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New Police Win In *Ramirez v. City of Gardena* Sets Up Split Decision in the Court of Appeal Districts Over Public Entities' Immunity Under the Vehicle Code.

by Mildred K. O'Linn, Esq.; Tony M. Sain, Esq. & Ladell H. Muhlestein, Esq.

Overview.

In *Ramirez v. City of Gardena* (Cal. Ct. App. case no. B279739, Aug. 23, 2017), the Court of Appeal - Second Appellate District held that the pursuit policy promulgation requirement of Vehicle Code § 17004.7 public entity immunity "does not require proof of compliance by *every* officer with the written certification requirement as a prerequisite to immunity." "While the agency must *require* all officers to sign a written acknowledgement, the agency need not prove that 100 percent of its officers have actually complied with that requirement to obtain immunity."

Legislative Background.

After a 2005 police chase where the defendant city was deemed immune from liability to the state-law claims where a bystander had been killed, and despite the fact that there was evidence that the defendant city had not even distributed its vehicle pursuit policy to its officers, effective 2007, the California Legislature revised the public entity immunity under Vehicle Code § 17004.7.

In addition to requiring that public entities adopt a vehicle pursuit policy meant to promote officer and public safety by restricting officers' discretion during vehicle pursuits, including listing specific content requirements the pursuit policy must meet, the Legislature added "promulgation" as a threshold for the immunity. The promulgation requirement consists of two elements necessary for the public entity to obtain the Vehicle Code immunity: (1) the entity must provide annual training to all of its police officers on the entity's vehicle pursuit policy; and (2) the entity must require all of its officers to certify, in writing, that the officer had "received, read, and understood" that policy. However, the Legislature included a caveat in the promulgation requirement language: "The failure of an individual officer to sign a certification shall not be used to impose liability on an individual officer or a public entity." *See* Cal. Veh. Code § 17004(b)(2).

The Ramirez (Gamar) Case.[1]

In February 2015, armed robber Mark Gamar fled the crime scene as a passenger in a pickup truck. Responding Gardena Police Department ("GPD") officers conducted a high-speed vehicle pursuit, with emergency lights and sirens, until Gamar's driver veered through oncoming

[1] In the *Ramirez/Gamar* case, the City of Gardena was represented by lead attorney and partner Mildred K. O'Linn, co-lead attorney and partner Tony M. Sain, appellate attorney and partner Ladell H. Muhlestein, and associate attorney Kayleigh A. McGuinness.

lanes of traffic toward the off-ramp of a busy freeway. Believing the suspect was putting lives in immediate mortal danger, the pursuing officer conducted a high-speed version of the Precision Intervention Technique ("PIT") maneuver: causing the suspect truck to spin into a light pole and killing Gamar. Plaintiff Ramirez, Gamar's mother, sued in state court: alleging vehicular negligence and battery under California law.

In 2015, GPD had a vehicle pursuit policy with specific procedures detailing when and how police officers were to initiate, conduct, or terminate vehicle pursuits. GPD required its officers to attend vehicle pursuit and policy training on an annual basis: at which, the officers read the policy aloud, discussed its implications, and recounted real-world applications. For a time, GPD used POST-recommended SB-719 certificate forms for each officer (including the incident pursuing officer) to certify, in writing, that the officer had "received, read, and understood" the GPD pursuit policy. GPD also required each of its officers attending the class to sign the attendance roster at the end of the class: in order to certify that such officers had received, read, and understood the pursuit policy. During a station move, GPD had misplaced its officers' POST pursuit policy certificates for the five years leading up to the incident. Though GPD had retained its attendance rosters for those years in electronic form, the hand-signed original rosters were lost.

During the litigation, the City of Gardena moved for summary judgment on grounds of Vehicle Code entity immunity and reasonable use of force. The trial court granted summary judgment on the immunity grounds. Plaintiff Ramirez then appealed the judgment.

Citing the Fourth Appellate District decision in *Morgan v. Beaumont Police Dept.* (2016) 246 Cal.App.4th 144 (until now, the only post-2007 case to interpret the promulgation requirement), on appeal, plaintiff Ramirez argued that the City was *not* entitled to the Vehicle Code immunity because it had not satisfied the promulgation requirement. Petitioner argued that since the City could not produce the POST pursuit policy certificates for all of its officers from every year leading up to the incident, the City could not show its threshold compliance. Plaintiff also argued that certain sections of the GPD pursuit policy gave officers "unfettered" discretion during pursuits, and thus that the policy failed to satisfy the statute's content requirement as well.

The *Ramirez* Court's Holding and Rationale.

In *Morgan*, the defendant city had emailed each of its officers its vehicle pursuit policy, but only required them to acknowledge "receipt" thereof: and the evidence was lacking that the officers had done so. Accordingly, in its April 2016 *Morgan* decision, the Fourth Appellate District Court of Appeal held that the City of Beaumont was *not* entitled to Vehicle Code entity immunity. In its analysis, the *Morgan* Court adopted language that could be read to hold that, unless a city actually obtained a POST-approved written certification from each and every one of its police officers that the officer had "received, read, and understood" the vehicle pursuit policy, and proved that each officer actually attended annual training thereon, the public entity would lose its immunity. In reaching this ruling, the *Morgan* Court reasoned that the second sentence of § 17004.7(b)(2) – that an officer's failure to certify could not be a basis of *liability* – had no bearing on whether that city was entitled to *immunity* under the Vehicle Code.

In August 2017, the *Ramirez* Court issued a strong rebuttal to the *Morgan* Court's holding and rationale. In *Ramirez*, the Second Appellate District Court of Appeal held and reasoned as follows on the public entity immunity under Vehicle Code § 17004.7.

First, the *Ramirez* Court observed that, as to government entities, the default policy in California is immunity: liability is the *exception*. Second, it concluded that although the Legislature sought to expand entity liability in the 2007 statutory revision, the legislative history showed that the Legislature rejected language that would have required the entities to prove that officers had actually understood the policy training before the immunity could operate. Third, and most importantly, the *Ramirez* Court observed that the statutory language of the second sentence of § 17004.7(b)(2) – that an officer's failure to certify could *not* be a basis of liability – showed that the Legislature did *not* intend that a single officer's failure to certify could void the entity's immunity: for such would be an "absurd" result.

To elaborate on how such a construction would be absurd, the *Ramirez* Court observed that, under *Morgan*, the failure by a single recalcitrant or absent police *officer* to complete a written certification (that the officer had "received, read, and understood" the pursuit policy) would deprive the *entity* of immunity. In other words, under the "absurd" construction, even though an *entity complied* with the Vehicle Code – by requiring that each of its officers certify receipt, review, and understanding the pursuit policy – *non-compliance by an officer* would cause the otherwise-compliant entity to lose its immunity without any wrongdoing *by the entity*. Rejecting such a construction, the *Ramirez* Court thus held that the Vehicle Code entity immunity turns on compliance action *by the entity*, not on compliance action *by the officers*.[2]

As a result, under *Ramirez*, a public entity satisfies the promulgation requirement of the Vehicle Code entity immunity if the entity: (1) trains all of its police officers annually on its vehicle pursuit policy; and (2) requires each of its officers to certify, in writing, that such officer has "received, read, and understood" that pursuit policy. *But*, if an officer fails to comply with the entity's certification requirement, the entity does *not* lose its Vehicle Code immunity.

Additionally, contrary to plaintiff's claims, the *Ramirez* Court also held that the challenged GPD pursuit policy provisions were specific enough to satisfy the content requirement of the Vehicle Code and that such did not leave the pursuing officers with "unfettered" discretion.

Accordingly, the *Ramirez* Court affirmed summary judgment on the immunity grounds.

The Next Fight and Best Practice Tips.

Given that the Fourth Appellate District (*Morgan*) and the Second Appellate District (*Ramirez*) have issued conflicting interpretations of the Vehicle Code's promulgation requirement for entity immunity, public entities should expect that the question will likely wind up before the California Supreme Court. At that point, the Supreme Court would then likely choose between the *Morgan* approach (proof of universal officer certification required for entity immunity) or the *Ramirez*

[2] The Court of Appeal also rejected the plaintiff's argument that a public entity claiming immunity under section 17004.7 may prove the fact of written certifications only by introducing the actual certifications themselves: noting that Section 17004.7 does not contain any evidentiary limitation on how compliance with the certification requirement may be proved.

construction (an entity satisfies its Vehicle Code immunity threshold by requiring each officer to certify, regardless of whether the officer actually complies).

In the interim, as a best practice, and to help defend their immunity, public entities should revise their police training procedures as follows. First, entities should include express language in their vehicle pursuit policies that mandates that every police officer must attend training on its vehicle pursuit policy at least once per year: and entities should distribute copies of the pursuit policy to each attending officer, as well as maintain documentation of officer attendance in their personnel files. Second, entities should include express language in their vehicle pursuit policies that mandates that, within a reasonable time after attending such training, every police officer must certify, in writing, that he or she has received, read, and understood the vehicle pursuit policy. Third, entities should consider making the POST-recommended certification form a page in their vehicle pursuit policies that the entities then distribute at each vehicle pursuit training: and entities should maintain those officer-completed forms in the officer's personnel file.

One helpful practice would be to treat training on vehicle pursuit policies with the same care as police departments give to perishable skills training. Be sure to watch out for lapses in training that may be caused by officers being off their regular duties (medical leave/injured on duty, vacations, administrative leave, undercover and task force assignments, maternity/paternity leave, family medical care, and comparable event): and make sure the officers receive their needed training updates as soon as possible and within the annual-training requirement of the Vehicle Code.

While such steps do *not* appear to be required in light of the *Ramirez* Court ruling, such steps should serve to protect entities better should the courts' interpretation of the Vehicle Code immunity requirements shift to less favorable ground.

Additional Resources.

For additional informational resources, please contact the Marketing Department at Manning & Kass, Ellrod, Ramirez, Trester, LLP to request a copy associated briefing.

About the Authors.

Tony M. Sain is a trial attorney and partner on the public entity defense and employment law teams of the law firm of Manning & Kass, Ellrod, Ramirez, Trester, LLP. He has been a Super Lawyers Rising Star each year since 2013 through to the present.

Mr. Sain has successfully defended countless peace officers and dozens of public entities in a variety of civil cases in both state and federal court. Mr. Sain's practice centers on defending municipalities, law enforcement agencies, and police officers in civil rights, excessive force, unlawful arrest, wrongful death, and employment discrimination-harassment-retaliation actions through trial; he also has extensive litigation experience in products liability and toxic tort cases. Mr. Sain has also served as a pro bono criminal trial prosecutor for the Los Angeles County District Attorney's Office.

Mr. Sain is a graduate of Princeton University's Woodrow Wilson School of Public and International Affairs: where he specialized in complex governmental systems and executive management. He is also a graduate of Loyola Law School of Los Angeles: where he was a litigator on

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Prior to becoming an attorney, Mr. Sain spent ten years as a top executive officer in charge of managing a variety of corporate/for-profit and non-profit entities; he was one of the youngest executive directors in the history of one of America's oldest community and youth service organizations; and he brings his unique experience as a chief departmental executive and director to his legal practice.

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Ladell Hulet Muhlestein is a partner in the Los Angeles office of Manning & Kass, where she is a member of the Strategy, Writs, and Appeals Team. Since the outset of her career, Ms. Muhlestein has also focused on law and motion and appellate work. She has eleven published opinions in the California Court of Appeal and the Ninth Circuit Court of Appeals, which deal with diverse subjects such as computation methods for prepayment of pre-computed loans, the scope of governmental immunity under the Tort Claims Act, the scope of the duty of care owed by police officers, the scope of admiralty jurisdiction, the federal court abstention doctrine, attorney's fees provisions in contingent fee agreements, and overtime pay provisions under Labor Code section 510. She authored a successful writ petition on a matter of first impression, which resulted in a published opinion holding that California employers are not required to pyramid different types of overtime pay. In one of her appeals, Ladell not only prevailed against a well-known civil rights attorney, but obtained an award of "attorney's fees and double costs on this appeal" to be paid by opposing counsel personally, not the client.

Ms. Muhlestein has extensive experience writing major motions and appellate briefs on subjects ranging from insurance broker defense issues to the intricacies of interpleader actions to the probate exception from federal court jurisdiction.

She is a co-author of "Guide to Post-Trial Motions and Appeals," a pamphlet guide to post-trial and appellate proceedings in California state and Federal courts, which she co-authored with Candace Kallberg, also of Manning & Kass.

Ladell is admitted to practice before the United States Supreme Court, to which she has submitted two petitions for writ of certiori. Ms. Muhlestein received her BA, magna cum laude, in 1976 from Brigham Young University. While at BYU, she interned at the United States House of Representatives and was the valedictorian of her college. Ms. Muhlestein received her JD in 1980 from the J. Reuben Clark Law School at Brigham Young University, where she was a member of Moot Court and a member of the BYU Student Supreme Court.