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IN THE SUPREME COURT OF CALIFORNIA

REBECCA MEGAN QUIGLEY

Plaintiff and Appellant,

vs.

GARDEN VALLEY FIRE PROTECTION DISTRICT, et al.,

Defendants and Respondents.

No.

3 Civil No. C079270

Plumas County Superior Court
Case No. CV1000225

SUPREME COURT
FILED

MAY 31 2017

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Deputy

PETITION FOR REVIEW

After a decision of the
Court of Appeal, Third Appellate District

Appeal from a Judgment of the Superior Court
Of the State of California, County of Plumas
Honorable Janet Hilde

CRC 8.25(b)

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ISSUES PRESENTED

This case presents two issues regarding the proper construction and application of Government Code section 850.4, an immunity provision of the Government Claims Act, which states:

> Neither a public entity, nor a public employee acting in the scope of his [or her] employment, is liable for any injury resulting from the condition of fire protection or firefighting equipment or facilities or, 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.[1]

1. Does section 850.4 apply in an action for personal injuries caused by a dangerous condition of public property where the injuries did not result from a condition that rendered any facility used to combat the fire inoperative, useless or otherwise defective—in the present case, injuries that plaintiff and appellant Rebecca Quigley suffered while she was asleep at a forest fire base camp miles from the fire when she was run over by a 30,000 pound truck that drove through the designated sleeping area where she and others slept (Slip op. at 1)?

2. To the extent that the immunity might apply, did defendants waive it by failing to allege it as an affirmative defense or otherwise assert it during more than four years of litigation and waiting until after a jury venire was called, the jury was impaneled, trial began and Quigley's attorney's made his opening statement before asserting it?

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

I
INTRODUCTION AND REASONS TO GRANT REVIEW

Review is necessary both "to settle an important question of law" and "to secure uniformity of decision...." (Cal. Rules of Court, rule 8.500(b)(1).)

A. The proper construction and application of section 850.4 is an important question that merits review.

Section 850.4 affects every California governmental entity that affords fire protection services. It affects every person, business, corporation, incorporated or unincorporated association, and any other entity suffering injury resulting from a "condition" of a firefighting "facility." The question is what kind of "condition" of what kind of "facility" gives rise to the immunity?

The Tort Claims Act of 1963 (Gov. Code §§ 810-996.6 [now denominated the Government Claims Act]) was enacted in response to *Muskopf v. Corning Hospital Dist.* (1961) 55 Cal.2d 211, in which the Court abrogated the common law rule of governmental immunity. "[W]hen there is negligence," the Court stated, "the rule is liability, immunity is the exception." (*Id.* at 219.) In construing the Act, the Court has "adhered to this basic axiom of tort law." *Baldwin v. State of California* (1972) 6 Cal.3d 424, 435.

The Court has also reaffirmed that the fundamental principle of the Act is that,

> "[I]t would be unjust in some circumstances to require an individual injured by official wrongdoing to bear the burden of his loss rather than distribute it throughout the community." (*Lipman v. Brisbane Elementary Sch. Dist.* (1961) 55 Cal.2d 224, 230.) "Accordingly, courts should not casually decree

> governmental immunity; ...." (*Johnson v. State of California* (1968) 69 Cal.2d 782, 798.) Unless the Legislature has clearly provided for immunity, the important societal goal of compensating injured parties for damages caused by willful or negligent acts must prevail."

(*Ramos v. County of Madera* (1971) 4 Cal.3d 685, 692); *Baldwin, supra*, 6 Cal.3d at 436 [quoting *Ramos*].)

In section 835, the legislature has made public entities liable "for injuries caused by maintaining dangerous conditions on their property when the condition 'created a reasonably foreseeable risk of the kind of injury which was incurred' and ... an employee's negligence or wrongful act or omission caused the dangerous condition...." (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347; see also Slip op. at 9 [quoting *Hampton*].)

Therefore, "[t]o further the goal of compensating injured parties for damages caused by negligent acts, section 850.4 should be construed to bar governmental liability only where the Legislature has clearly intended immunity." (*Potter v. City of Oceanside* (1981) 114 Cal.App.3d 564, 566; see also *Lewis v. Mendocino Fire Protection Dist* (1983) 142 Cal.App.3d 345, 347 [immunity did not apply where firefighters caused injuries in rescue operation that did not involve firefighting]).

The Court has considered section 850.4 only once, in a case decided more than 50 years ago. (*Heieck and Moran v. City of Modesto* (1966) 64 Cal.2d 229.)[2] There, city employees working on the municipal water system closed a valve in a main serving nearby fire hydrants but neglected to

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[2] The Court has mentioned the statute passing in three other cases. (*Van Horn v. Watson* (2008) 45 Cal.4th 322, 336-337 [discussing history of Health and Safety Code § 1799.107]; *Calatayud v. State of California*

reopen it. As a result, the hydrants could not supply water to contain a fire that spread to plaintiff's property. The Court treated the closed valve as a firefighting facility by holding the city immune from liability under section 850.4 for the damage viewed as resulting "from the closed 'condition' of the water valve (§ 850.4)...." (*Id.* at 233.)

Courts of appeal have followed *Heick and Moran* in cases involving similar circumstances. (*New Hampshire Ins. Co. v. City of Madera* (1983) 144 Cal.App.3d 298, 304-305 [closed valve in water main serving fire hydrant]; *Lainer Investments v. Department of Water and Power* (1985) 170 Cal.App.3d 1 [valve almost completely closed in city's connector between city water main and sprinkler system in private building].) In those cases the condition that resulted in injury was one that rendered facilities used to combat fires—hydrants and a sprinkler system—ineffective or inoperable. The same is true in other cases applying the immunity which are discussed in the argument *infra*, pp. 15-17: injuries resulted from conditions that rendered facilities used to fight fires defective, ineffective, or wholly nonfunctional.

Nevertheless, the court of appeal held in the present case that section 850.4 extends much further. The court stretched the statute so far as to deny a person who suffers injuries resulting from *any* condition of *any* fa-

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(1998) 18 Cal.4th 1057, 1069 [example of immunity conferred on public safety personnel and their employers]; *Thomas v. City of Richmond* (1995) 9 Cal.4th 1154, 1161 [listing statutes that confer immunity but provide exception for liability under Vehicle Code § 17001].) The Court has cited *Heieck and Moran* only once, for its holding that the Claims Act was retroactive to claims arising prior to its effective date. (*Cabell v. State of California* (1967) 67 Cal.2d 150, 152, overruled on other grounds by *Baldwin, supra*, 6 Cal.3d at 438-439.)

cility having *anything* to do with firefighting from recovering legal damages—here, the base camp where Quigley and other firefighting and non-firefighting personnel at the camp ate, showered and slept when they were *not* fighting the fire. (Slip op. at 1-2.)

Section 850.4 was adopted, as were almost all provisions of the Claims Act, at the recommendation of the Law Revision Commission. (4 Cal. L. Revision Com. Rep., Recommendation relating to Sovereign Immunity (1963) pp. 827-829, 862 (Commission Report).)[3] As the court of appeal recognized, the Commission recommended enactment of section 850.4 to serve the policy that "'public entities and public personnel should not be liable for injuries caused in fighting fires or in *maintaining fire protection equipment*....'" (Slip op. at 12, quoting Commission Report at 862 [court's italics].) Likewise, in its comment to section 850.4, the Commission stated that the section "'provides for absolute immunity from liability for injury caused in fighting fires (other than injuries resulting from operation of motor vehicles) *or from failure to properly maintain fire protection equipment or facilities.*'" (*Ibid.* [court's italics].

The purpose of maintenance and repair of equipment or facilities is to keep them in good operating order so they may be used effectively to fulfill their purpose. Thus, the "condition" of "firefighting facilities" to which the statute was intended to apply is a condition that results from a failure of maintenance or repair that results in a defect that impairs or prevents the

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[3] Both the Senate Committee on Judiciary and the Assembly Ways and Means Committees submitted reports stating that the Commission's comments on § 850.4 reflected the committees' intent in recommending approval. (*Razeto*, 88 Cal.App.3d at 352.) Thus, the Commission's comments "are declarative of the intent not only of the draftsmen ... but also of the legislators who subsequently enacted it." (*Kaplan v. Superior Court* (1971) 6 Cal.3d 150, 158, fn. 4.)

operation, usefulness or effectiveness of facilities employed to protect against or fight fires. The Commission's comment to 850.4 "states in clear terms that immunity is to be provided for dangerous and *defective* fire protection equipment." (*Razeto v. City of Oakland* (1979) 88 Cal.App.3d 349, 353 [italics added] (*Razeto.*)

In this case, however, the Third Appellate District gives section 850.4 a far broader construction to afford immunity from liability for injuries that were caused by a "condition" that did not in any way impair the functioning or effectiveness of a "facility" that used to fight a fire. The court held that the immunity applied because Quigley's injuries resulted from a condition of the base camp, which served to provide firefighters respite between shifts. But as a place of respite, the camp's use and purpose was to *not* fight the fire.

The legislative intent in the rules of liability and immunity that apply to fire protection and fire protection activities is "to strike a careful balance between the need for encouraging utmost diligence in combatting fires and the need for providing compensation for injuries caused by the negligent or wrongful conduct of public personnel." (Commission Report at 828.) The court of appeal disregarded that legislative intent. It upset the balance the Legislature intended by tilting the scales heavily against compensation for injuries and providing immunity for injuries that do not result from the defective, inoperative or ineffective condition of fire protection or firefighting facilities, but from a dangerous condition of property.

Professor Arvo Van Alstyne, whom the Court has acknowledged as "the principal architect of the California Tort Claims Act" (*Sullivan v. County of Los* Angeles (1974) 12 Cal.3d 710, 721), also authored the CEB book on the Act. (Van Alstyne, Calif. Government Tort Liability Practice (Cont. Ed. Bar 1980) [Van Alstyne]). He agreed that the Commission's

comment to section 850.4 can be read to support a construction of the statute under which it

> confers immunity only when fire-protection and fire-fighting facilities are in a dangerous condition because of inadequate maintenance or defective installation [citations]. It is possible for instance, that fire equipment or facilities in perfectly sound and workable order may cause an injury because of *qualitative* inadequacy.... If so, a court might conclude that the immunity granted by Govt Code §850.4 does not apply, since the equipment in question is in perfect physical condition.

(*Ibid.*, § 4.30, p. 373 [italics in original].)[4]

In the almost 40 years since Professor Van Alstyne wrote that, and until this case, no court has extended section 850.4 immunity beyond its intended purpose. This Court's review is necessary to settle the important question of the proper construction of section 850.4 to clarify the bounds of the immunity and, in doing so, restore the proper balance between compensating those injured by a dangerous condition of public property as provided in section 835, and providing immunity from liability to public entities when an injury results from a condition of firefighting facilities.

B. Review is also "necessary to secure uniformity of decision." (Cal. Rules of Court, rule 8.500(b)(1).)

In *McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App.3d 683, 689, disapproved on other grounds by *Bunch v. Coachella Valley Water Dist.* (1997) 15 Cal.4th 432, 447–448 (*McMahan's*), the court

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[4] A "qualitative inadequacy" or "qualitative insufficiency" is a defective condition (quality) of equipment or facilities rendering it ineffective or inoperable. (Van Alstyne, § 4.29-4.30, pp. 371, 373.)

squarely held that the section 850.4 immunity "is considered an affirmative defense and must be pled and proven or is deemed waived." (*Ibid.* at 689.) Likewise, in *Varshock v. California Dept. of Forestry and Fire Protection* (2011) 194 Cal.App.4th 635 the court held that section 850.4 "operates as an affirmative defense." (*Ibid.* at, 651, citing *McMahan's* and others; see also *Hata v. Los Angeles County Harbor/UCLA Medical Center* (1995) 31 Cal.App.4th 1791, 1802 [quoting *McMahan's*].)

Other authorities agree that *McMahan's* correctly states the rule. "Although the [section 850.4] immunity is broadly construed, it is inapplicable in cases in which it is not pleaded. If not pleaded, it is waived." (2 Schwing, Cal. Affirmative Defenses (2d ed. 2015) § 38:92 [citing *McMahan's*]). "[I]mmunity under the statute providing a public entity with absolute immunity in situations where private property is damaged by fire protection equipment or facilities is an affirmative defense and must be pleaded and proved or is deemed waived." (34 Cal.Jur.3d (2017 update) Fires and Fire Protection § 79 [same]).

Witkin cites *McMahan's*, among others, in stating the rule more comprehensively. "The statutory immunities under the Government Tort Claims Act [citation] are affirmative defenses, which must be pleaded.... The pleading should contain specific allegations to show that the facts fall within the statutory provision." (5 Witkin, Cal. Procedure 5th (2012), Pleading § 1107, p. 535 [Witkin Procedure]; see also Cal. Civil Practice Torts (2017 update) § 29:27 ["Governmental immunities will be considered to have been waived unless they are pleaded in the answer as affirmative defenses."]")

In particular, an immunity must be raised as an affirmative defense in an action, such as the present one, for injuries resulting from a dangerous condition of public property. (*De La Rosa*, *supra*, 16 Cal.App.3d at 747; *Hata*, *supra*, 31 Cal.App.4th at 1803)

Yet, the court of appeal here held—directly contrary to *McMahan's* and, inferentially, Witkin and the other secondary authorities accepting *McMahan's*—that section 850.4 immunity is not waived by failing to allege it as an affirmative defense as it is jurisdictional and may be raised at any time. (Slip op. at 5-6.)

Whether an immunity provided by the Act is jurisdictional is an issue on which courts have reached conflicting decisions. (See *Hata*, *supra*, 31 Cal.App.4th at 1800-1804 [collecting conflicting cases].) As Witkin points out, while there are cases holding other immunities jurisdictional, it is not clear what those cases mean when they use the term "jurisdiction." (2 Witkin Procedure, Jurisdiction, § 90.) The word "does not have a single, fixed meaning, but has different meanings in different situations." (*Id.*, § 1).

Do cases using "jurisdiction" with respect to immunities under the Act mean jurisdiction in its fundamental or strict sense, the power to adjudicate? (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288.) Or do they use the "jurisdiction" in the broader sense of the court's power to act on a matter over which it has fundamental jurisdiction as that power is defined by relevant law? (*Ibid.*)

The Court has yet to answer those questions and reconcile cases and other authorities holding that immunities are jurisdictional and cannot be waived, with others holding that they are affirmative defenses that are waived if not pleaded. The proper construction of section 850.4 immunity and whether it must be alleged as an affirmative defense to prevent waiver is an important issue deserving of the Court's review and determination.

II

SUMMARY OF FACTS AND PROCEDURE

As the court of appeal acknowledged, in reviewing a judgment of nonsuit the appellate court "view[s] the facts in the light most favorable to

the plaintiff. [Citation.] Thus, the court must accept as true all favorable facts asserted in the plaintiff's opening statement, indulge all legitimate inferences from those facts, and disregard all conflicting evidence. [Citation.]" (Slip op. at 2.)

The Silver Fire broke out in Plumas National Forest on September 19, 2009. (*Ibid.*).[5] The United States Forest Service (Forest Service) set up a base camp at the Plumas County Fairgrounds. (*Ibid.*). It included a sleeping area for firefighters. (*Ibid.*). Forest Service rules require that the sleeping area be quiet, shaded, and away from smoke, noise, and dust. (*Ibid.*). The rules also required posting signs designating the area as a sleeping area, and that the area be roped off. (*Ibid.*).

These rules are set forth in the Forest Service's Health and Safety Code Handbook, FSH 6709.11 ("Health and Safety Code").[6] It is "the primary source of standards for safe and healthful workplace conditions ... and operational procedures and practices in the Forest Service...." (*Ibid.*)., Zero Code, p. 0-3.) The requirements for sleeping areas are included in § 25.13b, p. 20-87, ¶ 9. Signing and roping off is an imperative: "9. Post signs and rope off sleeping areas." (*Id.*); see also RT 4 (Quigley's counsel reading provision to jury).

A direction in the Code written in the imperative mood "conveys mandatory compliance: 'Wear a hardhat on the fireline.'" (*Ibid.*)

The fairground has a racetrack with a large, grassy infield. (Slip op at 2.) The Forest Service set up a portable shower unit on the infield.

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[5] The facts are summarized from the court of appeal's decision with occasional elaboration from cited portions of the record.

[6] The Health and Safety Code Handbook is available online at http://www.fs.fed.us/im/directives/fsh/6709.11/FSH6709.pdf. It is issued pursuant to the federal Occupational Safety and Health Act and implementing regulations. (*Id.*), Zero Code § 01 - Authority, p. 0-3.

(*Ibid.*). The unit included two 1,500 gallon bladders, one with fresh water, the other holding the used, grey water from the showers. (*Id.*) at 2-3. Employees of an independent contractor drove water trucks weighing up to 30,000 pounds to service the bladders. (*Id.*) at 3. To reach them, the drivers drove across the infield. (*Ibid.*) They were not given a map nor were they directed where they could drive. (*Ibid.*)

The Fire Service called in a non-firefighting team known as NorCal Team 1 to manage the fire and the base camp. (*Ibid.*). Defendants DelCarlo, Jellison and Barnhart, all retired Forest Service employees, were members of the management team. (*Ibid.*) They became employees of the defendant local fire agencies, Chester Fire Protection District and Garden Valley Fire Protection District. (*Ibid.*)

Quigley, a Forest Service firefighter on a hotshot crew, worked the fire. (*Ibid.*). On September 20, after her shift fighting the fire, she and her crew worked returned to the base camp about 9:00 p.m. (*Ibid.*) The designated sleeping area was full and most of the crew had to sleep in and around filthy horse barns. (*Ibid.*) Quigley asked her supervisor if she could sleep in the infield, where other people were already sleeping in tents and in sleeping bags on the ground. (*Ibid.*) Her supervisor agreed and she slept on the grass in her sleeping bag. (*Ibid.*)

DelCarlo had authorized use of the infield as a sleeping area. (*Ibid.*) He ordered a California Conservation Crew to sleep near the showers, and he authorized another hotshot crew to sleep in the infield. (*Ibid.*) But, despite the command of the Health and Safety Code, the infield was never signed nor roped off. (*Ibid.*)

Quigley spent the next day, the 21st, with her crew fighting the fire. (*Ibid.*). During the day, Barnhart, the camp safety officer, inspected the camp and saw the California Conservation Corps tents in the infield. (*Ibid.*) Despite the absence of signs and roping off, he recorded on an inspection

form that all sleeping areas were separated from parking and posted, "'sleeping area (no vehicles allowed).'" (*Ibid.*)

That night, Quigley returned to the camp at about 9:00. (*Id.* at 4.) Again, the designated sleeping area was full and her crew had to sleep in and around the filthy horse barns. (*Ibid.*) Quigley again asked for and was given permission to sleep on the infield grass in her sleeping bag. (*Ibid.*)

About 10:00 that night, an employee of the company that serviced the showers drove his truck across the infield to reach the bladders. (*Ibid.*). He drained the grey-water bladder into the truck and as he drove back across the infield he ran over Quigley. (*Ibid.*). The truck crushed her chest, ribs, lungs and left shoulder and fractured her back. (*Ibid.*). Her heart, lungs, and eyes were permanently damaged. (*Ibid.*).[7]

Quigley sued defendants on three counts, including dangerous condition of public property (§ 835; 1 AA 12-14.) At trial, more than four years after the complaint was filed, when Quigley's counsel finished his opening statement, defendants moved for nonsuit and for the first time asserted that they were immune under various provisions of the Government Claims Act (Gov. Code § 810 et seq.), including § 850.4. (*Ibid.*; 1 AA 72-73.).

Defendants also argued that they were not liable under the common-law firefighter's rule because Quigley had been injured by the negligence of

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[7] Although Quigley recovered, she was unable to return to firefighting; she went through retraining and rehabilitation, and was in graduate school working on her master's degree at the time of trial. RT 48-49. Her past lost earnings and the cost of vocational retraining came to $332,000. RT 49. Her future lost earnings, even after retraining, will be approximately $2.3 million. RT 50. She faces future medical expenses of approximately $836,000. (*Id.*)
Those damages do not include general damages—loss of enjoyment of life, pain and suffering she have the rest of her life; she is expected to live to the age of 82. RT 50-51.

a public safety officer from another public safety agency in a joint operation. (*Ibid.*, citing *Terry v. Garcia* (2003) 109 Cal.App.4th 245, 253.)

Quigley's counsel opposed the motion on two grounds: (1) that defendants waived section 850.4 immunity by failing to allege it as an affirmative defense or otherwise raise it before Quigley's counsel finished his opening statement, and (2) in any event, the immunity did not apply. (Slip op. at 4; 1 AA 99). They also argued that the firefighter's rule did not apply because Quigley did not suffer her injuries in combating the fire but they were caused by the independent negligence of the individual defendants unrelated to fighting the fire. (Slip op. at 4; 1 AA 102.)

After argument and briefing, the court granted nonsuit on the ground that defendants had not waived the immunity because, in the court's view, the immunity is jurisdictional and can be raised at any time, and the immunity applied because Quigley's injuries were the result of the condition of a firefighting facility—the base camp—and were caused by fighting the fire. (Slip op. at 5).

The court denied Quigley's motion for new trial on the same grounds and also held that the firefighter's rule barred her action because she was injured in a joint response by different public agencies to a public safety incident. (*Ibid.*)[8]

As previously discussed, the court of appeal affirmed based on its construction of § 850.4, under which the immunity is not limited to conditions that affect the efficient or effective use of equipment and facilities employed in actually fighting a fire. Rather, the court interpreted the statute to

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[8] Since the court of appeal held section 850.4 immunizes defendants from liability for Quigley's injury and defendants did not waive the immunity, the court found it unnecessary to address the issue of the firefighter's rule.

apply the immunity broadly to injuries resulting from a condition of any kind of any facility that has any connection to fire protection or firefighting.

III
QUIGLEY WAS NOT INJURED BY A CONDITION OF A FIREFIGHTING FACILITY THAT GIVES RISE TO SECTION 850.4 IMMUNITY

a. Section 850.4 gives immunity from liability only for injuries resulting from a condition that renders facilities used to fight fires defective.

Section 850.4 "codifies prior case law denying liability for facilities that were so defective as to make effective fire suppression impossible." (Van Alstyne, § 4.30, p. 372, citing *Stang v. City of Mill Valley* (1952) 38 Cal.2d 486 [fire hydrant inoperative because water line clogged] and *Thon v. City of Los Angeles* (1962) 203 Cal.App.2d 186 [fire hose not long enough to reach from hydrant to plaintiff's buildings].)

So, as discussed at p. 5, *supra*, in *Heieck and Moran, supra* and similar cases, the condition of a firefighting facility that gave rise to the immunity was a closed valve in a municipal water system that rendered fire protection equipment inoperable. (*Ibid.* [fire hydrant]; *New Hampshire Ins. Co., supra,* 1[same]; *Lainer Investments, supra*, 170 Cal.App.3d 1 [nearly closed valve in city connector between building sprinkler system and city water main.)

In *Cairns v. County of Los Angeles* (1997) 62 Cal.App.4th 330, the immunity applied when a road to plaintiffs' properties had been closed by the county. When a wildfire broke out, firefighters had to take a longer route to plaintiffs' homes and did not arrive in time to save them. In

Cochran v. Herzog Engraving Co. (1984) 155 Cal.App.3d 405, fire extinguishers lacked extinguishing material necessary to quench a fire.[9] In *State of California v. Superior Court* (*Nagel*) (2001) 87 Cal.App.4th 1409, the immunity barred plaintiff's wrongful death action arising from the crash of an airplane attempting to drop fire retardant where plaintiff alleged a number of conditions that impaired the airplane—a defective or poorly designed dropping system, defective rudder, negligent repair or maintenance, and inadequate engines.[10]

In *City and County of San Francisco v. Superior Court* (*Lourdeaux*) (1984) 160 Cal.App.3d 837 the condition was the entire absence of firefighters from a fire station when a fire broke out a few hundred feet away. And in *Razeto*, *supra*, 88 Cal.App.3d at 352-353, the immunity applied where the inadequately secured condition of a fire hydrant enabled vandals to open it, flooding plaintiff's house.

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[9] In each of the above cases, the courts held the government entities were also immune for the conditions that impaired the use of facilities to fight fires under section 850.2, which provides immunity "for any injury resulting from the failure to provide or maintain sufficient personnel, equipment or other fire protection facilities." (*Heieck*, 64 Cal.2d at 233; *New Hampshire Ins. Co.*, 144 Cal.App.3d at 304-305; *Lainer Investments*, 170 Cal.App.3d at 8; *Cairns*, 62 Cal.App.4th at 335; *Cochran*, 155 Cal.App.3d at 413.) In *City and County of San Francisco*, the city asserted both §§ 850.2 and 850.4 in demurring, but the court of appeal considered only the 850.4 immunity. (*Id.*, 160 Cal.App.3d at 840.)

[10] In dictum, the court also stated that section 850.4 would apply if state employees conducting the firefighting effort negligently selected a flight path resulted in dropping fire retardant in the wrong place and, consequently, increased the loss of property due to the fire. (*Id.*, 87 Cal.App.4th at 1414. The court did not explain how negligently giving advice and instructions could constitute a condition of a firefighting facility.

In each of these cases, the conditions that resulted in injury were conditions that impaired or prevented effective operation of facilities used to fight fires.

b. The dangerous condition of property that caused Quigley's injury was not a defect in a facility used to fight a fire that impaired its effectiveness.

Quigley's injuries resulted from a dangerous condition of property, the infield sleeping area, that created a foreseeable risk of being run over by a vehicle crossing the infield. That condition had no impact on the effective use of the base camp. For all the record shows, the camp was in perfect working order.

The individual defendants created the dangerous condition by the failures to sign and rope off the sleeping area as dictated by the U.S. Forest Service in the Health and Safety Code, compounded by their failures to designate a route for the water trucks, to establish times when drivers could and could not service the showers, and to give the drivers maps and direct them where and where not to drive. (RT 29:14-17, 30:5-31:3.)

The failure to sign and rope off the sleeping area is particularly significant. Its direction to rope off and sign the sleeping area is mandatory. (*Id.*, Zero Code at 0-3; § 25.13b, p. 20-87, ¶ 9.)

The court of appeal acknowledged that prior to Quigley's accident defendant Barnhart, the camp safety officer, inspected the camp and he saw the showers and the infield sleeping area where the California Conservation crew's tents stood. (Slip op. at 3.) Nevertheless, he reported that all sleeping areas were "posted as a 'sleeping area (no vehicles allowed).'" (*Ibid.*) The immunity of section 850.4 for an injurious condition of a firefighting facility cannot reasonably be stretched to preclude liability for injuries resulting from what amounts to a knowing failure to perform a mandatory duty under the federal Health and Safety Code, a duty designed to protect

against the risk of the very kind of injury Quigley suffered, being run over while she slept in the designated sleeping area. (*Cf.*, § 815.6 [liability for failure to perform mandatory duty]).

Section 850.4 "should be construed to bar governmental liability only where the Legislature has clearly intended immunity." (*Potter v. City of Oceanside* (1981) 114 Cal.App.3d 564, 566). Nothing in the legislative intent as expressed in the Law Commission's Report suggests an intent to grant immunity for injuries resulting from a condition of fire protection equipment or facilities when that condition does not render facilities used in combating fires defective to accomplish that purpose.

c. The rationale for section 850.4 immunity does not apply.

The rationale for section 850.4 immunity is that "[t]he incentive to diligence in providing fire protection that might be provided by liability is already provided because fire insurance rates rise where the fire protection provided is inadequate. Moreover, the risk-spreading function of tort liability is performed to a large extent by fire insurance." Commission Report at 828.

The desire to keep fire insurance rates down does not provide an incentive to public entities and their employees to perform the duty that these defendants breached: the duty to take reasonable steps to protect people sleeping in the infield from being run over by trucks driving through the infield to service the shower units.

Likewise, fire insurance does not provide a risk-spreading function in cases like this. Fire insurance provides coverage "against loss by fire, lightning, windstorm, tornado or earthquake" and may include coverage against loss, destruction of, or damage to specified types of documents, instruments and personal property by fire. (Ins. Code § 102, subds. (a) and

(b)). Being run over by a truck while asleep is not a risk fire insurance covers.[11]

d. The court of appeal's strained construction of section 850.4 does not withstand minimal scrutiny.

The court of appeal's interpretation of section 850.4 rests on a somewhat convoluted rhetorical exercise. The court points out that the section contains two clauses, each describing a class of injuries: "any injury resulting from the condition of fire protection or firefighting equipment or facilities" and, with an exception, "any injury caused in fighting fires." (*Ibid.*; Slip op. at 10.) The court's interpretation hinges entirely on the word joining the two clauses, "or."

> "Use of the disjunctive 'or' between the two clauses renders these two classes of injuries alternatives. [Citation.] Only the latter prong is, on its face, limited to injuries that are sustained in the course of an active engagement in fighting fires. And, there is nothing in the syntax of the statute to suggest that 'in fighting fires' also modifies the first clause at issue here."

(*Id.* at 10-11.)

And, since the clauses are "connected by disjunctive, the language used in one clause does not affect or modify words used solely in other clause, but each clause 'is to be construed as if it stood alone and were read

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[11] One might ask what firefighter would expose himself or herself to the risk of unsafe conditions of a base camp that have nothing to do with fighting the fire knowing that if he or she was injured as a result of those conditions there would be no recourse against those whose negligence created them? Likewise, if base camp managers are immune for whatever they do or don't do at the camp to keep it safe, what incentive do they have to keep it safe?

in connection with the general words applying to all.'" (*Id.* at 11, quoting *In re Application of Roberts* (1910) 157 Cal. 472, 474.) "Thus," the court concludes, "there is no language in the statute itself limiting the 'condition of fire protection or firefighting equipment or facilities' to those related to the ability to fight fires." (*Id.* at 11.)

The court's interpretation is strained; it ignores words the court purports to construe. True, the phrase "in fighting fires" in the second clause does not appear in the first clause. But the immunity the first clause grants is for injuries arising from "fire protection or *firefighting* equipment or facilities...." (§ 850.4 [italics added].) "Firefighting" and "fighting fires" are synonymous. One engaged in firefighting is fighting a fire.

It is difficult to conceive of what "firefighting equipment and facilities" could refer to other than what the words say: equipment and facilities employed in fighting fires.

Moreover, the court's reasoning is self-contradictory. In construing the first clause, the question is, to what type of "condition" of what kind of "fire protection or firefighting equipment or facilities" does the first clause refer to? In answering the question, the court contradicts its premise that the clause should be read "'as if it stood alone.'" Instead, the court places the *second* clause next to the first and compares them, concluding that, because the second clause refers to "fighting fires" but the first doesn't, the first clause is not limited to injuries resulting from a condition that affects the use or effectiveness of a facility used in fighting fires.

The court's conclusion from its strained reading of the statute is non-sequitur. The court's conclusion does not logically flow from its reasoning. This is illustrated by an example: an art dealer offers a print of an artwork "in blue or in red on paper" for, say, $100. The offer is stated in the disjunctive and it describes two classes of prints in two clauses: a print "in blue *or*" a print "on red on paper." Even though the words, "on paper," do

not appear in the first clause, only in the second, the only reasonable meaning of the offer is that for $100 the buyer may purchase a print on paper in either blue or red. The offer cannot logically or plausibly be interpreted to mean that for $100 the buyer can purchase a print in red on paper, or she can purchase a print in blue on any material she wishes, from paper to the finest, and most expensive, archival linen.

Yet, that is the illogical manner in which the court of appeal reaches its interpretation of section 850.4.

The court found additional support for its reading of the statute in *Razeto*, *supra*, 88 Cal.App.3d at 351-353. There, vandals turned on a city fire hydrant, flooding plaintiff's house. The appellate court, acknowledging that its decision was inconsistent with the legislative intent expressed in the Commission Report, nevertheless held that section 850.4 provides immunity for "'dangerous and defective fire protection equipment which causes injury or property damage *while not in use fighting fires.*'" (Slip op. at 13, quoting *Razeto*, 88 Cal.App.3d at 351-352 [court's italics added].)

Razeto is irrelevant. Aside from the fact that a fire hydrant is unquestionably equipment used in fighting fires, *Razeto* considered only *when* the immunity applies. The issue here the facilities to which the immunity *applies*. The *Razeto* court had no occasion to treat that question. As the Court has often repeated, "It is axiomatic that a case is not authority for an issue that was not considered." (*People v. Brooks* (2017) 2 Cal.5th 674, 782.)

Finally, the court of appeal's construction of section 850.4 here is contrary to the very language the court quotes from the Law Revision Commission's comment on the section, which states that the statute is intended to provide immunity for injuries "'caused ... in *maintaining fire protection equipment*" and "*from failure to properly maintain fire protection equipment or facilities.*'" (Slip op. at 12 [court's italics].) The court went on to

quote the Commission's justification for the immunity: "*There are adequate incentives to careful maintenance of fire equipment without imposing tort liability....*" (Slip op. at 11 [court's italics; underlining added].)

Quigley's injuries did not result from a failure to carefully maintain fire protection facilities. Her counsel made no mention of a failure to maintain the base camp that led to a condition that impaired its effective use or operation in fulfilling its purpose. That purpose was not to protect against or to fight fires, but was to provide rest and relaxation.

Nothing in the record suggests that the condition that resulted in Quigley's injuries, the absence of signs and roping off to protect sleepers, had any adverse effect, or any effect at all, on the functioning of any facility used to combat a fire.

e. Applying section 850.4 immunity to conditions that do not affect fighting a fire leads to absurd results by denying compensation to victims of negligence without achieving any of the desired benefits of the statute.

The court of appeal's overly broad and incorrect interpretation of section 850.4 would, if left intact, have far-reaching and absurd results. Here are a few examples of conditions that could cause injury but have nothing to do with fighting a fire:

- There's a wet spot on a floor. One of the camp personnel slips on it, falls and breaks bones. (*Cf.*, *Donohue v. San Francisco Housing Authority* (1993) 16 Cal.App.4th 658, 661 [firefighter inspecting apartment building slips on steps that were just hosed down; no section 850.4 immunity].)
- Gas escaping from a faulty gas line explodes and people nearby suffer burns and other injuries. (*Cf.*, *Potter*, 114 Cal.App.3d 564 (fire chief at site of escaping gas orders nearby trenching machine

moved; when operator starts machine, gas explodes, injuring operator; no section 850.4 immunity as fire had not started when chief's negligence caused injury).

- A ceiling light fixture is not adequately secured; it falls and injures a person under it.
- A refrigerator needs repair; it malfunctions, food inside spoils, and firefighters and others who eat it suffer food poisoning.
- An electric cord stretched across a floor is not taped down or covered and causes a passer-by to trip and fall and suffer injuries.

The court of appeal's answer to these and other examples is that there is "adequate incentive for firefighters to maintain the facilities and equipment to avoid the risk of potential injury." (Slip op. at 14-15.) In the present case and the examples above the incentive failed. But more significantly if the person injured by any of these conditions is a firefighter, he or she is not denied compensation for the injury. As the court of appeal recognized, firefighters injured on the job are compensated for their injuries under the California Workers' Compensation Act. (Slip op. at 15, citing § 814.2 [immunities of the Act do not affect workers compensation].)

But that is not true here. As the court acknowledged, Quigley, a federal firefighter, is not covered by the California Act. (Slip op. at 15.) Although the court characterizes that as "unusual" (*Id.*, fn. 6), the same is true of every person injured by a dangerous condition of public property who is not working when he or she suffers the injury.[12]

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[12] Moreover, workers' compensation would not fully compensate Quigley for her injuries. Workers' compensation does not compensate tort damages but is intended only "to compensate for the disabled worker's diminished ability to compete in the open labor market...." (*Livitsanos v. Superior Court* (1992) 2 Cal.4th 744, 753, citing *Mercier v. Workers' Compensation Appeals Bd.* (1976) 16 Cal.3d 711, 716.)

Applying section 850.4 immunity in accordance with the court of appeal's opinion, which relieves defendants of liability for injury resulting from a dangerous condition of property that they created by failing act as mandated by the Health and Safety Code or to exercise reasonable care to protect those sleeping in the designated sleeping area from the obvious risk of being run over by trucks servicing the showers, would likewise deny recovery to any person injured by any condition of any facility related in any way to firefighting, even conditions that do not affect the usefulness or effectiveness of a firefighting facility used to fight fires.

IV
DEFENDANTS WAIVED IMMUNITY UNDER SECTION 850.4

a. Defendants did not plead section 850.4 as an affirmative defense but waited until after the opening statement of Quigley's counsel to spring the defense for the first time.

As discussed in the statement of reasons to grant review, the immunity of section 850.4 "is considered an affirmative defense and *must be pled* and proven *or is deemed waived.*" (*McMahan's,* 146 Ca1App.3d at 689 [emphasis added], and see authorities cited at pp. 9-9, *supra.*) Defendants here alleged 38 affirmative defenses, including ten statutory immunities. (1 AA 58-64.) There was no mention of section 850.4 nor any allegation that Quigley's injuries resulted from a condition of a firefighting facility.[13]

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[13] Defendants alleged in their 15th affirmative defense, "A public entity and its employees are immune from liability for damages alleged in the complaint and Defendants assert all defenses and rights granted to them by the provisions of Government Code sections 810 through 996.6, inclusive." The parties argued whether this blanket assertion of the entire Claims Act was sufficient to allege section 850.4 immunity. (See, e.g., Appellant's Opening Brief at 36-46, Respondent's Brief at 43-48, Appellant's Reply

In discovery, form interrogatory 15.1 asked defendants to state for each affirmative defense "all facts upon which you base the . . . special or affirmative defense. . . ." (1 AA 151, ¶¶ 3-5.) In a supplemental response, they stated over two pages of facts. (1 AA 167-169.) They did not state that Quigley's injuries arose from a condition of a firefighting facility.

Defendants moved for summary judgment, asserting five statutory immunities. (1 AA 212-214.) Section 850.4 was not one of them. Nor did they assert as undisputed facts that the Silver Fire base camp was a fire protection facility and that Quigley's injuries arose from a condition of the facility. (1 AA 223-272.)

The first and only mention of the section 850.4 immunity came after trial commenced and Quigley's counsel finished his opening statement. Their failure to assert section 850.4 or facts that would support the immunity at any prior time waived the immunity. *McMahan's*, 146 Cal.App.3d at 689; *Hata*, 31 Cal.App.4th at 1802.

b. *McMahan's* does not conflict with cases holding immunities jurisdictional.

1. *McMahan's* is consistent with other cases holding that Claims Act immunities are affirmative defenses.

The court of appeal held that *McMahan's* is not supported by the authority it cites, *De La Rosa*, *supra*, 16 Cal.App.3d at 747, which the court found distinguishable because it involved a different immunity of a different character, section 830.6. (Slip op. at 6.) When *De La Rosa* was decided, section 830.6 provided immunity "'for maintaining a dangerous condition of public property as long as the maintenance conforms to the origi-

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Brief at 13-19.) The court of appeal, having held that the immunity can be raised at any time (Slip op. at 5-6), did not treat this issue.

nal plan or design." (*Ibid.*, quoting *De La Rosa* at 747.) The court of appeal saw that immunity as requiring the public to "affirmatively show the dangerous condition alleged by the plaintiff conformed to a plan or design." (Slip op. at 6-7.) But, in the court's view, section 850.4 does not require any affirmative showing by the public entity. It applies "if the complained-of injury resulted from the condition of a firefighting facility." (*Id.* at 7.)

The court of appeal also dismissed Professor Van Alstyne's statement that "'[s]tatutory immunities and limitations on liability are regarded as affirmative defenses' for purposes of pleading with particularity." (Slip op. at 7, quoting Van Alstyne, *supra*, § 3.76, p. 301.) The cases he cited, the court held, all involved immunities that also required factual showings by the public entity. (*Id.*)

But *McMahan's* is not alone in holding that section 850.4 is an affirmative defense. *Hata* recognized the holding in *McMahan's*, although the court distinguished section 850.4 from the immunity at issue in *Hata*, section 854.8. (*Hata*, *supra*, 31 Cal.App.4th at 1803.) In *Varshock*, *supra*, 194 Cal.App.4th 635 the court likewise held that section 850.4 "operates as an affirmative defense." (*Id.* at 659, citing *McMahan's* and other cases].)

Second, section 850.4 is not the only immunity courts have characterized as affirmative defenses. (See, e.g., *Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 418 [section 830.6, design immunity]; *Meddock v. County of Yolo* (2013) 220 Cal.App.4th 170, 174 [section 831.2, natural condition of property]; *Meyer v. City of Oakland* (1980) 107 Cal.App.3d 770, 772 disapproved of on unrelated grounds in *Teter v. City of Newport Beach* (2003) 30 Cal.4th 446, 452) [section 844.6, injury to prisoner]; *City of Burbank v. Superior Court* (1965) 231 Cal.App.2d 675, 684 [section 835.4, reasonableness of act or omission that created dangerous condition of property, of action to protect against risk, or of failure to act].)

2. *McMahan's* does not conflict with cases holding Claims Act immunities jurisdictional.

As noted in the statement of reasons to grant review, it is unclear how the courts holding some immunities jurisdictional use the multifaceted word, "jurisdiction." (2 Witkin Procedure, Jurisdiction, § 90.)

In its most fundamental or strict sense it means the power to adjudicate, and a lack of jurisdiction in this sense is "an entire absence of power to hear or determine the case, an absence of authority over the subject matter or parties." (*Abelleira, supra*, 17 Cal.2d at 288; *Kabran v. Sharp Mem. Hospital* (2017) 2 Cal.5th 330, 339.)

In a broader sense, "jurisdiction" means "the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of *stare decisis*...." (*Abelleira*, 17 Cal.2d at 291; *In re Marriage of Goddard* (2004) 33 Cal.4th 49, 56.) So, a court may have jurisdiction of the subject matter and the parties in the fundamental sense, but "it has no 'jurisdiction' (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites." (*Shaw v. Superior Court* (2017) 2 Cal.5th 983, 991, quoting *Abelleira*, 17 Cal.2d at 288.).

Sovereign immunity, the subject of the Government Claims Act, can be of either classification. "In its substantive aspect, sovereign immunity is concerned with immunity of a sovereign state and its governmental subdivisions and agencies from *liability*, except to the extent expressly permitted by statute. [Citations.] [¶] In its procedural aspect, sovereign immunity relates to the immunity from *suit* except with its *consent*." (2 Witkin Procedure, Jurisdiction § 90 [italics in original].)

Section 850.4 is jurisdictional only in the broad sense of the term. It defines only the power of the court to *act* in a proceeding. Nothing in the section suggest that it defines the court's power to *hear* such a proceeding.

Acts in excess of jurisdiction "are subject to bars including waiver (i.e., the intentional relinquishment of a known right) [citation] and forfeiture (i.e., the loss of a right through failure of timely assertion) [citation]." (*People v. Mower* (2002) 28 Cal.4th 457, 474, fn. 6.) Defendants here had ample opportunity to object to the court taking any action in this case by raising section 850.4 in their answer, by demurrer, by motion to strike, by motion for summary judgment. Yet they made no objection and allowed the court to set the case for trial, call a jury pool, swear the jury and commence trial. Defendants waived or forfeited the immunity of § 850.4.

CONCLUSION

The issues here are of first impression: whether section 850.4 extends beyond affording immunity for the defective condition of facilities used in fighting a fire, and whether the immunity is waived by the failure to allege it as an affirmative defense.

The issues have statewide impact on every governmental entity that provides fire protection and firefighting services, and on every person who suffers injury for which the Legislature has made a public entity or employee liable and, in an action seeking compensation for the injury, the defendant asserts section 850.4 immunity.

The court of appeal's decision is unsupported by the court's reasoning. It flies in the face of the stated legislative intent of the firefighting immunities and section 850.4 in particular.

The court should grant review and reverse the court of appeal.

Dated: May 30, 2017

JAY-ALLEN EISEN LAW CORPORATION

REINER & SLAUGHTER, LLP

By: _____

JAY-ALLEN EISEN,
Attorneys for Plaintiff and Appellant,
Rebecca Megan Quigley

CERTIFICATION

I certify, pursuant to rule 8.504, Subdivision (d)(1), California Rules of Court, that the attached **PETITION FOR REVIEW** contains 8,086 words, as measured by the word count of the computer program used to prepare this brief.

Dated: May 30, 2017

JAY-ALLEN EISEN LAW CORPORATION

By: _____
JAY-ALLEN EISEN

Filed 4/19/17

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Plumas)

REBECCA MEGAN QUIGLEY, Plaintiff and Appellant, v. GARDEN VALLEY FIRE PROTECTION DISTRICT et al., Defendants and Respondents.	C079270 (Super. Ct. No. CV1000225)

APPEAL from a judgment of the Superior Court of Plumas County, Janet Hilde, Judge. Affirmed.

Jay-Allen Eisen Law Corporation, Jay-Allen Eisen; Law Offices of Reiner & Slaughter, Russell Reiner, Todd E. Slaughter and April K. Gesberg for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Joseph A. Salazar, Jr., Jeffry A. Miller and Jonna D. Lothyan for Defendants and Respondents.

While assigned to fight a wildfire, plaintiff and appellant Rebecca Megan Quigley was severely injured when a water truck ran over her as she slept at the fire base camp.

She sued, inter alia, defendants and respondents Garden Valley Fire Protection District, Chester Fire Protection District, and their employees Frank DelCarlo, Mike Jellison, and Jeff Barnhart for damages, claiming she was injured as a result of their negligence, a dangerous condition of public property, and defendants' failure to warn. The trial court granted nonsuit against plaintiff's complaint on the bases that defendants were statutorily immune from liability and the firefighter's rule prevented plaintiff from recovering. Because we agree defendants are immune from liability for plaintiff's injuries, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In our review of a judgment of nonsuit, we " 'view the facts in the light most favorable to the plaintiff.' " (*O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 347.) Thus, "the court must accept as true all favorable facts asserted in the plaintiff's opening statement, indulge all legitimate inferences from those facts, and disregard all conflicting evidence." (*Ewing v. Northridge Hospital Medical Center* (2004) 120 Cal.App.4th 1289, 1296.)

The "Silver Fire" broke out in the Plumas National Forest on September 19, 2009. The United States Forest Service (the Forest Service) initially managed the effort to fight the fire. It set up a base camp at the Plumas County Fairgrounds. The base camp included a sleeping area for firefighters. Forest Service rules required the Forest Service, when establishing a camp, to provide a quiet, shaded sleeping area away from smoke, noise, and dust, to post signs designating the area, and to rope off the area.

The Plumas County Fairgrounds has a racetrack with a large grassy infield. The Forest Service set up a shower unit on the infield and arranged for an independent contractor to service the unit.[1] The unit included two 1,500-gallon bladders to hold

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[1] The independent contractor's potential liability is not an issue before us.

water: one bladder held fresh water and the other collected used water from the showers. Employees of the independent contractor would drive 30,000-pound water trucks onto the infield to service the bladders. The truck drivers were never given a map or directions showing where they could drive on the infield to access the bladders.

Fearing the fire might affect structures, the Forest Service called in a non-firefighting team, referred to as NorCal Team 1 (NorCal 1), to manage the fire and the base camp. NorCal 1 took control at noon, September 20. Individual defendants DelCarlo, Jellison, and Barnhart were members of NorCal 1. The three men, all retired Forest Service employees, became employees of defendant local fire agencies Chester Fire Protection District and Garden Valley Fire Protection District in order to serve on NorCal 1.

Plaintiff was a Forest Service firefighter on a hotshot crew working the Silver Fire. She and her crew returned to the base camp around 9:00 p.m., September 20, after fighting the fire all day. The designated sleeping area was full, so most of the crew members slept in and around some horse barns in filthy conditions. Not wanting to sleep there, plaintiff asked her supervisor if she could sleep on the infield. Her supervisor agreed. Other people were already sleeping on the infield in tents and in sleeping bags on the ground. Earlier that day, DelCarlo had ordered a California Conservation crew to sleep near the shower unit, and he had authorized a different hotshot crew to sleep on the infield. The infield was never signed or roped off as a sleeping area.

Plaintiff arose the next day, September 21, and left the base camp with her crew to fight the fire. During the day, Barnhart, a safety officer, inspected the camp, including the shower unit and the infield. He saw the tents erected in the infield by the California Conservation crew. Nevertheless, he recorded on a form that all sleeping areas were separated from parking, shaded, and posted as a "sleeping area (no vehicles allowed)."

Plaintiff came back to the base camp that evening around 9:00 p.m. As was the case the previous night, the designated sleeping area was full, so her crew returned to the filthy horse barns to sleep. Plaintiff again received permission to sleep on the infield. As she had the night before, plaintiff slept on the grass in her sleeping bag.

Around 10:00 p.m. that evening, an employee of the independent contractor drove his water truck onto the infield to service the shower unit. He retrieved the used water, and as he drove off the infield, he ran over plaintiff. The truck crushed plaintiff's chest, ribs, lungs and left shoulder, and it fractured her back. The accident permanently damaged her heart, lungs, and eyes.

Following plaintiff's opening statement at trial reciting the above facts, defendants moved for nonsuit. Defendants contended they were immune from liability under various provisions of the Government Claims Act (the Act) (Gov. Code, § 810 et seq.).[2] Of relevance here, defendants claimed they were not liable pursuant to the immunity provided by section 850.4, which immunizes public agencies and their employees against claims "for any injury resulting from the condition of fire protection or firefighting equipment or facilities or, 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." Defendants also contended they were not liable under the common law firefighter's rule, which generally prevents a firefighter from recovering damages for negligence that precipitated the summoning of the firefighter, including "when an officer is injured by the negligence of an officer from a different public safety agency in a joint operation." (*Terry v. Garcia* (2003) 109 Cal.App.4th 245, 253.)

Over plaintiff's opposition that the statutory immunity was waived and did not apply and that the firefighter's rule did not apply, the trial court granted defendants'

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[2] Undesignated statutory references are to the Government Code.

motion for nonsuit. Initially, the court ruled defendants had not waived their immunity defense because it is jurisdictional and can be raised at any time. Substantively, the court held defendants were immune from liability under section 850.4 because plaintiff's injuries were the result of the condition of a firefighting facility (the base camp) and were caused by fighting the fire. Following plaintiff's motion for new trial, the trial court reaffirmed its ruling that section 850.4 was a jurisdictional immunity that barred plaintiff's action and also held that the firefighter's rule barred plaintiff's action because she suffered her injuries during a joint response by different public agencies to a public safety incident.

DISCUSSION

Plaintiff contends the trial court erred in granting nonsuit because defendants waived their claim to statutory immunity and, regardless, the immunity does not apply because plaintiff was not injured by a condition of a firefighting facility giving rise to immunity under section 850.4. "We review the grant of a nonsuit de novo" (*Legendary Investors Group No. 1, LLC v. Niemann* (2014) 224 Cal.App.4th 1407, 1412), upholding the nonsuit "only where it is clear plaintiff's counsel has stated all facts he expects to prove and such facts do not constitute a cause of action" (*Sturgeon v. Curnutt* (1994) 29 Cal.App.4th 301, 305). Here, we conclude the trial court did not err in awarding nonsuit because section 850.4 immunizes defendants from liability for plaintiff's injuries and defendants did not waive their claim to immunity. In light of this conclusion, we need not decide whether the firefighter's rule would also apply to prevent plaintiff's recovery.

1.0 Waiver of Immunity

We first address and reject plaintiff's contention that defendants waived their claim to immunity under section 850.4 by not expressly and separately pleading that immunity in their answer. As the trial court determined, governmental immunity is

jurisdictional and may be raised at any time. (*Paterson v. City of Los Angeles* (2009) 174 Cal.App.4th 1393, 1404, fn. 5 ["Governmental immunity is a jurisdictional question (*Kemmerer v. County of Fresno* (1988) 200 Cal.App.3d 1426, 1435), and thus is not subject to the rule that failure to raise a defense by demurrer or answer waives that defense. (Code Civ. Proc., § 430.80, subd. (a).)"]; see *Richardson-Tunnell v. Schools Ins. Program for Employees (SIPE)* (2007) 157 Cal.App.4th 1056, 1061; *Buford v. State of California* (1980) 104 Cal.App.3d 811, 826.)

Plaintiff relies on *McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App.3d 683, at page 689 (*McMahan's*) to assert that in contrast to other governmental immunities, section 850.4 immunity is an affirmative defense that may be waived. *McMahan's* holds, without further elucidation, that the immunity afforded by section 850.4 "is considered an affirmative defense and must be pled and proven or is deemed waived." (*McMahan's*, at p. 689.) *McMahan's* was an inverse condemnation action arising from damage caused to the plaintiff's property by a broken water main. (*Id.* at p. 687.) On appeal, the city for the first time asserted it was immune from liability pursuant to section 850.4 because the water main was a fire protection facility. (*McMahan's*, at pp. 687-689.) *McMahan's* concluded the city waived the defense by not pleading it. (*Id.* at p. 689.)

In support of its holding, *McMahan's* cites *De La Rosa v. City of San Bernardino* (1971) 16 Cal.App.3d 739, at page 747, and a government tort liability treatise. (*McMahan's*, *supra*, 146 Cal.App.3d at p. 689.) We discuss each in turn. *De La Rosa* does not involve section 850.4, but instead discusses whether the design immunity of former section 830.6 is an affirmative defense. (*De La Rosa*, at pp. 746-748.) Under former section 830.6, the public entity was immune from liability "for maintaining a dangerous condition of public property *as long as the maintenance conforms to the original plan or design*." (*De La Rosa*, at p. 747, italics added.) Thus, to trigger the

immunity, the public entity had to affirmatively show the dangerous condition alleged by the plaintiff conformed to a plan or design. There is no such required showing for the immunity under section 850.4, which applies, as alleged in this case, if the complained-of injury resulted from the condition of a firefighting facility. Therefore, *De La Rosa* does not appear to support the conclusion of *McMahan's* that section 850.4 operates as an affirmative defense.

Neither does the cited government tort liability treatise, which broadly states that "[s]tatutory immunities and limitations on liability are regarded as affirmative defenses" for purposes of pleading with particularity. (Van Alstyne, Cal. Government Tort Liability Practice (Cont.Ed.Bar 1980) § 3.76, p. 301.) All of the examples cited by the treatise involve immunities conditioned on factual showings of, for example, reasonableness, existence of a design, purpose of a road, and circumstances under which an emergency vehicle is operated. (*Ibid.*) It does not address a statute like section 850.4, which provides absolute, not qualified, immunity for public entities and public employees. (See *Pacific Bell v. City of San Diego* (2000) 81 Cal.App.4th 596, 602; see also Recommendation Relating to Sovereign Immunity, Number 1 – Tort Liability of Public Entities and Public Employees (Jan. 1963) 4 Cal. Law Revision Com. Rep. (1963) p. 862 (Recommendation) ["Section 850.4 provides for absolute immunity from liability for injury . . . from failure to properly maintain fire protection equipment or facilities"].)

Therefore, we disagree with the conclusion of *McMahan's* that the absolute governmental immunity under section 850.4 may be waived if not raised as an affirmative defense. Rather, the immunity under section 850.4, like that discussed in *Hata v. Los Angeles County Harbor/UCLA Medical Center* (1995) 31 Cal.App.4th 1791, at pages 1802 through 1804, required no affirmative showing on the part of the public entity or public employee defendant claiming the immunity. Thus, the section 850.4 immunity could be raised at any time and was not waived.

2.0 Applicability of Immunity

Plaintiff challenges the applicability of section 850.4 to her claims against defendants. She does not appear to dispute that the base camp was a firefighting facility,[3] but argues instead that the *condition* of the base camp that caused her injuries was not one that affected the ability to fight a fire but was unrelated to fighting fires. Thus, she contends, it does not trigger the statutory immunity of section 850.4. We conclude plaintiff's proposed construction of section 850.4 is not supportable.

In construing section 850.4, we extend no deference to the trial court's interpretation, but instead review the question of law regarding statutory construction de novo. (*John v. Superior Court* (2016) 63 Cal.4th 91, 95.) " 'Our primary task in interpreting a statute is to determine the Legislature's intent, giving effect to the law's purpose. [Citation.] We consider first the words of a statute, as the most reliable indicator of legislative intent.' " (*Id.* at pp. 95-96.) Where the language is clear, we do not stray from its plain meaning "unless a literal interpretation would result in absurd

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[3] Nor would such a contention likely withstand scrutiny given the broad interpretation courts have given the term "facility" in this context. (*Heieck & Moran v. City of Modesto* (1966) 64 Cal.2d 229, 233 [closed valve in a city water system that prevented water from reaching a fire was a fire protection facility triggering immunity]; *New Hampshire Ins. Co. v. City of Madera* (1983) 144 Cal.App.3d 298, 303-305 [immunity even where water delivery system was not controlled by fire personnel]; *Lainer Investments v. Department of Water & Power* (1985) 170 Cal.App.3d 1, 8 [immunity where semiclosed valve was installed on private property]; *Cairns v. County of Los Angeles* (1997) 62 Cal.App.4th 330, 335-336 [closed road that fire personnel could not access when responding to a fire was a fire protection facility under § 850.4].) Neither would it suit the plain meaning of the term "facilities" to construe it as excluding the base camp. When section 850.4 was enacted, a facility was, in relevant part, "something that facilitates an action, operation, or course of conduct easier—[usually] used in [plural]" or "something (as a hospital) that is built, installed, or established to serve a particular purpose." (Webster's Seventh New Collegiate Dict. (1963) p. 298, col. 2.) To "facilitate" meant "to make easier." (*Ibid.*) Under these definitions, the base camp would qualify as a firefighting facility. It was a physical location and operation that made fighting the Silver Fire easier and was established to serve that particular purpose.

consequences the Legislature did not intend." (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.) And, "we are, absent contrary direction, bound to give the words the Legislature chose their usual and ordinary meaning." (*Bernard v. Foley* (2006) 39 Cal.4th 794, 807.) Neither are we permitted to "insert what has been omitted, or . . . omit what has been inserted." (Code Civ. Proc., § 1858.) But where "the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy" to discern the legislative intent. (*Coalition of Concerned Communities, Inc.*, at p. 737.) Regardless, we construe the language in the context of the entire statutory framework, with consideration given to the policies and purposes of the statute. (*Jones v. Superior Court* (2016) 246 Cal.App.4th 390, 397.)

The statute at issue, section 850.4, is part of the Act, enacted in 1963 following a report of the California Law Revision Commission (the Commission). (§ 810, subd. (b); Cal. Gov. Tort Liability Practice (Cont.Ed.Bar 4th ed. 2017) Legislative Response: Government Claims Act, § 1.40, p. 24.) Under the Act, " '[a] public entity is not liable for an injury,' '[e]xcept as otherwise provided by statute.' (§ 815, subd. (a); see *Guzman v. County of Monterey* (2009) 46 Cal.4th 887, 897 ['there is no common law tort liability for public entities in California . . . ']; *Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1179 ['the intent of the Tort Claims Act is to confine potential governmental liability, not expand it'].)" (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347 (*Hampton*).) However, pursuant to the Act, public entities may be liable "for injuries caused by maintaining dangerous conditions on their property when the condition 'created a reasonably foreseeable risk of the kind of injury which was incurred' and either an employee's negligence or wrongful act or omission caused the dangerous condition or the entity was on 'actual or constructive notice' of the condition

in time to have taken preventive measures. (§ 835; see *Cornette* [*v. Department of Transportation* (2001) 26 Cal.4th 63,] 66.)" (*Hampton*, at pp. 347-348.)

Even where a dangerous condition is demonstrated, however, a public entity may prevail if a specific statutory immunity applies. (See *Hampton*, *supra*, 62 Cal.4th at pp. 347-348.) One such immunity is codified in section 850.4, which together with sections 850[4] and 850.2,[5] specifically limits the liability that can arise from a public agency's decisions and actions regarding the provision of fire protection and firefighting services. Section 850.4, as mentioned above, provides that "[n]either a public entity, nor a public employee acting in the scope of his employment, is liable for any injury resulting from the condition of fire protection or firefighting equipment or facilities or, 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."

In construing the language of the statute, we note that with section 850.4, the Legislature apparently classified injuries into two groups: (1) "any injury resulting from the condition of fire protection or firefighting equipment or facilities," and (2) subject to a specific exception, "any injury caused in fighting fires." Use of the disjunctive "or" between the two clauses renders these two classes of injuries alternatives. (See *In re Jesusa V.* (2004) 32 Cal.4th 588, 622 ["The ' "ordinary and popular" ' meaning of the word 'or' is well settled. [Citation.] It has a disjunctive meaning: 'In its ordinary sense, the function of the word "or" is to mark an alternative. . . .' "].) Only the latter prong is, on its face, limited to injuries that are sustained in the course of an active engagement in

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[4] Section 850 states that "[n]either a public entity nor a public employee is liable for failure to establish a fire department or otherwise to provide fire protection service."

[5] Section 850.2 states 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."

fighting fires. And, there is nothing in the syntax of the statute to suggest that "in fighting fires" also modifies the first clause at issue here. (See *In re Application of Roberts* (1910) 157 Cal. 472, 474 [where statute contains clauses connected by disjunctive, the language used in one clause does not affect or modify words used solely in other clause, but each clause "is to be construed as if it stood alone and were read in connection with the general words applying to all"].) Thus, there is no language in the statute itself limiting the "condition of fire protection or firefighting equipment or facilities" to those related to the ability to fight fires.

Nonetheless, plaintiff asserts that a construction of section 850.4 that does not read "condition" as limited to conditions affecting the ability to fight fires is contrary to legislative intent. We disagree. The Act arose from a study of governmental tort liability prepared by the Commission. The Commission's report on its study, Recommendation, *supra*, 4 Cal. Law Revision Com. Rep. at page 801, was submitted to the Legislature and is a significant source for ascertaining legislative intent. The Commission also added a written comment to each new statute it proposed. These comments were also before the Legislature and were approved by the Senate Judiciary Committee and the Assembly Ways and Means Committee as an expression of their intent. (See *Milligan v. City of Laguna Beach* (1983) 34 Cal.3d 829, 831-832.)

As relevant to our construction of section 850.4, the Commission recommended that, "[e]xcept 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 combatting 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." (Recommendation, *supra*, 4 Cal. Law Revision Com. Rep. at p. 828, italics added.)

The Commission proposed that section 850.4 be enacted to read: "Neither a public entity, nor a public employee acting in the scope of his employment, is liable for any injury resulting from the condition of fire protection or firefighting equipment or facilities or, 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." (Recommendation, *supra*, 4 Cal. Law Revision Com. Rep. at p. 862.) The Commission's comment with respect to this section stated: "Section 850.4 provides for absolute immunity from liability for injury caused in fighting fires (other than injuries resulting from operation of motor vehicles) *or from failure to properly maintain fire protection equipment or facilities. 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 combatting fires by a fear that liability might be imposed if a jury believes such action to be unreasonable." (*Ibid.*, italics added.)

That the Commission in its comment again separates injuries "caused in fighting fires" from those that result "from failure to properly maintain fire protection equipment and facilities" supports our interpretation of the language of section 850.4 viewing these two classes of injuries as distinct. Additionally, that the Commission did not suggest limiting the immunity related to maintenance of fire protection equipment or facilities to those instances where the failure to maintain equipment or facilities affects the firefighters' ability to fight fires means the plain language of the statute is not contrary to stated legislative intent. Thus, while it may be possible to infer some contrary intent in the recommendation of the Commission, its comment to section 850.4 supports an

interpretation of the plain language of the statute that is not limited to conditions of firefighting facilities and equipment that affect the ability to fight fires.

Razeto v. City of Oakland (1979) 88 Cal.App.3d 349 (*Razeto*) came to the same conclusion. There, the plaintiffs sued public entities after vandals allegedly turned on a publicly-maintained fire hydrant causing a stream of water to be directed at the plaintiffs' house resulting in damage to the house and its contents. (*Id.* at pp. 350-351.) *Razeto* considered whether the trial court properly awarded summary judgment based on the conclusion that section 850.4 applied to immunize the defendants for injuries caused by firefighting equipment. (*Razeto*, at p. 351.) To that end, *Razeto* reviewed the legislative history of section 850.4. It noted that prior to 1961, public entities could be held liable for dangerous and defective property conditions, including "dangerous and defective fire department property." (*Razeto*, at pp. 351-352.) After sovereign immunity was generally eliminated by *Muskopf v. Corning Hospital Dist.* (1961) 55 Cal.2d 211, at page 221, the Commission was engaged to develop legislation to preserve necessary sovereign immunity. (*Razeto*, at p. 352.)

Razeto noted that immunity for firefighting activities had not previously been extended to include defective or dangerous fire equipment when the injury did not occur during the fighting of a fire, and that it would seem to be inconsistent with the recommendations and policy rationale set forth in the Recommendation "to find that section 850.4 was designed to provide immunity for dangerous and defective fire protection equipment which causes injury or property damage *while not in use fighting fires*." (*Razeto*, *supra*, 88 Cal.App.3d at pp. 351-352, italics added.) Nonetheless, *Razeto* concluded, "[t]he [Commission's] comment to [section] 850.4 states in clear terms that immunity is to be provided for dangerous and defective fire protection equipment." (*Id.* at pp. 352-353.) "Hence, although there is an inferable contrary intent, the statute is clear and unambiguous. It explicitly provides sovereign immunity for any injury resulting

from the 'condition of fire protection or firefighting equipment.' In the face of that clear statutory language we are not at liberty to use a remotely inferable contrary legislative intention to show that a different meaning should be given to the statute." (*Id.* at p. 353.) Therefore, *Razeto* held, section 850.4 acted to immunize the public entity defendants from liability. (*Razeto*, at p. 353.)

Varshock v. Department of Forestry & Fire Protection (2011) 194 Cal.App.4th 635 and *Potter v. City of Oceanside* (1981) 114 Cal.App.3d 564 do not persuade us otherwise. *Varshock* concerned whether section 850.4's other ground for imposing immunity—for "any injury caused in fighting fires"—barred recovery where firefighters unsuccessfully used a fire truck to attempt to rescue persons from a home involved in a wildfire. (*Varshock*, at pp. 642-643.) *Potter* involved a fire captain who was summoned to the scene where the plaintiff had broken a natural gas line while operating a trenching machine. When the plaintiff started the machine as directed by the fire captain, the escaping gas exploded. The sole issue on appeal was whether section 850.4's immunity for "injuries caused by fighting fires" applied. The Court of Appeal ruled it did not, as the negligence was the captain's directions, not the resulting fire. (*Potter*, at pp. 565-566.) Thus, both *Varshock* and *Potter* are inapposite to consideration of the scope of the immunity for injuries "resulting from the condition of fire protection or firefighting equipment or facilities" because neither interpreted that language.

We also disagree with plaintiff that our interpretation of the statute will lead to absurd results. She offers several examples of potential sympathetic factual scenarios, which are unavailing for two primary reasons. First, for many of the examples she proffers, there is an adequate incentive for firefighters to maintain the facilities and equipment to avoid the risk of potential injury. For example, if a group of visitors were injured while at the base camp by slipping in a puddle, or if a fuel tank were left in an unstable position and fell over, sparking an explosion, the firefighters would be at as

great a risk of injury as the visitors. Thus, the firefighters and public agencies are adequately incentivized to exercise care to avoid the occurrence of those potential risks. Second, her other proffered examples are generally remedied through other means. Most firefighters injured on the job in California would be able to recover for injuries incurred as a result of a "condition of fire protection or firefighting equipment or facilities" pursuant to the California Workers' Compensation and Insurance Act. (See § 814.2 [the immunities of the Act do not override the Workers' Compensation and Insurance Act].) Thus, if as plaintiff conjectures, a firefighter were electrocuted by faulty wiring while showering at the base camp or fire station or if a firefighter slipped on wet stairs at the firehouse, she generally would have an adequate alternate remedy.[6] Thus, we are not persuaded an unconstrained construction of the term "condition" in the first prong of section 850.4 leads to absurd results.

Moreover, while a broad construction of section 850.4 that provides immunity regardless of whether the nature of the condition affects the ability to fight fires may occasionally yield results that seem unjust, that unbridled construction is supported by the plain language of the statute and is not contradicted by other evidence of legislative intent. One must recall that immunity from tort liability does not deny that a tort occurred, but absolves the favored defendant from the resulting liability to reflect a public policy priority. (*Whitcombe v. County of Yolo* (1977) 73 Cal.App.3d 698, 705.) Here, the Legislature intended to give fire protection agencies as much latitude as necessary to fulfill their mission. (See Recommendation, *supra*, 4 Cal. Law Revision Com. Rep. at pp. 827-829, 861-863.) If the Legislature believes the immunity sweeps too far, it has the power to tighten its scope. We will not assume its role.

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[6] This is not true in this unusual case because plaintiff, as a federal employee, is not covered by the California Workers' Compensation and Insurance Act.

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal. (Cal. Rules of Court, rule 8.278(a).) ***(CERTIFIED FOR PUBLICATION)***

/s/
BUTZ, Acting P. J.

We concur:

/s/
DUARTE, J.

/s/
HOCH, J.

PROOF OF SERVICE
(CCP Sections 1013a, 2015.5)

I, Michelle Micciche, declare:

I am employed in the County of Sacramento, State of California. I am over the age of eighteen years and not a party to the within cause. My business address is 1000 G Street, Suite 210, Sacramento, California 95814.

On May 30, 2017, I served the within **PETITION FOR REVIEW** as follows:

Todd E. Slaughter **Reiner & Slaughter** **P.O. Box 494940** **2851 Park Marina Drive, Suite 200** **Redding, CA 96049-4940** **[Attorneys for Plaintiff and Appellant: Rebecca Megan Quigley]**	**Jeffry Albin Miller** **Lewis Brisbois Bisgaard & Smith LLP** **701 B Street, Suite 1900** **San Diego, CA 92101** **[Attorneys for Defendants and Respondents: Garden Valley Fire Protection District, et al.]**
Appeals Clerk **Plumas County** **Superior Court** **520 Main Street, #104** **Quincy, CA 95971**	**Clerk** **Third District Court of Appeal** **914 Capitol Mall, 4th Floor** **Sacramento, CA 95814**

There is delivery by United States mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on May 30, 2017 at Sacramento, California.

MICHELLE MICCICHE