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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

CITY OF RIVERSIDE,

Petitioner,

v.

THE SUPERIOR COURT OF
RIVERSIDE COUNTY,

Respondent;

SARAH KNIGHT et al.,

Real Parties in Interest.

E060319

(Super.Ct.No. RIC528984)

OPINION

ORIGINAL PROCEEDINGS; petition for writ of mandate. Craig Riemer, Judge.

Petition is granted.

Orrock Popka Fortino Tucker & Dolen, Stanley O. Orrock, Micheal A. Fortino;
Greines, Martin, Stein & Richland, Timothy T. Coates and Jeffrey E. Raskin, for
Petitioner.

No appearance for Respondent.

Carpenter, Zuckerman & Rowley, John C. Carpenter; Lewis & Associates, Jonathan J. Lewis; Trial Lawyers for Justice and Andrew Lind, for Real Party in Interest.

Government Code section 815¹ establishes a broad immunity for public entities from suits for personal injury, expressly providing that there is no liability “[e]xcept as otherwise provided by statute.”² One such “[e]xcept” statute is section 815.6, which provides for liability “[w]here a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury,” there is liability unless the public entity can establish that it exercised reasonable diligence to perform the duty. In this case, defendant City of Riverside (City) seeks an order compelling the trial court to sustain its demurrer to the second amended complaint of plaintiff Sarah Knight³ (Knight). We determine that the regulations cited by plaintiff do not create a “mandatory duty” within the meaning of section 815.6⁴ and that her attempts

¹ All subsequent statutory references are to the Government Code unless otherwise specified.

² “Except as otherwise provided by statute: (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.”

³ Knight is the only plaintiff asserting the claims discussed in this opinion.

⁴ “Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.”

to further expand her claims must be rejected. Accordingly, we will grant the City's petition.

STATEMENT OF THE CASE

At a pretrial conference held over several days in October and November, 2013, the trial court allowed Knight to file a second amended complaint, which added a cause of action based on City's alleged violation of a mandatory duty. The case by that time had been pending for over four years. Up to that point, Knight's sole claim against City was for a dangerous condition of public property under section 830 *ff*.

The second amended complaint alleges generally that Knight was a passenger in a vehicle driven by one Walters. The latter lost control at a railroad crossing that constituted a "dangerous condition[]" for almost a dozen alleged reasons, but, as relevant here, because "[t]he sudden changes in the vertical slope of the SUBJECT ROADWAY at, before, and after the railroad tracks and other roadway surface defects posed an inconspicuous danger to drivers, causing, among other things, automobiles to vertically depart from the pavement surface and lose control."

The new cause of action alleged by Knight alleged liability based on the breach of a mandatory duty within the meaning of section 815.6. The mandatory duty was based on an order from the Public Utilities Commission known as "General Order 72B." As alleged by Knight, certain parties, including City, had wished to add a second track to the existing crossing in 1994, and therefore "were required to submit an application to the California Public Utilities Commission . . . pursuant to General Order 88A.

DEFENDANTS, and each of them, submitted the General Order 88A application to the PUC on or about March 30, 1994. In Defendants' General Order 88A application, DEFENDANTS, and each of them, voluntarily consented and agreed to comply with PUC General Order 72, version B" General Order 72B provides as follows: "In general, approach grades not in excess of six percent are desirable, but where not reasonably obtainable due to local topographical conditions the gradients in the vicinity of the rails shall be kept as low as feasible."

City demurred on two grounds: first, that the newly alleged cause of action was not encompassed within her administrative claim (see §§ 900 *ff.*) and that Order 72B did not create a mandatory duty which constituted an independent basis for liability. The trial court overruled the demurrer, ruling that plaintiff's claim was "sufficiently broad to include the new theory of liability" and that Order 72B *required* that if the six percent goal was not attainable, any slope at a crossing must be "as low as feasible." Because we disagree with the second conclusion, we need not address the first.

DISCUSSION

We exercise our independent judgment on whether a specific statute or regulation creates a mandatory duty under section 815.6. (*In re Groundwater Cases* (2007) 154 Cal.App.4th 659, 689.) The question involves issues of statutory interpretation for the courts. (*de Villers v. County of San Diego* (2007) 156 Cal.App.4th 238, 257 (*de Villers*).

The determination of whether an enactment creates a "mandatory duty" giving rise to liability under section 815.6 is not always straightforward. The standard interpretation

of statutes that “shall” is mandatory and “may” is discretionary (see, e.g., *Tarrant Bell Property, LLC v. Superior Court* (2011) 51 Cal.4th 538, 542) cannot be routinely applied in this context. (*County of Los Angeles v. Superior Court* (2012) 209 Cal.App.4th 543, 549.) Instead, courts focus on the particular action required by the statute, and will find a “mandatory duty” only if the commanded act does not lend itself to a “normative or qualitative debate over whether it was adequately fulfilled.” (*de Villers, supra*, 156 Cal.App.4th at p. 260.) Put another way, if an enactment compels action but leaves its performance subject to the exercise of discretion, there is no mandatory duty. (*Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 498-499.) Another factor in the analysis of whether a mandatory duty has been imposed upon a public entity is whether the statute or other regulation is specifically designed to protect against a particular risk of harm. (*Guzman v. County of Monterey* (2009) 178 Cal.App.4th 983, 990.) Finally, it has also been commented that whether an enactment is intended to create a mandatory duty to perform a specific act is applied “rather strictly” against finding such a duty. (*All Angels Preschool/Daycare v. County of Merced* (2011) 197 Cal.App.4th 394, 402 at fn. 8.)

Simple cases include *Braman v. State of California* (1994) 28 Cal.App.4th 344, 356-357 (*Braman*), in which a surviving spouse sued over the shooting suicide of her husband on the basis that he was legally prohibited from purchasing a firearm due to mental health concerns but the defendant had failed to prevent him from acquiring such a weapon. The statutory requirement was that the State “shall examine its records . . . in order to determine if the purchaser or transferee [of a weapon] is a person described in

Section 12021 or 12021.1 of [the Penal] [C]ode or Section 8100 or 8103 of the Welfare and Institutions Code. . . . If the department determines that the purchaser or transferee is a person described in [the cited statutes] it shall immediately notify the [gun] dealer of that fact.” (*Braman*, at p. 350; Pen. Code, former § 12076, subd. (c).) Held, this language was mandatory and could support tort recovery. (*Braman*, at pp. 352-354.) Arguably an even clearer case is *Morris v. County of Marin* (1977) 18 Cal.3d 901, 907 involving a statute that provided that local government entities “ ‘shall require’ ” an applicant for a building permit to provide proof of workers’ compensation insurance; the court easily held that this created a mandatory duty running in favor of a worker injured on a project where the builder had not obtained coverage.

However, if the language of an enactment requires a subjective evaluation before its application can be determined, it will be held discretionary. Thus, in *County of Los Angeles v. Superior Court, supra*, 209 Cal.App.4th 543, the plaintiffs sued for injuries received in an attack by a pit bull that was running loose. The complaint alleged that county animal control personnel failed to comply with an ordinance that stated that the county department “ ‘shall capture and take into custody . . . any animal being kept or maintained contrary to the provisions of this Division.’ ” (*Id.* at p. 547, italics omitted.) Those provisions included “ ‘No animal shall be allowed to constitute or cause a hazard, or be a menace to the health, peace or safety of the community.’ ” (*Id.* at p. 547.) The court concluded that whether an animal constituted a hazard or menace was “an inherently subjective question which requires the exercise of considerable discretion

based on consideration of a host of competing factors.” (*Id.* at p. 550.) Thus, plaintiffs’ argument involved “ ‘debatable issues over whether the steps taken by the entity *adequately* fulfilled its obligation,’ ” and therefore could not be construed as mandatory. (*Id.* at p. 550, citing *de Villers, supra*, 156 Cal.App.4th at p. 260, italics in original.)

On the other hand, “shall” was held to be mandatory in another case very arguably involving the potential for discretion in *Alejo v. City of Alhambra* (1999) 75 Cal.App.4th 1180 (*Alejo*). The relevant statutes (Pen. Code, §§ 11164 et seq.) required specified persons to report any instance of child abuse which the mandated reporter “reasonably suspects” to have occurred. The court held that this language imposed both a duty to investigate any allegation of abuse, and to take further action if a reasonable person would have concluded that the allegation was likely accurate. (*Alejo, supra*, 75 Cal.App.4th at pp. 1185-1186.)

Alejo came to the court after the trial court sustained defendants’ demurrer without leave to amend. (*Alejo, supra*, 75 Cal.App.4th at p. 1184.) The alleged facts in that case were distressing—the father of a three-year-old boy had personally reported to police his observations of bruises on the child’s face (the child lived with his mother and her boyfriend), as well as information from a neighbor who told the father that the boyfriend was physically abusing the child. A few weeks later the child was brutally beaten by the boyfriend, suffering disabling injuries. (*Id.* at pp. 1183-1184.) The complaint alleged that the police conducted *no* follow-up investigation of the father’s report. Because it was alleged that the officer to whom the father reported his suspicions made no

investigation at all, the appellate court was not required to—and did not—consider the wisdom of allowing a jury to determine whether an investigation that resulted in no report was “adequate.” Nor was there any consideration of the wisdom of allowing a jury to decide whether an officer’s decision, after investigation, not to further report the matter was “reasonable” in any given case. (See *County of Los Angeles v. Superior Court*, *supra*, 209 Cal.App.4th at p. 554 [noting that a statute would not be held to create a mandatory duty if to do so would raise disputable issues over whether the steps taken by the public entity adequately fulfilled its statutory obligation].)

Most recently, in *San Mateo Union High School Dist. v. County of San Mateo* (2013) 213 Cal.App.4th 418 (*San Mateo*), the plaintiff had lost money invested in a pooled investment managed by defendants. Plaintiff attempted to rely on Government Code sections 27000.3 and 53600.3, both of which provide that county officers managing funds “ ‘shall act’ according to the ‘prudent investor standard,’ with the ‘care, skill, prudence, and diligence under the circumstances then prevailing.’ ” (*San Mateo*, at p. 426.) While noting that “the dividing line between a discretionary and mandatory duty is not always dispositive,” (*id.* at p. 429), the court found that the duty imposed, although stated in mandatory language, was “quite general” and did “not command specific acts designed to achieve compliance with the prudent investor standard.” (*Ibid.*)

Commenting also that plaintiff’s claim would require inquiry into (and jury evaluation of)

highly subjective and speculative investment decisions, the court concluded that the cited statutes imposed no specific duty which could be the basis for liability. (*Id.* at p. 432.)⁵

The above authorities, considered as a whole, clearly compel the result which we reach in this case. General Order 72, version B, begins by explaining that “approach grades not in excess of six percent are desirable” “Desirable” clearly does not itself express an obligatory mandate. And the remainder of the order clearly reflects the understanding that the six percent maximum is a goal subject to site specifications and topography. “Feasible” also is a word that cannot be read as creating a mandatory duty to do any particular act. Read as a whole, we find that General Order 72B does not create a mandatory duty within the meaning of section 815.6.

To explain further, allowing plaintiff’s theory to go to trial would not be a matter of asking a jury to decide whether the City had performed or omitted a specific act. By comparison, in *Braman, supra*, 28 Cal.App.4th 344, the jury only needed to decide whether the defendant State had performed its duty of notifying the dealer who sold decedent the weapon that decedent could not legally own a firearm. In *Morris v. County of Marin, supra*, 18 Cal.3d 901, the question was simply whether the defendant issued a building permit but did not verify that the applicant had workers’ compensation coverage.

⁵ Other cases have no difficulty rejecting the application of the “mandatory duty” doctrine where the enactment or regulation uses language such as “sufficient” or “necessary.” (*Lockhart v. County of Los Angeles* (2007) 155 Cal.App.4th 289, 308 [duty to maintain “sufficient nursing staff”]; *County of Los Angeles v. Superior Court* (2002) 102 Cal.App.4th 627, 642-643 [duty to take “necessary” actions to preserve well-being of dependent minor].)

In this case, under plaintiff's theory, the jury would be asked to determine if a lower approach grade than that actually built was "feasible," given all the circumstances, including topography and the physical situation of the road. We believe that we can say without fear of contradiction that plaintiff would present an expert who would testify that a lower approach grade *was* feasible. We can similarly say that City would present an expert who would testify with equal confidence that the grade approach as built was as low as feasible. Instead of determining a simple factual issue, the jury would be faced with a choice between "talking heads," and would be required, in essence, to pass judgment on the decisions of the City.

Of course we recognize that in many contexts, juries are given the authority to hear and weigh the opinions of competing experts. But given the broad immunity established by section 815 and the "rigid requirements" for imposing liability (*Ellerbee v. County of Los Angeles* (2010) 187 Cal.App.4th 1206, 1215), it is clear that in this case General Order 72B provides no basis for submitting an issue of "mandatory duty" to the jury.

We now turn briefly to Knight's attempts to avoid, or deflect, this result.

First, she argues that writ relief is unnecessary because the City can appeal from any judgment. However, our issuance of an order to show cause operates as a determination that the remedy is not adequate in this case. (*Marron v. Superior Court* (2003) 108 Cal.App.4th 1049, 1056.)

Next, Knight argues that the *real* gravamen of her claim is that the City violated Public Utilities Code section 1201, which simply requires that before a railroad grade crossing is constructed, permission must be sought from the Public Utilities Commission.⁶ The contention borders on the frivolous. Not only does the second amended complaint utterly fail to zero in on the supposed failure to obtain such permission—it affirmatively alleges that the City *did* apply for and receive such permission.⁷ We freely agree that Public Utilities Code section 1201 creates a mandatory duty,⁸ but Knight has expressly and in detail alleged compliance with this duty.

Knight’s responsive brief presents no explanation for her eleventh⁹ hour decision to abandon express allegations and plead the opposite—a practice rarely permitted in any

⁶ “No public road, highway, or street shall be constructed across the track of any railroad corporation at grade, nor shall the track of any railroad corporation be constructed across a public road, highway, or street at grade . . . without having first secured the permission of the commission.” (Pub. Util. Code, § 1201.)

⁷ Paragraph 32 reads in its entirety “In or about 1994, a new (second) railroad track was added at the SUBJECT RAILWAY CROSSING. As a required condition for the addition of the new (second) railroad track, DEFENDANTS, and each of them, were required to submit an application to the California Public Utilities Commission (hereinafter ‘PUC’) pursuant to General Order 88A. DEFENDANTS, and each of them, submitted the General Order 88A application to the PUC on or about March 30, 1994. In Defendants’ General Order 88A application, DEFENDANTS, and each of them, voluntarily consented and agreed to comply with PUC General Order 72, version B (hereinafter ‘General Order 72B’).” Paragraph 33 adds the allegation that “PUC granted DEFENDANTS’ joint application to add the new (second) track at the SUBJECT RAILWAY CROSSING.”

⁸ We strongly doubt whether this duty is intended to protect against any particular risk of harm, but we need not so decide.

⁹ Or possibly twelfth, or even thirteenth.

event absent a very good explanation. (See *Lockton v. O'Rourke* (2010) 184 Cal.App.4th 1051, 1061; cf. *Dang v. Smith* (2010) 190 Cal.App.4th 646, 657-659 and fn. 8 [finding the variation in pleading merely “imprudent” and not altering the gist of the claim].) Although she requests that if we find (as we have) that General Order 72B does not create a mandatory duty, she be allowed to amend, we decline to order a remand for this purpose. Although the matter has been pending for over four years, plaintiff was generously permitted to amend her complaint to allege breach of a mandatory duty on the very eve of trial, necessitating delay in trial. She now seeks leave to amend yet again to add a completely new theory that would require even more delay and additional discovery. The request is clearly untimely (see *Magpali v. Farmers Group* (1996) 48 Cal.App.4th 471, 486), and we reject it. Plaintiff may proceed on her original theory of “dangerous condition.”¹⁰

¹⁰ Plaintiff’s last argument, which requires only a footnote for its disposition, is that the City has conceded the feasibility of a six percent grade. This is not correct. At a hearing *over two months before Knight amended her complaint*, the City merely agreed that it had no expert who would testify that a lower grade was not feasible; the court then declined to allow Knight to add an expert who would testify that a lower grade *was* feasible. But at that time, Knight had not alleged a “mandatory duty” claim, only a “dangerous condition” claim. That is, at the time whether the grade as built was as low as “feasible” was barely relevant; the crucial issue being addressed by all sides was whether the grade as built was *dangerous*. The City’s apparent position at that time was simply that even if the grade crossing *could* have been more gently sloped, it was just not dangerous when used with due care.

DISPOSITION

The petition for writ of mandate is granted. Let a peremptory writ of mandate issue, directing the Superior Court of Riverside County to vacate its order overruling petitioner's demurrer, and to enter a new order sustaining the demurrer without leave to amend.

Petitioner is directed to prepare and have the peremptory writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties. Petitioner to recover its costs, if any.

The previously ordered stay is lifted.

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HOLLENHORST
Acting P. J.

We concur:

KING
J.

MILLER
J.