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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

BRENDA BROWN et al., Plaintiffs and Appellants, v. COUNTY OF LOS ANGELES et al., Defendants and Respondents.	B239496 (Los Angeles County Super. Ct. No. TC025738)

APPEAL from an order of the Superior Court of Los Angeles County. Rose Hom and Lynn D. Olson, Judges. Affirmed in part and reversed in part.

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Law Offices of Gary S. Casselman, Gary S. Cassleman, and Danielle Leichner Casselman for Plaintiffs and Appellants.

Hurrell Cantrall, Thomas C. Hurrell, and Melinda Cantrall for Defendants and Respondents.

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Brenda Brown, Alexandra Hines, and DeLaron Hines, Jr., appeal from the order of dismissal entered in their negligence and wrongful death suit against the County of Los Angeles (County) and several of the County's firefighters. Defendants demurred to both causes of action on the basis of a governmental tort immunity statute. The trial court sustained the demurrer without leave to amend and dismissed the complaint. We affirm as to the individual defendants but reverse as to the County.

BACKGROUND

Plaintiffs allege that their decedent, DeLaron Hines,[1] was driving on a freeway on October 3, 2010, at approximately 3:15 a.m., when he collided with the back of a County fire truck that was "stopped blocking the number 3 and/or number 4 lanes . . . while attending to an unrelated vehicle fire at or on the roadway." Plaintiffs' decedent was fatally injured in the collision. According to the complaint, the stopped fire truck lacked "any or adequate and sufficient activated warning devices to the rear, including but not limited to rear emergency lights, flares, reflectors to the rear on the highway or other warning devices deployed to the rear."

After filing a claim for damages with the County and its fire department pursuant to Government Code section 910, plaintiffs filed suit against the County, eight individual firefighters, and 25 Doe defendants, alleging a claim for negligence on behalf of the decedent and a claim for wrongful death.

Defendants demurred to both causes of action, arguing that they were absolutely immune from liability pursuant to Government Code section 850.4 (section 850.4).[2] In

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[1] Brown is the decedent's mother, and Alexandra Hines and DeLaron Hines, Jr., are the decedent's children.

[2] The demurrer also cited and quoted Government Code section 850.2 but contained no substantive arguments based on that statute. On appeal, defendants again present no arguments under Government Code section 850.2, which provides that "[n]either a public entity that has undertaken to provide fire protection service, nor an employee of such a public entity, is liable for any injury resulting from the failure to provide or maintain sufficient personnel, equipment or other fire protection facilities." The statute is

opposition, plaintiffs argued that the demurrer should be overruled because their claims fall within an express statutory exception to the immunity granted by section 850.4. In the alternative, plaintiffs sought leave to amend.

The trial court sustained the demurrer without leave to amend and entered an order of dismissal with prejudice. Plaintiffs timely appealed.

STANDARD OF REVIEW

On appeal from an order dismissing a complaint after a demurrer is sustained without leave to amend, "courts must assume the truth of the complaint's properly pleaded or implied factual allegations. [Citation.] Courts must also consider judicially noticed matters. [Citation.] In addition, we give the complaint a reasonable interpretation, and read it in context. [Citation.] If the trial court has sustained the demur[r]er, we determine whether the complaint states facts sufficient to state a cause of action. If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. [Citation.] The plaintiff has the burden of proving that an amendment would cure the defect. [Citation.]" (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

DISCUSSION

I. Governing Law

Section 850.4 provides in relevant part as follows: "Neither a public entity, nor a public employee acting in the scope of his employment, is liable . . . , 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." Article 1 of Chapter 1 of Division 9 of the Vehicle Code contains Vehicle Code section 17001 (section 17001), which provides as follows: "A public entity is liable for death or injury to person or property proximately

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inapplicable on its face, because plaintiffs do not allege that any defendants failed to provide or maintain sufficient personnel, equipment, or other fire protection facilities.

caused by a negligent or wrongful act or omission in the operation of any motor vehicle by an employee of the public entity acting within the scope of his employment." Thus, section 850.4 creates immunity for conduct that constitutes "fighting fires," but section 17001 creates an exception to that immunity for conduct that constitutes both "fighting fires" and "operation of any motor vehicle."

The parties agree that this appeal is controlled by the interplay between the immunity provided by section 850.4 and the exception to that immunity provided by section 17001.

II. Individual Defendants

Section 850.4 provides immunity to any "public entity" or "public employee acting in the scope of his employment" from liability "for any injury caused in fighting fires." Section 17001 provides for an exception to that immunity, but only for a "public entity." The exception under section 17001 thus does not apply to the individual defendants, who therefore remain immune under section 850.4. Defendants raise this point in their respondents' brief, and plaintiffs fail to address it in their reply. We conclude that defendants' argument has merit, and we consequently affirm the order of dismissal as to the individual defendants.

III. Entity Defendant

As to defendant County, plaintiffs argue, as they did in the trial court, that the court should have overruled the demurrer on the basis of section 17001 or, alternatively, should have granted leave to amend. Plaintiffs further argue that the allegations of the complaint, although admittedly "unclear" in certain respects, are sufficient to withstand demurrer, and that the remaining factual indeterminacies should be left for resolution through further proceedings. Although we find the complaint deficient in its present form, we agree that plaintiffs should have been granted leave to amend and a reasonable opportunity to conduct discovery.

The purposes of section 850.4 and section 17001 were helpfully summarized by the California Law Revision Commission as follows: "'Except to the extent that public entities are liable under Vehicle Code Sections 17000 to 17004 for the tortious operation

of vehicles, public entities and public personnel should not be liable for injuries caused in fighting fires or in maintaining fire protection equipment. There are adequate incentives to careful maintenance of fire equipment without imposing tort liability; and *firemen should not be deterred from any action they may desire to take in combat[]ing fires by a fear that liability might be imposed if a jury believes such action to be unreasonable*. The liability created by the Vehicle Code for tortious operation of emergency fire equipment should be retained, however, *for such liability does not relate to the conduct of the actual firefighting operation*.' (Recommendations Relating to Sovereign Immunity, 4 Cal. Law Revision Com. Rep. (Jan. 1963) pp. 807, 828, italics added.)" (*Colapinto v. County of Riverside* (1991) 230 Cal.App.3d 147, 152 (*Colapinto*).) Thus, section 17001 "deal[s] with the hazard created by the operation of automobiles upon the streets and highways of the state," whereas immunity under section 850.4 applies "whenever firefighters are engaged in firefighting activities." (*Colapinto, supra*, 230 Cal.App.3d at pp. 152-153.)

The precise boundaries of the section 17001 exception are not always easy to discern. We need not comprehensively resolve that issue, however, because the procedural posture of the present appeal allows us to decide the case on a narrower ground. "'[T]o state a cause of action against a public entity, every fact material to the existence of its statutory liability must be pleaded with particularity,'" although "the allegations of a complaint must [still] be liberally construed with a view to attaining substantial justice between the parties." (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 792, 795, quoting *Peter W. v. San Francisco Unified Sch. Dist.* (1976) 60 Cal.App.3d 814, 819.)

Plaintiffs concede that the allegations of the complaint are "unclear" in certain respects, and plaintiffs do not attempt to argue that the complaint in its present form meets the "'pleaded with particularity'" standard articulated in *Lopez v. Southern Cal. Rapid Transit Dist., supra*, 40 Cal.3d at p. 795. We accordingly conclude that plaintiffs have failed to show that the trial court erred by sustaining the demurrer.

The trial court did, however, abuse its discretion by failing to grant leave to amend. Plaintiffs did not witness the accident, and the only percipient witness whose interests are aligned with plaintiffs is their decedent, who did not survive the crash. Plaintiffs have consequently been placed in the impossible position of having to plead their claims before gaining access to necessary information through the discovery process. Plaintiffs must therefore be given a reasonable opportunity to conduct discovery and to amend their complaint in light of any relevant information they uncover.

The County's only response to this argument is that any amended complaint that would be sufficient to withstand demurrer would be a "sham pleading," given the facts that plaintiffs have already alleged in their complaint. We are not persuaded. Plaintiffs have not yet had the opportunity to conduct discovery, to amend their complaint in light of the results of that discovery, and to explain, if necessary, any differences between their amended complaint and their original complaint. We cannot assume at this stage that they will be unable to provide a reasonable explanation, if necessary. (See, e.g., *Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 751.)

DISPOSITION

The order of dismissal as to the individual defendants is affirmed. The order of dismissal as to the County is reversed, the order sustaining the demurrer as to the County without leave to amend is vacated, and the trial court is directed to enter a new and different order sustaining the demurrer as to the County with leave to amend. Plaintiffs shall not be required to file an amended pleading until they have had a reasonable opportunity to conduct discovery to develop facts necessary to plead their claims with particularity. The parties shall bear their own costs of appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J. CHANEY, J.