Case No. S242250

IN THE SUPREME COURT OF CALIFORNIA

REBECCA MEGAN QUIGLEY,

Plaintiff and Appellant,

v.

GARDEN VALLEY FIRE PROTECTION DISTRICT, et al.,

Defendants and Respondents.

Court of Appeal of the State of California, Third Appellate District
2nd Civil No. C079270
Superior Court of the State of California, County of Plumas
Case No. CV1000225
The Honorable Janet Hilde, Judge Presiding

APPELLANT'S OPENING BRIEF ON THE MERITS

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INITIAL
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. Rules of Court, Rule 8.208)

This form is being submitted on behalf of **Plaintiff and Appellant REBECCA MEGAN QUIGLEY**.

There are no interested entities or persons that must be listed in this certificate under rule 8.208.

DATED: November 22, 2017

JAY-ALLEN EISEN LAW CORPORATION

By: _____

JAY-ALLEN EISEN
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ISSUE

"The issue to be briefed and argued is limited to the following: Whether, as the Court of Appeal held, the governmental immunity set forth in Government Code section 850.4 may be raised for the first time at trial." (8/23/17 Dkt. Entry; *see* rule 8.520(b)(2)(A), Cal. Rules of Court.)

INTRODUCTION

After four years of litigation, at the start of trial defendants and respondents moved for, and the trial court granted, nonsuit based on a defense that defendants had never before raised, even though it had been available to them from the outset of the case.

Plaintiff, Rebecca ("Becky") Quigley, then a U.S. Forest Service firefighter, was severely injured when a 15-ton truck rolled over her while she slept in a designated sleeping area of the base camp for the fire. The camp was under the management of the defendant and respondent fire protection districts. Against federal law, they did not provide minimum protections for sleeping firefighters by signing and roping off the sleeping area. Quigley filed this action seeking damages for her injuries resulting from a dangerous condition of public property.

Defendants actively litigated the action over the next four years. At trial, after Quigley's counsel finished his opening statement, defendants moved for nonsuit. For the first time, they asserted an immunity under the Government Claims Act that they had never before mentioned, Government Code section 850.4, which provides in relevant part, "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...." Quigley's injuries, they argued, resulted from a condition of the base camp, which they characterized as a firefighting facility.

Defendants' answer to Quigley's complaint alleged 38 affirmative defenses; 11 asserted Government Code immunities. Section 850.4 was not one of them. When asked in interrogatories to state all facts supporting each affirmative defense, defendants' answer was more than two pages but there was not a word about section 850.4 immunity. Defendants moved for summary judgment based on statutory immunities pleaded as affirmative defenses. The motion did not mention section 850.4. They held back the defense until the start of trial, then sprang it on Quigley and the court.

In opposing the nonsuit motion, Quigley argued that defendants had waived section 850.4 immunity by failing to allege it as an affirmative defense, citing authority squarely on point. The trial court rejected the argument, holding that the immunity is jurisdictional and can be raised at any time. The court of appeal agreed and affirmed. The court was wrong.

Defendants failure to plead section 850.4 as an affirmative defense and waiting until trial to raise it for the first time waived the immunity. As a basic matter of pleading, to ensure fairness in litigation and judicial efficiency and economy, a defendant must allege matter that adds a new issue to the case as an affirmative defense. Defendants' claim of section 850.4 immunity presented a new issue. Quigley's complaint for a dangerous condition of public property did not have to, and did not, allege that the base camp was a firefighting facility.

California authority squarely on point holds that failure to allege section 850.4 as an affirmative defense waives the immunity. Other cases and authorities agree. Courts throughout the country hold that an immunity must be pleaded as an affirmative defense in a government tort action, or asserting the immunity for the first time after actively litigating the case for a substantial time waives the immunity.

The court of appeal wrongly held that that defendants did not waive section 850.4 as the immunity is jurisdictional and can be raised at any

time. California courts have jurisdiction to adjudicate tort claims against governmental agencies for dangerous conditions of public property. Governmental immunity does not completely deprive the courts of all power to adjudicate such claims. Governmental immunity is a personal privilege; the government may consent to suit or waive the privilege. Were immunities jurisdictional in the sense that they divest courts of power to adjudicate and can be raised at any time, a judgment against a government agency would never be final as long as an immunity could be asserted.

A claim of governmental immunity is an issue that deserves speedy determination. Allowing the government to litigate actively and delay asserting an immunity is contrary to the very purpose of immunities, of Allowing the government to raise a tardy claim of immunity after vigorously litigating a case is not only contrary to the policies of fair, orderly litigation and promoting judicial economy and efficiency, it is contrary to the proper administration of justice and the very purpose of governmental immunity.

The court of appeal's decision should be reversed.

SUMMARY OF FACTS AND PROCEDURE

The Silver Fire broke out in Plumas National Forest on September 19, 2009. (Slip op. at p. 2.)[1] 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 posting signs to designate a sleeping area and roping it off. (*Ibid.*)

The rules are set forth in the Forest Service's Health and Safety Code Handbook, FSH 6709.11 ("Health and Safety Code"), which is "the primary source of standards for safe and healthful workplace conditions ...

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

and operational procedures and practices in the Forest Service...." (Slip op. at p. 2; Health and Safety Code, Zero Code, p. 0-3.)[2] The requirements for sleeping areas are included in § 25.13b, p. 20-87, ¶ 9. The Code requires that sleeping areas must be signed and roped off. "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.*)

Authorized sleeping area not signed or roped off

The base camp was managed by a team of non-firefighters, NorCal Team 1. (*Ibid.*) The team included Frank DelCarlo, the facility unit leader, Mike Jellison, the logistics chief, and Jeff Barnhart, the camp safety officer. (Slip op. at p. 3; RT 14-15.) All three were retired U.S. Forest Service firefighters. (*Ibid.*) In managing the camp, they were employees of the defendant local fire agencies, Chester Fire Protection District and Garden Valley Fire Protection District. (Slip op. at p. 3.)

The fairground has a racetrack with a large, grassy infield. (Slip op at p. 2.) The Forest Service set up a portable shower unit on the infield. (*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 pp. 2-3.) Employees of an independent contractor drove water trucks weighing up to 30,000 pounds to service the bladders. (*Id.* at p. 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.*)

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[2] 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.*); Health and Safety Code, Zero Code § 01 - Authority, p. 0-3.

DelCarlo authorized the use of the infield as a sleeping area for firefighters. (*Ibid.*) Despite the command of the Health and Safety Code, the infield sleeping area was neither signed nor roped off. (*Ibid.*)

Quigley permitted to sleep in authorized area

Quigley was a Forest Service firefighter, a member of a "hotshot" crew called to fight the fire. (*Ibid.*). At about 9 p.m. on September 20 after her shift fighting the fire, she and her crew returned to the base camp. (*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 area where DelCarlo had authorized firefighters to sleep and where others 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.*)

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.*) He recorded on an inspection form that all sleeping areas were separated from parking and posted, "'sleeping area (no vehicles allowed),'" but the sleeping area was still neither signed or roped off. (*Ibid.*)

Run over while sleeping by heavy truck

That night, Quigley returned to the camp at about 9:00. (*Id.* at p. 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 the area DelCarlo had authorized for sleeping. (*Ibid.*)

About 10:00 that night, an employee of the independent contractor that serviced the showers drove his truck across the infield to reach the bladders. (*Ibid.*). He drained the grey-water bladder into the truck. (*Ibid.*) As he drove off 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.*)

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 were $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. (*Ibid.*) These damages do not include general damages—loss of enjoyment of life, pain and suffering she will have the rest of her life; she is expected to live to the age of 82. (RT 50-51.)

Nonsuit

In July 2010, Quigley filed this action against defendants alleging dangerous condition of public property and other causes of action. (§ 835; 1 AA 12-14; 2 AA 405 [Register of Action].) Defendants generally denied the allegations of the complaint; they also alleged 38 affirmative defenses. (1 AA 57-65.) Eleven of the defenses asserted immunities under the Government Claims Act, Government Code sections 810 et seq. (the Act or Claims Act).[3] (1 AA 60-62.) But they did not allege immunity under section 850.4.

Trial commenced on February 2, 2015, more than four years after the complaint was filed. (2 AA 410 [Register of Action].) After jury selection, on February 4, Quigley's counsel made his opening statement. (RT 1-51.) When he finished, defendants' counsel presented a written motion for nonsuit and supporting points and authorities arguing that they were not liable under various provisions of the Act. (Slip op. at p. 4; 1 AA 68-74; RT 52.) Defendants asserted, for the first time after more than four

[3] All further unspecified statutory references are to the Government Code.

years of litigating the action, that they were immune under section 850.4. (Slip op. at p. 4; 1 AA 72-73.) Defense counsel admitted that it was an argument "that I don't think the Court has seen." (RT 57.)

In opposing the motion, Quigley's counsel argued that defendants had waived the immunity by failing to allege it as an affirmative defense or otherwise raise it prior to trial. (Slip op. at 4; 1 AA 99.)

After oral argument and briefing, the court granted nonsuit. (Slip op. at pp. 4-5.) The court held that defendants did not waive the immunity by not asserting it before trial as it is jurisdictional and can be raised at any time. (Slip op. at p. 5). The court subsequently denied Quigley's motion for new trial. (*Ibid.*; 2 AA 389.)

The court of appeal affirmed, holding that defendants had not waived section 850.4 immunity by waiting to raise the issue until Quigley's counsel finished his opening statement at trial. "[G]overnmental immunity," the court held, "is jurisdictional and may be raised at any time. [Citations.]" (*Id.* at pp. 4-5.)

ARGUMENT

I.

THE ACT MAKES PUBLIC AGENCIES LIABLE FOR INJURIES RESULTING FROM A DANGEROUS CONDITION OF PUBLIC PROPERTY

The modern law of government tort liability begins with this Court's decision in *Muskopf v. Corning Hosp. Dist.* (1961) 55 Cal.2d 211, in which the Court "discarded" the centuries-old rule of sovereign or governmental immunity as "mistaken and unjust." (*Id.*, 55 Cal.2d at p. 213, and see *id.* at 215, fn. 1.) Simultaneously, in the companion case, *Lipman v. Brisbane Elementary School District* (1961) 55 Cal.2d 224, the Court suggested that the immunity of public officers and employees for discretionary acts might not extend to public entities in all cases. Consequently, public entities

became generally liable for torts. (See Van Alstyne, et al., Cal. Government Tort Liability Practice (Cont.Ed.Bar. 2017) § 1.39, pp. 1-23-24 [CEB Govt. Tort Liability].)

The Legislature responded by enacting what was then referred to as the Tort Claims Act (Gov. Code §§ 810–996.6), now named the Government Claims Act. (§ 810, subd. (b).)

Muskopf rested on the fundamental principle that "when there is negligence, the rule is liability, immunity is the exception." (*Id.*, 55 Cal.2d at p. 219.) *Muskopf* indicated that the Legislature may determine the scope of tort liability of public entities. (*Id.* at p. 218). Although the Legislature has defined the scope of governmental tort liability in the Act, it did not alter that basic axiom of *Muskopf* or its corollary that "courts should not casually decree governmental immunity...." (*Johnson v. State of California* (1968) 69 Cal.2d 782, 798; see also, *Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 792; *Williams v. State of California* (1983) 34 Cal.3d 18, 34; *Baldwin v. State of California* (1972) 6 Cal.3d 424, 435-436; *Ramos v. County of Madera* (1971) 4 Cal.3d 685, 692.)

Thus, as the Court has repeatedly stated, "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." (*Milligan v. City of Laguna Beach* (1983) 34 Cal.3d 829, 832, quoting *Ramos*, *supra*, 4 Cal.3d at p. 692 (court's italics added in *Milligan*); see also, *e.g.*, *Baldwin*, *supra*, 6 Cal.3d at p. 436; *Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 814.)

Section 835 makes a public entity liable for injuries caused by a dangerous condition maintained on its property when the condition "'created a reasonably foreseeable risk of the kind of injury which was incurred' and either an employee's negligence or wrongful act or omission

caused the dangerous condition or the entity was on 'actual or constructive notice' of the condition in time to have taken preventive measures." (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347–348.) Quigley alleged, and was prepared to present evidence at trial, that her injuries resulted from a dangerous condition of public property that defendants negligently created —the unsigned and unprotected infield sleeping area—that exposed sleeping firefighters to an unreasonable risk of harm from traffic passing through the infield. (1 AA 12-13, ¶ 39.)

In some cases, most recently in *DiCampli-Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983, 991, the Court has said that the intent of the Act "is not to expand the rights of plaintiffs in suits against governmental entities, but to confine potential governmental liability to rigidly delineated circumstances." The negligence of defendants here in creating and maintaining the dangerous condition of property that caused Quigley's injuries is one of those delineated circumstances. (§ 835.)

II.

DEFENDANTS WAIVED THE AFFIRMATIVE DEFENSE OF SECTION 850.4 IMMUNITY BY NOT RAISING IT UNTIL TRIAL

A. Section 850.4 is waived if not pleaded as an affirmative defense.

In *McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App.3d 683, disapproved on unrelated grounds by *Bunch v. Coachella Valley Water Dist.* (1997) 15 Cal.4th 432, 447-448, the court held squarely that section 850.4 immunity is an affirmative defense that "must be pled and proven or is deemed waived." (*McMahan's* at p. 689; see also *Varshock v. California Dept. of Forestry and Fire Protection* (2011) 194 Cal.App.4th 635, 651 [§ 850.4 "operates as an affirmative defense"]; *Hata v. Los Angeles County Harbor/UCLA Medical Center* (1995) 31 Cal.App.4th 1791, 1802, quoting *McMahan's*.)

Other authorities agree. "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 ed. 2008 and 2017 supplement) Pleading, § 1107, at p. 535 [Witkin Procedure].) "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; "Governmental immunities will be considered to have been waived unless they are pleaded in the answer as affirmative defenses." Cal. Civil Practice: Torts (West Group 2017 update) § 29:27].)

Other jurisdictions agree that governmental immunity from tort liability is an affirmative defense that must be pleaded. (E.g., *Washington v. Whitaker* (1994) 317 S.C. 108, 114–15 and fn. 7 [collecting cases].)

Despite the concurrence among these authorities, the Court of Appeal held in the present case that the holding in *McMahan's* that section 850.4 must be pleaded or it is waived was not supported by the authorities it cited, *De La Rosa v. City of San Bernardino* (1971) 16 Cal.App.3d 739 and CEB Government Tort Liability. (Slip op. at pp. 6-7.) In the Court of Appeal's view, both authorities dealt with immunities that required the public entity defendant to make affirmative factual showings, such as that a dangerous condition of public property "conformed to a plan or design ... reasonableness, existence of a design, purpose of a road, and circumstances under which an emergency vehicle is operated." (*Id.* at p. 7) In the Court of