

S. Ferry Open Forum BOS 12/19/17

EL DORADO CO. SUPERIOR CT.

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BY SHAW
Deputy

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF EL DORADO

STEPHEN J. FERRY; BETH A. FERRY)	
Plaintiffs)	Case No.: PSC20170124
v.)	RULING FOLLOWING TRIAL ON THE
)	MERITS
COUNTY OF EL DORADO)	
Defendant)	

INTRODUCTION

Plaintiffs are suing the County for damages caused to his vehicle when it hit a pothole on a County maintained road. The County avers Plaintiffs' claim is barred as a matter of law under Government Code section 815 *et seq.*

POSITION OF PARTIES

Plaintiffs' Position

Plaintiffs' theory of recovery is that the County was negligent in the funding of repairs for County roads. According to Plaintiffs, local regulations implementing flood control measures *require* the County to allocate discretionary road funds to the maintenance of the County road system. (See Plntfs' Exh. 1; Objective 6.4.1, Implementing Policy TC-1n.) Plaintiffs argues the County has negligently mismanaged its budget by (1) paying certain elected officials special length of service and professional development bonuses, which constitute extra

1 pay for merely possessing the qualifications the officials need to hold their offices (Plntfs'
2 Exh. A pp. 6-7 [Taxpayer Committee Letters]); and, (2) significantly overpaid the cost of
3 modifying a sidewalk in the Marina School area to comply with ADA requirements (Plntfs'
4 Exh. 1 pp. 8-9 [ADA Materials]). Plaintiffs aver that had the County prudently managed its
5 budget by not engaging in the aforementioned wasteful spending, it would not have had to
6 reduce its funding for road maintenance and thereby would have been able to meet the on-going
7 maintenance requirements of County roads.

8 Thus, according to Plaintiffs, the County is liable for the natural result of its budgetary
9 decision i.e., deteriorating roads leading to dangerous and unsafe conditions.

10 *Defendant's Position*

11 Defendant opposes the suit arguing as follows: (1) California does not recognize
12 negligence of a public entity as a distinct cause of action (Gov. Code §815); (2) the allocation of
13 County resources to road maintenance and repairs is discretionary and public employees are
14 immune from liability arising from their exercise of discretion (Gov. Code §820.2); (3) the
15 pothole in question was created by traffic and extreme weather conditions and the County was
16 under a declared state of emergency; (4) the County did not have actual or constructive notice of
17 the complained of condition for a sufficient time to have taken action to prevent Plaintiffs' injury
18 (Gov. Code §835(b)); and, (5) under the conditions prevailing at the time of Plaintiffs' damage,
19 the action or inaction of the County and its employees in dealing with the defect complained of
20 by the Plaintiffs was objectively reasonable; therefore, the County and its employees are,
21 immune from liability (Gov. Code §§835.4, 840.6).

22 **ANALYSIS**

23 *I. Sovereign Immunity Doctrine - County May Be Sued Only As Provided By Statute*

24 Historically, governmental entities were immune from suit under the Sovereign
25 Immunity Doctrine. However, sovereign immunity as a common law principle was abolished
26 by the California Supreme Court in 1961 in *Muskopf v Corning Hosp. Dist.* (1961)
27 55 Cal.2d 211. The Legislature responded in 1963 by enacting the comprehensive Government
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1 Claims Act (Gov. Code §§810-996.6), overturning *Muskopf* and eliminating all common law or
2 judicially devised forms of governmental liability.

3 The cornerstone of the Governmental Claims Act (Act) is Government Code section 815,
4 which declares "except as otherwise provided by statute [a] public entity is not liable for an
5 injury, whether such injury arises out of an act or omission of the public entity or a public
6 employee or any other person."¹

7 Thus, under the Act, all governmental liability is statutory, except as required by the state
8 and federal constitutions. (*Nestle v City of Santa Monica* (1972) 6 Cal.3d 920, 932 (referring to
9 §815 as "policy cornerstone" of Act); *Hoff v Vacaville Unified Sch. Dist.* (1998)
10 19 Cal.4th 925, 932; *Creason v State Dep't of Health Servs.* (1998) 18 Cal.4th 623, 630; see also,
11 *Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 899 [stating that
12 Government Code, §815 abolishes common law tort or judicially declared forms of liability for
13 public entities, except for such liability as may be required by the state or federal constitution];
14 and, *Williams v. Horvath* (1976) 16 Cal.3d 834, 838, [stating that the purpose of the Act is not to
15 expand the right of plaintiffs in suits against governmental entities, but to confine potential
16 governmental liability to rigidly delineated circumstances: immunity is waived only if the
17 various requirements of the Act are satisfied].)

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19
20 ¹ More specifically, Government Code, § 815 states:

21 "Except as otherwise provided by statute:

22 (a) A public entity is not liable for an injury, whether such injury arises
23 out of an act or omission of the public entity or a public employee or
24 any other person.

25 (b) The liability of a public entity established by this part (commencing
26 with Section 814) is subject to any immunity of the public entity
27 provided by statute, including this part, and is subject to any defenses
28 that would be available to the public entity if it were a private person."

1 The Act applies to all public entities and their employees as defined in Government Code
2 sections 811.2 and 811.4 and sets forth the following basic principles:

- 3 1. Public *entities* are immune from liability except as provided by statute (Gov.
4 Code §815(a)).
- 5 2. Public *employees* are liable for their torts except as otherwise provided by statute
6 (Gov. Code §820(a)).
- 7 3. Public entities are vicariously liable for the torts of their employees (Gov. Code
8 §815.2(a)).
- 9 4. Public entities are immune when their employees are immune, except as
10 otherwise provided by statute (Gov. Code §815.2(b)). (*Nestle v City of Santa
11 Monica, surpa, 6 Cal.3d 920, 932.*)

12 Accordingly, under California law a public entity is not liable and may not be sued except
13 as expressly provided by statute. (*Williams v Horvath* (1976) 16 Cal.3d 834, 838; Government
14 Code sections 815 *et seq* and 900 *et seq*.) Therefore, the County is not liable in the present case
15 for injuries caused by potholes in County roads unless such liability is imposed by statute.

16 *II. Under Circumstances Provided By Statute, A County May Be Liable For
17 Dangerous Conditions Of Its Road*

18 Government Code section 835 provides:

19 “Except as provided by statute, a public entity is liable for injury caused
20 by a dangerous condition of its property if the plaintiff establishes that the
21 property was in a dangerous condition at the time of the injury, that the
22 injury was proximately caused by the dangerous condition, that the
23 dangerous condition created a reasonably foreseeable risk of the kind of
24 injury which was incurred, and either:

25 (a) A negligent or wrongful act or omission of an employee of the public
26 entity within the scope of his employment created the dangerous
27 condition; or

28 (b) The public entity had actual or constructive notice of the dangerous
condition under Section 835.2 a sufficient time prior to the injury to have
taken measures to protect against the dangerous condition.” (Emphasis
added.)

A dangerous condition of public property may arise from its damaged or deteriorated
condition, from “ ‘the interrelationship of its structural or natural features, or the presence of
latent hazards associated with its normal use.’ [Citation.]” (*Bonanno v. Central Contra Costa*

1 *Transit Authority* (2003) 30 Cal.4th 139, 149, 132.) Ordinarily, the existence of a dangerous
2 condition is a question of fact. (*Peterson v. San Francisco Community College Dist.* (1984) 36
3 Cal.3d 799, 810; see also *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1133, and
4 *Bonanno v. Central Contra Costa Transit Authority, supra*, 30 Cal.4th 139, 148.)

5 A “ ‘dangerous condition,’ as defined in section 830, is ‘a condition of property that
6 creates a substantial ... risk of injury when such property or adjacent property is used with due
7 care’ in a ‘reasonably foreseeable’ manner. (§ 830, subd. (a).)” (*Bonanno v. Central Contra*
8 *Costa Transit Authority, supra* 30 Cal.4th 139, 147, 132 Cal.Rptr.2d 341, 65 P.3d 807
9 (*Bonanno*.) Also, “[a] dangerous condition exists when public property ‘is physically damaged,
10 deteriorated, or defective in such a way as to foreseeably endanger those using the property
11 itself,’” (*Cerna, supra*, 161 Cal.App.4th at pp. 1347–1348, italics omitted.)

12 However, a public entity is not liable for a dangerous condition unless it had actual or
13 constructive notice of the condition. (*Metcalf v. County of San Joaquin* (2008)
14 42 Cal.4th 1121, 1130.) Further, a public entity may be held liable for a ‘dangerous condition’
15 of public property only if it has *acted unreasonably* failing to remedy or warn against the
16 condition under the circumstances described in subsequent sections. (Cal. Law Revision Com.
17 com., reprinted at 32 West’s Ann. Gov. Code (1995 ed.) § 830, p. 298, italics added.) Also,
18 “[u]nder general negligence principles, ... a person ordinarily is obligated to exercise due care in
19 his or her own actions so as not to create an *unreasonable* risk of injury to others, and this legal
20 duty generally is owed to the class of persons who it is reasonably foreseeable may be injured as
21 the result of the actor’s conduct” (italics added)]; *Zelig v. County of Los Angeles* (2002)
22 27 Cal.4th 1112, 1128, 119 Cal.Rptr.2d 709, 45 P.3d 1171; *Alcaraz v. Vece* (1997)
23 14 Cal.4th 1149, 1156, 60 Cal.Rptr.2d 448, 929 P.2d 1239; Civ. Code, § 1714; CACI No. 1001
24 [defining the basic duty of care in ordinary premises-liability dangerous condition cases].)”
25 (*Metcalf v. County of San Joaquin, supra*, 42 Cal.4th 1121, 1131-1136.)

26 The County, here, provided evidence that the pothole in question was created by traffic
27 and extreme weather conditions reflected in declarations of a State of Emergency issued by the

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1 Governor (Proclamation of State of Emergency, 1/23/2017) and County Board of Supervisors
2 (BOS Amended Resolution No. 023-2017). (See Def's Exh. 7 and 8.)

3 A County representative testified the County did not have actual or constructive notice of
4 the complained of condition for sufficient time to have taken action to prevent the damage.
5 According to the representative, shortly after the declarations of emergency issued, the County
6 dispatched road maintenance crews to drive county roads and locate areas of deteriorating
7 conditions caused by the weather. He further testified one of those crews discovered the pothole
8 in question on the morning of the incident while on routine patrol and not in response to
9 Plaintiffs' complaint. He stated this discovery occurred shortly after the damage to Plaintiffs'
10 vehicle and that the worker repaired the pothole within 30 minutes of learning of its existence.
11 Thus, under the conditions prevailing at the time of the incident, the action or inaction of the
12 County was objectively reasonable. (Gov. Code §§835.4 & 840.6.)

13 The Court finds Defendant's arguments persuasive and its evidence controlling. The
14 County took reasonable steps to address deteriorating road conditions during an emergency. It
15 assigned crews to drive the roads and locate dangerous conditions. That the county did not take
16 a passive approach during this emergency by waiting and only respond to complaints, but
17 instead, proactively searched for dangerous conditions, is compelling evidence of the County's
18 reasonable conduct. The County employee's prompt action in repairing the pothole is additional
19 evidence the County's conduct was reasonable under the circumstances. Accordingly, no
20 liability can arise under these facts. (Gov. Code §§835.4 & 840.6.)

21 *III. The Court Is Without Authority to Interfere With County's Budgetary Decisions,*
22 *Including The Results of Those Decisions*

23 Lastly, assuming for sake of argument only that an action for negligent funding can be
24 brought under the Governmental Claims Act, case law provides that a court is without authority
25 to interfere with a board of supervisor's budgetary decision to allocate less funding for road
26 maintenance than in prior fiscal years.

27 "The adoption of a budget is a *legislative function*, and that under the
28 "separation of powers" principle which is fundamental to our form of
government a court is generally without power to interfere in the

1 budgetary process. (*Hicks v. Board of Supervisors* (1977) 69 Cal.App.3d
2 228, 235, 138 Cal.Rptr. 101; and see *Mandel v. Myers* (1981) 29 Cal.3d
3 531, 539, 174 Cal.Rptr. 841, 629 P.2d 935.) The power and obligation to
4 enact a county's budget is vested by law in the board of supervisors.
(Gov.Code, § 29088.)” (Emphasis added; *County of Butte v. Superior
Court* (1985) 176 Cal.App.3d 693.)

5 Further, as a general rule

6 “... a court is without power to interfere with purely legislative action, in
7 the sense that it may not command or prohibit legislative acts, whether the
8 act contemplated or done be at the state level [citation] or the local level
9 [citation]. The reason for this is a fundamental one—it would violate the
10 basic constitutional concept of the separation of powers among the three
11 coequal branches of government.” (*Monarch Cablevision, Inc. v. City
Council of the City of Pacific Grove* (1966) 239 Cal.App.2d 206, 211.)

12 Case law also provides that a court may interfere with a legislative action only when that
13 action is

14 “‘so palpably unreasonable and arbitrary as to indicate an abuse of
15 discretion as a matter of law. (*Los Angeles City and County Employees
16 Union, Local 99 v. Los Angeles City Board of Education* (1974) 12 Cal.3d
17 851, 856.)’ This standard is, of course, *highly deferential*, as it should be
18 when the court is asked to intervene with respect to the exercise of
19 legislative discretion by an elected governmental body.” (Emphasis
20 added; *United Association of Journeymen, Etc. v. City and County of San
21 Francisco* (1995) 32 Cal.App.4th 751, 768.)

22 California statutes also create immunity from liability for legislative or policy making
23 determinations. For example, section 818.2 of the Government Code, provides that “[a] public
24 entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing
25 to enforce any law.” (Gov. Code § 818.2; *Sacramento v. Superior Court (Federer)* (1972)
26 8 C.3d 479, 485, Witkin | June 2016 update Summary of California Law, Tenth Edition § 296.)
27 The term “law” includes ordinances and regulations. (See e.g., Gov. Code § 810.6; *County of
28 Sacramento, supra* at 485; *Esparza v. County of Los Angeles*, (2014) 224 Cal.App.4th 452, 462.)

Similarly, Government Code section 821 provides: “A public employee is not liable for
an injury caused by his adoption of or failure to adopt an enactment or by his failure to enforce
an enactment.” (Gov. Code § 821.)

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1 Government Code sections 818.2 and 821 also reflect a long standing policy of immunity
2 for discretionary acts of legislative bodies. Moreover, “very few *legislative acts* can be imagined
3 that are not discretionary.” (Emphasis added; *Elson v. Public Utilities Comm’n*, (1975)
4 1 Cal.App.3d 577, 589; see in accord, *Morris v. County of Marin*, (1977) 18 Cal.3d 901, 911–17,
5 followed in *Slagle Construction Co. v. County of Contra Costa*, (1977) 67 Cal.App.3d 559,
6 562 – 63.) “[B]oth . . . constitutional and institutional understandings require that legislative
7 acts, *even if improper*, find their judicial remedy in the undoing of the wrongful legislation, not
8 in money damages awarded against the state.” (*HFH, Ltd. v. Superior Court*, (1975)
9 15 Cal.3d 508, 519, *cert. denied*, 425 U.S. 904, 96 S.Ct. 1495, 47 L.Ed.2d 754 (1976.)

10 The County’s decision to reduce funding for road maintenance is a legislative decision.
11 That decision cannot be considered “so palpably unreasonable and arbitrary as to indicate an
12 abuse of discretion as a matter of law.” (*United Association of Journeymen, Etc. v. City and*
13 *County of San Francisco, supra*, 32 Cal.App.4th 751, 768 quoting from *Los Angeles City and*
14 *County Employees Union, Local 99 v. Los Angeles City Board of Education, supra* 12 Cal.3d
15 851, 856.) Accordingly, Plaintiffs cannot state a cause of action against the County for
16 negligence based upon the budgetary decision to allocate scarce resources to other matters it
17 considers more pressing, necessary or justified.

18 JUDGEMENT AND ORDER

19 Judgment entered on PLAINTIFFS’ claim of STEPHEN J. FERRY and BETH A.
20 FERRY for DEFENDANT, COUNTY OF EL DORADO.

21 Judgment entered on PLAINTIFFS’ claim of STEPHEN J. FERRY and BETH A.
22 FERRY against PLAINTIFFS STEPHEN J. FERRY and BETH A. FERRY.

23
24 Dated: September 29, 2017

25 
26 WARREN C. STRACENER
27 Judge of the Superior Court
28

CERTIFICATE OF MAILING

1
2 I, Sherry Howe , Deputy Clerk of the Superior Court of the County of El Dorado, State
3 of California, do hereby certify that I am a citizen of the United States and employed in the
4 County of El Dorado; I am over the age of eighteen years and not a party to the within action;
5 my business address is Superior Court of the State of California, County of El Dorado,3321
6 Cameron Park Drive, Cameron Park, California 95682; and that on October 2, 2017, I
7 delivered a copy of the attached RULING FOLLOWING TRIAL ON THE MERITS, by placing
8 a copy in an envelope addressed to each of the following:

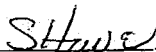
9 Stephen J. Ferry
10 4587 Echo Springs Circle
11 El Dorado Hills, CA 95762

12 Beth A. Ferry
13 4587 Echo Springs Circle
14 El Dorado Hills, CA 95762

15 County Counsel
16 County of El Dorado
17 330 Fair Lane
18 Placerville, CA 95667

19 I am familiar with the business practice of El Dorado County Superior Court with
20 regard to collection and processing of documents for mailing. The documents described
21 above were then sealed and deposited in the United States mail (with postage fully prepaid)
22 and/or in the El Dorado County inter-departmental mail or courthouse attorney box at
23 Cameron Park, California.

24 Executed on October 2, 2017, at Cameron Park, California

25 
26 _____
27 Sherry Howe
28 Deputy Clerk

L. Brent - Bumb Open Forum 308 12/19/17



January 19, 2018 @ 8:30 am - 5:30 pm

The El Dorado County Visitors Authority invites you to attend the 2018 Tourism Summit. Hear from leaders in the industry with timely topics including the Power of Partnerships, The Dos and Don'ts of Responding to Online Reviews, How to Optimize your Social Media & Build Your Brand and How to Get Media Attention to Help to Tell Your Story. Find out what Visit California is doing on your behalf at the state, national and international level. Learn about the latest travel trends and how that affects our local economy. Afterward, stay for wine reception featuring El Dorado County Wines.

Take advantage of special room rates starting at \$114 offered by Holiday Inn Express.

Ticket prices are as follows:

- **\$25 Early bird until December 15**
- **\$30 Priority Admission December 16 – January 5**
- **\$35 General Admission January 6 – January 12**

Tickets include registration to Tourism Summit, refreshments throughout the day, lunch, and El Dorado County Wine Reception from 4:00-5:30 pm.

> Buy tickets

<https://www.eventbrite.com/e/2018-el-dorado-county-tourism-summit-tickets-41060825033>