Case No. S242250

IN THE SUPREME COURT OF CALIFORNIA

REBECCA MEGAN QUIGLEY,

Plaintiff and Appellant,

v.

GARDEN VALLEY FIRE PROTECTION DISTRICT, et al.,

Defendants and Respondents.

Court of Appeal of the State of California, Third Appellate District
2nd Civil No. C079270
Superior Court of the State of California, County of Plumas
Case No. CV1000225
The Honorable Janet Hilde, Judge Presiding

APPELLANT'S OPENING BRIEF ON THE MERITS

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INITIAL
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. Rules of Court, Rule 8.208)

This form is being submitted on behalf of **Plaintiff and Appellant REBECCA MEGAN QUIGLEY**.

There are no interested entities or persons that must be listed in this certificate under rule 8.208.

DATED: November 22, 2017

JAY-ALLEN EISEN LAW CORPORATION

By: _____

JAY-ALLEN EISEN
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ISSUE

"The issue to be briefed and argued is limited to the following: Whether, as the Court of Appeal held, the governmental immunity set forth in Government Code section 850.4 may be raised for the first time at trial." (8/23/17 Dkt. Entry; *see* rule 8.520(b)(2)(A), Cal. Rules of Court.)

INTRODUCTION

After four years of litigation, at the start of trial defendants and respondents moved for, and the trial court granted, nonsuit based on a defense that defendants had never before raised, even though it had been available to them from the outset of the case.

Plaintiff, Rebecca ("Becky") Quigley, then a U.S. Forest Service firefighter, was severely injured when a 15-ton truck rolled over her while she slept in a designated sleeping area of the base camp for the fire. The camp was under the management of the defendant and respondent fire protection districts. Against federal law, they did not provide minimum protections for sleeping firefighters by signing and roping off the sleeping area. Quigley filed this action seeking damages for her injuries resulting from a dangerous condition of public property.

Defendants actively litigated the action over the next four years. At trial, after Quigley's counsel finished his opening statement, defendants moved for nonsuit. For the first time, they asserted an immunity under the Government Claims Act that they had never before mentioned, Government Code section 850.4, which provides in relevant part, "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...." Quigley's injuries, they argued, resulted from a condition of the base camp, which they characterized as a firefighting facility.

Defendants' answer to Quigley's complaint alleged 38 affirmative defenses; 11 asserted Government Code immunities. Section 850.4 was not one of them. When asked in interrogatories to state all facts supporting each affirmative defense, defendants' answer was more than two pages but there was not a word about section 850.4 immunity. Defendants moved for summary judgment based on statutory immunities pleaded as affirmative defenses. The motion did not mention section 850.4. They held back the defense until the start of trial, then sprang it on Quigley and the court.

In opposing the nonsuit motion, Quigley argued that defendants had waived section 850.4 immunity by failing to allege it as an affirmative defense, citing authority squarely on point. The trial court rejected the argument, holding that the immunity is jurisdictional and can be raised at any time. The court of appeal agreed and affirmed. The court was wrong.

Defendants failure to plead section 850.4 as an affirmative defense and waiting until trial to raise it for the first time waived the immunity. As a basic matter of pleading, to ensure fairness in litigation and judicial efficiency and economy, a defendant must allege matter that adds a new issue to the case as an affirmative defense. Defendants' claim of section 850.4 immunity presented a new issue. Quigley's complaint for a dangerous condition of public property did not have to, and did not, allege that the base camp was a firefighting facility.

California authority squarely on point holds that failure to allege section 850.4 as an affirmative defense waives the immunity. Other cases and authorities agree. Courts throughout the country hold that an immunity must be pleaded as an affirmative defense in a government tort action, or asserting the immunity for the first time after actively litigating the case for a substantial time waives the immunity.

The court of appeal wrongly held that that defendants did not waive section 850.4 as the immunity is jurisdictional and can be raised at any

time. California courts have jurisdiction to adjudicate tort claims against governmental agencies for dangerous conditions of public property. Governmental immunity does not completely deprive the courts of all power to adjudicate such claims. Governmental immunity is a personal privilege; the government may consent to suit or waive the privilege. Were immunities jurisdictional in the sense that they divest courts of power to adjudicate and can be raised at any time, a judgment against a government agency would never be final as long as an immunity could be asserted.

A claim of governmental immunity is an issue that deserves speedy determination. Allowing the government to litigate actively and delay asserting an immunity is contrary to the very purpose of immunities, of Allowing the government to raise a tardy claim of immunity after vigorously litigating a case is not only contrary to the policies of fair, orderly litigation and promoting judicial economy and efficiency, it is contrary to the proper administration of justice and the very purpose of governmental immunity.

The court of appeal's decision should be reversed.

SUMMARY OF FACTS AND PROCEDURE

The Silver Fire broke out in Plumas National Forest on September 19, 2009. (Slip op. at p. 2.)[1] 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 posting signs to designate a sleeping area and roping it off. (*Ibid.*)

The rules are set forth in the Forest Service's Health and Safety Code Handbook, FSH 6709.11 ("Health and Safety Code"), which is "the primary source of standards for safe and healthful workplace conditions ...

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

and operational procedures and practices in the Forest Service...." (Slip op. at p. 2; Health and Safety Code, Zero Code, p. 0-3.)[2] The requirements for sleeping areas are included in § 25.13b, p. 20-87, ¶ 9. The Code requires that sleeping areas must be signed and roped off. "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.*)

Authorized sleeping area not signed or roped off

The base camp was managed by a team of non-firefighters, NorCal Team 1. (*Ibid.*) The team included Frank DelCarlo, the facility unit leader, Mike Jellison, the logistics chief, and Jeff Barnhart, the camp safety officer. (Slip op. at p. 3; RT 14-15.) All three were retired U.S. Forest Service firefighters. (*Ibid.*) In managing the camp, they were employees of the defendant local fire agencies, Chester Fire Protection District and Garden Valley Fire Protection District. (Slip op. at p. 3.)

The fairground has a racetrack with a large, grassy infield. (Slip op at p. 2.) The Forest Service set up a portable shower unit on the infield. (*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 pp. 2-3.) Employees of an independent contractor drove water trucks weighing up to 30,000 pounds to service the bladders. (*Id.* at p. 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.*)

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[2] 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.*); Health and Safety Code, Zero Code § 01 - Authority, p. 0-3.

DelCarlo authorized the use of the infield as a sleeping area for firefighters. (*Ibid.*) Despite the command of the Health and Safety Code, the infield sleeping area was neither signed nor roped off. (*Ibid.*)

Quigley permitted to sleep in authorized area

Quigley was a Forest Service firefighter, a member of a "hotshot" crew called to fight the fire. (*Ibid.*). At about 9 p.m. on September 20 after her shift fighting the fire, she and her crew returned to the base camp. (*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 area where DelCarlo had authorized firefighters to sleep and where others 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.*)

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.*) He recorded on an inspection form that all sleeping areas were separated from parking and posted, "'sleeping area (no vehicles allowed),'" but the sleeping area was still neither signed or roped off. (*Ibid.*)

Run over while sleeping by heavy truck

That night, Quigley returned to the camp at about 9:00. (*Id.* at p. 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 the area DelCarlo had authorized for sleeping. (*Ibid.*)

About 10:00 that night, an employee of the independent contractor that serviced the showers drove his truck across the infield to reach the bladders. (*Ibid.*). He drained the grey-water bladder into the truck. (*Ibid.*) As he drove off 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.*)

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 were $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. (*Ibid.*) These damages do not include general damages—loss of enjoyment of life, pain and suffering she will have the rest of her life; she is expected to live to the age of 82. (RT 50-51.)

Nonsuit

In July 2010, Quigley filed this action against defendants alleging dangerous condition of public property and other causes of action. (§ 835; 1 AA 12-14; 2 AA 405 [Register of Action].) Defendants generally denied the allegations of the complaint; they also alleged 38 affirmative defenses. (1 AA 57-65.) Eleven of the defenses asserted immunities under the Government Claims Act, Government Code sections 810 et seq. (the Act or Claims Act).[3] (1 AA 60-62.) But they did not allege immunity under section 850.4.

Trial commenced on February 2, 2015, more than four years after the complaint was filed. (2 AA 410 [Register of Action].) After jury selection, on February 4, Quigley's counsel made his opening statement. (RT 1-51.) When he finished, defendants' counsel presented a written motion for nonsuit and supporting points and authorities arguing that they were not liable under various provisions of the Act. (Slip op. at p. 4; 1 AA 68-74; RT 52.) Defendants asserted, for the first time after more than four

[3] All further unspecified statutory references are to the Government Code.

years of litigating the action, that they were immune under section 850.4. (Slip op. at p. 4; 1 AA 72-73.) Defense counsel admitted that it was an argument "that I don't think the Court has seen." (RT 57.)

In opposing the motion, Quigley's counsel argued that defendants had waived the immunity by failing to allege it as an affirmative defense or otherwise raise it prior to trial. (Slip op. at 4; 1 AA 99.)

After oral argument and briefing, the court granted nonsuit. (Slip op. at pp. 4-5.) The court held that defendants did not waive the immunity by not asserting it before trial as it is jurisdictional and can be raised at any time. (Slip op. at p. 5). The court subsequently denied Quigley's motion for new trial. (*Ibid.*; 2 AA 389.)

The court of appeal affirmed, holding that defendants had not waived section 850.4 immunity by waiting to raise the issue until Quigley's counsel finished his opening statement at trial. "[G]overnmental immunity," the court held, "is jurisdictional and may be raised at any time. [Citations.]" (*Id.* at pp. 4-5.)

ARGUMENT

I.

THE ACT MAKES PUBLIC AGENCIES LIABLE FOR INJURIES RESULTING FROM A DANGEROUS CONDITION OF PUBLIC PROPERTY

The modern law of government tort liability begins with this Court's decision in *Muskopf v. Corning Hosp. Dist.* (1961) 55 Cal.2d 211, in which the Court "discarded" the centuries-old rule of sovereign or governmental immunity as "mistaken and unjust." (*Id.*, 55 Cal.2d at p. 213, and see *id.* at 215, fn. 1.) Simultaneously, in the companion case, *Lipman v. Brisbane Elementary School District* (1961) 55 Cal.2d 224, the Court suggested that the immunity of public officers and employees for discretionary acts might not extend to public entities in all cases. Consequently, public entities

became generally liable for torts. (See Van Alstyne, et al., Cal. Government Tort Liability Practice (Cont.Ed.Bar. 2017) § 1.39, pp. 1-23-24 [CEB Govt. Tort Liability].)

The Legislature responded by enacting what was then referred to as the Tort Claims Act (Gov. Code §§ 810–996.6), now named the Government Claims Act. (§ 810, subd. (b).)

Muskopf rested on the fundamental principle that "when there is negligence, the rule is liability, immunity is the exception." (*Id.*, 55 Cal.2d at p. 219.) *Muskopf* indicated that the Legislature may determine the scope of tort liability of public entities. (*Id.* at p. 218). Although the Legislature has defined the scope of governmental tort liability in the Act, it did not alter that basic axiom of *Muskopf* or its corollary that "courts should not casually decree governmental immunity...." (*Johnson v. State of California* (1968) 69 Cal.2d 782, 798; see also, *Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 792; *Williams v. State of California* (1983) 34 Cal.3d 18, 34; *Baldwin v. State of California* (1972) 6 Cal.3d 424, 435-436; *Ramos v. County of Madera* (1971) 4 Cal.3d 685, 692.)

Thus, as the Court has repeatedly stated, "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." (*Milligan v. City of Laguna Beach* (1983) 34 Cal.3d 829, 832, quoting *Ramos*, *supra*, 4 Cal.3d at p. 692 (court's italics added in *Milligan*); see also, *e.g.*, *Baldwin*, *supra*, 6 Cal.3d at p. 436; *Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 814.)

Section 835 makes a public entity liable for injuries caused by a dangerous condition maintained on its 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." (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347–348.) Quigley alleged, and was prepared to present evidence at trial, that her injuries resulted from a dangerous condition of public property that defendants negligently created —the unsigned and unprotected infield sleeping area—that exposed sleeping firefighters to an unreasonable risk of harm from traffic passing through the infield. (1 AA 12-13, ¶ 39.)

In some cases, most recently in *DiCampli-Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983, 991, the Court has said that the intent of the Act "is not to expand the rights of plaintiffs in suits against governmental entities, but to confine potential governmental liability to rigidly delineated circumstances." The negligence of defendants here in creating and maintaining the dangerous condition of property that caused Quigley's injuries is one of those delineated circumstances. (§ 835.)

II.

DEFENDANTS WAIVED THE AFFIRMATIVE DEFENSE OF SECTION 850.4 IMMUNITY BY NOT RAISING IT UNTIL TRIAL

A. Section 850.4 is waived if not pleaded as an affirmative defense.

In *McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App.3d 683, disapproved on unrelated grounds by *Bunch v. Coachella Valley Water Dist.* (1997) 15 Cal.4th 432, 447-448, the court held squarely that section 850.4 immunity is an affirmative defense that "must be pled and proven or is deemed waived." (*McMahan's* at p. 689; see also *Varshock v. California Dept. of Forestry and Fire Protection* (2011) 194 Cal.App.4th 635, 651 [§ 850.4 "operates as an affirmative defense"]; *Hata v. Los Angeles County Harbor/UCLA Medical Center* (1995) 31 Cal.App.4th 1791, 1802, quoting *McMahan's*.)

Other authorities agree. "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 ed. 2008 and 2017 supplement) Pleading, § 1107, at p. 535 [Witkin Procedure].) "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; "Governmental immunities will be considered to have been waived unless they are pleaded in the answer as affirmative defenses." Cal. Civil Practice: Torts (West Group 2017 update) § 29:27].)

Other jurisdictions agree that governmental immunity from tort liability is an affirmative defense that must be pleaded. (E.g., *Washington v. Whitaker* (1994) 317 S.C. 108, 114–15 and fn. 7 [collecting cases].)

Despite the concurrence among these authorities, the Court of Appeal held in the present case that the holding in *McMahan's* that section 850.4 must be pleaded or it is waived was not supported by the authorities it cited, *De La Rosa v. City of San Bernardino* (1971) 16 Cal.App.3d 739 and CEB Government Tort Liability. (Slip op. at pp. 6-7.) In the Court of Appeal's view, both authorities dealt with immunities that required the public entity defendant to make affirmative factual showings, such as that a dangerous condition of public property "conformed to a plan or design ... reasonableness, existence of a design, purpose of a road, and circumstances under which an emergency vehicle is operated." (*Id.* at p. 7) In the Court of

Appeal's view, however, "[t]here 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." (*Ibid.*)

The court's view is flawed.

Section 850.4 immunity has two elements: (1) there must be "fire protection or firefighting ... facilities," and (2) the plaintiff's injury must have resulted from a condition of those facilities. Defendants waived section 850.4 immunity by failing plead facts in an affirmative defense that could establish those elements and put Quigley and the trial court on notice prior to trial that they were asserting the immunity.

B. Defendants were required to allege all immunities on which they intended to rely at the outset of the case.

1. New matter that defendant has the burden to establish must be alleged as an affirmative defense.

Code of Civil Procedure section 431.30, subdivision (b) prescribes the content of an answer to a complaint. In addition to general or specific denials of allegations of the complaint, the answer "shall contain" any affirmative defenses—i.e., "[a] statement of any new matter constituting a defense." (*Id.*, subd. (b)(2).) This has been the rule almost since statehood. The language is taken verbatim from the Practice Act of 1851. (Stats. 1851, ch. 5, p. 57, § 46.)

Soon after the Practice Act was enacted, this Court stated that "[n]ew matter is that which, under the rules of evidence, the defendant must affirmatively establish." (*Piercy v. Sabin* (1858) 10 Cal. 22, 27.) The Court recently reiterated that truism. (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 239 [quoting *Piercy*].)

"New matter" is matter alleged for the first time that adds a new issue to the case that the complaint has not presented. *(Rancho Santa*

Margarita v. Vail (1938) 1 Cal.2d 501, 543.) In other words, "If the *onus* of proof is thrown upon the defendant, the matter to be proved by him is new matter." (*Piercy*, *supra*, 10 Cal. at p. 27; see also *Harris*, *supra,* 56 Cal.4th at p. 239 [quoting *Piercy*].)

2. Requiring defendant to plead new matter as an affirmative defense ensures fair, orderly litigation and affords judicial efficiency and economy.

An answer, like other pleadings, "is not merely a ticket to the courtroom which may be discarded after admission." (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 381.) "The primary function of a pleading is to give the other party notice so that it may prepare its case...." (*Harris*, *supra,* 56 Cal.4th at p. 240, citing *Leet v. Union Pacific Railroad Co.* (1944) 25 Cal.2d 605, 619, cert. den. sub. nom. *Union Pacific Railroad Company v. Leet* (1945) 325 U.S. 866, 65 S.Ct. 1403, 89 L.Ed. 1986 ["The essence of the matter is fairness in pleading...."])

Before the Practice Act, a defendant could only deny or admit allegations of the complaint in its answer, but the mere denial entitled the defendant to present "almost every conceivable defense" at trial. (*Piercy, supra* at p. 27.) The Legislature abolished that procedure in the Practice Act and adopted "the true and just rule," making it "certain that where new matter exists it must be stated in the answer." (*Ibid.*)

Accordingly, in *Piercy*, the court described the rule requiring a defendant to affirmatively allege new matter as "one of the most beneficial and obvious improvements upon the former system" under which defendant could merely deny the complaint, then raise any and all defenses for the first time at trial. (*Piercy*, *supra*, 10 Cal. at p. 27). "Each party is distinctly apprised of all the allegations to be proven by the other; and each is, therefore, prepared to meet the proofs of his adversary." (*Ibid.*) This serves the purpose of simplicity and economy by requiring both the

complaint and the answer "to be so framed as not only to apprise the parties of the facts to be proved by them, respectively, but to narrow the proofs upon the trial." (*Ibid.*)

> "[I]f the defendant, under his simple denial, is permitted to prove almost everything in discharge of the action, the plaintiff cannot know how to avoid surprise upon the trial, unless he comes prepared to meet every possible ground that may be taken by the defendant. The result is a great and unnecessary increase of costs in many cases."

(*Id.* at p. 28.)

"A plaintiff comes to court prepared to prove his case and to meet affirmative defenses pleaded in the answer. He could not be expected to meet special defenses which are not pleaded and has a right to be protected against them." (*Jetty v. Craco* (1954) 123 Cal.App.2d 876, 880.)

These considerations are especially pertinent when the defendant is a government agency that intends to assert an immunity defense. To paraphrase the Ninth Circuit slightly,

> "Timely disclosure provides fair warning to the plaintiff, who can amend the complaint, dismiss the action, ... or request a prompt ruling on the [immunity] defense before the parties and the court have invested substantial resources in the case. Timely disclosure also facilitates discovery, when appropriate, and allows the parties to establish a full record for appellate review. Requiring the prompt assertion of an [immunity] defense also minimizes the opportunity for improper manipulation of the judicial process."

Hill v. Blind Industries and Services of Maryland, (9th Cir. 1999) 179 F.3d 754, 758.

Since an immunity defense, if successful, is dispositive, plaintiff should have the opportunity to resolve an issue of immunity as early as possible, before incurring the financial and other burdens of litigation, and before the court is compelled to expend valuable resources on the case. If an immunity is raised as an affirmative defense, a demurrer or motion for judgment on the pleadings may be available. If the demurrer is overruled or the motion to strike denied, plaintiff will be entitled to conduct discovery to determine whether there is evidence of facts supporting the immunity.

Plaintiff will also be entitled to move for summary judgment or summary adjudication of the immunity defense by showing that undisputed facts "negate an essential element of the defense, or establish the defendant does not possess and cannot reasonably obtain evidence needed to support the defense." (*See's Candy Shops, Inc. v. Superior Court* (*Silva*) (2012) 210 Cal.App.4th 889, 900.)

If an immunity is not alleged as a defense, however, none of these means of testing and determining the issue of immunity prior to trial are unavailable. Plaintiff cannot demur to or move for judgment on the pleadings regarding an affirmative defense that has not been pleaded. There is nothing to demur to or on which to enter judgment.

Plaintiff cannot conduct discovery on an immunity as to which defendant is mute prior to trial. And plaintiff can hardly move for summary judgment or summary adjudication as to an immunity defendant has pleaded, particularly as "the pleadings determine the scope of relevant issues on a summary judgment motion," (*Nieb v. Blue Shield of California Life & Health Insurance Co.* (2010) 181 Cal.App.4th 60, 74.

And, it cannot be overlooked that, as with all affirmative defenses, requiring the defendant to plead an immunity as an affirmative defense benefits the court. If the immunity is dispositive, requiring defendant to plead it as an affirmative defense affords judicial economy and efficiency.

It relieves the court of the burdens of supervising the litigation of the case from the initial pleadings through discovery, motions, pretrial proceedings, calling and impaneling a jury, and trial, not to mention the additional burden of having to consider a new issue at the last minute that must be resolved immediately to determine whether the trial can even proceed.

"Pleadings on the part of a defendant generally are for the purpose of narrowing the issues and thus saving the time of the court." (*Fleming v. Bennett* (1941) 18 Cal.2d 518, 522.) When an immunity is not raised until trial, if the court finds it dispositive, all of the time and effort the court has expended on the case prior to the belated assertion of the immunity will have been a waste.

C. Section 850.4 immunity is new matter that must be pleaded as an affirmative defense.

1. Defendants' assertion of the immunity introduced a new issue not presented in the complaint.

Defendant's first-time-at-trial assertion of section 850.4 immunity added a new issue to the case. Quigley's cause of action for dangerous condition of public property did not plead, nor was she required to plead, that the public property where she was injured was not a firefighting facility. The essential facts Quigley had to prove on her dangerous condition cause of action were that:

(1) the fire district defendants controlled the fairgrounds;

(2) the property was in a dangerous condition at the time of the incident;

(3) the dangerous condition created a reasonably foreseeable risk of the kind of incident that occurred;

(4) negligent or wrongful conduct of employees of the fire departments acting within the scope of their employment created the

dangerous condition or had notice of the dangerous condition for a long enough time to have protected against it;

(5) Quigley was harmed; and,

(6) the dangerous condition was a substantial factor in causing her harm.

(CACI No. 1100; §§ 830, 835.)

Defendants generally denied her complaint. (1 AA 57.) The general denial was not sufficient to raise the immunity, an affirmative defense. (Code Civ. Proc. § 431.30, subd. (b) [distinguishing between requirements to plead general denial and separately plead affirmative defenses]; *FPI Development, supra*, 231 Cal.App.3d at p. 383 ["What is put in issue by a denial is limited to the allegations of the complaint."].)

2. Section 850.4 requires a defendant to make an affirmative factual showing that plaintiff's injury resulted from a condition of firefighting equipment or facilities that affect the ability to fight a fire.

Like nearly all provisions of the Act, section 850.4 was enacted at the recommendation of the Law Revision Commission. (Recommendation Relating to Sovereign Immunity (Jan. 1963) 4 *Cal. Law Revision Com. Rep.* (1963) pp. 827-829, 862.) 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 v. City of Oakland* (1979) 88 Cal.App.3d 349, 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; see also *Varshock*, 194 Cal.App.4th at 647 [regarding Commission's comments on § 850.4; *Heimberger v. City of Fairfield* (1975) 43 Cal.App.3d 711, 714 [same].)

As the Court of Appeal recognized, section 850.4 immunity is grounded on the principle 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 p. 862 [court's italics].) Likewise, in its comment to section 850.4, the Commission stated that the statute "'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 maintaining and repairing equipment or facilities is to keep them in good operating order so they may be used effectively to fulfill their purpose. 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, supra*, 88 Cal.App.3d at p. 353 [italics added].)

Heieck and Moran v. City of Modesto (1966) 64 Cal.2d 229 illustrates. There, city employees working on the municipal water system closed a valve in a main serving nearby fire hydrants but neglected to reopen it. As a result, the hydrants could not supply water to contain a fire that spread to plaintiff's property. (*Id.* at pp. 230-231.) This Court held the city immune from liability for the damage, which the Court viewed in part as resulting "from the closed 'condition' of the water valve (§ 850.4)...." (*Id.* at p. 233.)

Heieck and Moran is the only case in which this Court has considered section 850.4. The Court 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* (1988) 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 Veh. Code, § 17001].)[4]

Courts of appeal have followed *Heieck and Moran* in cases involving the same or 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 connector controlled by city between city water main and sprinkler system in private building].)

Other section 850.4 cases also involved conditions that rendered facilities used in combating fires ineffective or inoperable. (See *Cairns v. County of Los Angeles* (1997) 62 Cal.App.4th 330 [road to plaintiffs' homes closed, preventing fire fighters from reaching their homes in time to prevent damage from wildfire]; *Cochran v. Herzog Engraving Co.* (1984) 155 Cal.App.3d 405 [extinguishers inadequate to quench fire]; *State of California v. Superior Court (Nagel)* (2001) 87 Cal.App.4th 1409 [defective condition of airplane used to drop fire retardant].)

In each of these cases, the conditions that resulted in loss or injury were conditions of equipment or facilities "'involved in the conduct of *the actual firefighting operation*.'" *Varshock*, 194 Cal.App.4th at 649, quoting L. Rev. Com. Rep. at 828 (court's italics).

Thus, defendants had the burden to prove, and the obligation to allege as an affirmative defense, that Quigley's injuries resulted from a condition that impaired the operation, usefulness, or effectiveness of equipment or facilities employed in actual firefighting.

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[4] The Court has cited *Heieck and Moran* only once, for its holding that the 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 v. State of California* (1972) 6 Cal.3d 424, 438-439.)

D. Defendants failed to raise section 850.4 immunity before trial.

As noted, defendants' answer alleged thirty-eight affirmative defenses. (1 AA 58-65.) Eleven of those defenses asserted immunity under fifteen cited sections of the Act, but only in conclusory terms, without a single allegation of fact. (1 AA 60-62.) None, however, cited section 850.4, or made factual allegations that Quigley's injuries resulted from the condition of firefighting or fire protection facilities.

Compounding their failure to allege section 850.4 immunity as a defense, defendants did not disclose facts or evidence supporting the immunity in discovery. Form interrogatory 15.1 asked defendants to state for each affirmative defense in their pleading "all facts upon which you base the ...special or affirmative defense...." (1 AA 151, ¶¶ 3-5.) In a supplemental response, defendants stated more than two pages of facts. (1 AA 167-169.) None, however, stated facts or disclosed evidence that would give rise to section 850.4 immunity—that Quigley's injuries arose from a condition of a firefighting facility.

Defendants moved for summary judgment, asserting that undisputed facts supported five of the statutory immunities they had asserted in their answer. (1 AA 212-214.) But they still did not mention section 850.4. Nor did they assert as undisputed facts that the Silver Fire base camp was a fire protection or firefighting facility or that Quigley's injuries resulted from a condition of such a facility. (1 AA 223-272.)

By not raising section 850.4 immunity until trial commenced, defendants violated the command of Code of Civil Procedure section 431.30 to include in their answer "[a] statement of *any* new matter constituting a defense." (*Id.*, subd. (b)(2) [emphasis added). Public entities are as subject to pleading requirements as private litigants.

By waiting until trial to assert section 850.4, defendants deprived Quigley of her right to fully and fairly litigate the defense. At the same

time, defendants inexcusably wasted the court's scarce resources over the more than four years during which this case was litigated.

The Court of Appeal erred in affirming the nonsuit based on an immunity defense that defendants did not even hint that they intended to rely on until trial.

III.

STATUTORY IMMUNITIES DO NOT DEPRIVE A COURT OF SUBJECT MATTER JURISDICTION; THEY ARE DEFENSES THAT MUST BE RAISED PRIOR TO TRIAL OR THEY ARE WAIVED

The Court of Appeal excused defendants' failure to raise section 850.4 immunity for the first time at trial four years into the litigation because, in the court's view, "governmental immunity is jurisdictional and may be raised at any time. [Citations.]" (Slip op. at pp. 5-6.) The court of appeal's holding, as well as the similar holdings of other courts of appeal whose decisions the court here cited, reflect the persistence of "an unfortunately common failure of early decisions to distinguish between different levels of 'jurisdictional' defects" (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 122, fn. 27).

As the following discussion will show, the Court of Appeal mistakenly considered section 850.4 to be jurisdictional in the fundamental sense of completely depriving a court of power to adjudicate a case to which the immunity applies. The governmental immunities provided in the Act, however, are "jurisdictional" only in the broader sense of the word. They govern the manner in which the court may exercise its power in a case over which it has fundamental jurisdiction.

When a court acts contrary to a statute that is jurisdictional in this broader sense, the court's action is considered in excess of jurisdiction. But its action is still valid unless properly and timely attacked. Parties can

consent to have a court act in excess of jurisdiction. Even if they do not consent, they may waive or forfeit the right to attack an act in excess of jurisdiction. Allowing a government agency to defend a case vigorously on the merits and wait until trial before asserting an immunity that is "jurisdictional" only in this broader sense is contrary to the proper administration of justice and to the very purpose of governmental immunity.

A. "Jurisdiction" has different meanings with different effects on a court's power; it is only lack of jurisdiction in the fundamental sense may be raised at any time.

1. "Jurisdiction" in the fundamental sense is "the power to adjudicate," and any action taken by a court that lacks jurisdiction in this sense is void.

The term "jurisdiction" is "notoriously ambiguous and has different meanings in different situations notoriously subject to confusion." (*Shaw v. Superior Court* (2017) 2 Cal.5th 983, 991, citing *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 287 [*Abelleira*]; 2 Witkin Procedure, Jurisdiction § 1.) The United States Supreme Court observed wryly that "jurisdiction" "'is a word of many, too many meanings,' [citation]...." (*Sebelius v. Auburn Regional Medical Center* (2013) 568 U.S. 145, 153, 133 S.Ct. 817, 824, 184 L.Ed.2d 627, quoting *Steel Co. v. Citizens for a Better Environment* (1998) 523 U.S. 83, 90, 118 S.Ct. 1003, 1010, 14 L.Ed.2d 210.) Indeed, the Court recently confessed that it had been "'less than meticulous'" in its use of "jurisdictional." (*Hamer v. Neighborhood Housing Services of Chicago* (2017) ___ U.S. ___, 2017 WL 5160782.)

In *Abelleira, supra*, this Court explained two different ways in which "jurisdiction" is used. In its "fundamental" or strict sense, jurisdiction refers to the power to adjudicate; a lack of fundamental jurisdiction is "an

entire absence of power to hear or determine the case, an absence of authority over the subject matter or parties." (*Id.*, 17 Cal.2d at p. 288; accord, *Kabran v. Sharp Memorial Hospital* (2017) 2 Cal.5th 330, 339 [*Kabran*].) When a court lacks jurisdiction in the fundamental sense, it has no power to adjudicate; any action it may take is null and void and may be attacked at any time. (*Ibid.*; *People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 660.)

2. More broadly, "jurisdiction" refers to the manner in which the court must exercise its power.

Even when a court has fundamental jurisdiction, it may still lack "jurisdiction" in the sense that "'the Constitution, a statute or relevant case law may constrain the court to act only in a particular manner, or subject to certain limitations.' [Citation.]." (*Kabran*, *supra*, 2 Cal.5th at 339.) In this sense of the term, "'though the court has jurisdiction over the subject matter and the parties in the fundamental sense, 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.'" (*People v. Shaw, supra*, 2 Cal.5th at p. 991, quoting *Abelleira*, 17 Cal.2d at p. 291.) "'Speaking generally, any acts which exceed 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*, are in excess of jurisdiction.'" (*Ibid.*) Unlike jurisdiction in the fundamental sense, jurisdiction in this broader sense does not mean the absence of power to act. (*Abelleira*, *supra*, 17 Cal.2d at p. 288.)

When a court does not act within the constraints that the law imposes—that is, when it fails to follow required procedures, grants relief not authorized by law, denies relief compelled by law, or otherwise fails to conduct itself in the manner prescribed by law—it is said to act "'in *excess*

of jurisdiction.'" (*Kabran*, *supra*, 2 Cal.5th at pp. 339-340, quoting *People v. Lara*, *supra*, 48 Cal.4th at p. 224 [italics in original].)

An act in excess of jurisdiction, as distinguished from one in the absence of fundamental jurisdiction, is not void. The court still has fundamental jurisdiction over the subject matter and the parties. Even though the court has exceeded its jurisdiction, its act is valid until it is set aside. (*Kabran*, *supra*, 2 Cal.5th at p. 339; *People v. Ford* (2015) 61 Cal.4th 282, 287 [*Ford*.].) An ensuing judgment is not *void* but only *voidable* (*People v. American Contractors Indemnity Co.* (33 Cal.4th 653, 660.) It is subject to direct attack, such as by motion to vacate or appeal. But if the judgment is not set aside before it becomes final, even though in excess of jurisdiction, it is as binding as any other judgment; it *res judicata* and generally beyond attack. (*Ibid*; *Pacific Mutual Life Ins. Co. v. McConnell* (1955) 44 Cal.2d 715, 725; *Hollywood Circle, Inc. v. Dept. of Alcoholic Beverage Control* (1961) 55 Cal.2d 728, 731.)[5]

There is another important distinction between jurisdiction in the fundamental sense and jurisdiction in the broader sense. Although fundamental jurisdiction "cannot be conferred by waiver, estoppel, or consent'" (*Lara*, *supra*, 48 Cal.4th at p., 225 [citation omitted]), parties *can* vest the court with power to act in excess of jurisdiction. They can consent that the court may act in excess of jurisdiction. (*Ford*, *supra*, 61 Cal.4th at pp. 284-285.) If they do not consent, they can also forego or lose the right to set aside an act in excess of jurisdiction by "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*

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[5] A judgment in excess of jurisdiction that has become final may be subject to attack in "unusual circumstances which prevented an earlier, more appropriate attack." (*People v. American Contractors Indemnity Co.*, *supra*, 33 Cal.4th at p. 661.)

(2002) 28 Cal.4th 457, 454, fn. 6) and estoppel (*Ford, supra*, 61 Cal.4th at pp. 284-285; see also (*Pacific Mut. Life Ins. Co. v. McConnell* (1955) 44 Cal.2d 715, 727; 2 Witkin Procedure, Jurisdiction, § 333, p. 949.)

Neither consent to an act in excess of jurisdiction nor waiver of the right to attack it need be express. This Court has "long recognized that a failure to object can constitute implied consent to an act in excess of the court's jurisdiction." (*Ford, supra*, 61 Cal.4th at p. 288.) Likewise, by failing to object a party may waive or forfeit the right to challenge an action by a court. (*Ibid.*; see also *Harrington v. Superior Court* (1924) 194 Cal. 185, 188.)

The principle of implied consent or waiver protects the court and other parties from litigation tactics that amount to a game of heads-I-win-tails-you-lose. "[I]t is inappropriate to allow any party to 'trifle with the courts by standing silently by, thus permitting the proceedings to reach a conclusion in which the party could acquiesce if favorable and avoid if unfavorable." (*In re S.C.* (2006) 138 Cal.App.4th 396, 406; see also *Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 264 [rule of forfeiture of right to attack action in excess of jurisdiction "is designed to advance efficiency and deter gamesmanship."].)

B. Governmental immunities under the Act are not jurisdictional in the fundamental sense.

In California, governmental immunity is not jurisdictional in the fundamental sense that this Court articulated in *Abelleira*—i.e., 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 p. 288; *Kabran, supra*, 2 Cal.5th at p. 339.) Unlike fundamental jurisdiction, jurisdiction to hear and decide an action against a government entity can be conferred by consent or waiver. (*State Dept. of State Hospitals v. Superior Court (Novoa)* (2015) 61 Cal.4th 339, 347 ["Under the [sovereign

immunity] doctrine, a state is immune *except to the extent it consents to suit.*" [Italics added.]; *People v. Superior Court (Pierpont)* (1947) 29 Cal.2d 754, 756 ("*Pierpont*") [public entity can subject itself to tort liability by engaging in "a nonsovereign or commercial enterprise"]; *McMahan's*, *supra*, 146 Cal.App.3d at p. 689 [waiver by failure to allege as affirmative defense].)

California's Constitution gives courts subject-matter jurisdiction over actions against public agencies. Under Article III, section 5, "Suits may be brought against the State in such manner and in such courts as shall be directed by law." This provision authorizes the Legislature to "direct by law" the circumstances in which public entities consent to being sued. (*Muskopf, supra*, 55 Cal.2d at p. 218.) The Legislature has given that consent in the Act. (See *Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 837-838.)

The fact that the court's power to adjudicate a tort claim against the government can be conferred by consent shows that governmental immunity it is not a bar to subject-matter jurisdiction. It is, rather, an immunity that a governmental entity may choose to claim or to waive. Courts in other states have abandoned "the antiquated rule that sovereign immunity is a jurisdictional bar and, accordingly, cannot be waived." (*Washington v. Whitaker, supra*, 317 S.C. 107, 114-115; *Feree v. State* (Utah 1989) 784 P.2d 149, 152-153; *Maurer v. Oakland County Parks & Rec. Dept.* (1993) 201 Mich.App. 223, 506 N.W.2d 261, rev'd. on other grounds, *Bertrand v. Alan Ford, Inc.* (1995) 449 Mich. 606, 620-621, 537 N.W.2d 185; *City of Birmingham v. Business Realty Investment Co.* (Ala. 1998) 722 So.2d 747, 750-751; *Turner v. Central Local School Dist.* (1999) 85 Ohio St.3d 95, 97, 706 N.E.2d 1261; *Avila ex rel. Bartole v. State* (N.Y.Ct.Cl. 2013) 39 Misc.3d 1064, 1067-1068, 963 N.Y.S.2d 511; *cf.*, *Stewart v. United States* (7th Cir. 1952) 199 F.2d 517 [rejecting argument

that statutory exception to Federal Tort Claims Act jurisdictional and could be raised at any time; government waived exception by not asserting it until case remanded to district court after reversal of summary judgment.]

In short, Claims Act immunities are jurisdictional only in the broad rather than fundamental sense of the term. They do not deprive the court of subject-matter jurisdiction over a tort action against a public entity.

C. Eleventh Amendment decisions illustrate that governmental immunity is not jurisdictional in the fundamental sense.

The Eleventh Amendment provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." (U.S. Const., Amt. XI.) Even though the Amendment seemingly applies only to judicial power of federal courts to hear an action against a state by a citizen of another state, it is settled that it also applies to actions against a state by its own citizens. (*Hans v. Louisiana* (1890) 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842.)

The Eleventh Amendment thus provides states sovereign immunity in federal courts. (*Pitts v. County of Kern* (1998) 17 Cal.4th 340, 350, citing *Kentucky v. Graham* (1985) 473 U.S. 159, 167, 105 S.Ct. 3099, 3106, 87 L.Ed.2d 114; see also *Federal Maritime Com. v. South Carolina State Ports Authority* (2002) 535 U.S. 743, 752, 122 S.Ct. 1864, 1871, 152 L.Ed.2d 962 [Eleventh Amendment "one particular exemplification" of sovereign immunity].) The Amendment "enacts a sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary's subject-matter jurisdiction." (*Idaho v. Coeur d'Alene Tribe of Idaho* (1997) 521 U.S. 261, 267, 117 S.Ct. 2028, 2033, 138 L.Ed.2d 438.)

But the Eleventh Amendment "does not automatically destroy original jurisdiction." (*Wisconsin Department of Corrections v. Schacht*

(1998) 524 U.S. 381, 389, 118 S.Ct. 2047, 2052, 141 L.Ed.2d 364.) The Amendment "grants the State a legal power to assert a sovereign immunity defense *should it choose to do so. The State can waive the defense.*" (*Ibid.*) The immunity is a "personal privilege which [the state] may waive at [its] pleasure." (*Clark v. Barnard* (1883) 108 U.S. 436, 447; *Demshki v. Monteith* (9th Cir. 2001) 255 F.3d 986, 989.)

> "Once it is clear that the Eleventh Amendment is not a true limitation upon the court's subject matter jurisdiction, but rather a personal privilege that a state may waive, it is difficult to justify or explain a rule that allows this defense to be invoked at any time in the proceedings."
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> *Hill v. Blind Indus. and Services of Maryland* (9th Cir. 1999) 179 F.3d 754, 760 ["*Hill*"].

D. Defendants waived section 850.4 immunity by waiting until trial to assert it.

In *Hill*, the court held that defendant waived the sovereign immunity defense by doing as defendants did here, waiting until the first day of trial to assert the immunity. There, plaintiff, the owner of a business, sued Blind Industries & Services of Maryland ("BISM") in a California federal district court for breach of contract and fraud. (*Id.* at p. 755.) BISM filed an answer, made motions to dismiss, conducted discovery, participated in a pretrial conference, and filed trial materials, including witness and exhibit lists, proposed jury instructions, and a trial memorandum. (*Id.* at p. 756.) BISM made no claim of immunity throughout the litigation.

But on the opening day of trial, BISM moved to dismiss, asserting for the first time that it was an arm of the state and, therefore, the Eleventh Amendment barred the action. The court took the motion under advisement and trial proceeded. After the jury returned a verdict for the plaintiff on one of his claims, the district court denied BISM's motion to dismiss,

concluding that it was not an arm of the state entitled to Eleventh Amendment immunity. (*Ibid.*)

The Ninth Circuit affirmed, but for a different reason. The court did not decide whether BISM was an "arm of the state" for Eleventh Amendment purposes; rather, it held that BISM "consented to jurisdiction in federal court by actively litigating this action on the merits, while waiting until trial to first assert Eleventh Amendment immunity." (*Id.* at p. 756.)

The court held that a state may waive its sovereign immunity through "conduct that is incompatible with an intent to preserve that immunity." (*Id.* at p. 758.) Eleventh Amendment, the court held, does not destroy subject matter jurisdiction. (*Id.* at p. 760.)

By actively litigating the case on the merits through the opening day of trial, BISM "unequivocally consented to the jurisdiction of the federal court" and waived sovereign immunity. (*Id.* at p. 763; see also *In re Bliemeister* (9th Cir. 2002) 296 F.3d 858, 862 [state waived sovereign immunity by filing limited response to bankruptcy petition, answering subsequent complaint, and moving for summary judgment but not asserting immunity until after court announced tentative ruling on summary judgment motion]; *Ku v. Tennessee* (6th Cir. 2003) 322 F.3d 431, 435 [state waived Eleventh Amendment immunity defense by appearing without objection, defending on the merits, and not raising immunity until after adverse judgment in motion for stay on appeal].)

A government entity also waives sovereign immunity under the Eleventh Amendment even after asserting the immunity in an answer if its post-answer conduct shows consent to suit. For example, in *Johnson v. Rancho Santiago Community College Dist.* (9th Cir. 2010) 623 F.3d 1011, a community college district answered the plaintiffs' complaint with an assertion that it was "'immune from liability pursuant to the provisions of

the Eleventh Amendment of the United States Constitution.'" (*Id.* at p. 1022.) That assertion came in an opposition to a proposed amendment to the complaint. (*Ibid.*) But thereafter, the district litigated the lawsuit on the merits, participated in discovery, and filed motions to dismiss and for summary judgment without asserting sovereign immunity. Citing *Hill* and *Bliemeister*, the court held the district waived the defense. (*Id.* at pp. 1021-1022.)

As in these cases, defendants' conduct here unequivocally evidenced an intention to subject themselves to the trial court's jurisdiction to hear and determine Quigley's case on the merits despite the immunity provided by section 850.4. (See *Hill*, *supra*, 179 F.3d at p. 758.) For more than four years they vigorously litigated the merits of the case, with no mention of section 850.4 immunity. They did not demur to the complaint, move to strike it, or otherwise attack it on the ground of immunity of any kind.

They alleged 38 affirmative defenses, 11 of which asserted immunities Claims Act immunities. None of them mentioned section 850.4 or alleged facts that would support a finding that Quigley's injuries resulted from the condition of a fire protection or firefighting facility.

They participated in discovery, including answering an interrogatory asking them to state all facts supporting all affirmative defenses, but their longer than two-page response made no mention of section 850.4 and did not present evidence that could establish facts supporting the immunity.

They moved for summary judgment without mentioning section 850.4.

They maintained silence as to the immunity while the court called venirepersons from throughout the county, then while a jury was selected and impaneled.

Only after trial commenced and Quigley's counsel presented his opening statement did defendants assert section 850.4 immunity.

> "Such conduct undermines the integrity of the judicial system. It also wastes judicial resources, burdens jurors and witnesses, and imposes substantial costs upon the litigants.... [¶] "A party may gain an improper advantage through this tactic even without waiting until the first day of trial. The ruling on a motion for summary judgment, or on pre-trial matters such as motions in limine, can signal the probable outcome of the case. The integrity of the judicial process is undermined if a party, unhappy with the trial court's rulings or anticipating defeat, can unilaterally void the entire proceeding...."

(*Hill, supra*, 179 F.3d at pp. 756-757; See also *Johnson v. Rancho Santiago Community College Dist.*, supra, 623 F.3d at p. 1022; *Sebelius v. Auburn Regional Medical Center, supra*, 568 U.S. at p. 153, 133 S.Ct. 817, 184 L.Ed.2d 627 ["Tardy jurisdictional objections can therefore result in a waste of adjudicatory resources and can disturbingly disarm litigants."].)[6]

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[6] A great majority of courts in other jurisdictions hold that a government tort immunity is waived by tardy assertion after denial of summary judgment. (See, e.g., *Turner v. Central Local School District, supra* 85 Ohio St.3d 95, 98-100 [immunity raised almost three years after litigation commenced and motion for summary judgment denied]; *Waugh v. Nevada State Bd. of Cosmetology* (D.Nev. 2014) 36 F.Supp.3d 991, 1001, vacated and remanded for dismissal as moot, *Waugh v. Nevada State Bd of Cosmetology* (9th Cir. January 27, 2016) 2016 WL 8844242 [despite alleging immunity in answer, board "unequivocally waived" Eleventh Amendment immunity; board did not move for dismissal on that ground, participated in discovery, and moved for summary judgment without raising the immunity]; *Estate of Grimes ex rel. Grimes v. Warrington* (Miss. 2008) 982 So.2d 365, 369-371 [immunity pled as affirmative defense but defendant actively participated in litigation over five years before asserting immunity by motion for summary judgment]; *Spence v. Liberty Township Trustees* (1996) 109 OhioApp.3d 357, 672 N.E.2d 213 [first raised in directed verdict motion after plaintiff rested]; *City of Birmingham v. Business Realty Investment Co.* (Ala. 1998) 722 So.2d 747,

E. Sovereign immunity is in the nature of personal jurisdiction to which the state may consent.

A court must have both subject matter jurisdiction and "personal" jurisdiction over a defendant to render a valid, binding judgment that affects that defendant. (*Donaldson v. National Marine, Inc.* (2005) 35 Cal.4th 503, 512; 2 Witkin Procedure, Jurisdiction § 106, at p. 681.) Personal jurisdiction requires a party's presence, contacts, or other conduct within the forum state. (*Ibid.*; see also 2 Witkin Procedure, Jurisdiction § 108, at pp. 682-683, quoting Rest.2d Conflict of Laws § 27(1).)

But a defendant may waive a lack of personal jurisdiction and vest the court with power to adjudicate a claim against him or her by participating in the action without raising a jurisdictional objection immediately at the outset of the case. (Code Civ. Proc. § 418.10, subd. (e)(3); *Roy v. Superior Court* (*Lucky Star Industries, Inc.*) 127 Cal.App.4th 337, 341.) Participation in the action without first objecting to the lack of personal jurisdiction "operates as consent to the court's exercise of jurisdiction in the proceeding." *In re Marriage of Obrecht.* (2016) 245 Cal.App.4th 1, 7.

These same principles apply to sovereign immunity. Historically, sovereign immunity has been treated primarily as a matter of personal jurisdiction. Legal commentators as early as Blackstone recognized that sovereign immunity, like personal jurisdiction, is a right afforded a party—in this instance, the sovereign. "Hence, it is that no suit or action can be

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750-751 [first raised in post-verdict motion for judgment as matter of law]; *Davis v. San Antonio* (Tex. 1988) 752 S.W.2d 518 [same]; *Kinnear v. Texas Commission on Human Rights* (Tex. 2000) 14 S.W.3d 299 [immunity not asserted in trial court]; *Ku v. Tennessee*, *supra*, 322 F.3d at p. 435 [post-judgment motion].)

brought against the king, even in civil matters, because no court can have jurisdiction over him." (1 Blackstone's Commentaries 235.)

The Founding Fathers, who inherited the sovereign immunity doctrine as English colonists, agreed and emphasized that, just as a defendant may waive a lack of personal jurisdiction, the sovereign may waive its immunity. "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.*" (The Federalist No. 81 (Rossiter ed., 1961 (pp. 487-488 (Hamilton) [emphasis in original].)

The phrase, "amenable to suit," like its companions "amenable to process" and "amendable to service" are in the vocabulary of personal jurisdiction. (See *Watts v. Crawford* (1995) 10 Cal.4th 743, 755-757.) Thus, "'amenability to suit' has been employed as an antonym to the notion of immunity from suit conferred upon certain entities." (*Id.* at p. 757.)

Viewing governmental immunity, as it may properly be viewed, as a type of personal jurisdiction further shows that the immunity is not jurisdictional in the fundamental sense. It does not entirely deprive a court of power to adjudicate as the defendant may consent to suit and submit to the court's jurisdiction, or waive the immunity by participating in the litigation without asserting the immunity defense.

F. The court of appeal, like other courts of appeal it cited, erred in failing to recognize that sovereign immunity is not a matter of fundamental jurisdiction.

Lower courts have found the distinctions between different uses of "jurisdiction" to be "'"hazy."'" (*People v. Lara* (2010) 48 Cal.4th 216, 224, quoting *People v. Williams* (1999) 77 Cal.App.4th 436, 447, quoting *People v. Mendez* (1991) 234 Cal.App.3d 1773, 1781.) Consequently, an all-too-frequently-seen "abuse of terminology is the indiscriminate application of the term 'void' to different types of jurisdictional defects." (*Moffat v. Moffat* (1980) 27 Cal.3d 645, 656.)

This Court has never held that governmental immunity is jurisdictional in the fundamental sense. In *Pierpont, supra,* 29 Cal.2d 754, the state demurred to a personal injury action on the ground of sovereign immunity. (*Id.* at p. 756.) The trial court overruled the demurrer and the state petitioned for a writ of prohibition. (*Id.* at pp. 755-756.) This Court held that prohibition was a proper means to review the demurrer ruling as "[t]he defense of sovereign immunity from suit presents a jurisdictional question." (*Id.* at p. 756.) The Court did not state whether it meant "jurisdictional" in the fundamental sense or in the broader sense.

In *Yarrow v. State of California* (1960) 53 Cal.2d 427, 433, fn. 4, this Court repeated the rule that "[t]he defense of sovereign immunity presents a jurisdictional question." And in *County of Sacramento v. Superior Court* (1972) 8 Cal.3d 479, 481, the Court held that prohibition is an appropriate remedy to determine "an important jurisdictional question presented by the defense of sovereign immunity ...." Still, the Court did not elaborate to explain in which sense the court meant "jurisdictional."

Nevertheless, courts of appeal, without analysis or consideration of the different meanings of "jurisdictional," have used this Court's statement to build a body of law treating governmental immunity under the Act as jurisdictional in the fundamental sense, holding that it can be raised at any time and cannot be waived.

Thus, in *Buford v. State of California* (1980) 104 Cal.App.3d 811 (cited at Slip op. p. 6), the trial court sustained the state's demurrer to plaintiff's tort action without leave to amend and plaintiff appealed the resulting dismissal. In the appeal, the state asserted a Claims Act immunity it had not raised on demurrer. The Court of Appeal held that it could address the immunity issue "[s]ince governmental immunity is jurisdictional...." (*Id.* at p. 826 [citing *Pierpont*)].)

The holding in *Buford* that the immunity could be raised for the first time on appeal necessarily rested on the premise that governmental immunity is jurisdictional in the fundamental sense. The Fifth District followed *Buford* in holding that governmental immunity is jurisdictional and can be raised for the first time on appeal. (*Kemmerrer v. County of Fresno* (1988) 200 Cal.App.3d 1426, 1435.) From there, the view that governmental immunity can raised at any time, founded on the inherent premise that the immunity is jurisdictional in the fundamental sense, snowballed, with one court of appeal citing another on the point. (*Inland Empire Health Plan v. Superior Court* (2003) 108 Cal.App.4th 588, 592, [same, citing *Kemmerer*]; *Zuniga v. Los Angeles County Civil Service Com.* (2006) 137 Cal.App.4th 1255, 1260 [same, citing *Inland Empire Health Plan*]; *Richardson-Tunnell v. School Ins. Program for Employees (SIPE)* (2007) 157 Cal.App.4th 1056, 1061[same, citing *Kemmerer*]; *Hudson v. County of Los Angeles* (2014) 232 Cal.App.4th 392, 411, fn. 19 [same, citing *Zuniga*].)

In *Paterson v. City of Los Angeles* (2009) 174 Cal.App.4th 1393, the court cited *Kemmerer* in holding that "[g]overnmental immunity is a jurisdictional question [citation], and thus is not subject to the rule that failure to raise a defense by demurrer or answer waives that defense."

And, finally, the Court of Appeal here, in holding that defendants here could assert section 850.4 immunity for the first time at trial, rested its holding on an amalgamation of *Paterson*, *Kemmerer*, *Richardson-Tunnell* and *Buford*. (Slip op. at p. 6.)

In none of these cases, however, have the courts looked beyond the word "jurisdictional" to consider the starkly different —and determinative—meanings of the term. They all err in failing to recognize that governmental immunity does not wholly deprive the court of power to hear tort claims against public entities—that is, that such immunity does not

deprive a court of jurisdiction in the fundamental sense—and that a public entity can vest the court with the power to hear such claims on the merits by consent, waiver, forfeiture, or estoppel.

G. Delay in asserting an immunity under the Act is contrary to both the proper administration of justice and the purpose of governmental immunity.

A claim of governmental immunity is an issue that deserves speedy determination. (*Pierpont*, *supra*, 29 Cal.2d at p. 756.) For that reason, this Court has reviewed by petition for writ of prohibition interlocutory trial court orders rejecting claims of governmental immunity, even though the orders would be reviewable in an appeal from a final judgment. (*Ibid.*; see also *County of Sacramento v. Superior Court*, *supra*, 8 Cal.3d at p. 481; *Harden v. Superior Court* (1955) 44 Cal.2d 630, 637; *cf.*, *McGovern v. City of Minneapolis* (Minn. 1991) 475 N.W.2d 71, 72 [denial of motion for summary judgment based on claims of discretionary and official immunity immediately appealable]; *Ashcroft v. Iqbal* (2009) 556 U.S. 662, 671-672, 129 S.Ct. 1937, 1946), 173 L.Ed.2d 868 [order denying motion to dismiss on ground of qualified immunity immediately appealable].)

The United States Supreme Court has articulated why it is important in actions against public agencies or their employees for parties and courts to deal with claims of immunity early in the litigation. Assertion of the immunity relieves public entities and officials of the consequences of litigation, including not only liability for damages but "the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." (*Mitchell v. Forsyth* (1985) 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 [citation and internal quotation marks omitted].)

"[E]ven such pretrial matters as discovery are to be avoided if possible, as '[i]nquiries of this kind can be peculiarly disruptive of effective government.'" (*Ibid.*, quoting *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 816-817, 102 S.Ct. 2727, 2737, 73 L.Ed.2d 396; see also *Ashcroft v. Iqbal*, *supra*, 556 U.S. at p. 685, 129 S.Ct. 1937, 1952, 173 L.Ed.2d 868 [basic thrust of qualified immunity "is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.' [Citation.]"]).

As the purpose of an immunity is to bar a lawsuit, "it is effectively lost if a case is erroneously permitted to go to trial." (*Mitchell v. Forsyth*, *supra*, 472 U.S. at p. 512, 105 S.Ct. at p. 2808, 116 L.Ed.2d at 589.) A governmental immunity, therefore, "ordinarily should be decided by the court long before trial." (*Hunter v. Bryant* (1991) 502 U.S. 224, 228, 112 S.Ct. 534, 116 L.Ed.2d 589.)

Allowing a public entity to withhold a claim of immunity until after the commencement of trial exposes the entity, and the citizens it serves, to the very harms to effective and efficient governing that the immunity is designed to prevent.

CONCLUSION

Government agencies are subject to the same rules of pleading and procedure as any other party in litigation. They are not exempt from the rule that failure to allege an affirmative defense waives that defense. Defendants' failure to allege section 850.4 prior to trial cannot be endorsed under the erroneous theory that government immunities are jurisdictional in the fundamental sense of wholly depriving a court of power to adjudicate a claim.

Allowing a government defendant to raise for the first time at trial an immunity defense that was available throughout the litigation violates fundamental rules of pleading that are designed to ensure a fair and orderly litigation process. Immunity, as this Court has repeatedly held, is a matter

deserving of prompt determination. Allowing the defendant to withhold an immunity claim until trial unfairly denies plaintiff the right to full and fair litigation. It prevents plaintiff from having the potentially dispositive issue determined before incurring the substantial burdens and expenses of litigating the case all the way to trial. It deprives plaintiff of the right to conduct discovery on issues tendered by the pleadings, make dispositive motions that may resolve the immunity issue, and prepare to meet the defense at trial.

Allowing a government defendant to wait until trial to raise a new immunity defense thwarts judicial efficiency and economy. The court must spend years overseeing a case that should have been dismissed at the outset if the immunity is valid. If defendant can withhold and conceal a dispositive immunity until trial, all of the preceding judicial time and effort is a waste. And it unjustifiably contravenes the primary purpose of governmental immunity: protecting the government and its employees from distractions that interfere with the ability to perform their functions and protecting against the unwarranted expenditure of time and taxpayer money unnecessarily defending litigation.

Justice Kennedy criticized the last-minute gamesmanship of governmental agencies of waiting until late in a lawsuit to assert an immunity in *Wisconsin Department of Corrections v. Schacht*, *supra*. When a state is permitted to raise sovereign immunity at a late stage of litigation, he noted, the state may "proceed to judgment without facing any real risk of adverse consequences. Should the State prevail, the plaintiff would be bound by principles of res judicata. If the State were to lose, however, it could void the entire judgment simply by asserting its immunity on appeal." (*Id.*, 524 U.S. at p. 394, 118 S.Ct. 2047, 141 L.Ed.2d 364 (Kennedy, J., concurring)

Justice Lehrman of the Texas Supreme Court took Justice Kennedy's point to its logically inevitable conclusion: "If sovereign immunity deprives the courts of subject matter jurisdiction, governmental entities could attack years-old judgments by asserting sovereign immunity because without subject matter jurisdiction, the judgments would be void." *Rusk State Hosp. v. Black, supra*, 392 S.W.3d at 108 (Lehrman, J., concurring in part and dissenting in part.)

The court of appeal's decision erred in affirming the nonsuit in this case. The court's decision should be reversed.

DATED: November 22, 2017

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CERTIFICATE OF WORD COUNT

The text of this brief consists of 11,392 words according to the word count feature of the computer program used to prepare this brief.

Dated: November 22, 2017

JAY-ALLEN EISEN

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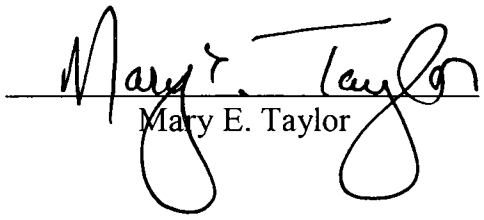

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