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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MICHAEL JOHNSON, Plaintiff and Appellant, v. PEDRO DE LA MORA et al., Defendants and Respondents.	B233553 (Los Angeles County Super. Ct. No. BC425735)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael C. Solner, Judge. Reversed.

Law Offices of Richard T. Ferko and Richard T. Ferko, attorney for Plaintiff and Appellant Michael Johnson.

Gilbert N. Nishimura, J. Edwin Rathbun, Jr., and Corinne D. Orquiola, attorneys for Defendants and Respondents Sean Tureaud, Miguel Hernandez, and Pedro De La Mora.

Appellant Michael Johnson was seriously injured during his incarceration at the Men's Los Angles Twin Towers Correctional Facility (TTCF) when acoustic ceiling tiles fell and hit him on the head and shoulders, causing him to fall down a flight of stairs. His appeal challenges the summary judgment entered in favor of county employees Pedro De La Mora, Miguel Hernandez, and Sean Tureaud based on the trial court's finding that defendants were entitled to "immunity" under Government Code section 840.2.[1] On appeal, Johnson contends the trial court erred in applying immunity and argues there were triable issues of fact as to breach of duty and the proximate cause of his injuries. We conclude section 840.2 does not afford defendants immunity and Johnson presented evidence establishing triable issues as to defendants' liability. Accordingly, we reverse.

BACKGROUND

1. Factual Background

Inmate housing in the TTCF is organized into separate dormitories, or "Pods." Johnson was housed in the "162 E Pod."[2] On December 23, 2008, a TTCF maintenance supervisor created new maintenance work order number 124053, stating, "T/162 E Pod dayroom ceiling tiles are falling on inmates." According to a maintenance record created by Tureaud, a number of ceiling tiles in 162 E Pod had already fallen, and others were visibly missing, broken or hanging from the ceiling.

In March 2009, almost three months later, defendants De La Mora, Hernandez, and Tureaud, general maintenance workers for the County of Los Angeles assigned to the TTCF, were dispatched to repair or replace hanging and broken ceiling tiles in 162 E Pod pursuant to the December work order. To fix a tile, defendants would remove the broken or hanging tile, affix glue to the back of a new tile, and attach it to the ceiling using

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

[2] The 162 E Pod is a two-level section with a common room, dormitory area, and a stairwell connecting the levels.

inserts to hold it in place. At the end of the day, each employee would make an entry on a work order tracking log summarizing his work.

On March 19, Hernandez replaced approximately 20 ceiling tiles. On March 20, Tureaud replaced additional ceiling tiles and noted in the work order tracking log that ceiling tiles also needed to be replaced over the Pod stairwell. A scissor lift was made available for this purpose, and on March 21, De La Mora and another employee used the lift to replace and repair the tiles over the stairwell. De La Mora noted in the work order tracking log that he had "finished replacing ceiling tiles" with the assistance of the other employee. Hernandez also worked on ceiling tiles in 162 E Pod on March 21, although the exact location of his work was not presented into evidence. The work order tracking logs indicated that no that other employees worked on the ceiling tiles in the 162 E Pod.

The day after defendants completed their work, Johnson was at the top of the stairwell in the 162 E Pod dayroom, leaning forward to grasp the rail to walk down the stairs, when he was struck on the head by several tiles falling from the ceiling, causing him to fall down the stairs.

De La Mora and Hernandez testified in their depositions that when they later returned to the scene of the accident they saw that some of the new tiles above the stairs were already missing.

2. Procedural Background

On November 10, 2009, Johnson filed a complaint for damages against the County of Los Angeles, "County Employee Guze," "County Employee Burgose," and Does 1 to 25, claiming general negligence, premises liability, and liability pursuant to sections 835 (public entity liability for a dangerous condition of public property) and 844.6 (public employee liability for injury to a prisoner proximately caused by his or her negligent or wrongful act or omission).[3] Johnson alleged defendants, through their "negligence and carelessness," failed to repair the ceiling tiles in such a way as to prevent them from falling, which directly caused his injuries.

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[3] Guze and Burgose were apparently never served and are not part of this appeal.

The county moved for summary judgment, arguing it was precluded from vicarious liability because Johnson was an inmate at the time of his injury. The trial court granted the motion and entered judgment in favor of the county and dismissed it from the lawsuit. The county is not part of this appeal.

After the county's motion for summary judgment was filed but before it was granted, Johnson amended his complaint to substitute De La Mora, Hernandez, and Tureaud for Does 1 to 3. These defendants raised a number of affirmative defenses in their joint answer, including immunity from liability based on their status as public employees. After several depositions were taken, defendants filed a motion for summary judgment, asserting: (1) They were "immune from liability" pursuant to section 840.2 because they did not create the dangerous condition that injured Johnson and had no authority to perform any work beyond the work order created by their supervisor; (2) Johnson lacked admissible evidence to establish causation; and (3) defendants were not subject to premises liability because they lacked ownership, control, or possession of the TTCF.

In opposition to defendants' motion, Johnson argued that each defendant saw the missing and broken tiles above the stairs where Johnson fell and undertook affirmative steps to make repairs. Johnson argued defendants owed him a duty of care and were not immune, and whether they breached their duty and whether such breach proximately caused his injuries were questions of fact that precluded summary judgment.

The trial court granted the motion "based on [section] 840.2" and defendants' arguments. Judgment was entered for defendants on April 21, 2011, and Johnson timely appealed.

DISCUSSION

1. Standard of Review

A "motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) Once the moving defendant has met

its burden, the burden shifts to the plaintiff to show that a triable issue of material fact exists as to each cause of action. (Code Civ. Proc., § 437c, subd. (p)(2).) A triable issue of material fact exists where "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 845.)

We review the trial court's ruling on a motion for summary judgment de novo. (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 60.) "We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party" (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037), accepting as true the facts shown by the evidence offered in opposition to summary judgment and the reasonable inferences that can be drawn from them (*Spitzer v. Good Guys, Inc*. (2000) 80 Cal.App.4th 1376, 1385). If the material facts are in conflict, the factual issues must be resolved by trial. (*Hernandez v. Department of Transportation* (2003) 114 Cal.App.4th 376, 382.)

In deciding whether the trial court property granted summary judgment, we must answer two questions. First, did triable issues remain as to whether Johnson had a cause of action against the defendants, and second, did governmental immunity insulate the defendants from liability? (See *Walker v. County of Los Angeles* (1987) 192 Cal.App.3d 1393, 1396.) We conclude that triable issues exist and no immunity applies.

2. Public Employee Liability for Negligent or Wrongful Acts or Omissions Under the California Tort Claims Act

Defendants moved for summary judgment first on the ground that they were immune from liability pursuant to section 840.2. In granting the motion, the trial court stated it was doing so "based on 840.2." In the judgment the court stated that "Government Code § 840.2 precludes the Defendants from liability." (Italics omitted.)

We preliminarily note that defendants use the term "immunity" rather loosely. "Immunity" is "[f]reedom or exemption from penalty, burden or duty." (Black's Law Dict. (1990 6th ed.) p. 751.) For example, state and local governments are generally free

from tort liability except in cases where they consent to be sued. (See § 815, subd. (a) [a public entity is not liable for an injury arising out of an act or omission except as otherwise provided by statute].) As pertinent here, a public employee is immune from liability for "injury caused by a condition of public property where such condition exists because of any act or omission of such employee within the scope of his employment." (§ 840.) However, public employee immunity is subject to several statutory exceptions. (*Ibid.*) Section 820 prescribes one such exception: A public employee is liable for an injury caused by his or her act or omission "to the same extent as a private person." (§ 820, subd. (a).)

A more specific exception, and for our purposes more pertinent, is set forth in section 840.2, which describes a public employee's liability for acts or omissions concerning a dangerous condition of public property. Pursuant to section 840.2, "An employee of a public entity is liable for injury caused by a dangerous condition of public property if the plaintiff establishes that the property of the public entity was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either: [¶] (a) The dangerous condition was directly attributable wholly or in substantial part to a negligent or wrongful act of the employee and the employee had the authority and the funds and other means immediately available to take alternative action which would not have created the dangerous condition; or [¶] (b) The employee had the authority and it was his responsibility to take adequate measures to protect against the dangerous condition at the expense of the public entity and the funds and other means for doing so were immediately available to him, and he had actual or constructive notice of the dangerous condition under Section 840.4 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition."

It is therefore incorrect to say that section 840.2 confers immunity. Rather, section 840.2 describes an *exception* to immunity. Defendants' argument is that no triable issue exists as to whether the exception applies to them. We disagree.

Defendants first contend section 840.2 does not apply to them because no evidence suggests they created the dangerous condition that injured Johnson. Even if true, the point would be inapposite because section 840.2 prescribes liability not only where a public employee creates a dangerous condition of property, but also where the employee fails "to take adequate measures to protect against the dangerous condition." But even as to this first point, evidence exists that defendants did in fact create the dangerous condition. Johnson testified he saw defendants performing work in the dayroom area just prior to his accident, and work records showed that no one other than defendants worked on the ceiling tiles there. De La Mora testified that he knew the glue previously used to affix tiles to the ceiling had given out or failed over time. And De La Mora and Hernandez testified that when they returned to the stairwell after the accident, some of the new tiles had already fallen. This evidence raises a triable issue as to whether defendants created the dangerous condition of falling ceiling tiles.

Even if no evidence suggested defendants created the dangerous condition, it is undisputed they failed to remedy it. Defendants argue they had no notice that tiles were falling. The record is to the contrary. The December work order stated that "T/162 E Pod dayroom ceiling tiles are falling on the inmates," and this statement was repeated on every work order tracking log on which defendants noted their progress in replacing the tiles. In addition, Tureaud stated in his log that "there's still an area above the stair well and an[] area by the tv. that needs ceiling tiles." This evidence raises a triable issue as to whether defendants had notice of the problem.

Defendants also argue they had no authority to fix the tiles over the stairwell, as work order No. 124053 stated only that tiles were falling in the "dayroom." This argument too is contradicted by the record. We first note that it appears Johnson was struck by tiles in the dayroom, not the stairway. When asked in deposition how far down the stairs he had gone before the ceiling tile hit him he testified, "I was just at the peak, at the top of the stairwell, and I was leaning forward to reach down to grab the rail to walk down the stairs, so I was at the top." A fair inference is that Johnson had not yet entered the stairwell when he was struck. Even if the actual tiles that fell on Johnson came from

the stairwell, it is undisputed that De La Mora repaired the tiles there as well as in the dayroom, which implies the authority conferred by the dayroom work order extended also to tiles located in the stairwell.

Bartlett v. State of California (1956) 145 Cal.App.2d 50, upon which defendants rely, is inapposite. There, the plaintiffs were involved in a traffic accident at an intersection that was missing a stop sign. They sued municipal employees and police officers, alleging the parties had known the sign was missing. Affirming dismissal upon demurrer, the appellate court held that "While it is true that the pleading states fully that respondents knew of the dangerous condition at the intersection . . . by reason of the absence of the stop sign . . . , yet the danger alone is not sufficient to make a police officer liable for injuries resulting from the absence of the stop sign. Unless they had the authority to repair the condition and the funds requisite for such performance, a valid cause of action was not alleged against them." (*Id*. at pp. 55-56.) Here, defendants had the authority and responsibility to repair the dangerous condition created by damaged ceiling tiles and were provided funds and other means needed to carry out the repairs.

Defendants next contend no evidence suggests their acts or omissions caused Johnson's injuries because Johnson cannot show that any tile they replaced actually fell on him. Hernandez and Tureaud argue they worked on tiles only in the center of the dayroom, not by the stairwell, which was fifteen to twenty feet away. And De La Mora, who admittedly worked on tiles over the stairwell, argues he merely assisted another employee in the installation of replacement tiles, and did not affix any tile himself.

The arguments fail. As stated, section 840.2 prescribes liability where a public employee "had the authority and it was his responsibility to take adequate measures to protect against the dangerous condition at the expense of the public entity and the funds and other means for doing so were immediately available to him, and he had actual or constructive notice of the dangerous condition . . . a sufficient time prior to the injury to have taken measures to protect against the dangerous condition." Work order No. 124053 and work order tracking log entries completed by each defendant indicated the falling ceiling tiles were known to all defendants. And defendants admitted they were

provided the necessary supplies, equipment, and means to effect repairs, including a scissor lift for repairing tiles that were difficult to reach. It is therefore irrelevant which particular tile fell on Johnson.

Finally, citing general landowner liability law, defendants contend they cannot be held liable because they lacked ownership, control, or possession of the TTCF. Such is not required under section 840.2.

DISPOSITION

The judgment is reversed. The matter is remanded to the superior court with directions to deny defendants' motion for summary judgment. Appellant is to recover his costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, Acting P. J.

JOHNSON, J.