S249792

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JAMES GUND, et al,
Plaintiffs, Appellants & Petitioners,

v.

COUNTY OF TRINITY, et al.,
Defendants and Respondents.

After a Decision by the Court of Appeal,
Third Appellate District, Case No. C076828
(TCSC No. 11CV0080)

PETITIONERS' OPENING BRIEF ON THE MERITS

BENJAMIN H. MAINZER (CSB #257748)
Bragg, Mainzer & Firpo, LLP
804 Third Street
Eureka, CA 95501
Telephone: (707) 445-7917
Fax: (707) 443-0442
E-mail: bmainzer@bmf-lawyers.com

Attorneys for Petitioners, James Gund and Norma Gund

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

CASES

STATUTES

CIVIL CODE

GOVERNMENT CODE

LABOR CODE

OTHER AUTHORITIES

TREATISES

ISSUE PRESENTED

"Were Plaintiffs engaged in active law enforcement and limited to workers' compensation for their injuries (Lab. Code, § 3366) when a deputy sheriff asked them to check on a neighbor who had made a 911 call and the officer allegedly misrepresented the danger of the situation?" (Order, August 22, 2018.)

INTRODUCTION

Labor Code section 3366 provides that, for the purposes of workers' compensation,

> [E]ach person engaged in the performance of active law enforcement service as part of the posse comitatus or power of the county, and each person (other than an independent contractor or an employee of an independent contractor) engaged in assisting any peace officer in active law enforcement service at the request of such peace officer, is deemed to be an employee of the public entity that he or she is serving or assisting in the enforcement of the law, and is entitled to receive compensation from the public entity in accordance with the provisions of this division. (Cal. Lab. Code § 3366.)

In the context of a 911 call misrepresented as weather-related and "probably no big deal," a request by a peace officer that two civilians with no law enforcement training or experience check on the welfare of their neighbor is not a request to engage in "active law enforcement service" within the meaning of this section. In this case, a Trinity County Sheriff's Corporal, Ronald Whitman, telephoned plaintiffs, appellants James and

Norma Gund, to ask if they would check on a neighbor, Kristine, who had called 911 for help. Whitman told them that their neighbor's call was probably related to a big storm that was coming in and "probably no big deal." (3 CT 675:4-16, 3 CT 680: 3-14.) Whitman however withheld critical information from the Gunds. He did not tell the Gunds that when Kristine called 911, she whispered for help and the dispatcher who took the call did not call her back for fear that she was trying not to be overheard. Nor did Whitman tell the Gunds that when the sheriff's office tried to return the call, there was no answer. The Gunds were familiar with their neighbor's house and knew it was subject to weather-related problems. (3 CT 675 4-7.) They agreed to check on her believing Whitman's assurances that the call was very likely for a weather-related reason.

When the Gunds got to their neighbor's house, they walked into the scene of a double murder, and the murderer was still there. He attacked and almost killed them.

The trial court held that section 3366 barred the Gunds from suing the County. In the trial court's view, in going to check on the neighbor at Whitman's request, the Gunds were assisting in the active enforcement of the law within the meaning of the section. Therefore, their exclusive remedy was workers' compensation. The Third Appellate District affirmed.

The lower courts erred. An unbroken line of cases holds that "active law enforcement service" describes only the physically active, life-endangering aspect of police work related to detecting and suppressing crime and pursuing and arresting criminals. It does not include "community caretaking" functions peace officers also perform—which is what the Gunds were asked to do. In *People v. Ray,* (1999) 21 Cal. 4th 464, 467, this Court gave some examples of community caretaking—tasks such as "helping stranded motorists, returning lost children to anxious parents, assisting and

protecting citizens in need"—tasks that are " 'totally divorced' " from active law enforcement.

Legislative history confirms the consistent holdings of courts that have construed section 3366 that "active law enforcement service" is intended to refer only to the physically active and life-threatening function of police work related to suppressing crime and arresting criminals, and not other functions that police officers routinely perform.

Whitman's statements that there was probably nothing serious to be concerned about in checking on their neighbor, and his concealment of significant facts to the contrary, had the effect of leading the Gunds to reasonably believe that Whitman was asking them to do nothing more than perform a community caretaking task. His request therefore that the Gunds perform a task unrelated to the physically active suppression of crime or the arresting of criminals was not a request to engage in "active law enforcement service."

Relying on his misrepresentations, the Gunds unknowingly walked into a trap that nearly cost them their lives.

The court of appeal's decision should be reversed.

STATEMENT OF FACTS

James and Norma Gund live on a small ranch outside Kettenpom in Trinity County, more than two hours from the County seat in Weaverville. On March 13, 2011, they were at their home when they received a telephone call from Trinity County Sheriff's Corporal Ronald Whitman. (3 CT 640:17-19.) Whitman spoke with Norma and told her that the Gunds's neighbor, Kristine, who lived about a quarter mile away, had called 911. (3 CT 671:18-20; 3 CT 655:23-25.) Whitman asked Norma Gund if she knew Kristine, and Norma said she did. (*Ibid.*) He asked if Norma and James

would check on Kristine, since they were so much closer to her than he was. (3 CT 672:23-673:24.)

When he asked the Gunds to go check on Kristine, Whitman told Norma, "There's a big storm coming. That's probably what this is all about. It's probably no big deal." (3 CT 675:4-16, 3 CT 680: 3-14.)[1] Norma told Whitman that she and James had been to the house where Kristine lived to help the previous owner with weather-related problems before—snow and fallen trees. (3 CT 675 4-7.)

Whitman, however, knew that Kristine was very likely not having a weather-related emergency. Whitman knew Kristine had been whispering for help. (3 CT 656:17-19; 3 CT 657:13-18; 3 CT 664 19-21.) Whitman also knew that the dispatcher who had spoken with Kristine was afraid to call her back, suspecting that Kristine may have been trying to avoid being heard. (3 CT 657:13-18; 3 CT 650:15-19; 3 CT 651:17-20; 3 CT 662; 3 CT 664-668; 3 CT 648:16-24.) Whitman also knew that attempts to call Kristine back had been unsuccessful. (3 CT 647:9-18; 3 CT 651:17-20; 3 CT 662; 3 CT 664-668.)

But Whitman did not tell Norma any of these facts. (3 CT 656:17-19; 3 CT 657:13-18; 3 CT 658:6-11.)

The Gunds had no reason to know that Whitman's representation that Kristine had likely called about a weather-related problem was false. They had no way to know that facts Whitman did not disclose suggested Kristine's reason for calling 911 was because she was being harmed.

Relying on Whitman's misrepresentations, and unaware of the facts

---

1 This is an appeal after a motion for summary judgment. In this context, all evidence and all inferences reasonably drawn therefrom should be evaluated in the light most favorable to the party that opposed the motion, here the Gunds. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.)

that Whitman concealed, the Gunds agreed to go to Kristine's home and check on her. (3 CT 677:9-14; 676:5-23.) When they entered her house, the man who had just murdered Kristine and her boyfriend attacked the Gunds with a knife. The man slit their throats. Miraculously, James and Norma were somehow able to escape. Had they not, they unquestionably would have been killed.

PROCEDURAL HISTORY

James and Norma Gund, submitted timely claims to the County, which were denied. (1 CT 7-35.) They then timely filed this action against Trinity County and Whitman. (1 CT 2-35.) The fifth and sixth causes of action in their First Amended Complaint included counts alleging intentional misrepresentation. (1 CT 66-67.)

Defendants moved for summary judgment. (2 CT 571-582.) In relevant part, the motion was on the ground that when the Gunds went to check on their neighbor, they were assisting the sheriff's office in active law enforcement service and therefore, under Labor Code section 3366, their exclusive remedy was workers' compensation. (2 CT 574-579.)

In opposing the motion, the Gunds argued that section 3366 did not apply as they were not assisting in active law enforcement when they went to check on Kristine. (2 CT 583-711.) The court held that that the Gunds were engaged in active law enforcement service; section 3366 barred their suit; granted summary judgment and entered judgment for the County and Whitman. (3 CT 739-742.)

The court of appeal affirmed. (*Gund v. County of Trinity* (2018) 24 Cal.App.5th 185.) On August 22, 2018, on its own motion, this Court granted review.

ARGUMENT

A. The Gunds Were Not Engaged In "Active Law Enforcement Service" When They Went To Their Neighbor's House To Help With What They Were Told Was Likely A Weather-Related Emergency.

1. "Active Law Enforcement Service" Means Tasks That Inherently Involve The Risk Of Death Or Serious Injury While Providing Law Enforcement Protection To The Public

"Active law enforcement service" describes a specific subset of police activities. In *People v. Ray*, *supra,* 21 Cal.4th 467, the Court recognized that "police officers perform a broad range of duties. . . ." In addition to protecting the public by apprehending criminals and suppressing crime, police officers also perform "'community caretaking functions,' " such as "helping stranded motorists, returning lost children to anxious parents, assisting and protecting citizens in need. . . ." (*Ibid.*) These services are " 'totally divorced' " from typical law enforcement activities. (*Ibid.*; [citation omitted].))

In *McCorkle v. City of Los Angeles*, (1969) 70 Cal.2d 252, the Court touched upon the meaning of "active law enforcement service" in section 3366. The Court distinguished between a person who assists a police officer in active law enforcement services and one who assists a police officer with a service that does not involve active law enforcement.

In *McCorkle*, a police officer was attempting to determine where two cars collided in an intersection. The officer walked into the intersection with plaintiff, one of the drivers, and asked the plaintiff to show him the

skidmarks and point of impact. Although it was a dark hour, the officer took no measures to protect against the danger of vehicles on the highway. A car entered the intersection and struck plaintiff, severely injuring him. Plaintiff recovered a substantial judgment against the city.

On appeal the city argued, among other things, that under section 3366, plaintiff's exclusive remedy for his injuries was worker's compensation because when he was struck, the plaintiff was engaged in "active law enforcement service." The Court rejected the argument. "We do not believe that plaintiff's activity in the present case constituted 'assisting any police officer in active law enforcement service' within the scope of Labor Code section 3366." (*Id.*, 70 Cal.2d at p. 264, fn. 11.)

Subsequent cases define "active law enforcement service." The phrase describes services "which pertain to the active investigation and suppression of crime; the arrest and detention of criminals and the administrative control of such duties in the offices of the sheriff and district attorney." (*Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567, 577 [quoting 22 Ops.Atty.Gen. 227, 229 (1953); duties of animal control officers for police department did not constitute "active law enforcement" services]); (*Neeley v. Board of Retirement* (1974) 36 Cal.App.3d 815, 822 [quoting and following *Crumpler*; activities of sheriff's deputies working as identification technicians while related to and essential to law enforcement were not active law enforcement].)

The mission of police officers is protecting the public; it is a particularly hazardous occupation. (*Neeley*, *supra*, 36 Cal.App.3d at p. 821, citing *Kimball v. County of Santa Clara* (1972) 24 Cal.App.3d 780, 785.) Therefore, "[a]ctive law enforcement implies hazardous activity."

(*Neeley, supra*, 36 Cal.App.3d at p. 822.)[2]

As the court pointed out in *Crumpler*, while many public employees, including welfare fraud investigators, may be said in to be engaged in law enforcement, their work is not *active* law enforcement. (*Id.*, 32 Cal.App.3d at p. 579.) Even persons who investigate felonies are not per se engaged in active law enforcement service as that term is used in section 3366. "[A]ctive law enforcement," thus, describes a particular type of peace officers' work, the type exclusively related to inherently dangerous physically active policing—i.e., "the active enforcement and suppression of crimes and the arrest and detention of criminals." (*Id.* at p. 578.; see also *Neeley, supra*, 36 Cal.App.3d at p. 821 [same].)

Thus, a housing authority patrolman whose primary duties are "'active investigation and suppression of crime' and 'the arrest and detention of criminals' " is engaged in active law enforcement." (*Boxx v. Board of Administration* (1980) 114 Cal.App.3d 79, 85-86 [quoting *Crumpler*.) Likewise, correctional officers are engaged in active law enforcement as their duties include detecting criminal activity within the prison walls, confiscating contraband materials, arresting criminal offenders inside the facility, and protecting fellow correctional officers and inmates from criminal attack. (*Kimball v. County of Santa Clara* (1972) 24 Cal.App.3d 780, 785.) "It cannot be seriously contended that the supervision of prison inmates is any less hazardous than the supervision of the general public by policemen." (*Id.*)

---

2 That a person assumes a hazard in assisting an officer does not, of itself, make the person engaged in assisting the officer in active law enforcement. In *McCorkle, supra*, plaintiff exposed himself to the hazard of injury or death from passing vehicles, but he was not engaged in active law enforcement.

In *Biggers v. Workers Comp. Appeals Bd.* (1999) 69 Cal.App.4th 431, the court held that a deputy sheriff acting as a courtroom bailiff was engaged in active law enforcement. (*Id.* at pp. 440-441.). The court noted that like a police officer, a courtroom bailiff protects the public. (*Id.*) He or she is armed. (*Id.*) He or she is responsible for keeping the courtroom secure. The bailiff deputy in *Biggers* confiscated knives and guns and made arrests in the courtroom. Her contact with inmates exposed her to the same kinds of hazards as those faced by deputies on patrol. (*Id.*)

And in *Page v. City of Montebello*, (1980) 112 Cal.App.3d 658, a store manager was engaged in "active law enforcement service" when he worked with the city police as an undercover informant. He assisted the police in the inherently dangerous work of apprehending suspected narcotics dealers. He was abducted from his work, shot and killed, apparently because of his undercover narcotics activities. The Workers' Compensation Appeals Board, relying on section 3366, held that he was an employee of the city and his injury and death arose out of and occurred in the course of that employment.

In stark contrast, the Gunds were never engaged in assisting the sheriff's department in active law enforcement service. They were not asked to perform, and they did not perform, services " 'which pertain to the active investigation and suppression of crime; the arrest and detention of criminals and the administrative control of such duties in the offices of the sheriff and district attorney.' " (*Crumpler*, *supra*, 32 Cal.App.3d at p. 577; *Neeley*, *supra*, 36 Cal.App.3d at p. 822; *Boxx*, *supra*, 114 Cal.App.3d at pp. 85-86.) They were not asked to engage, and did not engage, in an activity that inherently carries a risk of death or injury. They were simply asked to check on their neighbor whom they were told was likely having a

weather-related emergency. That is all they agreed to do and all they intended to do. The Gunds were not engaged in "active law enforcement service" within the meaning of Labor Code section 3366.

B. The Legislative History Of Section 3366 Shows "Active Law Enforcement Service" Was Intended To Have A Narrow Meaning.

1. The Law Revision Commission Intended Section 3366 Be Limited To Persons Who Assist Peace Officers By Enforcing The Law In A Manner That Inherently Risks Injury Or Death

The legislative history of section 3366 clarifies the particular type of police activities that the phrase, "active law enforcement," was intended to describe. Section 3366 was proposed by the Law Revision Commission in 1963. (4 Cal.Law Revision Com. Rep. (1963) pp. 1505-1507.) The Commission did *not* recommend that compensation coverage be extended to *all* people injured while assisting peace officers in performing any task. Rather, the Commission recommended that workers' compensation benefits be extended to people "killed or injured while engaged in the performance of *active law enforcement* . . . service." (*Id.* at p. 1506 [emphasis added].)

> When a person not trained in law enforcement or fire suppression is required by law to assume the risk of death or serious injury to provide such protection to the public, or when he undertakes to do so at the request of a peace officer or fire control officer, he and his dependents should be provided with protection against the financial consequences of his death or injury. (*Id.* at p. 1505)

Section 3366 was, therefore, intended to apply only to persons who assist a peace officer in a specific way—i.e., enforcing the law in a manner that carries with it the inherent risk of death or serious injury. Section 3366 was not intended to apply to persons who provide other types of non-hazardous service.

Reports of the Law Revision Commission are afforded substantial weight when determining legislative intent and the Commission's comments on a proposed statute are well accepted sources from which to determine legislative intent. (*Van Arsdale v. Hollinger* (1968) 68 Cal.2d 245, 249-50.) This is particularly true where, as in the present case, the Legislature adopts language of a statute proposed by the commission without any change. (*Id.*)

Furthermore, as section 3366 was enacted as recommended by the Commission without relevant amendment, it is reasonable to assume that the Legislature expected the language of the section to effectuate the Commission's stated intent. (*W. v. Superior Court* (1978) 20 Cal.3d 618, 623.)

2. Rules Of Statutory Construction Confirm That "Active Law Enforcement" Was Intended To Describe Particular Work Of Peace Officers And Not To Encompass All Of Their Duties.

i. Interpreting The Phrase "Active Law Enforcement" In Section 3366 To Mean All Work Done By Peace Officers Would Cause The Phrase To Have Different Meanings In Different Sections Of The Labor Code Concerning The Same Subject Matter.

"Words or phrases common to two statutes dealing with the same subject matter must be construed in pari materia to have the same meaning" (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1161.) Construing "active law enforcement service" to mean the general duties of a peace officer in toto would cause the phrase to have different meanings in different sections of the Labor Code.

Relevant here, Labor Code section 3212.1 creates a presumption that if certain public safety employees develop cancer, the cancer is presumed to have arisen in the course of their employment. Section 3212.1 does not afford all peace officers the benefit of this presumption. It restricts this presumption to a subset of peace officers "who are primarily engaged in active law enforcement activities." (*Id.*, subd. (a)(4).)

In interpreting statutes, "[w]ords must be construed in context, and statutes must be harmonized, both internally and with each other, to the extent possible." (*California Mfrs. Assn. v. Public Utilities Com.* (1979) 24 Cal.3d 836, 844.) In section 3212.1, the phrase "active law enforcement" is used to delineate one group of peace officers from another based on the duties they perform. To harmonize sections 3366 and 3212.1, "active law enforcement" in section 3366 must also delineate between specific activities that trigger section 3366, and the generalized set of duties peace officers perform.

ii. Interpreting The Phrase "Active Law Enforcement" To Mean All Work Done By Peace Officers Renders The Phrase Useless Surplusage.

"Courts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage." (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 22.) Under this rule of statutory

construction, "active law enforcement service" must mean a particular subset of the work peace officers do.

Interpreting the phrase to describe all activities peace officers perform would render the phrase useless surplusage. If this were the case, section 3366 would have the same effect if the words were stricken out and it simply read in relevant part: "Each person . . . engaged in assisting any peace officer ~~in active law enforcement service~~ at the request of such peace officer. . . ."

The same is true of section 3212.1(a)(4). If all the activities of peace officers are "active law enforcement activities," the provision could simply read: "Peace officers, as defined in [the specified Penal Code sections] ~~who are primarily engaged in active law enforcement activities.~~"

For the stricken-out words to not be surplusage, the phrase, "active law activities," must mean particular activities performed by peace officers.

iii. Interpreting The Phrase "Active Law Enforcement" To Mean All Work Done By Peace Officers Runs Contrary To The Rule Exceptions Be Narrowly Construed.

"Exceptions to the general provisions of a statute are to be narrowly construed; only those circumstances that are within the words and reason of the exception may be included." (*City of Lafayette v. East Bay Municipal Utility Dist.* (1993) 16 Cal.App.4th 1005, 1017.)

The general rule is that persons who volunteer for public entities are not afforded workers' compensation coverage. (Lab. Code § 3352 subd. (i.) Section 3366 is an exception to the general rule, making persons who voluntarily assist peace officers in active law enforcement services eligible

for workers' compensation. Therefore, "active law enforcement service" in section 3366 should be construed narrowly. (*Id.*)

3. There Is To Be One Uniform Definition Of Active Law Enforcement Service Applicable To All California Statutes

Cases that define the phrase "active law enforcement service" are applicable to all statutes where the phrase "active law enforcement service" appears. In *United Public Employees v. City of Oakland* (1994) 26 Cal.App.4th 729, the Court considered whether jailers were eligible for special workers' compensation benefits that Labor Code section 4850 affords employees engaged in active law enforcement service. This Court had previously held that jailers were not eligible for special public employee retirement benefits under Government Code section 20020 because they were not "active law enforcement" employees, as the statute requires. (Gov. Code §20020.) The appellants in *City of Oakland* argued that *Huntington Beach* was distinguishable because the case had to do with retirement provisions of the Government Code, not Labor Code section 4850. The court of appeal rejected this argument holding, "In light of their common purpose and similar wording, all these statutes must be construed together; cases decided under one such statute are relevant to interpretation of the other statutes." (*United Public Employees v. City of Oakland, supra*, 26 Cal.App.4th at p. 733.) [3]

---

[3] In *Biggers, supra*, 69 Cal.App.4th 431, the Third Appellate District criticized the First District's decision in *City of Oakland* arguing, "While the 'engaged in active law enforcement service' language may be the same, other differences between workers' compensation and retirement law--in language, scope, and purpose--convince us that the *City of Oakland* analysis is flawed." (*Id* at 437.) This difference of opinion however, is irrelevant to

City of Oakland is consistent with the Court's opinion in *Crumpler* which, two decades before, had recognized that the phrase "active law enforcement service" "...appears in various sections of the Public Employees' Retirement Act (e.g., §§ 20017.5, 20021.5) as well as in the County Retirement Law of 1937 (e.g., §§ 31469.3, 31470.3, 31470.6, 31558) and the Labor Code (e.g., §§ 4850, 3212)." (*Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567, 577) There, as in *United Public Employees*, the *Crumpler* Court declined to offer a limited definition of "active law enforcement service" applicable only to section 20020. Rather, the *Crumpler* Court offered a definition of "active law enforcement service" that was intended to be universally applicable to all California statutes. (*Id.*)

C. Responding To A 911 Call Is Not Per Se Active Law Enforcement Service.

The Gunds were neither asked to investigate any crime, participate in the apprehension of any criminal, nor to serve or assist in the enforcement of the law in a manner that inherently carried a risk of death or serious injury. Rather, they were innocuously asked simply to check on their neighbor who, Whitman told them, was likely having a weather-related emergency.

---

the instant case. *Biggers* simply noted that whether jailers or bailiffs qualify as local safety members is ultimately determined by whether the local public entity elects to classify them as such. "Whether jailers and bailiffs are local safety members under PERS depends not on a case-by-case analysis of whether their functions 'clearly fall within the scope of active law enforcement service' (Gov. Code, § 20425), but whether an election has been made to treat them as local safety members." (*Id.* at p. 438.)

Responding to a weather-related request for help does not in any way relate to enforcement of the law or to the active investigation and suppression of crime and the arrest and detention of criminals. (*Neeley*, *supra*, 36 Cal.App.3d 822 [quoting and following *Crumpler*; even activities related to and essential to law enforcement were not active law enforcement].) Nor does responding to a 911 call that is likely due to a weather-related emergency inherently expose the responder to the risk of death or serious injury.

Nevertheless, the court of appeal held, "Plaintiffs knew they were responding to a 911 call, and therefore they were assisting in active law enforcement." (*Gund v. County of Trinity* (2018) 24 Cal.App.5th 185, 200.) The court erroneously considered a 911 call to be inherently a request for law enforcement aid. But 911 calls are commonly made for reasons that have nothing to do with law enforcement. Without more, a 911 may not properly be considered to be a request for active law enforcement.

1. The Legislature Intended 911 To Be A Means Of Reporting All Types Of Emergencies Including Emergencies Unrelated To Crime

911 is a means for requesting several types of emergency assistance, much of which is completely unrelated to law enforcement. The singular, uniform "911" emergency telephone number was first established in California in 1972 in the Warren-911-Emergency Assistant Act, codified in Government Code section 53100 et seq. Prior to the Act, there were "thousands of different emergency phone numbers throughout the state." (Gov. Code, § 53100.) The purpose of the Act was to "shorten the time required for a citizen to request and receive emergency aid." (*Id.*)

People in need of emergency help could simply call "the telephone number '911' seeking police, fire, medical, rescue, and other emergency services." (*Id.*)

The Legislature did not intend 911 to be exclusively a means for requesting law enforcement aid. Rather, the Legislature intended that the telephone number "911" was to be a method for requesting *all* types of emergency assistance, including assistance completely unrelated to law enforcement. For this reason, the Act requires that every local 911 system "shall include" not just police services, but also "firefighting, and emergency medical and ambulance services, and may include other emergency services, in the discretion of the affected local public agency, such as poison control services, suicide prevention services, and civil defense services." (*Id.*)

The fact that the Gunds's neighbor called 911, therefore, does not render that call a request for law enforcement assistance. Nor does it render the Gunds' response "active law enforcement service."

Contrary to the Court of Appeal's assertion, it is just wrong to say that simply because the Gunds were asked to check on their neighbor in response to a 911 call, they were assisting in active law enforcement service.

D. The Gunds Were Not Engaged In Active Law Enforcement Service Because Whitman Misrepresented Their Neighbor's 911 Call As A Call For Help Unrelated To The Suppression Of Crime Or The Apprehension Of Criminals

1. Only What The Gunds Reasonably Believed To Be True About Their Neighbor's 911 Call Is Relevant To Determining If They Were Engaged In Active Law Enforcement Service

In *People v. Ray*, *supra*, 21 Cal.4th 464, this Court explained that determining whether a police officer was engaged in law enforcement activity or community caretaking (an activity totally unrelated to criminal investigation duties of the police) depended on what facts the officer knew when he or she acted. "Given the known facts, would a prudent and reasonable officer have perceived a need to act in the proper discharge of his or her community caretaking functions?" (*Id.* at pp. 476-477.) In other words, whether an officer was engaged in community caretaking or law enforcement depends upon the facts the officer knew at the relevant time, not on facts learned later, or on facts misrepresented to him or her when the officer was dispatched.

In deciding that the Gunds were engaged in active law enforcement service, however, the Court of Appeal held that "responding to 911 calls for unspecified help is clearly active law enforcement." (*Gund v. County of Trinity*, *supra*, 24 Cal.App. at p. 195.) This ignores *Ray*, which requires the court to consider whether a reasonable person knowing only the skewed and incomplete facts Whitman provided would reasonably perceive a need for assistance related to the enforcement of law or suppression of crime.

Under *Ray*, because the Gunds responded to the call, it is what the Gunds reasonably believed, and not what Whitman knew, that is relevant in determining whether the Gunds were engaged in active law enforcement service. From the Gunds' perspective, their neighbor's 911 call was not, as the Court of Appeal characterized it, an unspecified request for help. On the contrary, Whitman told the Gunds that their neighbor's 911 call was likely a request for help completely unrelated to crime.

He specifically told them, "There's a big storm coming. That must be what this is all about. It's probably no big deal." (3 CT 675 8-10.) During the call, Norma Gund told Whitman that she and her husband had

gone to the house where their neighbor lived to assist the previous owner with weather-related problems. (3 CT 675 4-7.) It was only from Whitman's perspective, given his knowledge of facts he did not tell the Gunds, that the call could be characterized as a request for possible active law enforcement help and exposure to the risk of injury or death.

To view the issue from another perspective, suppose that Whitman had contacted a subordinate deputy instead of the Gunds, and gave that subordinate only the same, misleading facts he told the Gunds—that a 911 caller was likely having a weather-related emergency that was "probably no big deal." (3 CT 675 8-10.) The subordinate officer, advised only of a likely, insubstantial, weather-related emergency, would not have reasonably perceived a need to engage in crime-related activities in going to the neighbor's house.

At no time were the Gunds engaged in active law enforcement service.

2. Because Of The Misleading Information The Gunds Were Provided, They Never Intended To Provide Any Kind Of Law Enforcement Assistance

"Any intention of engaging in crime-solving activities will defeat the community caretaking exception even in cases of mixed motives." (*People v. Ray* (1999) 21 Cal.4th 464, 477.) There is no evidence that the Gunds had any intent to engage in crime-solving activities or any other activities that constitute active law enforcement, or that they had a mixed motive when they went to check on their neighbor. They went to her house unarmed. When they arrived, James Gund waited in their vehicle while Norma went up to the house. Based on the misleading and incomplete information from Whitman, they did not believe, and had no

reasonable basis to believe, that they were responding to the scene of a possible crime.

The Gunds did not intend to engage in any crime-solving activity, nor did they reasonably expect that they would be engaging in a task that inherently required them to risk their lives. Going to a neighbor's house to check on a probable weather-related emergency was no more active law enforcement than was providing facts to an officer in *McCorkle*.

E. The Danger That May Accompany Any Task Does Not Mutate The Task Of Giving A Peace Officer Ordinary Assistance Into "Active Law Enforcement Service"

The Court of Appeal implicitly decided that responding to *every* 911 call inherently carries a risk of death or serious injury and therefore, whenever a person acts on a peace officer's request to respond to such a call the person is engaged in active law enforcement service. This argument is inconsistent with this Court's holding in *McCorkle*. There, the Court declined to characterize McCorkle's assistance to the officer investigating the accident as "active law enforcement service," even though McCorkle was injured while performing a potentially dangerous activity that peace officers routinely perform, i.e., walking into a roadway intersection to gather evidence about a possible traffic offense. *McCorkle* confirms that assisting an officer with a task is not, *per se*, active law enforcement service, even if the task carries a risk of injury and is part of the officer's investigation into a possible crime.

The Law Revision Commission's report, *supra*, is in harmony with the Court's view in *McCorkle* that "active law enforcement" is distinct from other tasks a person may assist a police officer in performing. A

person assists a peace officer in active law enforcement only when the person assists the officer in providing protection to the public and does so in a manner that requires the person to assume the exceptional risk of injury or death that police officers assume. (4 Cal.Law Revision Com. Rep. (1963) pp. 1505.) The ordinary risk of harm that may accompany a task a peace officer performs does not mutate the task into active law enforcement service or make a person assisting the officer covered by section 3366. (*McCorkle, supra*, 70 Cal.2d 264, fn. 11.) If the mere possibility that a 911 call may be for a crime-related reason, even though there is no reason to believe that the call has to do with a crime, a paramedic responding to a 911 call for medical assistance would be engaged in active law enforcement service and be subject to section 3366.

Defining "active law enforcement service" to mean those dangerous law enforcement tasks related to the investigation and suppression of crime is also in harmony with *Page v. City of Montebello, supra*, where the decedent was held to be a city employee under section 3366. He was not merely asked to provide information or check on the welfare of a neighbor. The assistance he provided at city police officers' request—acting as an undercover narcotics informant—directly aided the police in the suppression of crime and apprehension of criminals and required him to "assume the risk of death or serious injury to provide such protection to the public." (4 Cal.Law Revision Com.Rep. (1963) pp. 1505-1507.)

Here, in contrast, not only did the Gunds agree only to check on their neighbor, Whitman dispelled any possible hint of danger by telling them that her 911 call was probably related to the big storm coming and "no big deal." (3 CT 675:4-16, 3 CT 680: 3-14.)

There can be no serious argument that the Gunds ever assumed the risks and dangers of active law enforcement service.

F. Significant Collateral Consequences Exist If The Gunds Are Considered To Have Been Engaged In Active Law Enforcement Service

A decision that the Gunds were engaged in active law enforcement would eviscerate the community caretaking doctrine.

Under the doctrine, warrantless entries and seizures of evidence are permitted because the purpose of such entries is " 'totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.' " (*People v. Ray*, *supra*, 21 Cal.4th at p. 467.) As previously discussed, the test for whether a warrantless entry falls under the community caretaking rule is whether, "[g]iven the known facts, would a prudent and reasonable officer have perceived a need to act in the proper discharge of his or her community caretaking functions?" (*Id.* at pp. 476-477.)

Accordingly, if this Court decides that the Gunds were actually engaged in active law enforcement service, then warrantless entries by peace officers under similar circumstances—acting on the reasonable belief from the facts they knew that they were engaging in a task completely unrelated to the detection, investigation, or acquisition of evidence relating to crime—could no longer be characterized as community caretaking. Officers would always be engaged in active law enforcement service. They would never be engaged in community caretaking, and the community caretaking doctrine would vanish. Peace officers engaged in community caretaking *cannot* simultaneously be engaged in active law enforcement service.

Indeed, a ruling that the Gunds were engaged in active law enforcement would upset the entire rationale for warrantless entries under the community caretaking doctrine and disharmonize California with long-standing United States Supreme Court precedent. (*See, Cady v. Dombrowski* (1973) 413 U.S. 433, 441.) Put another way, if this Court holds that the Gunds were engaged in active law enforcement service when they responded to a 911 call and the facts they were told would not give a reasonably prudent officer reason to perceive a need for law enforcement activities, warrantless entries by police officers would always be unlawful. The officers would always be considered to have entered to perform active law enforcement services regardless of the reasonableness of their belief that the entry was for a non-law enforcement purpose. Consequently, evidence found in plain view during what would otherwise have been a community caretaking entry would always have to be suppressed.

Furthermore, barring the Gunds from suing the County would have the undesirable effect of discouraging people from agreeing to provide volunteer services to law enforcement officers. If there is no meaningful consequence to when officers misrepresent facts to induce civilians to provide assistance, there is nothing deterring officers from outright lying to civilians to induce them to assist—even when, as here, such misrepresentations cause people to unknowingly expose themselves to danger. Public policy would strongly encourage both that officers be truthful and that the public have confidence that when an officer requests assistance, he or she will accurately describe the proposed undertaking so the civilian can make a knowing and intelligent decision about whether he or she wishes to assist. An avenue of meaningful recourse if officers do misrepresent facts would raise the likelihood that civilians would in fact help officers since they could have some confidence that what is told to them is

true.

G. Whitman's Misrepresentations To The Gunds About Their Neighbor's 911 Call Render Section 3366 Inapplicable

The Law Revision Commission intended section 3366 to apply "[w]hen a person not trained in law enforcement or fire suppression is required by law to assume the risk of death or serious injury to provide such protection to the public, or when he undertakes to do so at the request of a peace officer or fire control officer. . . ." (4 Cal.Law Revision Com. Rep. (1963) p. 1505.) In other words, the Commission's intent was for section 3366 to apply when a person not compelled to assist a peace officer voluntarily *chooses* to assist and assume the risk of death or serious injury that a police officer assumes in detecting and suppressing criminal activity.[4]

Therefore, a condition precedent for the application of section 3366 to the Gunds is whether they voluntarily chose to assume those risks. Whitman, however, by withholding from the Gunds facts about the 911 call that he knew would have informed them of the real risk of criminal activity, prevented the Gunds from meaningfully volunteering.

In *Moyer v. Workmen's Comp. Appeals Bd.*, (1973) 10 Cal.3d 222, the Court explained that "voluntary" in the context of workers' compensation does not simply mean willing acceptance–i.e., acting or refraining from acting free from compulsion. It also includes the

---

[4]The Commission also intended the section apply when a person was compelled to provide relevant service i.e., as part of the *posse comitatus.* As there is no allegation that the Gunds were compelled to act, this circumstance is not discussed.

requirement that the acceptance be an intelligent one–i.e, an acceptance with knowledge of the consequences and dangers associated with the act:

> We think that in the phrase "the acceptance [of a rehabilitation program] shall be voluntary," an interpretation of "voluntary" to mean not only a *willing* acceptance but an *intelligent* one is more promotive of the purpose of the section and of the compensation laws in general since it is more promotive of the welfare of the injured workman. (*Moyer v. Workmen's Comp. Appeals Bd., supra,* 10 Cal.3d 222, 234 [court's italics].)

The Court elaborated on the meaning of "voluntary" in *In re Marriage of Bonds* (2000) 24 Cal.4th 1, 16. The Court explained that "voluntary" means not only acting without coercion but also means acting with knowledge of essential facts.

> Black's Law Dictionary defines "voluntarily" as "Done by design . . . . Intentionally and without coercion." (Black's Law Dict. (6th ed. 1990) p. 1575.) The same source defines "voluntary" as "Proceeding from the free and unrestrained will of the person. Produced in or by an act of choice. Resulting from free choice, without compulsion or solicitation. *The word, especially in statutes, often implies knowledge of essential facts."* (*In re Marriage of Bonds* (2000) 24 Cal.4th 1, 16 [emphasis added].)

Under these definitions, the Gunds were not volunteers. Whitman never advised the Gunds of the essential facts about what they were being asked to do. Not having been advised of those facts, they never had the opportunity to make a knowing, intelligent decision whether they even wanted to volunteer.

The facts that Whitman withheld from the Gunds about their neighbor's 911 call are significant, numerous and undisputed. Whitman admitted that he never told the Gunds that the 911 caller had been whispering. (3 CT 656:17-19; 3 CT 657:13-18; 3 CT 658:6-11; 3 CT 613-6.) He also admitted that he failed to tell them that the CHP dispatcher who had spoken with their neighbor was afraid to call her back in case the caller had been trying to secretly call for help. (*Id.*) And, Whitman admitted that he did not tell the Gunds that efforts by the Trinity County dispatcher to return the call were unsuccessful. (*Id.*) Whitman told Norma Gund no more than that the 911 call was likely weather related and "probably no big deal." (*Id.*)

Whether his statements to Ms. Gund were intentional misrepresentations or negligent oversights is of no concern. His failure to properly advise the Gunds of the true nature of their neighbor's 911 call means that their agreement to check on their neighbor was neither knowing nor intelligent.

They cannot be deemed volunteers.

H. There Is No Immunity For Whitman's Misrepresentations

The general rule is that public employees are immune for harm caused by their misrepresentations. (Cal.Gov. Code § 822.2.) However, section 822.2 does not apply when a public employee "is guilty of actual fraud, corruption or actual malice." (Id.) That is the case here.

Civil Code section 3294 includes in the definition of "malice" "conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (Civ. Code § 3294.) The Gunds allege that Whitman acted with a willful and conscious disregard of their rights or safety both when he knowingly omitted facts about the 911 call and

by downplaying the potential seriousness of the call by falsely representing that the call was likely a weather-related emergency. (1 CT 66-67; 3 CT 656:17-19; 3 CT 657:13-18; 3 CT 658:6-11; 3 CT 613-6.)

Furthermore, "the statutory immunity from liability for misrepresentations (Gov. Code, §§ 818.8 and 822.2) does not apply to negligent misrepresentations involving a risk of physical harm." (*Garcia v. Superior Court* (1990) 50 Cal.3d 728, 738, fn. 8.) In this case, Whitman's misrepresentations caused the Gunds to believe that they were responding to a weather-related emergency that was "no big deal" when the facts known to Whitman made it abundantly clear that a dangerous crime may have been occurring. Whitman dishonestly put the Gunds at ease, and caused them to disastrously enter the scene of a crime with the false belief, which his misrepresentations and failure to disclose implanted, that there was no danger.

CONCLUSION

The court of appeal erred in holding that the Gunds were engaged in "active law enforcement service" when they went to check on their neighbor. Because of Whitman's representations, the Gunds reasonably believed their neighbor had called 911 only because of a weather-related emergency. "Active law enforcement service" describes only physically dangerous tasks peace officers perform related to the detection and suppression of crime and the arrest and detention of criminals. "Active law enforcement service" does not include community caretaking tasks totally divorced" from law enforcement activities—which is what the Gunds were asked to do.

Furthermore, Whitman's misrepresentations regarding the nature of the 911 call further demonstrate that the Gunds never engaged and never

intended to engage in active law enforcement service. A 911 call itself is not per se a request for law enforcement aid. Even a reasonably prudent law enforcement officer would have believed, given Whitman's false assurances that the call was weather-related and not a big deal, that responding to the call would not involve "active law enforcement service."

The Court should reverse the court of appeal's decision.

Dated: September 21, 2018 Respectfully submitted,

BRAGG, MAINZER & FIRPO, LLP

By: _____
BENJAMIN H. MAINZER
Attorneys for Petitioners,
James and Norma Gund

CERTIFICATE OF WORD COUNT

I certify that the text of this document uses a 13 point Times New Roman font and consists of 7,232 words as counted by the Microsoft Word Processing Program used to generate this document.

Dated: September 21, 2018

BRAGG, MAINZER & FIRPO, LLP

By: _____
BENJAMIN H. MAINZER
Attorneys for Petitioners,
James and Norma Gund

CERTIFICATE OF CONFORMITY WITH ELECTRONIC BRIEF

I hereby certify that Petitioners' Opening Brief on the Merits to which this Certificate of Conformity is attached is, aside from the attachment of this Certificate, identical in all respects to the electronically filed Opening Brief submitted using the Court's electronic upload website.

The paper copies of the Opening Brief were printed from the PDF file generated by Word, the program in which the original Opening Brief was created.

Dated: September 21, 2018

BRAGG, MAINZER & FIRPO, LLP

By: _____
BENJAMIN H. MAINZER
Attorneys for Petitioners,
James and Norma Gund

CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the County of Humboldt. My business address is 804 Third Street, Eureka, California 95501. I am over the age of 18 years and not a party to the within cause.

On this date, I served the following document(s):

PETITIONERS' OPENING BRIEF ON THE MERITS

[X] **BY MAIL:** By placing a true copy thereof enclosed in a sealed envelope, addressed as shown below and placing the envelope for collection and mailing on the date and at the place shown below, following our ordinary business practices. I am readily familiar with this business' practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

John R. Whitefleet (Attorneys for Respondents)
PORTER SCOTT A Professional Corporation
350 University Avenue, Suite 200
Sacramento, CA 95825

Honorable Dennis Murray & Honorable Richard Schueler
Trinity County Superior Court
P.O. Box 1258
Weaverville, CA 96093

Court of Appeal, Third Appellate District
914 Capitol Mall, Fourth Floor
Sacramento, CA 95814

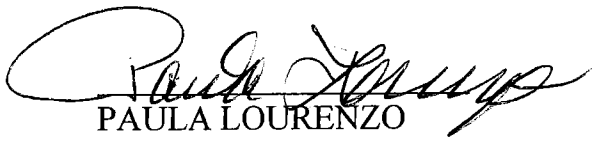
[X] **BY OVERNIGHT DELIVERY:** By placing a true copy thereof enclosed in a sealed envelope addressed as shown below and depositing said envelope in a box or other facility regularly maintained by the express service carrier in an envelope or package designated by the express service carrier with delivery fees paid or provided for.

Supreme Court of California *(9 copies - "1 to be conformed*
Earl Warren Bldg at Civic Center Plaza *& returned")*
350 McAllister Street
San Francisco, CA. 94102-4797

[X] An electronic text-searchable PDF copy of the above-referenced document was submitted via e-submission through the court's electronic filing system.

Supreme Court of California
Earl Warren Bldg at Civic Center Plaza

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed this 21st day of September, 2018 at Eureka, California.



PAULA LOURENZO