated, forbidden or otherwise dictated law enforcement tactics in the situation at hand. The second step in the analysis is whether the employee's judgment involves considerations of social, economic, or political policy. "Social" costs are high for allowing murder suspects to escape *(Brown)*, or abandoning reportedly-suicidal people to their likely self-inflicted fates (Mr. Hayes). The *public interest* in providing effective emergency response and rescue services satisfies the "political" or public policy element, as discussed in *Flax v. United States, supra,* 847 F.Supp. at 1190.

"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; Italics added; citation omitted.)

> 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; Italics added; citation omitted.)

What is true for tactics preceding intentional torts (battery) is also true for negligent tactics -- especially when intentional and negligent tort theories are pursued for the same alleged injury. This Court could formulate a fair, workable and statutorily-supported response to the Ninth

Circuit's question by simply adopting the same well-considered two-step approach to public employee negligence liability for discretionary emergency tactics as federal courts utilize under the FTCA.

D. Federal Due Process Liability for Emergency Tactics.

As discussed in section III. E. above, there is no federal liability under 42 U.S.C. section 1983 for state actors who negligently deprive someone of life without due process. To address situations in which plaintiffs claim that the deprivation was intentional, or resulted from intentional-type deliberate indifference to the safety of others, the United States Supreme Court has developed a "purpose to harm" standard that applies in Fourteenth Amendment substantive due process cases arising from emergencies. For officers to be civilly liable, 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.) The "purpose to harm" standard differs from "deliberate indifference" because "deliberate indifference" occurs "only when actual deliberation is practical." (*County of Sacramento v. Lewis* (1998) 523 U.S. 833, 851.) "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.) In fast-evolving situations, the "purpose to harm" standard applies, not the "deliberate indifference" standard. (*Id.* at 853.) Officers do *not* act with purpose to harm that is unrelated to law enforcement objectives when they respond to an emergency in progress. (*Bingue v. Prunchak* (9th Cir. 2008) 512 F.3d 1169, 1177.) In *Moreland v. Las Vegas Metropolitan Police Dept.* (9th Cir. 1998) 159 F.3d 365, 373, the Ninth Circuit held that "because the officers were *responding* to the extreme emergency of public

gunfire" they did not intend any harm unrelated to law enforcement objectives.

The FTCA discretionary approach and identical suggested approach under Government Code section 820.2 would not preclude liability if officers acted with a purpose to harm. If respondent had been able to show that the deputies acted with such an unlawful purpose, liability would have been possible under section 1983, and respondent would have no practical need for a remedy in negligence that (at most) would yield a lesser concurrent recovery.

V

CONCLUSION AND *REVISED* SUGGESTED RESPONSE TO THE NINTH CIRCUIT

In *Williams v. State of California*, this Court quoted Professor Van Alstyne as follows:

> "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.]"

(*Williams v. State of California*, *supra*, 34 Cal.3d at 23-24; fn. omitted.) However, this Court soon acknowledged the practical impediments to always trying to put the duty horse before the privilege/immunity cart:

> 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's response to the Ninth Circuit should not reduce the issue to an oversimplified duty statement of the kind as suggested in respondent's merits brief. That would offer judges no useful help in analyzing cases like this one, where every discretionary tactical choice that was made -- along with every discretionary tactical choice that could have been made -- before, during and after the deadly force incident -- is posited as an example of negligence, backed by opinions of a paid expert witness that officers could have tried something else.

It is no answer to say that juries can sort it out. Cases such as this one should never go to a jury, because no one would seriously criticize the deputies if they had saved Mr. Hayes from a suicide attempt, or if they had detained him for administrative proceedings under Welfare and Institutions Code section 5150, or even if they had found it was a false alarm, and departed in peace.

Respondent's merits brief carefully avoids mentioning what happened in Mr. Hayes' prior suicidal gesture four months earlier, where he stabbed himself in his wrists with the same kind of kitchen knife in the same bedroom where Ms. Neill told the deputies they could find him on the night he was shot. Different deputies entered four months earlier, using tactics no different than on the night he was shot. Mr. Hayes was peaceably detained for mental evaluation while medical care for his bleeding wrists was summoned. No PERT was summoned before entering the house that night. No one filed a lawsuit afterwards, either.

No one honestly knows whether any alternative tactical choices would have led to a better or worse outcome, because the outcome was

driven by the free-will actions of Mr. Hayes, actions that he could have changed in a split-second. Officers always make discretionary tactical choices in relation to criminal and administrative investigations and in relation to emergency responses, with results that can never be predicted with any real accuracy. It is always possible -- and very easy -- for paid experts to plausibly opine -- and attorneys to plausibly argue -- that officers could have tried something else.

Petitioners' *revised* proposed response to the Ninth Circuit's question is well-supported by established state and federal legal principles, and would minimize the instances where law enforcement discretionary tactical choices are unfairly second-guessed in hindsight. The revised proposed response would also minimize attempts to take second bites at the litigation apple after more lucrative claims fail. This Court should offer the Ninth Circuit the following response:

> "Under California negligence law, negligence liability cannot arise from discretionary tactical conduct and decisions of law enforcement officers preceding the use of deadly force during criminal or administrative investigations or emergencies unless the use of deadly force has been found to have been unreasonable, unprivileged or unprotected by immunity."

This proposed response would deny negligence recovery to respondent, but not to any deserving and genuinely-aggrieved plaintiff. Other legal theories provide ample remedies for uses of deadly force that are found unreasonable under the totality of circumstances.

DATED: Jan 3 2012 Respectfully submitted,

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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 7,041 words as counted by the Microsoft Word 2007 word-processing program used to generate the brief.

DATED: Jan 3 2012 THOMAS E. MONTGOMERY, County Counsel

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Proof of Service by Mail

I, LAURA FLORES, 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 January 3, 2012, I caused to be served the following document(s): **Petitioners' Reply Brief On The Merits** by placing a true copy of each document in a separate envelope addressed to each addressee, respectively, as follows:

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I then sealed each envelope and, with the postage thereon fully prepaid, I placed each for deposit in the United States Postal Service, this same day, at my business address shown above, following ordinary business practices.

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Executed on January 3, 2012, at San Diego, California.

_____
LAURA FLORES