S249792

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JAMES GUND, et al,
Plaintiffs, Appellants & Petitioners,

v.

COUNTY OF TRINITY, et al.,
Defendants and Respondents.

After a Decision by the Court of Appeal,
Third Appellate District, Case No. C076828
(TCSC No. 11CV0080)

PETITIONERS' REPLY BRIEF ON THE MERITS

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INTRODUCTION

Contrary to the County's assertions, the Gunds do not seek any change in law. Rather, the Gunds ask the Court to affirm the existing rule that "active law enforcement work means 'physically active' work such as the arrest and detention of criminals." (*Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567, 577.) The phrase does not describe the task the deputy sheriff asked the Gunds to perform: merely checking on the welfare of their neighbor whom a deputy sheriff misled them to believe was having nothing but a weather-related emergency.

The County ignores key facts, as well as most of the law and authorities cited in the Gunds' Opening Brief on the Merits. Many of the County's arguments already been addressed in the Opening Brief and need not be repeated. Nonetheless, the County continues to argue that this Court should interpret the phrase "active law enforcement service" in Labor Code section 3366 "broadly" to encompass all duties of the "position" of peace officer. The County's interpretation is contrary to precedent and would render the phrase itself ineffective surplusage.

The County rests its case on the general policy that the "presumed bargain" underpinning the workers' compensation system supports interpreting section 3366 to bar the Gunds' tort claims under the exclusivity rule of workers' compensation. But the bargain exchanging the worker's certainty of recovery for the wider array of damages available in tort has never been understood to apply to an employer's tortious conduct outside of the bargain. (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 708.) In particular, the exclusivity rule of workers' compensation does not bar a worker's tort claims when the "employer's conduct violated public policy

and therefore fell outside the compensation bargain." (*Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal. 4th 800, 823.)

That is the case here. Under the "danger creation" rule, this Court has held, when a public entity, by misrepresentation, induces a civilian to leave a place of safety and, in so doing, exposes the civilian to the danger of third-party criminal conduct, the agency violates not only public policy, but the Constitutional rights of the misled civilian. (*Zelig v. County of Los Angeles*, (2002) 27 Cal.4th 1112, 1149; see also *L.W. v. Grubbs* (9th Cir. 1992) 974 F.2d 119, 123.) Such conduct is not covered by the workers' compensation bargain.

Such wrongful, unconstitutional conduct by a public entity is not within the workers' compensation bargain. The exclusivity rule of workers' compensation does not bar The Gunds' claims.

The County's last-gasp effort to invoke its resolution dealing with volunteers fails for the simple reason that the conditions provided in the resolution have not been met.

I. LOOKING IN ON A NEIGHBOR IS NOT "ACTIVE LAW ENFORCEMENT."

A. "Active Law Enforcement" Does Not Encompass All Duties Of A Peace Officer; It; It Refers Only To The Subset Of Duties Involving The Detection And Suppression Of Crime.

This Court has defined "law enforcement activities" as "investigating crimes, pursuing suspected felons, issuing traffic citations . . . [,] the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." (*People v. Ray* (1999) 21 Cal. 4th 464, 467.) "Active law enforcement," thus, means the physical performance of those activities. (*Crumpler v. Board of Administration, supra*, 32 Cal.App.

3d at p. 577.) The County, however, seeks to broaden the scope of that phrase by claiming that it describes the "position" of peace officer and embraces all of the duties peace officers perform. Law enforcement activities, however, are but a subset of an officer's total duties. "It cannot be gainsaid that the societal role played by local police officers extends well beyond their criminal enforcement activities." (*United States v. Erickson* (9th Cir. 1993) 991 F.2d 529, 531.) "In the average day," this Court has observed, "police officers perform a broad range of duties," from the law enforcement activities described in *Ray*, "to 'community caretaking functions—helping stranded motorists, returning lost children to anxious parents, assisting and protecting citizens in need . . . ." (*Ray, supra*, 21 Cal.4th at p. 467." "Active law enforcement" implies only those particular duties involving hazardous activity. (*Neeley v. Board of Retirement* (1974) 36 Cal.App.3d 815, 822.

The County effectively concedes this point—that peace officers' duties are broader than active law enforcement and, therefore, not everything peace officers do is active law enforcement—when it asserts that sections of the Labor Code "appear to make a distinction between 'active law enforcement service' and firefighters and first-aid responders." (RBM at p. 15.) Firefighters and first-aid responders routinely check on peoples' welfare in response to 911 calls for help. The County however cannot rationally argue that when firefighters and first-aid responders answer these 911 calls for assistance, they are engaged in law enforcement—active or otherwise. Neither are peace offices when they perform the same task.[1] Neither were the Gunds.

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1 Nor has the County offered any authority for the proposition that a task that is *not* active law enforcement when done by a firefighter or first-aid

Section 3366 therefore does not apply, as the County argues, to all of "the duties of [a peace officer's] position in the broadest sense. . . ." (RBM at p. 16.) The section by its express terms applies only when a citizen is assisting an officer in performing "active law enforcement service" —i.e., detecting, investigating, and acquiring evidence of crime and the arrest and detention of criminals. (*Crumpler v. Board of Administration, supra*, 32 Cal.App.3d at p. 577.). It does not apply to the other duties a peace officer performs that are, in this Court's words, "totally divorced" from active law enforcement duties. (*People v. Ray, supra*, 21 Cal.4th at p. 467.)

In fact, statutes the County cites recognize that the duties of a peace officer are not limited to active law enforcement. Sections 3212.6 and 3212.9 (see RBM at pp. 14-15) provide eligibility for workers' compensation for tuberculosis or meningitis contracted by an individual serving as a member of a police department, sheriff's office or the California Highway Patrol, or as a district attorney's inspector or investigator and "whose *principal* duties consist of active law enforcement service . . ." (Emphasis added.) The term, "principal duties" necessarily implies that peace officers also perform *other* duties unrelated to active law enforcement.

Similarly, under section 4800 (see RBM at p. 15), a member of the Department of Justice who is a state police officer disabled by an injury arising out of and in the course of his or her duties is entitled to a paid leave of absence at full salary for up to one year. "This section applies only to

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responder somehow transmutates into active law enforcement when done either by a peace officer or civilian induced to by a peace officer to perform the same task.

members of the Department of Justice whose principal duties consist of active law enforcement . . ." Again, the phrase, "principal duties" necessarily implies that peace officers participate in other tasks that are not active law enforcement.

B. The County's Argument That "Active Law Enforcement" In Section 3366 Refers To The Position Of Peace Officer And All Duties Of That Position Is Contrary To Section 3366 Itself.

There is another reason why the County is wrong in arguing that "active law enforcement" in section 3366 refers to the position of peace officer and encompasses all of "the duties of that position in the broadest sense. . . ." (RBM at p. 16.) Section 3366 does not simply provide that a person is eligible for workers' compensation if he or she suffers injury or death while "engaged in assisting any peace officer." Rather, the section goes farther and adds the qualification that a person be "engaged in assisting any peace officer *in active law enforcement*. . . ." (Emphasis added.) That phrase limits the scope and application of the section and that confirms that "active law enforcement service" describes a subset of the work peace officers perform.

To look at it another way, as pointed out in the Opening Brief on the Merits (pp. 18-19), if section 3366 were read to apply whenever a person is assisting a peace officer with *any* of the officer's duties, the words, "active law enforcement," would be pointless surplusage. The section would achieve the same result if it simply provided that a person is limited to workers' compensation for injury or death suffered while he or she is

"engaged in assisting any peace officer."[2]

In short, in arguing that section 3366 should be construed to refer to the position of police officer and include all duties of a peace officer, the County asks the Court to judicially amend the section by deleting the words, "active law enforcement." But "courts may not excise words from statutes." (*Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 611.) "Our office, of course, is 'simply to ascertain and declare' what is in the relevant statutes, 'not to insert what has been omitted, or omit what has been inserted.' " (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 573, quoting Code Civ. Proc. § 1858.)

C. The Court Has Squarely Held That Assisting A Peace Officer Is Not, Per Se, Assisting The Officer In Active Law Enforcement.

The County cites *McCorkle* v. *City of Los Angeles* (1969) 70 Cal. 2d 252 in passing, but makes no effort to show how its argument—that active law enforcement service refers to the duties of a peace officer "in the broadest sense"—can be reconciled with *McCorkle's* holding. There, at the request of a peace officer investigating a traffic collision, plaintiff entered a roadway to point out skid marks and was struck by an automobile. Although investigation and locating evidence are undoubtably core duties

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2 The County's proffered interpretation would have the same effect on the definition of "peace officers" in section 3212.1(a)(4). The section provides for workers' compensation benefits to peace officers and firefighters who contract cancer after exposure to a known carcinogen while in service. Subsection (a)(4) restricts the application of section 3212.1 to those peace officers "who are primarily engaged in active law enforcement activities."

of every peace officer, the Court rejected the city's argument that plaintiff's exclusive remedy was workers' compensation under section 3366.

> We do not believe that plaintiff's activity in the present case constituted "assisting any peace officer in active law enforcement service" within the scope of Labor Code, section 3366. The legislative purpose of this section was to cover a person who assumes the functions and risks of a peace officer, and not one who merely informs a peace officer of facts within his own knowledge. (See, 4 Cal. Law Revision Com. Rep. (1963) pp. 1505-1507.) *McCorkle*, *supra*, 70 Cal.2d at p. 263, fn. 11.

Here, Deputy Whitman asked the Gunds to perform a purely caretaking task and look in on their neighbor, Kristine, in response to her 911 call, which, he told them, was probably related to the large storm coming in and "probably no big deal." (3 CT 675:4-13, 680:3-14.) In performing that caretaking task, the Gunds were no more engaged in assisting in active law enforcement than was the plaintiff in *McCorkle*.

II. WORKERS' COMPENSATION EXCLUSIVITY DOES NOT BAR CLAIMS ARISING FROM EMPLOYER CONDUCT THAT VIOLATE PUBLIC POLICY

A. Employer Conduct In Violation of Fundamental Public Policy Is Not Within The "Presumed Bargain" Upon Which Workers' Compensation Is Based.

The County argues that the Gunds are limited to workers' compensation because of the "presumed bargain" between employer and employee that exchanges quick access to limited workers' compensation benefits for the wider range of damages available in tort proceedings. But "certain types of injurious employer misconduct remain outside this

bargain." (*Fermino v. Fedco, Inc., supra,* 7 Cal.4th at 708.) Workers' compensation exclusivity does not bar employees from bringing tort claims when an "employer's conduct violated public policy and therefore fell outside the compensation bargain." (*Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund, supra* 24 Cal. 4th at 823.) That is the case here.

The question before the Court is: when a peace officer misrepresents facts to induce individuals to engage in a task, and the misled individuals, relying on the officer's false statements, are injured in the course of performing that task, is the officer or the officer's employing entity always effectively immunized from tort liability by the workers' compensation bargain? Longstanding principles of law say, "No."

Although workers' compensation is frequently an employee's exclusive remedy for a work-related injury, some claims, including those based on "conduct contrary to fundamental public policy, are not subject to the exclusivity provisions of the workers' compensation law." (*Claxton v. Waters* (2004) 34 Cal.4th 367, 373.) "[S]uch claims may be the subject of both workers' compensation proceedings and civil actions." (*Ibid.*; see also *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1155, 1161.)

Tort claims asserting conduct that violates constitutional principles fall within this public policy exception to the general rule of workers' compensation exclusivity. (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1095.) "normal part of the employment relationship" (*Cole v. Fair Oaks Fire Protection Dist., supra,* 43 Cal.3d at p. 160) or a "risk reasonably encompassed within the compensation bargain." (*Shoemaker v. Myers, supra,* 52 Cal.3d at p. 16.) The obligation to refrain from such conduct is a "duty imposed by law upon all employers to implement the fundamental

public policies" of the state (*Tameny, supra,* 27 Cal.3d at p. 176. It cannot be bargained away (*Foley v. Interactive Data Corp., supra,* 47 Cal.3d at p. 670, fn. 12); it is not preempted by other statutory remedies (*Rojo v. Kliger, supra,* 52 Cal.3d 65); and its breach is most assuredly not a "normal" risk of the employment relationship subject to the exclusive remedy provisions of the Labor Code." (*Id.*)

B. Conduct Of A Public Entity Employee That Places A Citizen In Danger Of Criminal Attack Violates Fundamental Public Policy; It Is A Denial Of Due Process Rights.

In *Zelig v. County of Los Angeles*, (2002) 27 Cal.4th 1112, 1149, the Court held that a public entity is subject to liability when it affirmatively acts to place a person in danger of injury from a third party's criminal act. The liability arises from the entity's use of its authority " 'to create an opportunity that would not otherwise have existed for the third party's crime to occur.' " (*Ibid.* at p. 1150, quoting *Johnson v. Dallas Independent School Dist.* (5th Cir. 1994) 37 F.3d 198, 201.) The entity's action in affirmatively putting the plaintiff in danger is a deprivation of the plaintiff's liberty and, thus, unconstitutional, a denial of her due process rights. (*L.W. v. Grubbs. supra,* 974 F.2d 119, 123; see also *Zelig, supra*, 27 Cal.4th at p. 1146)

The point is well illustrated in *L.W. v. Grubbs,* one of the cases on which this Court relied in articulating the "danger creation" rule in *Zelig v. County of Los Angeles, supra*, 27 Cal.4th at p. 1149. In *L.W.*, plaintiff was a registered nurse hired to work in the medical clinic at a state custodial institution for young male offenders. Defendants, state employees who supervised her, led her to believe when they hired her that she would not be

required to work alone with violent sex offenders. Nevertheless, defendants selected a violent sex offender inmate, Blehm, to work alone with her. He had failed all of the institution's treatment programs and was considered very likely to commit a violent crime if alone with a woman. Once he was alone with plaintiff, he assaulted, battered, kidnapped and raped her.

The Ninth Circuit held that plaintiff stated a claim for violation of her due process rights. Defendants' affirmative acts, independent of the crime itself, created the opportunity for plaintiff to be the victim of a criminal attack. "The Defendants . . . used their authority as state correctional officers to create an opportunity for Blehm to assault L.W that would not otherwise have existed. The Defendants also enhanced L.W.'s vulnerability to attack by misrepresenting to her the risks attending her work." (*L. W. v. Grubbs*, *supra*, 974 F.2d at pp. 121-122.)

Such a violation of an individual's constitutional right to due process is manifestly in violation of public policy. This Court has said more than once that " '[t]here is no public policy more important or more fundamental than the one favoring the effective protection of the lives and property of citizens.' " (*General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164, 1183; *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 82-83.)

Thus, a public entity violates fundamental constitutional rights and fundamental public policy when, through misrepresentation or acting with deliberate indifference, the entity affirmatively exposes persons to dangers that they would not otherwise have faced. Accordingly, the Gunds' action is not barred by workers' compensation exclusivity. Like the prison staff in *L. W. v. Grubbs* who, through misrepresentation to the plaintiff created the opportunity for her rape, here, through misrepresentation to the Gunds

about the nature of their neighbor's 911 call and concealment of the facts suggesting that she could well be the victim of a serious crime in progress, the County, through its employee Whitman, not only *created* the opportunity for the man who had just murdered Kristine and her boyfriend to assault the Gunds; it also *enhanced* their vulnerability to the attack.

The County's conduct in creating the danger to the Gunds of a vicious criminal attack deprived them of their fundamental constitutional right of due process and was a patent violation of public policy. The County's conduct axiomatically falls outside of the compensation bargain. The workers' compensation exclusivity rule does not immunize the County from civil liability.

III. COUNTY RESOLUTION NO. 163-87 DOES NOT APPLY

A. As Whitman Misrepresented And Concealed Essential Facts, The Gunds Could Not Have Agreed To Check On Their Neighbor Willingly, Intelligently And With Knowledge Of Essential Facts.

The County fleetingly asserts that an alternative basis for affirming the court of appeal is Trinity County Resolution No. 163-87. The County does not provide the Court with the text of the resolution or present any quotation from it. Instead, the County merely characterizes the resolution as providing "that any person who performs any service for the County either voluntarily or without pay, is deemed an employee of the County for purpose of Workers' Compensation." (RBM at pp. 28-29.) The County goes on to argue that, as the Gunds were not paid, they were volunteers subject to the Resolution.

Before turning to the Resolution itself, it must be pointed out that the

County disregards this Court's holdings quoted in the Opening Brief on the Merits (pp. 30-31) under which a voluntary act is one that a person chooses to perform willingly, intelligently, and with knowledge of essential facts. (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 234; *In re Marriage of Bonds* (2000) 24 Cal.4th 1, 16.) Under that test, the Gunds cannot be considered volunteers. They did not willingly choose to look in on Kristine with knowledge of essential facts. The County does not dispute that Whitman failed to inform them that when Kristine called 911, she was whispering and the call was suddenly cut off; that the Highway Patrol dispatcher who took the call did not call her back for fear that she had been trying to call for help secretly; and that the Trinity County dispatcher who tried to return her call was unsuccessful. Instead of providing the Gunds with those essential facts so they could decide willingly and intelligently whether to look in on Kristine, the County misrepresented that her call was probably related to the oncoming storm and "probably no big deal." (3 CT 656:17-19, 657:13-18, 658:6-11, 613-6.) Such misrepresentations disqualify the Gunds from being considered volunteers.

B. Resolution No. 163-87 Does Not Apply Because No Department Head Engaged The Gunds To Act.

The general rule under subdivision (a)(9) of section 3352 is that those who perform voluntary services for a public entity are not the entity's employees and are not eligible for or limited to workers' compensation coverage for injuries they may suffer while performing services. Section 3363.5 creates a limited exception: "a person who performs voluntary service without pay for a public agency, as designated and authorized by the governing body of the agency or its designee, shall, upon adoption of a

resolution by the governing body of the agency so declaring, be deemed to be an employee of the agency for purposes of this division while performing such service."

Pursuant to section 3365.5 and other provisions of the Labor Code, the Trinity County Board of Supervisors adopted Resolution 163-87. It states in relevant part that:

> any volunteer, or unsalaried person engaging or providing service to Trinity County, is hereby declared to be deemed an employee of the County of Trinity for the purpose of Division 4 of the Labor Code, and solely for such purpose.
>
> FURTHER RESOLVED any Department Head responsible for the engaging of any of the herein stated persons without pay, is hereby directed to supply to the Trindel Insurance Fund a roster of the persons so engaged, and that said roster so supplied shall be kept current as to reflect all personnel changes. (2 C.T. 543-544.)

Under the plain language of the resolution, only department heads have the authority to engage volunteers. The department head of the Sheriff's Office is the Sheriff. The County did not offer any evidence that the Sheriff or the head of any other department engaged the Gunds to check on their neighbor in response to her 911 call, or determined that such a task was one for which compensation coverage would be extended. The only evidence is that Whitman, who is only a deputy sheriff, unilaterally induced the Gunds to check on their neighbor.

C. Resolution No. 163-87 Does Not Enable The County To Authorize Conduct That Is Illegal.

Section 3363.5 requires that to be deemed an employee for purposes of workers' compensation coverage, the person performing voluntary service must have been performing services that were *authorized* by the governing body of the agency or its designee. (Lab. Code§ 3363.5.) The County cannot authorize conduct that is illegal or violates a constitutional right. As explained in section II of this brief, *supra*, a public entity violates fundamental constitutional rights and fundamental public policy when, through misrepresentation or acting with deliberate indifference, the entity affirmatively exposes an individual to the danger of injury from a third party's criminal act that the individual would not otherwise have faced.

This is why the County does not cite any evidence that the Board of Supervisors, the governing body of Trinity County, nor any designee of the Board, ever authorized civilians perform the type of task the Gunds were misled into performing. What is in the record, and what the County neglects to mention, is a press release signed by Trinity County Sheriff's Office Public Information Officer Lynn Ward, who stated that the Trinity County Sheriff's Office would never send a citizen to perform a Deputy's job. (3 CT 700; 3 CT 697:18-27.)

That statement supports three reasonable inferences—all fatal to the County's attempt to rely on Resolution 163-87. First, it implicitly concedes that a deputy who did ask a civilian to respond to a 911 call would be acting contrary to Trinity County policy and in a manner the County did not authorize. Second, it is an admission that when Whitman asked the Gunds to go check on their neighbor who had called 911, he was asking them to perform a task that was not authorized by any governing body of Trinity County nor by any designee of any governing body of

Trinity County. Third, and not of least significance, if the task that Whitman asked the Gunds to perform was not a deputy's job, the task could not have involved performance of the deputy's duty of "active law enforcement."

Resolution 163-87 does not apply.

CONCLUSION

The County, while disregarding significant facts, has not offered a compelling reason why its novel interpretation of section 3366 should be accepted. Nor has the County meaningfully addressed the authorities cited by the Gunds in their brief. The County has not meaningfully answered the law and supporting authorities the Gunds present in their Opening Brief on the Merits. Nor has the County shown that its Resolution 163-87 has any application

The decision of the court of appeal should be reversed.

Dated: January 14, 2019

Respectfully submitted,

BRAGG, MAINZER & FIRPO, LLP

By: _____
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CERTIFICATE OF WORD COUNT

I certify that the text of this document uses a 13-point Times New Roman font and consists of 4,806 words as counted by the Microsoft Word Processing Program used to generate this document.

Dated: January 14, 2019

Respectfully submitted,

BRAGG, MAINZER & FIRPO, LLP

By:_____

BENJAMIN H. MAINZER
Attorneys for Petitioners,
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CERTIFICATE OF CONFORMITY WITH ELECTRONIC BRIEF

I hereby certify that Petitioners' Reply Brief on the Merits to which this Certificate of Conformity is attached is, aside from the attachment of this Certificate, identical in all respects to the electronically filed Opening Brief submitted using the Court's electronic upload website.

The paper copies of the Opening Brief were printed from the PDF file generated by Word, the program in which the original Opening Brief was created.

Dated: January 14, 2019

BRAGG, MAINZER & FIRPO, LLP

By: _____
BENJAMIN H. MAINZER
Attorneys for Petitioners,
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CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the County of Humboldt. My business address is 804 Third Street, Eureka, California 95501. I am over the age of 18 years and not a party to the within cause.

On this date, I served the following document(s):

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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed this 14th day of January, 2019 at Eureka, California.

PAULA LOURENZO