Supreme Court Number S242250

In the Supreme Court of the State of California

REBECCA MEGAN QUIGLEY,

Plaintiff and Appellant,

v.

GARDEN VALLEY FIRE PROTECTION DISTRICT, et al.,

Defendants and Respondents.

After a Decision by the Court of Appeal
For the Third Appellate District
Third Civil Case Number C079270
Superior Court of the State of California
For the County of Plumas, Case No. CV10-00225
The Honorable Janet Hilde

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CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

S242250 - QUIGLEY v. GARDEN VALLEY FIRE PROTECTION DISTRICT

Full Name of Interested Entity/Person	Party / Non-Party		Nature of Interest
No interested parties	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
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Submitted by: Jonna D. Lothyan

/s/ Jonna D. Lothyan

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ISSUE PRESENTED

"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."

INTRODUCTION

Respondents, Garden Valley Fire Protection District, Jeff Barnhart, Frank DelCarlo and Mike Jellison ("the firefighter defendants") will demonstrate that immunity for firefighting

activities as described in Government Code section 850.4[1] may be raised for the first time at trial.

In California, courts possess jurisdiction to adjudicate public entity tort liability only if a statute provides for liability. Otherwise, courts lack subject matter jurisdiction because the government is generally immune from tort liability under the Government Tort Claims Act ("Act"). Under the Act, the only means by which a public entity may be held liable for tortious conduct is by specific statutory provision. Although here the firefighter defendants alleged a range a of government immunities as an affirmative defense in their answer, which included section 850.4, no California statute provides that governmental immunities may be waived by litigation conduct, such as by failing to allege immunity as an affirmative defense or failing to raise it in discovery responses or a dispositive motion.

The legislative history and intent of the Act—and that of section 850.4 in particular—establishes that Rebecca Megan Quigley ("Quigley") has it precisely backwards; it is the *plaintiff's burden* to establish liability under the Act and to plead around immunity, not the public entity's burden to plead immunity as an affirmative defense.

The Legislature's enactment of a comprehensive statutory scheme rigidly delineating public entity and public employee

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1 All further statutory references are to the Government Code unless otherwise noted.

immunity is premised on the idea that the Legislature, not the courts, should decide what protections ought to be afforded to the state's resources for functions the state must provide. Indeed, under the statutory scheme, public entity immunity is so significant that it is jurisdictional in nature. The Act does not contemplate or permit implicit consent to liability by litigation conduct where, by statute, immunity is absolute.

The policy of providing notice of a defendant's defenses—the policy that underlies the general rule that affirmative defenses must be pled in an answer—offers no reason to treat section 850.4 as an affirmative defense that must be pleaded or waived. A complaint alleging public entity conduct, together with specific application of provisions of the Act, necessarily places governmental immunity in issue.

The immunity for firefighting activities contained in section 850.4 is not conditioned on factual showings that constitute "new matter." The very circumstances alleged in Quigley's complaint give rise to governmental immunity for firefighting activities. Indeed, this court in *Heieck & Moran v. Modesto* (1966) 64 Cal.2d 229 (*Heieck*), concluded the application of section 850.4 can be decided on demurrer, as the application of the statute to the allegations of the complaint tests the sufficiency of the pleadings, without consideration of evidence, and is purely a question of law. Thus, immunity under section 850.4 can be raised at any time, even for the first time at trial or on appeal. The trial court and appellate court correctly decided the issue as a matter of law.

Finally, here, the firefighter defendants did not raise section 850.4 immunity for the first time at trial.[2] They alleged in an affirmative defense in their answer they were immune from Quigley's claims and identified a range of applicable Government Code immunity statutes, within which section 850.4 was contained. The firefighter defendants were not required to assert each specific statute as a separate affirmative defense. The range of governmental immunity statutes pled sufficiently raised the defense.

FACTUAL AND PROCEDURAL HISTORY

A. The Parties.

The United States Forest Service ("USFS") employed Quigley as a firefighter. [RT 6.] Chester Fire Protection District ("Chester Fire") is a public entity that provides local firefighting services. [1 AA 205.] Chester Fire employed DelCarlo and Jellison. [*Id.* at pp. 8, 89, 205; RT 56.] Garden Valley is also a public entity that provides local firefighting services. Garden Valley employed Barnhart. [1 AA 205.]

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[2] Although the court has asked for briefing on whether section 850.4 may be raised for the first time at trial, the firefighter defendants in fact raised section 850.4 immunity as an affirmative defense in a range of immunities (Gov. Code, §§ 810-996.6) pled in their answer. [1 AA 60.] The legal sufficiency of the firefighter defendants' pleading of section 850.4 is addressed in Section VI.

B. The Silver Fire and Silver Fire Camp.

The Plumas County Fairgrounds ("fairgrounds") is public property owned and operated by Plumas County. [1 AA 10, 201.] In 2009, a fire known as the "Silver Fire" broke out in the Plumas National Forest. [*Id.* at pp. 10, 209.] The USFS set up a fire camp at the fairgrounds in response to the Silver Fire ("fire camp") to house all USFS personnel required to fight the fire. [*Id.* at pp. 201, 205.] A team of about 50 people, referred to as the NorCal 1 Team, took control over the Silver Fire and established the fire camp. [RT 9-10.] Barnhart, DelCarlo and Jellison, members of NorCal 1, worked at the fire camp. [*Id.* at p. 10.] Barnhart acted as the safety officer, DelCarlo as a facility unit leader, and Jellison as a logistics chief. [*Id.* at p. 1.]

On September 20, 2009, 300 people were present at the fire camp. [RT 16.] Shower units had been set up near the grassy racetrack infield area of the fire camp. [*Id.* at p. 12.] Vehicles drove through the grassy infield to deliver clean water and remove gray water from the shower units. [*Id.* at p. 15.] By the next day, the population had doubled to 600 people working in response to the Silver Fire. [*Id.* at p. 21.] When Quigley returned from fighting the fire, she slept in the infield near the showers and away from her hotshot team. [*Id.* at pp. 21-22; 1 AA 210.] A sanitation truck removing gray water from the showers drove though the infield and accidentally ran over Quigley while she slept. [RT 22-23.]

C. Quigley's First Amended Complaint.

Quigley filed governmental tort claims against the public entities pursuant to section 910 of the Act. [1 AA 10-11, 19-50.] The public entities rejected Quigley's claims and Quigley sued the firefighter defendants and others as a result of injuries she sustained in the accident. [*Id.* at pp. 6, 10-11.] Quigley alleged causes of action for: (1) negligence; (2) dangerous condition of public property; and (3) failure to warn. [*Id.* at pp. 11-14.] Quigley contended she was a firefighter engaged in fighting a fire at the time of the incident. [*Id.* at pp. 10-11.]

According to Quigley, the firefighter defendants were responsible for the safety and planning of the fire camp sleeping areas. [1 AA 13.] Quigley claimed the firefighter defendants maintained the fairgrounds in a manner that created a dangerous condition, including designing a sleeping area for firefighter crews on the lawn of the racetrack, failing to mark roads adequately and exposing firefighters to an unreasonable risk of harm to traffic passing though the sleeping area. [*Id.* at pp. 12-13.] Finally, Quigley alleged the firefighter defendants failed to provide adequate markings, routes, or warnings of trucks driving through the sleeping area, causing Quigley to sustain injuries. [*Id.* at pp. 14-15.]

The firefighter defendants answered Quigley's first amended complaint. [1 AA 57.] They asserted affirmative defenses for immunity, including Government Code sections 810 through 996.6. [*Id.* at p. 60.] At the time they answered the

complaint and throughout the action, the firefighter defendants were not certain whether the State of California, the federal government, or the fire districts employed DelCarlo, Jellison, and Barnhart in their roles regarding the Silver Fire, or whether they acted as independent contractors. [*Id.* at pp. 201-202.] In fact, because the USFS set up the fire camp and maintained exclusive control over the Silver Fire, the firefighter defendants believed they may have been federal government employees during the Silver Fire. Thus, the case was removed to federal court for the district court to determine whether DelCarlo, Jellison and Barnhart acted as federal employees. Following application to the United States Attorney General, the district court determined the three were not federal employees, but rather independent contractors. The district court remanded the case to state court. [*Id.* at p. 202.]

The firefighter defendants defended the case under the assumption that DelCarlo, Jellison, and Barnhart were independent contractors. Accordingly, in later responses to discovery, they stated that they considered DelCarlo, Jellison, and Barnhart to be independent contractors hired by the USFS. [1 AA 168.] Consistent with this understanding, the firefighter defendants based their summary judgment motion on DelCarlo, Jellison and Barnhart acting as independent contractors at the time of the incident, rather than as government employees. [*Id.* at pp. 201-203.]

D. The Case Proceeds to Trial.

At the time of trial, the firefighter defendants were the only remaining defendants in the case. The other parties had settled for substantial amounts. [RT 59.] At the trial readiness conference, the individual defendants' employment status was finally resolved when the parties stipulated that DelCarlo and Jellison were employees of Chester Fire and Barnhart was employed by Garden Valley. [1 AA 201-202.] The parties also stipulated that DelCarlo, Jellison, and Barnhart acted within the course and scope of their employment at the time of the accident. [*Id.* at pp. 85, 89-91.]

E. Quigley's Opening Statement.

During opening statements, Quigley's counsel argued that DelCarlo, Jellison, and Barnhart were part of the NorCal 1 Team that arrived on the morning of September 20, 2009, to take over the fire camp. [RT 9-10.] They were paid for being on duty 24 hours a day. [*Id.* at p. 11.]

DelCarlo's responsibilities as the facility unit leader included the layout and operations of the fire camp. He was responsible for signing and roping off sleeping areas for resting firefighters and other personnel working at the fire camp. He also provided fire camp maps to truck drivers. [RT 27.]

Quigley's counsel described the showers that were set up in the grassy infield. [RT 12-13.] DelCarlo ordered a crew to set up tents by the showers. [*Id.* at pp. 13-14.] According to Quigley's

counsel, DelCarlo knew vehicles serviced the shower area and would be driving in and out of the grassy infield area. [*Id.* at p. 14.] DelCarlo gave firefighters permission to sleep in the grassy infield area. Quigley's counsel argued DelCarlo failed to sign and rope off the designated sleeping area in the infield as required. [*Id.* at pp. 14-15.]

Jellison, the logistics chief, helped with the camp layout, including sleeping areas. [RT 18-19.] He monitored the base camp population to determine whether additional sleeping areas were needed and prepared the fire camp for an influx of firefighters. [*Id.* at pp. 31-32.]

Quigley's counsel argued Jellison and DelCarlo failed to provide a safe sleeping area. [RT 19.] The fire camp doubled from 300 to 600 people, but Jellison and DelCarlo did not expand the sleeping area, so Quigley slept in the grassy infield. [*Id.* at pp. 21-22.]

Barnhart, the safety officer, was responsible for walking through the camp to check for safety. Quigley's counsel argued Barnhart had a responsibility to make sure the sleeping area in the grassy infield was roped off, but he failed to do so. When Barnhart inspected the showers and sleeping area he checked-off the inspection form that sleeping areas were separate from parking. [*Id.* at pp. 20-21.] The sleeping area was not roped off and did not have signs posted. [*Id.* at p. 21.]

On September 21, 2009, at 10:00 p.m., a sanitation truck ran over Quigley while servicing the showers. [RT 22.] Quigley's counsel argued the truck did not need to service the showers at night, but the firefighter defendants did not give the driver any direction. [*Id.* at p. 26.] DelCarlo did not provide a fire camp map to the truck driver or set up a traffic route away from the sleeping area in the infield. [*Id.* at pp. 27-28.]

Quigley's counsel argued the firefighter defendants caused Quigley's injuries and damages by creating an unsecured infield sleeping area, which included failing to: (1) sign and rope off the sleeping area; (2) provide a fire camp map to the truck driver; (3) set a traffic route for the truck driver; (4) provide a schedule to the truck driver; (5) increase sleeping areas; and (6) identify safety hazards. [RT 29-30, 34-38.]

F. The Firefighter Defendants Move for Nonsuit.

The firefighter defendants moved for nonsuit at the completion of Quigley's opening statement. [RT 52; 1 AA 68.] They relied on statutory immunity under Government Code sections 815, 815.2, 818.6, 820.2, 821.4, 850.2 and 850.4, and argued that Barnhart, DelCarlo and Jellison were employees of a public entity and entitled to immunity. [1 AA 70-72; RT 56.] Thus, because Garden Valley and Chester Fire employed Barnhart, DelCarlo and Jellison, but did not own the fairgrounds, the immunities applied. [RT 57-59.]

The court provided Quigley an opportunity to submit written opposition to the nonsuit motion. [RT 60-61; 1 AA 92.]

Quigley argued, among other things, that the firefighter defendants waived sections 850.2 and 850.4 because they failed to raise these immunities in their answer to the complaint, their summary judgment motion, or in discovery responses. [1 AA 99.] Quigley also submitted declarations from expert witnesses regarding the meaning of a "firefighting facility" as described in section 850.4. [*Id.* at pp. 113-116.]

The court ordered the parties to appear for further argument the following day and requested further briefing on the waiver issue. [RT 70, 102.] Quigley argued that the firefighter defendants waived their right to assert immunity because they did not adequately plead immunity in the affirmative defenses section of their answer. [*Id.* at pp. 103-104.] The firefighter defendants asserted that the 15th affirmative defense raised in their answer adequately pled the immunities as a defense. [*Id.* at pp. 117-120.] They also raised immunity as a defense in discovery responses. [*Id.* at p. 121.]

The court granted nonsuit on the grounds that the firefighter defendants were immune from liability pursuant to section 850.4. [RT 136.] The court stated the matter was a purely legal question regarding the meaning of "firefighting facilities" in section 850.4. For this reason, the court did not consider the expert declarations Quigley submitted in opposition because expert declarations do not tell a court "what the statute says." [1 AA 177, 183-186.] The court granted the nonsuit motion. [*Id.* at pp. 122-126.]

G. Quigley Moves for New Trial.

Quigley moved for a new trial. [1 AA 136, 146.] She argued the court erred in not denying the nonsuit motion due to waiver and in finding the fire camp was a firefighting facility as a matter of law within the meaning of section 850.4. [*Id.* at pp. 136-146.] Quigley also argued that the firefighter defendants' counsel engaged in misconduct by concealing the immunity defense. [*Id.* at pp. 146-147.]

In opposition, the firefighter defendants argued they did not waive governmental immunity as a defense. Rather, they adequately pled section 850.4 as an affirmative defense in their answer. They also raised the immunity defense in responses to discovery. [2 AA 292-297.] Finally, counsel did not willfully conceal material evidence as counsel did in fact disclose the immunity defense prior to trial. [*Id.* at pp. 302-304.]

The court denied the new trial motion finding that the firefighter defendants did not waive the immunity defense and no error of law occurred. [2 AA 390, 394.]

H. Appellate Court Opinion.

The Court of Appeal affirmed the judgment of nonsuit holding, inter alia, that governmental immunity is jurisdictional and may be raised at any time. (*Quigley v. Garden Valley Fire Protection Dist.* (2017) 10 Cal.App.5th 1135, 1141 (*Quigley*).) The appellate court reasoned that this is especially true for section