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IN THE SUPREME COURT OF CALIFORNIA

REBECCA MEGAN QUIGLEY

Plaintiff and Appellant,

vs.

GARDEN VALLEY FIRE PROTECTION DISTRICT, et al.,

Defendants and Respondents.

No.

3 Civil No. C079270

Plumas County Superior Court
Case No. CV1000225

SUPREME COURT
FILED

MAY 31 2017

Jorge Navarrete Clerk

Deputy

PETITION FOR REVIEW

After a decision of the
Court of Appeal, Third Appellate District

Appeal from a Judgment of the Superior Court
Of the State of California, County of Plumas
Honorable Janet Hilde

CRC 8.25(b)

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This case presents two issues regarding the proper construction and application of Government Code section 850.4, an immunity provision of the Government Claims Act, which states:

> Neither a public entity, nor a public employee acting in the scope of his [or her] employment, is liable for any injury resulting from the condition of fire protection or firefighting equipment or facilities or, except as provided in Article 1 (commencing with Section 17000) of Chapter 1 of Division 9 of the Vehicle Code, for any injury caused in fighting fires.[1]

1. Does section 850.4 apply in an action for personal injuries caused by a dangerous condition of public property where the injuries did not result from a condition that rendered any facility used to combat the fire inoperative, useless or otherwise defective—in the present case, injuries that plaintiff and appellant Rebecca Quigley suffered while she was asleep at a forest fire base camp miles from the fire when she was run over by a 30,000 pound truck that drove through the designated sleeping area where she and others slept (Slip op. at 1)?

2. To the extent that the immunity might apply, did defendants waive it by failing to allege it as an affirmative defense or otherwise assert it during more than four years of litigation and waiting until after a jury venire was called, the jury was impaneled, trial began and Quigley's attorney's made his opening statement before asserting it?

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[1] All further statutory references are to the Government Code unless otherwise indicated.

I
INTRODUCTION AND REASONS TO GRANT REVIEW

Review is necessary both "to settle an important question of law" and "to secure uniformity of decision...." (Cal. Rules of Court, rule 8.500(b)(1).)

A. The proper construction and application of section 850.4 is an important question that merits review.

Section 850.4 affects every California governmental entity that affords fire protection services. It affects every person, business, corporation, incorporated or unincorporated association, and any other entity suffering injury resulting from a "condition" of a firefighting "facility." The question is what kind of "condition" of what kind of "facility" gives rise to the immunity?

The Tort Claims Act of 1963 (Gov. Code §§ 810-996.6 [now denominated the Government Claims Act]) was enacted in response to *Muskopf v. Corning Hospital Dist.* (1961) 55 Cal.2d 211, in which the Court abrogated the common law rule of governmental immunity. "[W]hen there is negligence," the Court stated, "the rule is liability, immunity is the exception." (*Id.* at 219.) In construing the Act, the Court has "adhered to this basic axiom of tort law." *Baldwin v. State of California* (1972) 6 Cal.3d 424, 435.

The Court has also reaffirmed that the fundamental principle of the Act is that,

> "[I]t would be unjust in some circumstances to require an individual injured by official wrongdoing to bear the burden of his loss rather than distribute it throughout the community." (*Lipman v. Brisbane Elementary Sch. Dist.* (1961) 55 Cal.2d 224, 230.) "Accordingly, courts should not casually decree

> governmental immunity; ...." (*Johnson v. State of California* (1968) 69 Cal.2d 782, 798.) Unless the Legislature has clearly provided for immunity, the important societal goal of compensating injured parties for damages caused by willful or negligent acts must prevail."

(*Ramos v. County of Madera* (1971) 4 Cal.3d 685, 692); *Baldwin*, *supra*, 6 Cal.3d at 436 [quoting *Ramos*].)

In section 835, the legislature has made public entities liable "for injuries caused by maintaining dangerous conditions on their property when the condition 'created a reasonably foreseeable risk of the kind of injury which was incurred' and ... an employee's negligence or wrongful act or omission caused the dangerous condition...." (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347; see also Slip op. at 9 [quoting *Hampton*].)

Therefore, "[t]o further the goal of compensating injured parties for damages caused by negligent acts, section 850.4 should be construed to bar governmental liability only where the Legislature has clearly intended immunity." (*Potter v. City of Oceanside* (1981) 114 Cal.App.3d 564, 566; see also *Lewis v. Mendocino Fire Protection Dist* (1983) 142 Cal.App.3d 345, 347 [immunity did not apply where firefighters caused injuries in rescue operation that did not involve firefighting]).

The Court has considered section 850.4 only once, in a case decided more than 50 years ago. (*Heieck and Moran v. City of Modesto* (1966) 64 Cal.2d 229.)[2] There, city employees working on the municipal water system closed a valve in a main serving nearby fire hydrants but neglected to

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[2] The Court has mentioned the statute passing in three other cases. (*Van Horn v. Watson* (2008) 45 Cal.4th 322, 336-337 [discussing history of Health and Safety Code § 1799.107]; *Calatayud v. State of California*

reopen it. As a result, the hydrants could not supply water to contain a fire that spread to plaintiff's property. The Court treated the closed valve as a firefighting facility by holding the city immune from liability under section 850.4 for the damage viewed as resulting "from the closed 'condition' of the water valve (§ 850.4)...." (*Id.* at 233.)

Courts of appeal have followed *Heick and Moran* in cases involving similar circumstances. (*New Hampshire Ins. Co. v. City of Madera* (1983) 144 Cal.App.3d 298, 304-305 [closed valve in water main serving fire hydrant]; *Lainer Investments v. Department of Water and Power* (1985) 170 Cal.App.3d 1 [valve almost completely closed in city's connector between city water main and sprinkler system in private building].) In those cases the condition that resulted in injury was one that rendered facilities used to combat fires—hydrants and a sprinkler system—ineffective or inoperable. The same is true in other cases applying the immunity which are discussed in the argument *infra*, pp. 15-17: injuries resulted from conditions that rendered facilities used to fight fires defective, ineffective, or wholly nonfunctional.

Nevertheless, the court of appeal held in the present case that section 850.4 extends much further. The court stretched the statute so far as to deny a person who suffers injuries resulting from *any* condition of *any* fa-

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(1998) 18 Cal.4th 1057, 1069 [example of immunity conferred on public safety personnel and their employers]; *Thomas v. City of Richmond* (1995) 9 Cal.4th 1154, 1161 [listing statutes that confer immunity but provide exception for liability under Vehicle Code § 17001].) The Court has cited *Heieck and Moran* only once, for its holding that the Claims Act was retroactive to claims arising prior to its effective date. (*Cabell v. State of California* (1967) 67 Cal.2d 150, 152, overruled on other grounds by *Baldwin, supra*, 6 Cal.3d at 438-439.)

cility having *anything* to do with firefighting from recovering legal damages—here, the base camp where Quigley and other firefighting and non-firefighting personnel at the camp ate, showered and slept when they were *not* fighting the fire. (Slip op. at 1-2.)

Section 850.4 was adopted, as were almost all provisions of the Claims Act, at the recommendation of the Law Revision Commission. (4 Cal. L. Revision Com. Rep., Recommendation relating to Sovereign Immunity (1963) pp. 827-829, 862 (Commission Report).)[3] As the court of appeal recognized, the Commission recommended enactment of section 850.4 to serve the policy that "'public entities and public personnel should not be liable for injuries caused in fighting fires or in *maintaining fire protection equipment*....'" (Slip op. at 12, quoting Commission Report at 862 [court's italics].) Likewise, in its comment to section 850.4, the Commission stated that the section "'provides for absolute immunity from liability for injury caused in fighting fires (other than injuries resulting from operation of motor vehicles) *or from failure to properly maintain fire protection equipment or facilities.*'" (*Ibid.* [court's italics].

The purpose of maintenance and repair of equipment or facilities is to keep them in good operating order so they may be used effectively to fulfill their purpose. Thus, the "condition" of "firefighting facilities" to which the statute was intended to apply is a condition that results from a failure of maintenance or repair that results in a defect that impairs or prevents the

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[3] Both the Senate Committee on Judiciary and the Assembly Ways and Means Committees submitted reports stating that the Commission's comments on § 850.4 reflected the committees' intent in recommending approval. (*Razeto*, 88 Cal.App.3d at 352.) Thus, the Commission's comments "are declarative of the intent not only of the draftsmen ... but also of the legislators who subsequently enacted it." (*Kaplan v. Superior Court* (1971) 6 Cal.3d 150, 158, fn. 4.)

operation, usefulness or effectiveness of facilities employed to protect against or fight fires. The Commission's comment to 850.4 "states in clear terms that immunity is to be provided for dangerous and *defective* fire protection equipment." (*Razeto v. City of Oakland* (1979) 88 Cal.App.3d 349, 353 [italics added] (*Razeto.*)

In this case, however, the Third Appellate District gives section 850.4 a far broader construction to afford immunity from liability for injuries that were caused by a "condition" that did not in any way impair the functioning or effectiveness of a "facility" that used to fight a fire. The court held that the immunity applied because Quigley's injuries resulted from a condition of the base camp, which served to provide firefighters respite between shifts. But as a place of respite, the camp's use and purpose was to *not* fight the fire.

The legislative intent in the rules of liability and immunity that apply to fire protection and fire protection activities is "to strike a careful balance between the need for encouraging utmost diligence in combatting fires and the need for providing compensation for injuries caused by the negligent or wrongful conduct of public personnel." (Commission Report at 828.) The court of appeal disregarded that legislative intent. It upset the balance the Legislature intended by tilting the scales heavily against compensation for injuries and providing immunity for injuries that do not result from the defective, inoperative or ineffective condition of fire protection or firefighting facilities, but from a dangerous condition of property.

Professor Arvo Van Alstyne, whom the Court has acknowledged as "the principal architect of the California Tort Claims Act" (*Sullivan v. County of Los* Angeles (1974) 12 Cal.3d 710, 721), also authored the CEB book on the Act. (Van Alstyne, Calif. Government Tort Liability Practice (Cont. Ed. Bar 1980) [Van Alstyne]). He agreed that the Commission's

comment to section 850.4 can be read to support a construction of the statute under which it

> confers immunity only when fire-protection and fire-fighting facilities are in a dangerous condition because of inadequate maintenance or defective installation [citations]. It is possible for instance, that fire equipment or facilities in perfectly sound and workable order may cause an injury because of *qualitative* inadequacy.... If so, a court might conclude that the immunity granted by Govt Code §850.4 does not apply, since the equipment in question is in perfect physical condition.

(*Ibid.*, § 4.30, p. 373 [italics in original].)[4]

In the almost 40 years since Professor Van Alstyne wrote that, and until this case, no court has extended section 850.4 immunity beyond its intended purpose. This Court's review is necessary to settle the important question of the proper construction of section 850.4 to clarify the bounds of the immunity and, in doing so, restore the proper balance between compensating those injured by a dangerous condition of public property as provided in section 835, and providing immunity from liability to public entities when an injury results from a condition of firefighting facilities.

B. Review is also "necessary to secure uniformity of decision." (Cal. Rules of Court, rule 8.500(b)(1).)

In *McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App.3d 683, 689, disapproved on other grounds by *Bunch v. Coachella Valley Water Dist.* (1997) 15 Cal.4th 432, 447–448 (*McMahan's*), the court

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[4] A "qualitative inadequacy" or "qualitative insufficiency" is a defective condition (quality) of equipment or facilities rendering it ineffective or inoperable. (Van Alstyne, § 4.29-4.30, pp. 371, 373.)

squarely held that the section 850.4 immunity "is considered an affirmative defense and must be pled and proven or is deemed waived." (*Ibid.* at 689.) Likewise, in *Varshock v. California Dept. of Forestry and Fire Protection* (2011) 194 Cal.App.4th 635 the court held that section 850.4 "operates as an affirmative defense." (*Ibid.* at, 651, citing *McMahan's* and others; see also *Hata v. Los Angeles County Harbor/UCLA Medical Center* (1995) 31 Cal.App.4th 1791, 1802 [quoting *McMahan's*].)

Other authorities agree that *McMahan's* correctly states the rule. "Although the [section 850.4] immunity is broadly construed, it is inapplicable in cases in which it is not pleaded. If not pleaded, it is waived." (2 Schwing, Cal. Affirmative Defenses (2d ed. 2015) § 38:92 [citing *McMahan's*]). "[I]mmunity under the statute providing a public entity with absolute immunity in situations where private property is damaged by fire protection equipment or facilities is an affirmative defense and must be pleaded and proved or is deemed waived." (34 Cal.Jur.3d (2017 update) Fires and Fire Protection § 79 [same]).

Witkin cites *McMahan's*, among others, in stating the rule more comprehensively. "The statutory immunities under the Government Tort Claims Act [citation] are affirmative defenses, which must be pleaded.... The pleading should contain specific allegations to show that the facts fall within the statutory provision." (5 Witkin, Cal. Procedure 5th (2012), Pleading § 1107, p. 535 [Witkin Procedure]; see also Cal. Civil Practice Torts (2017 update) § 29:27 ["Governmental immunities will be considered to have been waived unless they are pleaded in the answer as affirmative defenses."]")

In particular, an immunity must be raised as an affirmative defense in an action, such as the present one, for injuries resulting from a dangerous condition of public property. (*De La Rosa*, *supra*, 16 Cal.App.3d at 747; *Hata*, *supra*, 31 Cal.App.4th at 1803)

Yet, the court of appeal here held—directly contrary to *McMahan's* and, inferentially, Witkin and the other secondary authorities accepting *McMahan's*—that section 850.4 immunity is not waived by failing to allege it as an affirmative defense as it is jurisdictional and may be raised at any time. (Slip op. at 5-6.)

Whether an immunity provided by the Act is jurisdictional is an issue on which courts have reached conflicting decisions. (See *Hata*, *supra*, 31 Cal.App.4th at 1800-1804 [collecting conflicting cases].) As Witkin points out, while there are cases holding other immunities jurisdictional, it is not clear what those cases mean when they use the term "jurisdiction." (2 Witkin Procedure, Jurisdiction, § 90.) The word "does not have a single, fixed meaning, but has different meanings in different situations." (*Id.*, § 1).

Do cases using "jurisdiction" with respect to immunities under the Act mean jurisdiction in its fundamental or strict sense, the power to adjudicate? (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288.) Or do they use the "jurisdiction" in the broader sense of the court's power to act on a matter over which it has fundamental jurisdiction as that power is defined by relevant law? (*Ibid.*)

The Court has yet to answer those questions and reconcile cases and other authorities holding that immunities are jurisdictional and cannot be waived, with others holding that they are affirmative defenses that are waived if not pleaded. The proper construction of section 850.4 immunity and whether it must be alleged as an affirmative defense to prevent waiver is an important issue deserving of the Court's review and determination.

II

SUMMARY OF FACTS AND PROCEDURE

As the court of appeal acknowledged, in reviewing a judgment of nonsuit the appellate court "view[s] the facts in the light most favorable to

the plaintiff. [Citation.] Thus, the court must accept as true all favorable facts asserted in the plaintiff's opening statement, indulge all legitimate inferences from those facts, and disregard all conflicting evidence. [Citation.]" (Slip op. at 2.)

The Silver Fire broke out in Plumas National Forest on September 19, 2009. (*Ibid.*).[5] The United States Forest Service (Forest Service) set up a base camp at the Plumas County Fairgrounds. (*Ibid.*). It included a sleeping area for firefighters. (*Ibid.*). Forest Service rules require that the sleeping area be quiet, shaded, and away from smoke, noise, and dust. (*Ibid.*). The rules also required posting signs designating the area as a sleeping area, and that the area be roped off. (*Ibid.*).

These rules are set forth in the Forest Service's Health and Safety Code Handbook, FSH 6709.11 ("Health and Safety Code").[6] It is "the primary source of standards for safe and healthful workplace conditions ... and operational procedures and practices in the Forest Service...." (*Ibid.*)., Zero Code, p. 0-3.) The requirements for sleeping areas are included in § 25.13b, p. 20-87, ¶ 9. Signing and roping off is an imperative: "9. Post signs and rope off sleeping areas." (*Id.*); see also RT 4 (Quigley's counsel reading provision to jury).

A direction in the Code written in the imperative mood "conveys mandatory compliance: 'Wear a hardhat on the fireline.'" (*Ibid.*)

The fairground has a racetrack with a large, grassy infield. (Slip op at 2.) The Forest Service set up a portable shower unit on the infield.

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[5] The facts are summarized from the court of appeal's decision with occasional elaboration from cited portions of the record.

[6] The Health and Safety Code Handbook is available online at http://www.fs.fed.us/im/directives/fsh/6709.11/FSH6709.pdf. It is issued pursuant to the federal Occupational Safety and Health Act and implementing regulations. (*Id.*), Zero Code § 01 - Authority, p. 0-3.

(*Ibid.*). The unit included two 1,500 gallon bladders, one with fresh water, the other holding the used, grey water from the showers. (*Id.*) at 2-3. Employees of an independent contractor drove water trucks weighing up to 30,000 pounds to service the bladders. (*Id.*) at 3. To reach them, the drivers drove across the infield. (*Ibid.*) They were not given a map nor were they directed where they could drive. (*Ibid.*)

The Fire Service called in a non-firefighting team known as NorCal Team 1 to manage the fire and the base camp. (*Ibid.*). Defendants DelCarlo, Jellison and Barnhart, all retired Forest Service employees, were members of the management team. (*Ibid.*) They became employees of the defendant local fire agencies, Chester Fire Protection District and Garden Valley Fire Protection District. (*Ibid.*)

Quigley, a Forest Service firefighter on a hotshot crew, worked the fire. (*Ibid.*). On September 20, after her shift fighting the fire, she and her crew worked returned to the base camp about 9:00 p.m. (*Ibid.*) The designated sleeping area was full and most of the crew had to sleep in and around filthy horse barns. (*Ibid.*) Quigley asked her supervisor if she could sleep in the infield, where other people were already sleeping in tents and in sleeping bags on the ground. (*Ibid.*) Her supervisor agreed and she slept on the grass in her sleeping bag. (*Ibid.*)

DelCarlo had authorized use of the infield as a sleeping area. (*Ibid.*) He ordered a California Conservation Crew to sleep near the showers, and he authorized another hotshot crew to sleep in the infield. (*Ibid.*) But, despite the command of the Health and Safety Code, the infield was never signed nor roped off. (*Ibid.*)

Quigley spent the next day, the 21st, with her crew fighting the fire. (*Ibid.*). During the day, Barnhart, the camp safety officer, inspected the camp and saw the California Conservation Corps tents in the infield. (*Ibid.*) Despite the absence of signs and roping off, he recorded on an inspection

form that all sleeping areas were separated from parking and posted, "'sleeping area (no vehicles allowed).'" (*Ibid.*)

That night, Quigley returned to the camp at about 9:00. (*Id.* at 4.) Again, the designated sleeping area was full and her crew had to sleep in and around the filthy horse barns. (*Ibid.*) Quigley again asked for and was given permission to sleep on the infield grass in her sleeping bag. (*Ibid.*)

About 10:00 that night, an employee of the company that serviced the showers drove his truck across the infield to reach the bladders. (*Ibid.*). He drained the grey-water bladder into the truck and as he drove back across the infield he ran over Quigley. (*Ibid.*). The truck crushed her chest, ribs, lungs and left shoulder and fractured her back. (*Ibid.*). Her heart, lungs, and eyes were permanently damaged. (*Ibid.*).[7]

Quigley sued defendants on three counts, including dangerous condition of public property (§ 835; 1 AA 12-14.) At trial, more than four years after the complaint was filed, when Quigley's counsel finished his opening statement, defendants moved for nonsuit and for the first time asserted that they were immune under various provisions of the Government Claims Act (Gov. Code § 810 et seq.), including § 850.4. (*Ibid.*; 1 AA 72-73.).

Defendants also argued that they were not liable under the common-law firefighter's rule because Quigley had been injured by the negligence of

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[7] Although Quigley recovered, she was unable to return to firefighting; she went through retraining and rehabilitation, and was in graduate school working on her master's degree at the time of trial. RT 48-49. Her past lost earnings and the cost of vocational retraining came to $332,000. RT 49. Her future lost earnings, even after retraining, will be approximately $2.3 million. RT 50. She faces future medical expenses of approximately $836,000. (*Id.*)
Those damages do not include general damages—loss of enjoyment of life, pain and suffering she have the rest of her life; she is expected to live to the age of 82. RT 50-51.

a public safety officer from another public safety agency in a joint operation. (*Ibid.*, citing *Terry v. Garcia* (2003) 109 Cal.App.4th 245, 253.)

Quigley's counsel opposed the motion on two grounds: (1) that defendants waived section 850.4 immunity by failing to allege it as an affirmative defense or otherwise raise it before Quigley's counsel finished his opening statement, and (2) in any event, the immunity did not apply. (Slip op. at 4; 1 AA 99). They also argued that the firefighter's rule did not apply because Quigley did not suffer her injuries in combating the fire but they were caused by the independent negligence of the individual defendants unrelated to fighting the fire. (Slip op. at 4; 1 AA 102.)

After argument and briefing, the court granted nonsuit on the ground that defendants had not waived the immunity because, in the court's view, the immunity is jurisdictional and can be raised at any time, and the immunity applied because Quigley's injuries were the result of the condition of a firefighting facility—the base camp—and were caused by fighting the fire. (Slip op. at 5).

The court denied Quigley's motion for new trial on the same grounds and also held that the firefighter's rule barred her action because she was injured in a joint response by different public agencies to a public safety incident. (*Ibid.*)[8]

As previously discussed, the court of appeal affirmed based on its construction of § 850.4, under which the immunity is not limited to conditions that affect the efficient or effective use of equipment and facilities employed in actually fighting a fire. Rather, the court interpreted the statute to

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[8] Since the court of appeal held section 850.4 immunizes defendants from liability for Quigley's injury and defendants did not waive the immunity, the court found it unnecessary to address the issue of the firefighter's rule.

apply the immunity broadly to injuries resulting from a condition of any kind of any facility that has any connection to fire protection or firefighting.

III
QUIGLEY WAS NOT INJURED BY A CONDITION OF A FIREFIGHTING FACILITY THAT GIVES RISE TO SECTION 850.4 IMMUNITY

a. Section 850.4 gives immunity from liability only for injuries resulting from a condition that renders facilities used to fight fires defective.

Section 850.4 "codifies prior case law denying liability for facilities that were so defective as to make effective fire suppression impossible." (Van Alstyne, § 4.30, p. 372, citing *Stang v. City of Mill Valley* (1952) 38 Cal.2d 486 [fire hydrant inoperative because water line clogged] and *Thon v. City of Los Angeles* (1962) 203 Cal.App.2d 186 [fire hose not long enough to reach from hydrant to plaintiff's buildings].)

So, as discussed at p. 5, *supra*, in *Heieck and Moran, supra* and similar cases, the condition of a firefighting facility that gave rise to the immunity was a closed valve in a municipal water system that rendered fire protection equipment inoperable. (*Ibid.* [fire hydrant]; *New Hampshire Ins. Co., supra,* 1[same]; *Lainer Investments, supra*, 170 Cal.App.3d 1 [nearly closed valve in city connector between building sprinkler system and city water main.)

In *Cairns v. County of Los Angeles* (1997) 62 Cal.App.4th 330, the immunity applied when a road to plaintiffs' properties had been closed by the county. When a wildfire broke out, firefighters had to take a longer route to plaintiffs' homes and did not arrive in time to save them. In