2nd Civ. No. B233228

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

Salvador Aguirre,	)	2nd Civ. No. B233228
Plaintiff /Appellant,	)	Los Angeles County Superior Court No. BC428221
v.	)	
County of Los Angeles et al.,	)	
Defendants/Respondents.	)	

APPELLANT'S OPENING BRIEF

On Appeal from the Judgment of the Superior Court
County of Los Angeles, State of California
Hon. Rolf M. Treu, Judge

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Introduction

Appellant Salvador Aguirre is a man more sinned against than sinning. He went with his girlfriend to the Key Club in Hollywood for a concert one evening. Having had several drinks beforehand, he appeared possibly intoxicated to Deputy Daniel Riordan, who reportedly intervened out of concern for Aguirre's own welfare and arrested him.

The police intervention did not enhance Aguirre's welfare. Officers handcuffed his hands behind his back. When he stepped back to clarify if this was a case of mistaken identification, Deputy Riordan tackled him to the ground. After Aguirre landed face first onto the concrete, and as a puddle of blood was forming, the deputy pressed his knee into Aguirre's neck. As a consequence of the police intervention to protect Aguirre, he suffered injuries requiring six surgeries, and his jaw was wired shut for nearly five months. The incident ended with several officers drawing their guns to warn protesting onlookers.

Aguirre sued Deputy Riordan and the County of Los Angeles (respondents) for numerous torts, including false arrest and assault and battery/excessive force. The trial court granted respondents' motion for nonsuit. The court concluded the officer deserved

qualified immunity for his action in tackling Aguirre, and the County was thus immune from suit as well. Although the court did not conclude Deputy Riordan acted reasonably when he ground his knee into the back of Aguirre's neck, the court rejected liability for this act because Aguirre did not describe which damages resulted from the (purportedly reasonable) tackle and which resulted from the (presumably unreasonable) knee-grinding.

The court erred in granting the motion for nonsuit due to the conflicting evidence presented. First, although Deputy Riordan described symptoms that may have supported a finding that Aguirre was in violation of Penal Code section 647, subdivision (f) (unable to care for himself or a public danger due to intoxication), other evidence refuted this showing, and described Aguirre as able to care for himself and not a threat to others. Because there was disputed evidence as to whether Deputy Riordan had probable cause to believe Aguirre had committed a misdemeanor in his presence, the court erred in granting a nonsuit as to the false arrest claim. (Argument I, *post.*)

There was also disputed evidence as to whether Deputy Riordan's tackling Aguirre was a reasonable or unreasonable use of

force. Riordan described Aguirre as being in a "full run" (despite being unable to "walk under his own power" just moments earlier), but other witnesses reported he did not appear to be running, but only stepped back to clarify whether he was the person sought. This evidentiary conflict presented a triable issue for the jury to decide whether Deputy Riordan's force was reasonable under the totality of the circumstances. (Argument II(A), *post*.)

Notwithstanding the existence of evidence showing Deputy Riordan used unreasonable force, the court withdrew the case from the jury for legal reasons. The court concluded: (1) officers are immune from liability for injuries inflicted upon fleeing arrestees; (2) beyond this alleged absolute immunity, Deputy Riordan had an unlimited right to use force, not bound by a reasonableness limitation, to prevent an escape; (3) even if Deputy Riordan's use of force was unreasonable, he was shielded from liability by qualified immunity; (4) even if he could be subject to liability for unreasonable force, a jury cannot determine the reasonableness of officer force without expert testimony; (5) even if Deputy Riordan was liable, the County was immune because California does not recognize the doctrine of respondeat superior for governmental

actions. All of these legal conclusions were incorrect. (Argument II(B), *post*.)

Finally, the evidence showed that even as Aguirre lay face-down on the pavement, his mouth oozing blood and his hands still cuffed behind his back, Deputy Riordan pressed his knee against the back of Aguirre's neck. Even if a need to frustrate Aguirre's purported escape warranted Deputy Riordan's first use of force, there was no legitimate basis for this second use of force. (Argument III(A), *post*.) But the court held that even if the second use of force was unreasonable, there was no showing which damages it caused. This was error (1) because the jury could infer that the two uses of force corresponded to the two distinct head traumas suffered; (2) because it is the defendant's burden, not the plaintiff's, to apportion damages between purportedly nontortious and tortious conduct; (3) because the court was obligated to allow Aguirre to reopen and cure any lack of specificity in apportioning damages; and (4) because Aguirre was entitled to recover damages beyond his medical injuries. (Argument III(B), *post*.)

Statement of Appealability

This appeal is taken from an order granting nonsuit, and is appealable under Code of Civil Procedure 904.1. (*Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1214; *Shepardson v. McClellan* (1963) 59 Cal.2d 83, 86.)

Statement of the Case

Aguirre filed a first amended complaint for damages, which included the following causes of action: assault (I), battery (II), false arrest (III), false imprisonment (IV), a violation of civil rights under 42 U.S.C. § 1983 (V), excessive force under 42 U.S.C. § 1983 (VI), intentional infliction of emotional distress (VII), municipal liability (VIII), a violation of the Bane Act (IX), negligent hiring, training and retention (X), and negligence (XI), against both respondents County of Los Angeles and Deputy Daniel Riordan. (Augmented Clerk's Transcript 15.) Respondents demurred. (ACT 30.) The court sustained the County's demurrer with leave to amend as to the fifth, sixth, eighth and ninth causes of action, and overruled it in all other respects. The court sustained Deputy Riordan's demurrer with leave to amend as to the ninth cause of action only,

and overruled it in all other respects. (ACT 63-67.) Aguirre filed a second amended complaint. (CT 7.) The court sustained without leave to amend the County's demurrer as to the fifth, sixth and eighth causes of action. (ACT 97-98.) Aguirre dismissed his ninth cause of action. (ACT .)

Trial commenced as to the remaining causes of action on February 1, 2011, and continued for the next two days. (RT 1, ACT 99.) On February 3, 2011, the court granted respondents' motion for non-suit. (ACT 123.) On April 7, 2011, respondents filed a motion for award of attorneys' fees and costs. (ACT 131.)[1] The court granted respondents $123,809.34 in attorney's fees and costs, and $3,278.00 in expert fees. (ACT 150-151.)

Aguirre filed a timely notice of appeal. (CT 27-30, 36-37, see Cal. Rules of Ct., rule 8.104, subd. (a)(2).)

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[1] Respondents requested attorney's fees under both Code of Civil Procedure sections 1021.7 and 1038, as well as federal law. (ACT 131.) However, the motion for attorney's fees was not filed until April 7, after the notice of entry of judgment. (ACT 131, CT 29.) Because section 1038, subdivision requires that the motion for attorney's fees be brought prior to the discharge of the jury or entry of judgment (April 1), the request was untimely under section 1038. However, section 1021.7 does not contain such a deadline. Accordingly, attorney's fees were available only under section 1021.7, or 42 U.S.C. § 1988.

Statement of Facts

Arrest

On December 26, 2008, Aguirre and his girlfriend Samantha Narcho rode a bus to Hollywood to hear music at the Key Club with other friends. (2 RT 298-300.) Aguirre entered the club for about ten minutes, and returned outside to find and greet his friend Johnny Quintana. (2 RT 302.) After meeting up with Quintana, and still arm-in-arm with Narcho, he returned to the line to re-enter the club. (2 RT 302.)

Aguirre felt a hand yank him out of line, and he feared someone was trying to pick a fight with him. But then the individual put Aguirre's hand behind his back, so he knew it was the police. (2 RT 302.) Two deputies, Egan and Plunkett, each grabbed one of Aguirre's arms, and brought him to a police car waiting outside the club. (1 RT 81.) After being searched, Aguirre told them, "`I have nothing on me. I just want to know why I'm being arrested.'" (2 RT 304.) He asked several times why he was being arrested. (1 RT 174.) The officer neither answered Aguirre's question nor asked him any. (1 RT 173-174.) They kept pushing his head forward and telling him to "shut the fuck up." (2 RT 304.)

They handcuffed him within ten seconds. (1 RT 174.)

Aguirre appeared coherent to Narcho and clearly understood what she said to him that evening. (1 RT 172.) His eyes were not bloodshot, he did not smell of alcohol, he was not dramatically slurring his words, and he did not fall down at all. (1 RT 172.) Brian Cabezas testified that he was with Aguirre when they entered the club. (2 RT 212.) Aguirre appeared "normal," and was not falling down at all; the club would have kicked him out had he been so unstable. (2 RT 212.) Aguirre testified he "was walking just fine." He and Narcho walked arm-in-arm, but neither leaned on the other. (1 RT 169, 2 RT 303.) He did not fall or stumble. (2 RT 303.) The officers did not ask about his age. (2 RT 304.)

The arresting officer, Deputy Daniel Riordan testified he received a report concerning two males in the parking lot from a valet. (1 RT 50-51.) Deputy Riordan then saw two apparently adult males walk by his car. (1 RT 55-56.) One of the two, Aguirre, said one word to Deputy Riordan in slurred speech. (1 RT 55-56.) Aguirre was also swaying and walking "in a labored manner." (1 RT 57.) Deputy Riordan drove his car closer onto Sunset Boulevard and parked there. (1 RT 61-62.)

Deputy Riordan called out to Aguirre and his friend to come

over to the parked police car, but they went to sit on a low wall outside the Key Club. (1 RT 62.) Deputy Riordan called for backup units "to contact people that were possibly intoxicated." (1 RT 62.) Aguirre did not hit anybody or fall off the wall as he sat there, but seemed to "sway in a circular motion." (1 RT 74.) The deputy was concerned for Aguirre's safety, but did not contact him immediately because there were about 30 or 40 people dressed in "punk rock attire" making derogatory comments like "fascist" and "nazi," although Deputy Riordan did not know if they were being made about him. (1 RT 75.)

Deputy Riordan saw two other males carry Aguirre to the Key Club because he could not walk under his own power. (1 RT 80.) Deputy Riordan directed Deputies Egan and Plunkett to detain Aguirre, due to the "fear . . . that if [Aguirre] got inside the crowd, due to the violent nature of the punk rock concert that night, he may become injured." (1 RT 81.) Deputies Egan and Plunkett each took hold of one arm and brought Aguirre out to Deputy Riordan's car. (1 RT 82.) According to the testimony of police expert Sergeant Lawrence Kirkley, Aguirre was legally under arrest at this point. (2 RT 387.) Deputy Riordan then asked Aguirre some questions but did not measure his intoxication through a

breathlyzer or nystagmus test. (1 RT 85.) Because Deputy Riordan had to repeat some of his questions and some of Aguirre's responses appeared unintelligible, Deputy Riordan conducted a patdown search and placed him in handcuffs. (1 RT 86-87.)

First Use of Force

Aguirre was scared that the police must have confused him with someone else, as he knew he hadn't done anything. (2 RT 304.) He took three of four steps to his left. (2 RT 304.) He was not trying to flee, because he could not get far with the handcuffs. (2 RT 305.) He moved away to clarify why he was arrested. (2 RT 305.) Cabezas saw Aguirre take three "sidestep[s]." (2 RT 231.) Cabezas recalled it was too close "to like run"; Aguirre simply "stepped back a little bit." (2 RT 214.) Johnny Quintana testified that Aguirre moved about three or four feet away, and did not appear to be running away from Deputy Riordan. (1 RT 150.) Deputy Riordan testified that Aguirre was only one or two steps away "but he was at a full run." (1 RT 90.)

Deputy Riordan testified that he "lunged" at Aguirre. (1 RT 92.) Sergeant Gonzalez also described Riordan as "lung[ing]." (2 RT 305.) Riordan, as well as Narcho and Cabezas, recalled that the

deputy then "tackled" Aguirre to the ground. (1 RT 92, 2 RT 235.) Deputy Plunkett reported that the two men "got tangled up together and they tripped and fell together." (1 RT 142.) With the strong pressure on his back, Aguirre fell face first onto the concrete. (2 RT 236, 305.) Deputy Riordan saw the pool of blood running from Aguirre's mouth. (1 RT 102.)

Second Use of Force

After Aguirre was on the ground, Narcho saw Deputy Riordan force his right knee onto the back of Aguirre's neck. (2 RT 236.) Cabezas described it as the back of his head and pointed to the neck. (2 RT 219.) Deputy Plunkett testified the knee was on Aguirre's back. (1 RT 145) Deputy Riordan indicated he put his shins on Aguirre's upper legs. (1 RT 95.)

Some of the concertgoers shouted "Let him go. He didn't do anything." (1 RT 101.) Because the demands to let Aguirre go were threatening to the officers, Deputy Egan and Sergeant Gonzalez pulled out their firearms and Deputy Plunkett brandished his baton. (1 RT 134-135.) Aguirre received medical attention. (1 RT 137.)

Injuries

Dr. Vincent Sghiatti described Aguirre's injuries as "very severe." (2 RT 196.) He suffered at least two different point-of-impact facial traumas. (2 RT 189.) The first was on the left side of his face, where there was a fracture to the high jawbone and a fracture to the midrange jawbone that extended behind his eardrum, causing bleeding from the ear. (2 RT 190.) This left-side fracture also caused cracks and trauma to both his upper and lower level molar teeth. (2 RT 190.)

There was another trauma, on the right side of his face. (2 RT 190.) This trauma fractured his chin near the area where people have a little dent. (2 RT 190.) His lip was split in a way that required sutures and deep sutures. (2 RT 190.) The trauma's impact on his chin not only resulted in the loss of two teeth and a split lip, but it pushed higher and fractured Aguirre's sinus. (2 RT 191.) He also suffered a concussion. (2 RT 193-194.)

These injuries required treatment, which included wiring Aguirre's jaw shut for over four and one-half months "to try to keep the bones in place so they would heal." (2 RT 191, 308.) He therefore had to carry pliers around with him, because if he vomited or choked, he would need to cut the wires so he would be

able to breath. This produced considerable anxiety for Aguirre. (2 RT 192.)

Because he could not chew solid food, he lost 15 pounds, which was more than 10 percent of his prior bodyweight of 140 pounds. (2 RT 191.) His inability to chew things also had a mental effect on him. (2 RT 192.) Aguirre needed to take pain pills for nausea and gastritus, and needed additional medication for the gastritus. (2 RT 192.) His teeth needed work and are still growing crookedly. (2 RT 192.) "There was a total traumatic effect aside from trying to get the bones to heal." (2 RT 192.)

Trial Court's Ruling

The court granted the motion for nonsuit as to all remaining causes of action. As to false of arrest, the court found "[T]here is conflicting evidence as to whether or not the person in fact arrested is the person first seen and pointed out to Deputy Riordan by the witness. So the tentative will be to grant the motion on that basis." (2 RT 423.)

As to battery/unreasonable force, the court concluded that the first use of force (tackling Aguirre) was not unreasonable. "The court does not find as a matter of law that the evidence in this case

indicates anything Officer Riordan did in stopping the movement of Mr. Aguirre, whatever that movement was, was with unreasonable force." (2 RT 418, emphasis added.) The court also found legal grounds for precluding liability. The court relied on *Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, for its purported holding: "No liability for injuries sustained by a fleeing arrestee." (2 RT 421-422.) The court further concluded there was no reasonableness qualification on an officer's use of force. "[A]n officer may use whatever physical force is necessary to make him stop. It's not qualified by `reasonable' or `unreasonable.' Just any." (2 RT 415.) The court further found the officer's "qualified immunity absolves even excessive force. Even if you have excessive force, if you have a violation, qualified immunity protects that." (2 RT 415.) The court also found that expert testimony was needed to establish the force used was unreasonable: "How can they make that determination in the absence of any evidence as to what a reasonable officer should have done under the circumstances?" (2 RT 410.) The court concluded that the County was immune from liability for Deputy Riordan's actions: "There is no respondeat superior in government agency if you read the code." (2 RT 430.)

The court also found there could be no liability for the second use of force (knee-grinding on Aguirre's neck). The court did not affirmatively find this use of force to be reasonable, but rather to be harmless, as Aguirre failed to show he suffered any injuries as a result of the knee-grinding. "The jury will be purely speculating if they were to be argued or if they were to have argued to them that the knee in the neck caused any injury whatsoever." (2 RT 417.) The court denied Aguirre's request to present rebuttal evidence for the limited purpose of apportioning damages between the two uses of force. (2 RT 425-426.)

Standard of Review

The law disfavors nonsuits. Reviewing courts review the evidence in the light most favorable to the plaintiff, and must reverse if substantial evidence supported the plaintiff's claim(s).

> "[C]ourts traditionally have taken a very restrictive view of the circumstances under which nonsuit is proper. The rule is that a trial court may not grant a defendant's motion for nonsuit if plaintiff's evidence would support a jury verdict in plaintiff's favor. [Citations.] [¶] In determining whether plaintiff's evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, **the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded**. The court must give 'to the plaintiff['s] evidence all the value to which it is legally entitled, ... indulging every legitimate inference which may be drawn from the evidence in plaintiff['s] favor...."

(*Castaneda v. Olsher*, *supra*, 41 Cal.4th 1205, 1214, quoting *Campbell v. General Motors Corp.* (1982) 31 Cal.3d 112, 118-119 [internal citation omitted], emphasis added.)

This reluctance to remove factual questions from juries derives from the California Constitution, which preserves "inviolate" the right to trial by jury. (*Alpert v. Villa Romano Homeowners Assn.* (2000) 81 Cal.App.4th 1320, 1328.)

Appellate review is de novo. (*Wolf v. Walt Disney Pictures and Television* (2008) 162 Cal.App.4th 1107, 1124.)

Argument

I. The court erred in dismissing the false arrest claim, because plaintiff's evidence describing how Aguirre did not violate Penal Code section 647, subdivision (f), established a false arrest/imprisonment.

Aguirre presented evidence which, if true, showed he was not a danger to himself or others. A reasonable juror could have concluded Aguirre was not in violation of section 647, so his arrest was unlawful. The court therefore erred in granting the motion for nonsuit as to this claim.

The decision to arrest a specific individual is an operational decision that does not enjoy immunity from liability. (*Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1051.) False arrest and false imprisonment fall beyond the reach of any general policy providing law enforcement immunity.

> A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment.

(Govt. Code, § 820.4.)

Officers are thus not immune from liability for false arrest or false imprisonment. (*Asgari v. City of Los Angeles* (1997) 15 Cal.4th 744, 752; *Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710, 721.)

Penal Code section 647, subdivision (f), the basis for Aguirre's arrest, requires more than mere intoxication. The law encompasses a person who

> is found in any public place under the influence of any intoxicating liquor [or substance] . . . in a condition that he or she is **unable to exercise care for his or her own safety or the safety of others**, or [due to intoxication] interferes with or obstructs or prevents the free use of any street, sidewalk, or other public way.

(Pen. Code, § 647, subd. (f), emphasis added.)

In other words, as police expert Sergeant Kirkley testified,

> What 647(f) is about, is are you so drunk that you can't take care of yourself, I need to take you to protect you from yourself or if you had been picking fights with people, so drunk that he's either stumbling into people or he's picking fights with people and he's going to get hurt. That is what 647(f) is about.

(2 RT 367.)

Because section 647, subdivision (f), is a misdemeanor, its violation does not justify a warrantless arrest unless the violation occurred in the deputy's presence. (Pen. Code, § 836, subd. (a)(1).) Accordingly, the relevant question is whether Deputy Riordan personally observed Aguirre being a danger to himself or others.

The evidence was in conflict. The defense presented evidence establishing a violation. The deputy testified that Aguirre was "walking in a labored manner," with slurred speech. (1 RT 56, 57.) From about five or six feet away, Deputy Riordan called out from

his car to Aguirre to stop, but Aguirre, who appeared youthful, sat down on a wall with his friend. (1 RT 69-70.) Although Deputy Riordan did not see Aguirre fall off the wall, hit anybody, or try to injure himself, the deputy did see Aguirre "sway in a circular motion" while seated. (1 RT 74.) Deputy Riordan saw two males assist Aguirre in walking into the club. (1 RT 80.)[2]

Assuming arguendo this evidence showed Aguirre was violated section 647, subdivision (f), there was ample evidence to the contrary. Samantha Narcho testified that Aguirre appeared coherent throughout the evening and clearly understood their conversations. (1 RT 172.) His eyes were not bloodshot, he did not smell of alcohol, he was not dramatically slurring his words, and he did not fall down at all. (1 RT 172.) Brian Cabezas testified that Aguirre appeared "normal," and was not falling down at all; the

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[2] It was here that officers grabbed Aguirre, and, according to Sergeant Kirkley, functionally arrested him. (2 RT 387.) Accordingly, any subsequent questioning, and its yield of "unintelligible answers" (1 RT 86), may not be considered in evaluating the strength of the evidence justifying arrest. Even if Aguirre was not then under arrest, so that those answers could be considered, Aguirre was surely arrested once he was handcuffed, and therefore any blood alcohol tests performed hours later could not justify the arrest retroactively. (*Johnson v. United States* (1948) 333 U.S. 10, 16 [68 S.Ct. 367, 92 L.Ed. 436].)

club would have kicked him out had he been so unstable. (2 RT 212.) Aguirre testified he "was walking just fine," he and Narcho were walking arm-in-arm, but neither leaned on the other. (1 RT 169, 2 RT 303.) He did not fall or stumble. (2 RT 303.) The officers did not ask about his age. (2 RT 304.) Sergeant Kirkley concluded the police lacked a legitimate basis for arresting Aguirre for a violation of Penal Code section 647, subdivision (f). (2 RT 365.) Although Riordan's testimony arguably supported the conclusion that Aguirre was in violation of Penal Code section 647, subdivision (f), the testimony of Narcho, Cabezas and Aguirre supported the finding that he was not.

A court reviewing a motion for nonsuit may not weigh the evidence or consider the witnesses' credibility, but must accept as true the evidence most favorable to the plaintiff and disregard conflicting evidence. (*Castaneda v. Olsher*, *supra*, 41 Cal.4th 1205, 1214; see also *Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 847 [testimony in conflict with plaintiff's evidence "should not have been given any weight for purposes of the ruling on the nonsuit motions"].) This Court must accept as true that Aguirre was coherent, not falling or stumbling, that his eyes were not

bloodshot and that he did not smell of alcohol. (1 RT 169, 172, 2 RT 303.) This Court must disregard Deputy Riordan's testimony that Aguirre was slurring his words, and unable to walk on his own. (1 RT 56-57, 80.) Because Aguirre's evidence showed there was no reasonable basis for Deputy Riordan's believing Aguirre had violated Penal Code section 647, subdivision (f) in his presence, the court erred in granting the motion for nonsuit. (*Castaneda*, *supra*, at p. 1214.)

The court's ruling on the false arrest apparently recognized that the evidence regarding the legitimacy of the arrest was in conflict **— and then granted the motion based on that conflict!** "[T]here is conflicting evidence as to whether or not the person in fact arrested is the person first seen and pointed out to Deputy Riordan by the witness. So the tentative will be to grant the motion on that basis." (2 RT 423.)[3] The conflicting evidence compelled *denial* of the motion for nonsuit. Reversal is required.

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[3] The "witness" described in this quotation was the individual who informed Deputy Riordan of the presence of an inebriate in the vicinity of the Key Club. (1 RT 54.) Because police officers may not arrest suspects for misdemeanors committed outside their presence, this information did not support the arrest. (Pen. Code, § 836, subd. (a)(1).)

II. The court erred in dismissing the assault, battery, and negligence causes of action, because plaintiff's evidence describing how Deputy Riordan tackled Aguirre established a battery and/or negligence.

Governmental entities may be liable for an officer's assault, battery, and use of unreasonable force in effecting arrest. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 568, fn. 17, citing *Scruggs v. Haynes* (1967) 252 Cal.App.2d 256; see also *Blankenhorn v. City of Orange* (9th Cir. 2007) 485 F.3d 463, 487.) Although a suspect may not resist an unlawful arrest by using force or a weapon, (Pen. Code, § 834a; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1219, superseded by statute on another point as recognized in *In re Steele* (2004) 32 Cal.4th 682, 691), one may resist an unlawful arrest by flight or nonviolent means. (*In re Michael V.* (1974) 10 Cal.3d 676, 681; *Garcia v. Superior Court* (2009) 177 Cal.App.4th 803, 818-819.) Insofar as there was a triable issue as to whether Aguirre's arrest was lawful (see Argument I, *ante*), there was a triable issue as to whether the officers had a privilege to use force against him.

There are limits on even lawful arrests. An officer's privilege to use force in response to flight is not absolute; the officer may "use *reasonable* force to effect [an] arrest, to

prevent escape or to overcome resistance." (Pen. Code, § 835a, emphasis added.) As the standard jury instruction provides, "A peace officer who uses unreasonable or excessive force in making a lawful arrest or detention commits a battery upon the person being arrested or detained as to such excessive force." (*Munoz v. City of Union City* (2004) 120 Cal.App.4th 1077, 1102; quoting BAJI 7.54.)

The unreasonable use of force may establish a battery under state law and an excessive force claim under federal law. (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 527; *Munoz*, *supra*, 120 Cal.App. 4th at p. 1102, fn. 6.) Because both federal civil rights claims of excessive force and state claims of battery require a showing that the officer acted unreasonably, federal cases are "instructive." (*Munoz*, *supra*, at pp. 1102, fn. 6.) The plaintiff has the burden of proving the degree of force was unreasonable. (*Edson v. City of Anaheim* (1998) 63 Cal.App.4th 1269, 1272.)

The reasonableness of the force used is a pure question of fact. (*In re Joseph F.* (2000) 85 Cal.App.4th 975, 989.) The jury must evaluate the reasonableness of the officer's use of

force from the perspective of a reasonable officer at the scene, rather than with the 20/20 vision of hindsight. (*Brown v. Ransweiler*, *supra*, 171 Cal.App.4th at p. 527.) Officer safety is an important part of the equation: "What constitutes `reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure." (*Munoz*, *supra*, 120 Cal.App.4th at pp. 1102-1103.) (Of course, there was no evidence that Aguirre acted as an "assailant" to Deputy Riordan.) In sum, to escape liability, the officer's split-second judgment to use force must have been reasonable, though it need not have been right.

In determining the reasonableness of the officer's force, the jury must consider certain specific factors. These include the severity of the crime, whether the plaintiff posed a reasonable threat to the safety of the officer or others, and whether the plaintiff was actively resisting detention or trying to escape. (*Graham v. Connor* (1989) 490 U.S. 386, 396-397 [109 S.Ct. 1865, 104 L.Ed.2d 443]; *Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 514.) These factors rarely lend themselves to summary judgment or nonsuit as a matter

of law.

> Determining whether a police officer's use of force was reasonable or excessive therefore "requires careful attention to the facts and circumstances of each particular case" and a "careful balancing" of an individual's liberty with the government's interest in the application of force. [Citations.] Because such balancing nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, we have held on many occasions that **summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly.** [Citations.] This is because police misconduct cases almost always turn on a jury's credibility determinations.

(*Santos v. Gates* (9th Cir. 2002) 287 F.3d 846, 853, emphasis added.)

There were conflicting accounts of the circumstances surrounding the use of force, so the court erred in granting the motion for nonsuit.

A. *The disputed facts precluded a meritorious motion for nonsuit.*

1. *Aguirre's evidence established a battery.*

In granting the nonsuit, the court rejected Aguirre's claim that Deputy Riordan used unreasonable force. (2 RT 418.) But the evidence showed there was a triable issue as to the deputy's use of force against Aguirre. (*Santos v. Gates*, *supra*, 287 F.3d 846; see also *Schmidlin v. City of Palo Alto*

(2007) 157 Cal.App.4th 728.)

The similar facts of *Santos v. Gates*, *supra*, 287 F.3d 846, illustrate the impropriety of the instant nonsuit. As here, the purportedly observed offense was the misdemeanor of public intoxication (although there was also a report of the more serious crime of burglary in *Santos*); Santos' blood alcohol content two hours after his arrest was .227. (*Santos v. Gates*, *supra*, 287 F.3d at p. 850.) As here, police testimony indicated that the officers drove alongside the suspect and asked to speak with him, but he attempted to evade the contact. (*Santos*, at p. 849; 1 RT 69.) As here, the officer decided to take and hold the suspect until he could determine whether the suspect had committed an offense. (*Santos*, at p. 849; 1 RT 79-81.) As here, the officer brought the suspect to the ground after the suspect failed to comply fully with officer commands. (*Santos*, at p. 849; 1 RT 89-90.) As here, the suspect had difficulty remembering the details because he saw a white flash when the officers struck him. (*Santos*, at p. 848; see 2 RT 305.)

Not only the circumstances but also the consequences

of the two arrests were comparable. As a result of the police use of force, Santos was forced to wear a back brace and walk with a walker for about a year. (*Santos*, *supra*, 287 F.3d at p. 849.) Aguirre had his jaw wired shut for almost five months and was unable to eat solid foods. (2 RT 308.)

The Ninth Circuit concluded the *Santos* district court had erred in directing a verdict for the defense, because the jury could have resolved the disputed facts and credibility determinations to find excessive force. (*Santos v. Gates*, *supra*, 287 F.3d at p. 853.) Considering the three factors of *Graham v. Connor*, *supra*, 490 U.S. 386, 396-397, the severity of the crime, the danger to the officers/bystanders, and the suspect's active resistance, the instant facts were no less amenable to an excessive force finding.

First, both cases involved the infliction of serious injury in the process of containing the minor offense of public intoxication (although the police in *Santos* at least described reports of the more serious offense of burglary). (*Santos*, *supra*, 287 F.3d at p. 849.) Second, there was little evidence of any danger to the officers or others; Riordan actually

testified that he detained and arrested Aguirre out of concern for the suspect's *own* safety (1 RT 81), which is not among the prescribed concerns. (*Graham, supra*, 490 U.S. at pp. 396-397; *Hernandez, supra*, 46 Cal.4th 501, 514.) Riordan's demurrer characterized the use of force as necessary to protect "nearby vehicle passengers/drivers as well as all deputies present." (ACT 45-46.) Of course, a reasonable juror could find a stumbling, handcuffed man posed little danger to passing automobiles, or deputies with guns drawn. (2 RT 239.)[4]

The only way that the case for force may have been stronger below than in *Santos* was the third factor; Santos's noncompliance involved merely dropping his hands to his sides rather than placing them behind his head, whereas Aguirre affirmatively moved three or four feet to the side,

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[4] Even if there was a danger to passing automoblies, it was doubtful that their protection required tackling the handcuffed Aguirre. According to Deputy Riordan, just moments earlier, "It was clear that he could not walk under his own power toward the front of the Key Club." (1 RT 80.) Yet after Aguirre's hands were cuffed behind his back (1 RT 150, 2 RT 304-305), he as "at a full run" according to Deputy Riordan. (1 RT 90.) (Even so, he was only one or two steps away from the deputy when he was tackled. (1 RT 90).)

although he did not appear to be running and did not expect to get away. (1 RT 150, 2 RT 305.) As a suspect's flight is only one factor, however, Aguirre's movement away from Deputy Riordan did not by itself necessarily privilege the subsequent tackle. (*Hernandez*, *supra*, 46 Cal.4th 501, 514.)

The court in *Santos v. Gates*, *supra*, 287 F.3d 846, concluded that "In light of the factual disputes regarding the amount of force used, the circumstances under which it was applied, and the extent of the plaintiff['s] injuries, the question is properly for the jury whether the force applied by the officers was objectively reasonable under the totality of the circumstances." (*Id.* at p. 855.) The similar facts below compel the same conclusion here.

Schmidlin, *supra*, 157 Cal.App.4th 728, likewise supports Aguirre's claim. The plaintiff, a late-night pedestrian, appeared intoxicated to an officer. (*Id.* at p. 735.) The plaintiff and his witnesses admitted the plaintiff averted his gaze at one point and "stepped back as [the officer] got extremely close to him." (*Id.* at p. 736.) But they denied the officer's testimony that plaintiff seemed to be preparing to

fight the officer, and then walked away despite the officer's commands to stay. (*Ibid.*) The officer soon declared plaintiff under arrest and threw him to the ground. (*Id.* at p. 736.) A jury found the officer used excessive force. (*Id.* at p. 737.)

The Court of Appeal affirmed the verdict, concluding a reasonable trier of fact could have found the officer used excessive force. (*Schmidlin*, *supra*, 157 Cal.App.4th at pp. 737-739.) The officer contended he deserved qualified immunity due to the objective reasonableness of his belief "'that the "take-down" approach was a reasonably necessary and effective technique for handcuffing an intoxicated, uncooperative, and potentially dangerous individual.' " (*Id.* at p. 740.) But the Court of Appeal found the jury reasonably could have found that "plaintiff did *not* appear sufficiently intoxicated, uncooperative or potentially dangerous to permit a reasonable officer to believe it was reasonably necessary to knock him down, strike and club him." (*Ibid.*) (Unlike the *Schmidlin* plaintiff, Aguirre was already handcuffed behind his back when tackled.) The jury instead could have believed that the plaintiff's drinking five or six beers over the course of

an evening would not "affect his ability to walk or talk, but would just leave him feeling mellow and relaxed." (*Id.* at p. 739.) Such "mellow relaxation" was described in the instant case by not only Aguirre and his witnesses, but also by Deputy Riordan's account of Aguirre's "sway[ing] in a circular motion" while seated outside the club. (1 RT 74.) The "plaintiff's testimony about his reactions to alcohol . . . that it left him feeling `mellow,' would support an inference that he posed no threat to officers whatever." (*Ibid.*) Assuming arguendo that Deputy Riordan's testimony supported the theory that Aguirre's condition justified the amount of force used, the testimony of Aguirre and his witnesses supported the theory that the force was not justified. This evidentiary conflict compelled a denial of the motion for nonsuit.

Both *Santos*, *supra*, 287 F.3d 846, and *Schmidlin*, *supra*, 157 Cal.App.4th 728, thus demonstrate how easily force can become legally unreasonable when the offense is a minor one like public intoxication, and the harm that the victim would have suffered if left alone pales besides that which actually resulted from police intervention. There was a triable issue

as to the reasonableness of the force used against Aguirre, and the court erred in granting the motion for nonsuit.

2. *Aguirre's evidence established negligence.*

Alternatively, the evidence also supported Aguirre's negligence claim. (See *Grudt v. City of Los Angeles* (1970) 2 Cal.3d 575, 586-587; see also *Munoz v. Olin* (1979) 24 Cal.3d 629, 634-635 [plaintiff may present both intentional and negligent tort theories].) Negligence may be found from Deputy Plunkett's testimony that Deputy Riordan and Aguirre got "tangled up together and they tripped and fell together." (1 RT 142.) Negligence may also be found from even the intentional act of tackling Aguirre, if the decision to tackle did not comport with the duty of due care.

The police in *Grudt* approached Grudt, who was hard of hearing, as he drove through a high crime area late at night. The officer rapped the shotgun against the window, and fired the fatal shot when Grudt did not yield. (*Grudt*, *supra*, 2 Cal.3d at p. 587.)[5] The Supreme Court held even the

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[5] As here, there were many conflicts in the record. There was evidence that Grudt drove at an officer, although other evidence

intentional act of shooting could reflect "negligence on the part of the officers in interpreting the circumstances as necessitating a shotgun blast and four rounds from a revolver, designed to kill, although Grudt was hemmed in by black and white police vehicles converging to his front and rear." (*Ibid.*) Similarly, the jury could have found negligence from Deputy Riordan's tackling Aguirre in way that produced such injury when Aguirre, like Grudt, lacked a reasonable possibility of escape.

There was also sufficient evidence of police negligence in *Munoz v. Olin*, *supra*, 24 Cal.3d 629. The officers chased a suspect who refused to stop on command, and shot him as he climbed a gate trying to flee. (*Id.* at p. 634.) The Supreme Court found there could be negligence in two ways that are pertinent here. First, the officers may have been negligent in identifying Munoz as the suspected arsonist. (*Id.* at p. 636.) Deputy Riordan likewise might have been negligent in identifying Aguirre as the individual who was reported for public intoxication. (1 RT 62-63.) More significantly, the

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showed he did not. (*Id.* at p. 582.)

Munoz v. Olin jury could have found negligence from the decision to *shoot* when the police could have pursued him by *driving*. (*Id.* at pp. 636-637.) The instant jury could likewise have found that tackling Aguirre was unnecessary because patrol cars could have prevented Aguirre's escape on foot.

Aguirre's evidence showing a battery did not preclude a negligence claim as well. (*Munoz v. Olin*, *supra*, 24 Cal.3d at pp. 634-635; *Grudt*, *supra*, 2 Cal.3d at pp. 586-587.)

B. *The court's granting the motion for nonsuit derived from errors of law.*

Notwithstanding the above-described evidence, the trial court did not allow the jury to decide the case. The court precluded trial, not due to its assessment of the facts, but due to several incorrect legal conclusions. These errors require reversal.

1. *The* Ladd *decision did not preclude liability for injuries inflicted on escaping arrestees.*

The court endorsed the defense assertion that the California Supreme Court, in *Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, precluded liability for any injuries

inflicted upon a fleeing arrestee. (2 RT 403, 405.) Aguirre correctly argued that *Ladd* did not provide immunity against a battery/excessive force claim. (2 RT 407-408.) The court erred in "rul[ing] in favor of the defense" on the theory that *Ladd* held "No liability for injuries sustained by a fleeing arrestee." (2 RT 421-422.)

The Supreme Court in *Ladd*, *supra*, 12 Cal.4th 913, reviewed liability under Government Code section 845.8. This provision provides the government with immunity for any injury *caused by* an escaping prisoner or arrestee, or a person resisting arrest. The *Ladd* plaintiff was a prison escapee who fell and lost her legs under the wheels of a train. (*Id.* at pp. 916-917.) The Supreme Court held that immunity applied because the injury was "caused by" the escapee, even though she was also the victim. It would be anomalous to deny relief to an innocent bystander for an injury caused by an escapee, but to grant relief to the injured escapee herself. (*Id.* at p. 920-921.) Aguirre did not cause his own injury, so *Ladd* did

not apply.[6]

Even if Aguirre did "flee" and prompt a police pursuit, that flight would not be the "cause" of his eventual injury. In a case where a fleeing suspect ignored a command to halt and was injured by pursuing officers, Chief Justice George, the author of *Ladd*, rejected the notion that the suspect's flight could be deemed the "cause" of the pursuit, and thus the "cause" of the eventual injury inflicted upon him.

> [I]t cannot be said that, because plaintiff refused to submit to detention, he caused his own injury within the meaning of section 845.8. . . . Such an interpretation of section 845.8 would stretch the language of the statute beyond its plain meaning and result in startling consequences. **If section 845.8 were held to apply whenever a suspect failed to submit to custody, the public entity would be immunized for *any* injury sustained by either the fleeing suspect or a third person, even if law enforcement officers acted negligently, <u>used excessive force</u>, or committed an intentional tort.** . . . Nothing in section 845.8 suggests that the Legislature intended such results. [¶.] . . .

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Ladd 's reference to section 844.6, which immunizes public entities from liability both for injuries "caused by" and "caused to" prisoners, does not support immunity here, because "`caused to' immunity" applies in cases involving *prisoners* but not *escaped prisoners* or *arrestees*. (*Reed v. County of Santa Cruz* (1995) 37 Cal.App.4th 1274, 1281.)

(*Thomas*, *supra*, at p. 1175 (dis. opn. of George, C.J.) (boldface and underline added.)

Because a "suspect does not cause his or her own injuries . . . simply by failing to submit to an arrest or detention," a suspect's flight does not license an officer to inflict excessive force. (*Ibid.*)

There was no basis for granting immunity based on *Ladd*, *supra*, 12 Cal.4th 913. That case not does preclude liability for injuries *caused by police* on arrestees or people resisting/escaping arrest. The trial court erred in precluding liability through an incorrect reliance on the case.

2. *Deputy Riordan's right to use force was not absolute but was bound by reasonableness.*

Beyond the question of absolute liability, the parties disputed the legitimacy of Deputy Riordan's use of force. Aguirre contended there was a triable issue of fact as to whether the degree of force was unreasonable. (2 RT 411.) Respondents denied there was any reasonableness limitation on the deputy's use of force. The court agreed with the defense. "When a suspect does not succumb or is resisting or fleeing arrest, the officer may use whatever physical force is

necessary to make him stop. It's not qualified by `reasonable' or `unreasonable.' Just any." (2 RT 415.) The court agreed with respondents in holding "There is . . . no dispute and no question of fact the officer is required to do what was necessary to attempt to regain control of Mr. Aguirre." (2 RT 417.)

Contrary to respondents' argument, Penal Code section 835a expressly authorizes officers to "use *reasonable* force to effect [an] arrest, to prevent escape or to overcome resistance." Although the court omitted the qualifier "reasonable" before the term "force," the actual statute restricts the legitimate use of force to that which is reasonable. An officer does not have carte blanche to use unlimited force, even where there is probable cause to arrest (*Blankenhorn*, *supra*, 485 F.3d 463, 473, 478-480), or where the suspect attempts to flee. (*Hernandez*, *supra*, 46 Cal.4th 501, 514.)

The court thus erred in pre-empting the reasonableness evaluation by holding "the officer is required to do what was necessary to regain control of Mr. Aguirre." (2 RT 417.)

3. *Deputy Riordan did not enjoy qualified immunity to use excessive force.*

The court further accepted respondents' incorrect contention that Deputy Riordan was entitled to qualified immunity "even if a jury believes the testimony that the officer placed his knee on [Aguirre's] neck" as he lay prone on the ground. (2 RT 415.) "[Q]ualified immunity absolves even excessive force. Even if you have excessive force, if you have a violation, qualified immunity protects that." (2 RT 415.) The court was incorrect; Deputy Riordan did not enjoy qualified immunity to a battery/excessive force claim.

"`The doctrine of qualified governmental immunity is a federal doctrine that does not extend to state court claims against government employees.' " (*Venegas v. County of Los Angeles* (2007) 153 Cal.App.4th 1230, 1243, quoting *Ogborn v. City of Lancaster* (2002) 101 Cal.App.4th 448, 460.) Regardless of the scope of federal qualified immunity under *Saucier v. Katz* (2001) 533 U.S. 194, 201 [121 S.Ct. 2151, 150 L.Ed.2d 272] receded from in *Pearson v. Callahan* (2009) 555 U.S. 223, 236 [129 S.Ct. 808, 172 L.Ed.2d 565], "officers'

immunity under state law is narrower," and thus *Saucier* does not provide immunity for the state law claims of assault and battery. (*Robinson v. Solano County* (9th Cir. 2002) 278 F.3d 1007, 1013 (en banc).)

Police officers are thus potentially liable for state claims of battery/excessive force. (*Scruggs v. Haynes*, *supra*, 266 Cal.App.2d. 256, 264, 268; *Robinson*, *supra*, 278 F.3d at p. 1016.) California law has no equivalent to the qualified immunity described in *Saucier v. Katz*, *supra*, 533 U.S. 194. (*Venegas*, *supra*, 153 Cal.App.4th at p. 1249.) Whereas immunities to federal claims derive not from statute but a judicial gloss on section 1983, and apply based on the nature of the defendant's duties (*Asgari*, *supra*, 15 Cal.4th 744, 755-756), immunity under California law is governed by statute, and focuses on the nature of the alleged tort rather than defendant's governmental duties. (*Id.* at p. 756.) Therefore, regardless of the reach of *Saucier*'s qualified immunity for federal claims, it did not preclude the state law claims of battery or negligence. Assuming without conceding Deputy Riordan deserved qualified immunity regarding the section

1983 claim (2 RT 427-428), that immunity did not cover the state claims of battery or negligence.

4. *A jury may determine reasonableness.*

The court further refused to allow the jury to weigh the reasonableness of Deputy Riordan's conduct. The court held that the jury, at least in the absence of expert testimony, was incapable of evaluating the reasonableness of the force used.

> How is a jury to determine from plaintiff's standpoint as to what reasonable force was relative to the stopping of this moving plaintiff? In other words, are they to speculate, well, he should have taken one hand to his shoulder or grabbed an arm and turned him around? Are they supposed to speculate that he should have kicked him and kicked his legs from under him? What is the jury to determine here? How are they to make this decision?

(2 RT 412-413.)

Aguirre denied expert testimony was required; "Once there are disputed facts in question, it is the province of the jury to decide whether there was excessive force or not." (2 RT 413.)

Aguirre was correct that the jury could determine the reasonableness of the force used. California courts instruct the jury to consider certain factors, and find the force was reasonable or unreasonable based on the totality of the

circumstances. (*Hernandez*, *supra*, 46 Cal.4th 501, 514.) Likewise, contrary to respondents' claim that immunity is "always a judicial issue," (2 RT 414), the extent of qualified immunity may be determined by a jury. (*Venegas*, *supra*, 153 Cal.App.4th 1230, 1237.)

Aguirre was also correct in asserting that juries may find unreasonable force *without expert testimony*. (*Blankenhorn*, *supra*, 485 F.3d 463, 478-479; *Drummond ex rel. Drummond v. City of Anaheim* (9th Cir. 2003) 343 F.3d 1052, 1059, fn. 6.)[7] Juries have returned, and appellate courts have affirmed, verdicts finding unreasonable force even without expert testimony about the reasonableness of the force used. (E.g. *Schmidlin*, *supra*, 157 Cal.App.4th 728, 740; *Scruggs v. Haynes*, *supra*, 252 Cal.App.2d 256, 269.) "[T]he jury was entitled to find . . . that plaintiff did *not* appear sufficiently intoxicated, uncooperative, or potentially dangerous to permit a reasonable officer to believe it was reasonably necessary to

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[7] Assuming without conceding that Aguirre needed expert testimony to show the unreasonableness of the force used to subdue him, the court erred in denying Aguirre's motion to reopen to allow Sergeant Kirkley to testify as to the contours of reasonable force. (2 RT 425.) (See Argument III(B)(3), *post*.)

knock him down, strike, and club him." (*Schmidlin*, *supra*, at p. 740.) The court erred in finding the jury incapable of determining reasonableness.

5. *Deputy Riordan's potential liability extended to the County*.

Finally, as Deputy Riordan was subject to liability on these state law claims, so was the County. The court precluded vicarious liability by endorsing the County's argument that "There is no respondeat superior in government agency if you read the code." (2 RT 430.) To the contrary, "The doctrine of respondeat superior applies to public and private employers alike." (*In re Mary M.* (1991) 52 Cal.3d 202, 209.) As the Supreme Court has explained,

> [T]he imposition of vicarious liability on a public employer is an appropriate method to ensure that victims of police misconduct are compensated. [The Legislature] has done so by declining to grant immunity to public entities when their police officers engage in violent conduct. Since . . . 1963 . . . **a governmental entity can be held vicariously liable when a police officer acting in the course and scope of employment uses excessive force** or engages in assaultive conduct.

(*Id.* at p. 215, emphasis added.)

Both Deputy Riordan and the County could be held liable for the deputy's excessive use of force against Aguirre.

In sum, Aguirre presented evidence from which a reasonable trier of fact could have found Deputy Riordan committed a battery by using excessive force in making the arrest. The trial court's reasons for denying the jury the opportunity to consider the case — that *Ladd*, *supra*, 12 Cal.4th 913, precluded liability for any injuries *caused to* a fleeing suspect, that Deputy Riordan could use unlimited force, that qualified immunity privileged the use of excessive force, that the jury could not find excessive force without expert testimony, and that the County could not be liable through the doctrine of respondeat superior — were legally incorrect. Reversal is required.

III. The court erred in dismissing the assault, battery, and negligence force causes of action, because plaintiff's evidence describing how Deputy Riordan pressed his knee on Aguirre's neck established a battery and/or negligence.

A. *The evidence established a triable issue of fact as to the reasonableness of Deputy Riordan's post-tackle use of force.*

Even if Deputy Riordan's tackling Aguirre was reasonable because it was needed to prevent his flight, the subsequent act of force enjoyed no such justification. Construed in the light most favorable to Aguirre, the evidence showed that while Aguirre was lying motionless, bleeding on the ground, with his hands tied behind his back, Deputy Riordan pressed his knee on the back of Aguirre's head or neck. (1 RT 94, 99, 145, 2 RT 219, 239, 305.) Deputy Riordan admitted there was a stream of blood running away from his mouth. (1 RT 102.) As Aguirre was not resisting, his mouth was oozing blood onto the concrete and his hands were cuffed behind his back, a jury could have reasonably found there was no need for self-defense or escape prevention that justified this additional use of force.

Deputy Riordan's pressing his knee against Aguirre's neck or head could have been an unreasonable use of force,

and thus a battery, even if the initial tackle was reasonable. In *Scruggs v. Haynes*, *supra*, 252 Cal.App.2d 256, Officer Haynes was investigating a traffic accident, in which plaintiff Scruggs was a passenger. (*Id.* at p. 258.) A scuffle occurred between the other car's driver and Officer Haynes' partner, and Haynes went to assist his partner. Plaintiff Scruggs, who wished to advise Officer Haynes about the other driver's pre-existing injury, extended his hand and started to say "Wait a minute." (*Ibid.*) Officer Haynes then grabbed Scrugg's arm, but he spun away from the officer's grip. The officer grabbed Scruggs' arm again, kicked his feet out from under him, and the two men fell, with Scruggs landing on his back and Haynes landing on him. (*Ibid.*)

The factual narrative up to this point bears some resemblance to the instant case. Just as Deputy Riordan asserted he needed to prevent Aguirre's escape, and protect the safety of others present, Officer Haynes may have needed to ensure Scruggs did not escape or interfere with the officer's ability to protect his partner. (*Scruggs v. Haynes*, *supra*, 252 Cal.App.2d at p. 262.) Moreover, in each case, the officer's

falling on the suspect may have been somewhere between completely intentional and completely accidental. The *Scruggs* court, sitting as trier of fact, did not find the officer's conduct, up to this point, to be unreasonable. (*Ibid.*)

The two men's fall, however, did not end the incident. A plaintiff's witness testified that Officer Haynes "`stomped'" on Scruggs with his foot. (*Scruggs*, *supra*, 252 Cal.App.2d at p. 258.) Officer Haynes himself admitted that he pinioned Scruggs' left hand with his knee, and tried to restrain Scruggs' right arm. When Scruggs' got his arm free, Haynes struck him twice in the head and once in the abdomen. The officer then rolled him over and handcuffed him. (*Id.* at p. 259.)

The court considered this second round of force less justifiable than the first. The officer's justification for using force continued "`up until the time, with the man flat on his back and helpless, that he struck him with such vicious force.'" (*Scruggs*, *supra*, 252 Cal.App.2d at p. 262.)

> It thus appears that the court felt that appellant Haynes had used reasonable force in subduing [Scruggs] to the point of grounding him and pinning him down, but that, once he was pinned, the officer used unreasonable and unnecessary force in striking him repeatedly with a fist. The

> evidence is wholly sufficient to support the findings that unreasonable force was used and that an assault and battery was thereby committed.

(*Ibid.*)

The instant "post-fall" (or post-tackle) use of force was even less justifiable. Unlike Scruggs, Aguirre already had his hands cuffed behind his back when he fell to the ground. Unlike Scruggs, who freed his arm from restraint, Aguirre was not resisting. Unlike Scruggs, Aguirre was already bleeding profusely from the tackle. Unlike Scruggs, who had initially extended his arm and delayed Officer Haynes' assistance to his partner, Aguirre had never taken any affirmative action against any officer that could have been perceived as hostile. If the post-fall force used against Scruggs was unreasonable, a fortiori, the post-fall force here was worse.

The vulnerability of a prone, handcuffed individual to a heavier individual's kneeling on his head or neck is obvious. (*Drummond*, *supra*, 343 F.3d 1052, 1059.) "Under similar circumstances, in what has come to be known as `compression asphyxia,' prone and handcuffed individuals in an agitated state have suffocated under the weight of restraining officers." (*Id.* at pp. 1056-1057.) Fortunately,

Aguirre did not suffer the fate of Drummond, who lost consciousness and fell into a permanent vegetative state due to the compression of his chest and his consequent inability to breathe. (*Id.* at p. 1055.) But the *Drummond* court's analysis applies here as well. (*Id.* at pp. 1057-1058.)

Drummond was not accused of any crime but was restrained due to mental illness; Aguirre of course was suspected of the minor offense of public intoxication. (*Drummond*, *supra*, 343 F.3d at p. 1057.) In both cases, police intervened to protect an individual from a self-harm they deemed substantially probable. The other factors were even more parallel to those below.

> Second, while Drummond may have represented a threat (to himself or possibly others) before he was handcuffed . . . after he was "knock[ed] . . . to the ground where **the officers cuffed his arms behind his back as [he] lay on his stomach**," a jury could reasonably find that he posed only a minimal threat to anyone's safety. Finally, evidence in the record derived from an independent eyewitness unequivocally states that once Drummond was on the ground, he "was not resisting the officers"; **there was therefore little or no need to use any further physical force**. All three [*Graham v. Connor, supra,* 490 U.S. 386] factors would have permitted the use of only minimal force once Drummond was handcuffed and lying on the ground.

(*Id.* at p. 1058, emphasis added.)

The evidence created at least a triable issue as to whether, regardless of the reasonableness of the initial tackle, Deputy Riordan's pressing his knee against Aguirre's head or neck as he lay prone and handcuffed on the ground was a reasonable use of force.[8]

B. *The court erred in refusing to allow the jury to decide the reasonableness of this use of force based on Aguirre's asserted failure to apportion damages between the first use of force and the second use of force.*

1. *The evidence supported the finding that Deputy Riordan's pressing his knee against Aguirre's neck caused damages.*

The evidence showed Deputy Riordan's post-tackle conduct led to a second physical injury. The court recalled the doctor stated,

> there were two different points of impact, blunt traumas to his facial area,[9] one being the left side

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[8] Alternatively, the jury could have found that Deputy Riordan acted negligently in perceiving the need to press his knee to Aguirre's neck once he was already lying bleeding on the ground. (*Munoz v. Olin*, *supra*, 24 Cal.3d 629, 636-637; *Grudt*, *supra*, 2 Cal.3d 575, 586-587.)

[9] The actual testimony described "at least" two different point-of-impact traumas. (2 RT 189.)

> of the face affecting his teeth on the left side, another trauma to the right side, the dent of the chin, fracture of the something synthesis above that, fracture, split lip, scar, the incisor teeth, teeth pushed higher into what is called the maxillary bone, injuries that require treatment, jaw wired shut.

(2 RT 416-417.)

Notwithstanding these multiple points of impact (on opposite sides of the face), the court refused to allow the jury to consider the excessive force question, even as to the post-fall conduct, because there was no affirmative evidence establishing that Aguirre suffered an injury from the post-tackle use of force. (2 RT 417.) This was error because the jury could have reasonably inferred that the two traumas corresponded to the two uses of police force.

On review of a motion for nonsuit, the reviewing court must indulge every legitimate inference in favor of the plaintiff. (*Castaneda v. Olsher*, *supra*, 41 Cal.4th 1205, 1214.) The trial court must "draw all available inferences from the plaintiff's evidence." (*Greening v. General Air-Conditioning Corp.* (1965) 233 Cal.App.2d 545, 550.) There were two different points (places) of impact, one on each side of the face, and two different times of impact, when Aguirre was tackled and when

he was kneed in the neck/head. A permissible (and, in motion for nonsuit, obligatory) inference is that there was one impact on each occasion. A reasonable juror could thus infer that Aguirre suffered the second trauma when Deputy Riordan pushed his knee against Aguirre's neck/back, and this Court must indulge that inference on appeal.

The case of *Estate of Rowley* (1967) 257 Cal.App.2d 324, best illustrates the broad range of inferences available in evaluating injuries without direct testimony. Two women, Rowley and Cooper, died when another car crashed into theirs, and whether their deaths were simultaneous or sequential was material for inheritance purposes. (*Id.* at p. 328.) The difficulty in determining whether one predeceased the other was apparent: "The deputy coroner, who performed the autopsy, testified that it would be a matter of `conjection (sic)' as to the exact instant when death occurred as between the death of Miss Cooper and Mrs. Rowley." (*Id.* at 330.) Even one party's expert "postulated that he did not think anybody could say who died first or when either of them, in point of time, received the damaging blows." (*Id.* at p. 332.)

Accordingly, the party opposing the claim that Rowley predeceased Cooper contended it was "based on guess, surmise and conjecture; that her survivorship is a mere possibility, not a probability; and that therefore there is no substantial evidence to satisfy the burden of proof which respondent acknowledgedly bore." (*Id.* at p. 335.)

The Court of Appeal, however, recognized the permissibility of inferences to establish circumstantially that one predeceased the other. There was evidence supporting the inference that each woman died immediately upon the impact of the other car, and that Rowley was sitting on the side of the car that the other car hit first. (*Estate of Rowley*, *supra*, 257 Cal.App.2d 324, 330-331.) There was therefore substantial evidence, established circumstantially, that Rowley died first. (*Id.* at pp. 327-328.)

There was substantial evidence from which a trier of fact could have drawn a comparable inference here. Dr. Sghiatti described "two different point-of-impact traumas." (2 RT 189.) "There was another trauma. And I say that there was *another* trauma because the impact was on the right side." (2 RT 190,

emphasis added.) In *Estate of Rowley*, *supra*, 257 Cal.App.2d 324, it was reasonable to infer from the location of the two women that the fatal impacts were sequential rather than simultaneous. It is likewise reasonable here to infer that the traumas were sequential (one after each use of force) rather than simultaneous (both after the first use of force). A jury could reasonably infer that each use of force caused one of the two traumas.

2. *The court erred in granting the motion for nonsuit based on Aguirre's not apportioning the damages between the tackling and the knee-pressing, because it was respondents' burden to apportion damages between the allegedly nontortious and tortious conduct.*

The second use of force was logically connected to the second *injury*, even if there was no express documentation of its *damages*. In other words, Aguirre did not show whether the second use of force caused the left side or right side trauma. But forcing Aguirre to show which damages resulted from which use of force would reverse the burden of proof. "A plaintiff does not have the burden of apportioning damages." (*Espinosa v. Little Co. of Mary Hospital* (1995) 31 Cal.App.4th 1304, 1321.) It is the defendant who must apportion damages

between the tortious and nontortious activity to avoid full liability. "[W]hen the damages cannot be apportioned . . . between tortious and nontortious causes, a tortfeasor whose acts have been a substantial factor in causing the damages is legally responsible for the whole." (*State v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1036; see also *State Farm Mutual Auto Ins. Co. v. Partridge* (1973) 10 Cal.3d 94, 105: "[T]hat multiple acts concurred in the infliction of injury does not nullify any single contributing act.") Nothing in *Scruggs*, *supra*, 252 Cal.App.2d 256, showed that the plaintiff made such apportionment of damages between the first, reasonable use of force, and the second, unreasonable use. As the court did not dispute that Deputy Riordan used unreasonable force when Aguirre was lying handcuffed on the ground while bleeding, Riordan was a tortfeasor who had the burden of showing the injuries occurred as a result of his (prior) nontortious conduct.

3. *The court erred in not allowing Aguirre to reopen to apportion damages.*

If there was any uncertainty about the apportionment of damages, the court should have granted Aguirre's request to

present rebuttal for this limited purpose. (2 RT 425-426.) Such a request was especially justified given the court's prior rulings. (See *Olsen v. Breeze* (1996) 48 Cal.App.4th 608, 626.) For example, when Dr. Sghiatti testified, and had the opportunity to document fully the effects of each of Deputy Riordan's acts, the court rushed Aguirre's direct examination. Although Aguirre wanted to document more fully the injuries and their causes, the court (and respondents) assured him: "The injuries are not going to be at issue." (2 RT 192.)[10]

A court has a "duty" to permit such reopening. (*Eatwell v. Beck* (1953) 41 Cal.2d 128, 133.)

> One of the chief objects subserved by a motion for nonsuit is to point out to the court and to opposing counsel the specific oversights and defects in plaintiff's proof of his case; and this is order that, as to the latter, he may supply if possible the specified deficiencies in his proof. [Citations.] When the plaintiff in this case, his attention being called to the matter, offered to do this, it was the duty of the court to permit him to supply the missing evidence; and it was error to refuse this privilege to the plaintiff and, after such, refusal to grant a

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[10] Later, the court made another curious observation about causation, that there was "no question whatsoever" about the injuries. "The fact is the injuries weren't caused by the deputy hitting him in the mouth. The injuries were caused by the fact that he fell and struck his face on the pavement; right?" (2 RT 411.)

motion for nonsuit. [Citation.]
(*Ibid.*, internal citations omitted.)

Because Aguirre offered to recall the expert witness and elicit testimony that Deputy Riordan's second use of force caused independent damage (2 RT 425-426), the court's depriving Aguirre of the opportunity to cure the purportedly deficient showing was reversible error. (*Alpert v. Villa Romano Homeowners Assn.*, *supra*, 81 Cal.App.4th 1320, 1337.)

The Supreme Court's decision in *Eatwell v. Beck*, *supra*, 41 Cal.2d 128, is factually apposite and legally controlling. The plaintiffs alleged the defendants committed fraud in the sale of a motel, which the defense conceded for purposes of the nonsuit motion. (*Id.* at pp. 130-131.) The plaintiffs presented evidence showing they had purchased the property for $43,000, overpaying due to defendants' fraud. (*Ibid.*) The defense motion for nonsuit alleged the plaintiffs' evidence failed to show how much the property was actually worth, and thus the extent of their damages. (*Id.* at p. 131.) Plaintiffs moved to reopen "`for the purpose of clarifying the point of the actual value vs. the representative value.'" (*Id.* at p. 132.) In other words, reopening the case would allow the plaintiffs to

show "the property was worth only $30,000 and that plaintiffs were thereby damaged in the sum of $13,000 . . . ." (*Ibid.*)

The trial court denied the motion to reopen, which the Supreme Court held to be reversible error. The plaintiffs had already provided evidence that "tended at least inferentially to show that the actual value of the property purchased was less than the price paid" and that the "defendants do not appear to have been misled or in anywise prejudiced by the failure of the plaintiffs to have earlier pleaded the more specific facts." (*Id.* at p. 136.) "[I]t was incumbent upon the court to accept plaintiffs' offer and permit them to produce further and more specific evidence as to the actual, or market, value of the property . . . ." (*Id.* at p. 134.)

The decision in *Eatwell v. Beck*, *supra*, 41 Cal.2d 128, compels reversal here. Just as the defense conceded there was fraud for the purpose of the nonsuit, the trial court below did not dispute Aguirre's assertion that the second use of force (the knee to the neck/head) was unreasonable. Rather, the trial court found the evidence presented did not specifically show which, if any, damages resulted from this second use of

force (2 RT 417), just as the *Eatwell* plaintiffs' showing was insufficiently specific as to what damages they suffered. As in *Eatwell*, the evidence showing at least two independent points of trauma "tended at least inferentially" to show damages from the second use of force, and the defense was not prejudiced by Aguirre's not apportioning the damages sooner. (See *Eatwell*, *supra*, at p. 136.) If Aguirre failed to show the damages suffered from the second use of force with adequate specificity, the trial court erred in denying him the opportunity to reopen.

4. *The trial court erred in granting the nonsuit motion based on Aguirre's alleged failure to specify damages resulting from the second use of force because the recoverable damages extended beyond his medical injuries.*

Finally, even if Aguirre forfeited his right to recover his medical expenses due to his failure to link those damages to the second use of force, medical injuries are not the only damages that warrant relief. A plaintiff may also recover for physical pain, "fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal." (*Capelouto v. Kaiser*

Foundation Hospitals (1972) 7 Cal.3d 889, 892-893.) Dr. Sghiatti testified as to Aguirre's anxiety. (2 RT 192.) In any event, there were grounds for inferring that an individual spitting up blood, lying face down on the pavement with his hands already cuffed behind his back, could suffer most if not all these harms when a heavier officer pushed his knee against his neck without any apparent need. The absence of medical bills or medical testimony will not foreclose a recovery for pain and suffering; expert testimony is not a prerequisite for relief. (See *Capelouto*, *supra*, at p. 895; *Hilliard v. A.H. Robins Co.* (1983) 148 Cal.App3d 374, 413.) Indeed, only $41.50 of the $17,000.00 awarded in *Scruggs v. Haynes*, *supra*, 252 Cal.App.2d 256, was for medical expenses. (*Id.* at p. 261.)

There was a triable issue as to the reasonableness of Deputy Riordan's pressing his knee against Aguirre's neck as he lay prone and handcuffed. The court erred in granting the motion for nonsuit based on Aguirre's supposed failure to specify which damages resulted from Deputy Riordan's pressing his knee to Aguirre's neck. Reversal is required.

Conclusion

This case was a textbook example of why our legal system empanels juries. According to Deputy Riordan, he confronted a severely intoxicated individual who endangered himself and others, so the deputy did nothing more than was necessary to prevent Aguirre from escaping and harming others. By contrast, Aguirre presented evidence that he was simply in a "mellow" or "relaxed" state, threatened no one, and was the victim of excessive police force, both when he was tackled after taking three steps to the side, and then again when he was lying on the ground and Deputy Riordan pressed his knee into Aguirre's neck. The jury was needed to weigh these conflicting accounts.

The court erred in preventing the jury's participation by granting respondents' motion for nonsuit. Notwithstanding the factual sufficiency of the evidence supporting Aguirre's claims, the court relied on inapposite authorities: *Ladd*, *supra*, 12 Cal.4th 913, and federal qualified immunity law. Furthermore, even though there were at least two distinct points of impact, the court incorrectly refused to infer there

was an injury when Deputy Riordan pressed his knee into Aguirre's neck, incorrectly reversed the burden of apportioning damages, incorrectly refused to allow Aguirre to reopen his case, and incorrectly refused to allow the jury to consider nonmedical damages.

This Court must reverse the court's granting the motion for nonsuit, and the attendant order of fees and costs.

Respectfully submitted,

Dated: April 4, 2012

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Mitchell Keiter, Counsel for
Appellant Salvador Aguirre

Certification of Word Count

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

I, Mitchell Keiter, counsel for Appellant, certify pursuant to the California Rules of Court, that the word count for this document is 12,107 words, excluding tables, this certificate, and any attachment permitted under rule 8.204(d). This document was prepared in WordPerfect version X3 word-processing program, and this is the word count generated by the program for this document. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: April 4, 2012

_____

Mitchell Keiter, Counsel for
Appellant Salvador Aguirre

Proof of Service

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action.

On April 4, 2012, I served the foregoing document described as **APPELLANTS' OPENING BRIEF** on the interested parties in this action.

Salvador Aguirre (address omitted)

John M. Coleman
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601 W. Fifth St.
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California Supreme Court
350 McAllister St.
San Francisco, CA 94102 (delivered electronically)

I deposited such envelope in the mail at Beverly Hills, California. The envelope was mailed with postage thereon fully prepaid.

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

Executed this 4th day of April, 2012, at Beverly Hills, California.

_____
Mitchell Keiter