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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

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INTRODUCTION

Respondents misstate facts, misstate law, and contradict themselves.

They admit that they did not raise immunity under Government Code section 850.4 until trial but offer the excuse that they were unable to raise the immunity earlier because they were uncertain whether the individual respondents were employees of the respondent fire protection districts or independent contractors.[1] (RBM at pp. 19-20.) But section 850.4 provides, "Neither a public entity, nor a public employee" is liable for an injury as provided in the section. Any purported uncertainty over the status of the individual respondents as employees or independent contractors cannot excuse respondents' failure to assert section 850.4 immunity prior to trial on behalf of the respondent fire districts.

Respondents argue that Claims Act immunity cannot be waived and can be raised at any time because the Act's immunities are jurisdictional. They do not address Quigley's showing that the immunities are not jurisdictional in the fundamental sense, but only in the broader sense. In a recent decision that respondents cite, the Court held that sovereign immunity can be waived and is not a jurisdictional bar. (*People ex rel. Owen v. Miami Nation Enterprises* (2016) 2 Cal.5th 222, 243-244 [*Miami Nation*].)

Respondents argue that cases holding that sovereign immunity does not deprive a court of subject matter jurisdiction and can be waived are inapplicable. Under section 815, they contend, the Act preempts the sovereign immunity doctrine. In fact, the Court explained over 40 years ago that section 815, enacted in the aftermath of the Court's decisions abolishing sovereign immunity, "restores sovereign immunity in California

[1] As in previous briefs, all further statutory references are to the Government Code unless otherwise indicated.

except as provided in the Tort Claims Act or other statute." (*Williams v. Horvath* (1976) 16 Cal.3d 834, 838.)

Respondents contend that they *did* assert section 850.4 immunity, both as an affirmative defense and in documents throughout the action and they cite three pleadings. (RBM at pp. 65-72.) That assertion directly contradicts their claim that they were unable to raise the immunity prior to the commencement of trial. And none of the documents they cite to support their claim that they raised section 850.4 immunity mentions section 850.4 or states facts that would give rise to that immunity.

Finally, respondents stand silent in the face of Quigley's showing that allowing a public entity to delay assertion of a statutory immunity is contrary to public policy and the very purposes of such immunities: not only to conserve taxpayer funds, but to further conserve the time and effort of public employees by preventing the demands of litigation from impairing their ability to perform their public functions.

Respondents, in short, fail to overcome Quigley's showing that section 850.4 does not deprive the courts of subject matter jurisdiction; that the immunity can be waived; that respondents waived it by not asserting it until the third day of trial; and that it would be contrary to public policy to permit a public agency to vigorously litigate a case for more than four years and wait until trial to assert an immunity for the first time.

I. AN IMMUNITY DOES NOT DEPRIVE A COURT OF SUBJECT MATTER JURISDICTION; IT MUST BE RAISED TIMELY OR IT IS WAIVED.

A. Respondents do not answer, much less overcome, Quigley's showing that immunities are not jurisdictional in the fundamental sense and do not deprive a court of power to hear and decide a case.

Quigley showed in her opening brief that section 850.4 and the other immunity provisions of the Act are not jurisdictional in the fundamental sense. They do not wholly deprive courts of the power to hear and decide tort actions against public entities and employees; they are jurisdictional only in the broader sense; they define the court's power to act in a matter over which it has fundamental jurisdiction, and, therefore may be waived. (OBM at pp. 32-38; see also, *Kabran v. Sharp Memorial Hospital* (2017) 2 Cal.5th 330, 340).

Respondents acknowledge the argument in a single paragraph but offer no substantive rebuttal. (ABM at p. 35). Instead, they cite the cases that Quigley discussed in the opening brief declaring that statutory immunities are jurisdictional and cannot be waived, but do not consider the different meanings of "jurisdictional" or analyze in which sense the immunities are jurisdictional. (OBM at pp. 45-46.) Rote recitation that an immunity is jurisdictional and cannot be waived is not sufficient. As respondents agree, "'It is axiomatic that cases are not authority for propositions not considered.'" (ABM at p. 61, quoting *In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388.)

Immunities in the Act are aspects of sovereign immunity, which does not implicate a court's authority to hear and decide a case and which can be waived. Thus, a statutory immunity can be waived by a public entity's litigation conduct.

B. Under this Court's decision in *Miami Nation Enterprises*, state sovereign immunity is not jurisdictional in the fundamental sense and, therefore, can be waived.

Respondents answer Quigley's showing that sovereign immunity is not jurisdictional in the fundamental sense by asserting that the law of sovereign immunity is inapplicable. Citing section 815, they argue that the Act preempts sovereign immunity. (ABM at p. 43.) To the contrary, as noted in the Introduction, "Government Code section 815 *restores sovereign immunity in California* except as provided in the Tort Claims Act or other statute." (*Williams v. Horvath*, *supra*, 16 Cal.3d at p. 838 [emphasis added].)

Respondents also contend that the burdens of proof are different under the doctrine of sovereign immunity and the Act. The sovereign immunity doctrine, they argue, puts the burden of proof on the public entity to establish immunity, but the Act puts the burden on the plaintiff to establish liability. (ABM at p. 43, citing *Miami Nation*, *supra*, 2 Cal.5th at pp. 242-243, citing *ITSI T.V. Productions, Inc. v. Agricultural Assns.* (9th Cir. 1993) 3 F.3d 1289, 1291 [*ITSI*].) Respondents do not explain why requiring plaintiff to carry the burden to establish liability makes the Act's immunities jurisdictional in the fundamental sense. The Act is not unique in putting the burden on a plaintiff to establish liability. Every plaintiff seeking tort damages has that burden. (Evid. Code § 500 ["Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."])

In *Miami Nation*, the Court clarified that sovereign immunity can be waived and does not deprive a court of subject matter jurisdiction. The issue there was whether business entities affiliated with Indian tribes were immune from suit under the "arm-of-the-tribe" aspect of tribal immunity.

Describing the jurisprudence in the area as "confused," the Court, after reviewing conflicting decisions, concluded,

> "Regardless of how we characterize tribal immunity, it is undisputed that tribal immunity, *like state sovereign immunity, can be affirmatively waived.* In addition, trial courts do not have a sua sponte duty to raise the issue of tribal immunity. These features indicate that tribal immunity, like Eleventh Amendment immunity, is not a true jurisdictional bar' that automatically divests a court of the ability to hear or decide the case. (*ITSI, supra*, 3 F.3d at p. 1291; see *Wisconsin Dept. of Corrections v. Schacht* (1998) 524 U.S. 381, 389 [118 S.Ct. 2047, 2052, 141 L.Ed.2d 364]. Thus, 'whatever its jurisdictional attributes, tribal immunity does not implicate a ... court's subject matter jurisdiction in any ordinary sense.' (*ITSI*, at p. 1291)."

(*Miami Nation, supra*, 2 Cal.5th at pp. 243-244 [emphasis added].)

By equating state sovereign immunity with tribal immunity, *Miami Nation* compels the same conclusion with respect to state sovereign immunity: it is not a jurisdictional bar that wholly divests a court of the power to hear or decide a case, and it can be affirmatively waived.

C. Cases from other jurisdictions hold that a sovereign immunity defense is not a bar to subject matter jurisdiction and can be waived.

Respondents contend that the great majority of jurisdictions hold that the legislature must consent to the sovereign being sued and, absent

legislative authority, sovereign immunity cannot be waived or forfeited by procedural requirements. Reading those statements in isolation, however, is not instructive. Decisions often turn on provisions of state constitutions, government tort liability statutes, or other rules that vary from state to state, sometimes within a state. The better reasoned decisions hold that a sovereign can waive its immunity through its conduct in litigation.

In *Estate of Grimes v. Warrington* (Miss. 2008) 982 So.2d 365, the defendant, an employee of a community hospital, actively engaged in litigation, participating in written discovery, conducting depositions, designating experts, and filing motions in limine. After five years of litigating, defendant moved for summary judgment based on a state Tort Claims Act immunity never before raised. The Mississippi Supreme Court held that defendant's "failure actively and specifically to pursue his affirmative defense while participating in the litigation served as a waiver of the defense." (*Id.* at p. 370.).

In *Turner v. Central Local School District* (1999) 85 Ohio St.3d 95, 706 N.E.2d 1261), the district did not raise an immunity defense until almost three years into the litigation, after plaintiffs successfully had appealed summary judgment for the district, all experts were in place, discovery was complete, and a trial date was set. At that late stage of the proceedings, the trial court allowed the district to amend its answer to allege the immunity, then summary judgment based on the immunity, which the court granted. The Ohio Supreme Court reversed.

The court held that the district had the responsibility to assert its defenses in a timely manner and, as the district had not pled the immunity or raised it in the first summary judgment motion, plaintiff could reasonably assume that the district had waived the defense. (*Id.*, 85 Ohio St. at pp. 98-99, 706 N.E.2d at p. 1264.) Furthermore, the district had forced plaintiffs to expend time, resources, and money litigating because of

the district's failure to assert the defense earlier, which most likely would have terminated the litigation or at least narrowed the issues remaining for trial. (*Id.*, 85 Ohio St. at p. 101, 706 N.E.2d at p. 1264.)

In *City of Birmingham v. Business Realty Investment Co.* (Ala 1998) 772 So.2d 747, 750-751, a building contractor sued the city for intentional interference with the contractor's business relationship with its bonding company. The city did not plead immunity as a defense, mention it in a court-ordered statement summarizing its claims and position, move for the equivalent of a nonsuit at the close of plaintiffs' case, for a directed verdict at the close of trial, or object in having the case submitted to the jury. The jury returned a verdict for the contractor. The city then asserted for the first time in a post-verdict motion for judgment or a new trial that it was statutorily immune from liability for intentional interference with business relations. The trial court denied the motion and the Alabama Supreme Court affirmed, holding that the city waived the immunity by failing to raise it in its pleadings or at trial. Under rule 8(c) of the Alabama Rule of Civil Procedure, "a party must set forth affirmatively any 'matter constituting an avoidance or affirmative defense.'" (*Id.*, 772 So.2d at p. 750.) "The city, like any other defendant, must follow the procedural rules," the Court wrote. (*Id.* at p. 751.)

Respondents cite out-of-state cases in which courts have said that statutory immunity of a public entity is a jurisdictional bar. Of the 18 cases respondents cite, two-thirds (12) decided immunity at the outset of the case.[2] The cases respondents cite are either inapplicable or support

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[2] *Mack v. Wilcox County Board of Education* (Ala. 2016) 218 So.3d 774 (immunity raised in motion to dismiss); *Janowski v. Division of State Police* (Del. 2009) 981 A.2d 1166 (same); *Smith v. Jones* (1986) 113 Ill.2d 126 (same); *City of New Braunfels v. Carowest Land, Ltd.* (Tex.Ct.App. 2014) 432 S.W.3d 501 (same); *Lister v. Board of Regents of the University of Wisconsin System* (Wis. 1976) 240 N.W.2d 610 (same); *Charles E.*

Quigley's showing that sovereign immunity is waived if not timely asserted. A few examples:

In Alabama, the state constitution expressly prohibits lawsuits against the state (Ala. Const. (1901) § 14 ["[T]he State of Alabama shall never be made a defendant in any court of law or equity."]). But the constitution does not apply to municipalities, which may be sued as provided by statute. (See *City of Birmingham v. Business Realty Investment Co., supra*, 772 So.2d at p. 750). A municipality waives sovereign immunity if it fails to plead or timely raise it as a defense. (*Ibid.* at pp. 749-750.)

Respondents cite a Wisconsin case, but Wisconsin treats sovereign immunity as a matter of *personal* jurisdiction, not *subject matter* jurisdiction, and, therefore, the immunity is waived if not properly raised. (*Cords v. State* (1974), 62 Wis.2d 42, 46, 214 N.W.2d 405, 407 ["Objection to personal jurisdiction must be raised specifically or be deemed waived."]; *Kenosha v. State* (1967) 35 Wis. 2d 317, 151 N.W.2d 36.) In the very case that respondents cite, indeed, on the very same page, the Wisconsin Supreme Court, citing both *Cords* and *Kenosha*, repeated that "sovereign immunity is a matter of personal jurisdiction which may be waived." *Lister v. Board of Regents of University Wisconsin System* (1976) 72 Wis.2d 282, 296, 240 N.W.2d 610, 619–620 [no waiver of sovereign immunity by failing to plead; Regents "effectively, if inartfully," raised defense.]

Brohawn Brothers v. Board of Trustee of Chesapeake College (Md.Ct.App. 1973) 269 Md. 164 (same); *Heman v. Construction Co. v. Capper* (1919) 105 Kan. 291 (same); *Wallace v. Dean* (Fla. 2009) 3 So.3d 1035 (same); *Board of Regents of the University System of Georgia v. Myers* (2014) 295 Ga. 843 (same); *Davis v. State* (2017) 297 Neb. 955 (same); *Horak v. State* (1976) 171 Conn. 257 (immunity raised in motion to erase); *Orange County v. Health* (1972) 282 N.C. 292 (immunity raised in motion for summary judgment motion two months into case).

Likewise, in North Carolina, another jurisdiction from which respondents cite a case, "the general rule is that sovereign immunity presents a question of personal jurisdiction, not subject matter jurisdiction...." (*Green v. Kearney* (2010) 203 N.C.App. 260, 265, 690 S.E.2d 755, 760.)

Respondents claim that Maine is a no-waiver state, citing *Drake v. Smith* (Me. 1978) 390 A.2d 541, 543. Subsequently, the Maine Supreme Court held that, although the court had "characterize[d] the question of the waiver of sovereign immunity as jurisdictional, it may not be so characterized in all contexts." *(Brann v. State* (Me. 1981) 424 A.2d 699, 702, fn. 3.) The court specifically did not decide whether the assertion that a particular tort claim was outside the scope of the state's tort claims act "is an assertion of lack of jurisdiction or is the assertion of an affirmative defense." (*Ibid.*)[3]

In Texas, the Supreme Court twice in the last thirty years ruled that sovereign immunity was waived when it was not pled timely. (*Davis v. San Antonio* (Tex. 752 S.W.2d 518 (Tex. 1988); *Kinnear v. Texas Commission on Human Rights* (Tex. 2000) 14 S.W.3d 299). More recently, the Court decided that sovereign immunity "implicates subject matter jurisdiction," but "carefully avoided squarely determining that it is an issue of subject matter jurisdiction." (See *Rusk State Hospital v. Black* (Tex. 2012) 392 S.W.3d 88, 100 [Lehrman, J., concurring in part and dissenting in part.])

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[3] The Maine Supreme Court has yet to squarely address whether sovereign immunity is a matter of subject matter jurisdiction. In *Williams v. Me. HHS* (Me 2015) 2015 Me. Super. LEXIS 205, *3-*7, the court, citing *Brann* and cases directly considering the issue, held that it had subject matter jurisdiction over a case notwithstanding the state's assertion of sovereign immunity, noting that sovereign immunity is more akin to a challenge to personal jurisdiction than to subject-matter jurisdiction. (*Ibid.*)

Ignoring those Texas Supreme Court authorities, respondents rely on a recent lower court opinion stating that, outside the context of the sovereign's litigation conduct, sovereign immunity deprives courts of subject-matter jurisdiction. (*City of New Braunfels v. Carowest Land, Ltd.*, 432 S.W.3d 501, 513 n.19 (Tex. App. 2014).) Respondents omit the court's further statement, "Immunity from liability is an affirmative defense; it does not implicate the trial court's subject-matter jurisdiction...." (*Ibid.*)

Respondents also point to an old Michigan case, *McNair v. State Highway Dept.* (Mich. 1943), 9 N.W.2d 52, as authority that sovereign immunity cannot be waived by procedural requirements. But Michigan subsequently adopted Michigan Court Rules (MCR) 2.111(F)(3)(a), which requires that an "immunity granted by law" must be pled as an affirmative defense "[u]nder a separate and distinct heading" and "state the facts constituting" the defense. (*Ibid.*) In a more recent case, *Ajax Paving Industries Inc. v. Zenz* (1996) 1996 Mich. App. LEXIS 1707, 1996 WL 33347817, the court applied the rule and held that the defendant county road commissioner waived his governmental immunity defense by failing to raise it in a responsive pleading.

D. Eleventh Amendment immunity principles apply.

In her opening brief, Quigley cited numerous federal cases in which the courts held that a sovereign waived immunity by appearing and actively litigating a case on the merits before raising an immunity defense. (OBM at pp. 38-43). Respondents argue that the federal cases are inapplicable because they were decided under the Eleventh Amendment. That is not a valid distinction.

Eleventh Amendment immunity and sovereign immunity are one and the same.

> "[T]he States' immunity from suit [under the Eleventh Amendment] is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments."

Alden v. Maine (1999) 527 U.S. 706, 713 [119 S.Ct. 2240, 2246–2247, 144 L.Ed.2d 636; see also (*Meyers v. Texas* (5th Cir. 2005) 410 F.3d 236, 251 [citing *Alden*; "the states' sovereign immunity from suits by individuals is the same immunity they enjoyed prior to the Constitution and ... the states' immunity from suit was not changed, limited or added to by the Eleventh Amendment."]).

Although Quigley cited a number of Eleventh Amendment cases in her opening brief (OBM at pp. 40-42), respondents address only one, *Hill v. Blind Indus. and Services of Maryland* (9th Cir. 1999) 179 F.3d 754. Respondents attempt to distinguish *Hill* on the ground that the case was not a tort action but an action for breach of contract to which governmental immunity does not apply. (Section 814.) Respondents overlook the fact that the plaintiff in *Hill* also sued for fraud. (*Id.*, 179 F.3d at p. 756.)

In attempting to distinguish *Hill* based on the fact that it included a contract cause of action, respondents make the mistake that Justice Gilbert of the Second Appellate District cautioned against: they "seize upon those facts, the pertinence of which go only to the circumstances of the case but are not material to its holding. The *Palsgraf* rule, for example, is not limited to train stations." (*Harris v. Superior Court* (1992) 3 Cal.App.4th 661, 666,

disapproved on another ground in *Williams v. Superior Court* (2017) 3 Cal.5th 531, 557, fn. 8.)

The material facts are that the defendant in *Hill* actively litigated the case, made motions to dismiss, conducted discovery, participated in a pretrial conference, and obtained a jury trial. (*Id.*) Defendant did not mention the Eleventh Amendment or sovereign immunity in its answer or its motions. But, on the first day of trial, defendant moved to dismiss on the ground that the Eleventh Amendment barred the action as defendant was an arm of a state. (*Id.*) The Ninth Circuit affirmed the district court's order denying the motion.

The Eleventh Amendment, the court held, does not automatically destroy federal jurisdiction. "'Rather, the Eleventh 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. Nor need a court raise the defect on its own. Unless the State raises the matter, a court can ignore it.'" (*Id.* at p. 760, quoting *Wisconsin Dept. of Corrections v. Schacht*, *supra*, 524 U.S. at p. 389, 118 S.Ct. at p. 2052, 141 L.Ed.2d 364.)

State sovereign immunity, likewise, is not a jurisdictional bar that deprives a court of power to hear and decide an action, and can be waived. *Miami Nation*, *supra*, 2 Cal.5th at 243-244, citing *Schacht*.)

E. Under the FTCA, immunities are affirmative defenses that can be waived.

Respondents contend that federal cases under the Federal Torts Claims Act (FTCA) are relevant to the jurisdictional nature of sovereign immunity. (ABM at p. 45.) According to respondents, if a claim under the FTCA on its face falls within an immunity statute, a federal court lacks subject matter jurisdiction. Respondents argue that California should adopt the same rule.

The FTCA is quite different from the Claims Act. The Law Revision Commission considered but rejected using the FTCA as a model, which the Commission saw as "fraught with difficulties." (Recommendation Relating to Sovereign Immunity (Jan. 1963) 4 *Cal. Law Revision Com. Rep.*, pp. 811-812.) The FTCA gave federal courts little guidance in defining the limits of governmental liability and decisions "[had] reached unsound conclusions and have either restricted liability unduly or placed burdens on government that impair its ability to perform its vital functions...." (*Id.* at p. 812.)

Furthermore, jurisdiction of the federal courts is strictly limited by Congress under Article III, section 1 of the U.S. Constitution. Federal courts "have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to present." (*Henderson ex rel. Henderson v. Shinseki* (2011) 562 US 428, 434, 131 S.Ct. 1197, 1202, 179 L.Ed.2d 159.) In fact, the complaint in a federal action must include a "short and plain statement of the grounds for the court's jurisdiction...." (Fed. Rules Civ. Proc., rule 8(b), 28 U.S.C.)

If, despite these differences, the FTCA cases offer some guidance, they favor Quigley. Sovereign immunity is not a matter of subject matter jurisdiction, but a defense that governmental entities can waive.

> "[W]hat sovereign immunity means is that relief against the United States depends on a statute; the question is not the competence of the court to render a binding judgment, but the propriety of interpreting a given statute to allow particular relief. The statutory exceptions . . . to the United States' waiver of sovereign immunity . . . limit the breadth of the Government's waiver

> of sovereign immunity, but they do not accomplish this task by withdrawing subject-matter jurisdiction from the federal courts."

(*Parrott v. United States* (7th Cir 2008) 536 F.3d 629, 634 citing *United States v. Cook County* (7th Cir. 1999) 167 F.3d 381; see also, *Wisconsin Imperial Co. v. United States* (7th Cir. 2009) 569 F.3d 331, 333-334 ["Sovereign immunity is not a jurisdictional doctrine."); *Blagojevich v. Gates* (7th Cir. 2008) 519 F.3d 370, 371 ["[S]overeign immunity does not diminish a court's subject-matter jurisdiction."); *Keller v. United States* (7th Cir. 2014) 771 F.3d 1021, 1023("The discretionary function exception is an affirmative defense to liability under the FTCA that the government must plead and prove.")

All of these cases agree with *Stewart v. United States* (7th Cir. 1952) 199 F.2d 517, which respondents denigrate as an outlier. These cases reaffirm the fundamental rule that immunities are affirmative defenses that do not deprive a court of jurisdiction to decide the case.

Respondents claim that immunity defenses cannot be waived by litigation conduct, citing *Carlyle v. United States* (6th Cir. 1982) 674 F.2d 554. That case does not help them. The words "immunity" or "waive" or any variation of that word are absent from the decision. The case involved what the court referred to as an "exception" to FTCA liability for a discretionary function. (See 28 U.S.C. § 2680, subd. (a)). The district court held that section 2680 applied and granted judgment for the Army. The court of appeals rejected plaintiff's argument that the judgment could not be based on the statute because the Army did not raise it in pretrial proceedings.

Under Federal Rule of Civil Procedure 15(b)(2), "When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings." The record

showed that plaintiff implicitly consented to trial of the discretionary function issue. Therefore, the issue had to be treated as if it had been raised in the pleadings. (*Carlyle*, 674 F.2d at p. 556.)

Unlike the plaintiff in *Carlyle*, Quigley did not consent to trial of the section 850.4 immunity. She objected immediately when respondents first raised it at trial and again in her motion for new trial. And the issue never went to trial; the court granted nonsuit based on the immunity.

Finally, respondents rely on a line of cases from the Ninth Circuit that discuss the burden of pleading and proving immunities under the FTCA. The most recent is *Prescott v. United States* (9th Cir. 1993) 973 F.2d 696. In *Prescott*, plaintiffs sued for injuries sustained as workers at the Nevada Nuclear Testing Site. The government moved for summary judgment claiming that the discretionary function exception barred the claims. The issue for the court was which party had the burden of pleading and proving the defense.

Joining with the Sixth and Seventh Circuits, the court ruled that the exceptions to the FTCA's general waiver of immunity are "analogous to an affirmative defense" and the government bears the burden of proving their applicability. The Court affirmed the denial of the government's motion for summary judgment because the government failed to meet its burden of proof to establish the immunity. The court said nothing about waiver by belatedly raising a defense.

Treating the exceptions to the FTCA as affirmative defenses that the defendant must plead and prove is irreconcilable with considering them issues of subject matter jurisdiction, which the plaintiff in federal court always has the burden to plead and prove.

The Ninth Circuit relied on its analysis in *Prescott* to decide an analogous case involving Eleventh Amendment immunity, *ITSI, supra*, 3 F.3d 1289. There, the Court held that Eleventh Amendment immunity can

be waived or forfeited by the State's failure to assert it; that Eleventh Amendment immunity does not implicate a federal court's subject matter jurisdiction; and that such immunity should be treated as an affirmative defense with the burden to assert and prove on the government.

This Court relied on *ITSI* in holding that sovereign immunity "'is not a true jurisdictional bar' that automatically divests a court of the ability to hear or decide the case." (*Miami Nation, supra*, 5 Cal.5th at 243-244, citing *ITSI*, 5 F.3d at p. 1291.)

II. NOTWITHSTANDING THE RULE THAT A GENERAL WAIVER OF IMMUNITY CAN ONLY BE MADE BY THE LEGISLATURE, COURTS HAVE THE AUTHORITY TO ENFORCE A LITIGATION-SPECIFIC WAIVER.

A. The government can waive immunity by its conduct in litigation without a "clear declaration" by the legislature of an intent to waive.

Respondents argue that a sovereign cannot waive immunity through its litigation conduct because only the legislature can waive sovereign immunity by enacting a specific statute. (ABM at p. 34). The argument confuses the principles that apply to determining whether the state has abrogated sovereign immunity across the board, and the principles that apply in determining whether the state has waived the immunity by litigation conduct in a particular case.

Before 1945, the rule was that a state waived its Eleventh Amendment immunity by litigating a case on the merits without timely raising it. In *Clark v. Barnard* (1883) 108 U.S. 436, 447, 2 S.Ct. 878, 883, the Court stated in broad language that Eleventh Amendment immunity was a "personal privilege which [the state] may waive at its pleasure." (See also (*Hill, supra* 179 F.3d at p. 760 quoting *Clark*.) Following *Clark*, the Supreme Court repeatedly confirmed that a sovereign could waive its

immunity by its litigation conduct. (See *Gunter v. Atlantic Coast Railroad Col* (1906) 200 U.S. 273, 26 S.Ct. 25250 L.Ed. 477 [state attorney general waived state's immunity by failing to assert it in litigation]; *Porto Rico v. Ramos* (1914) 232 U.S. 627, 34 S.Ct. 461, 58 L.Ed. 763 [by intervening in action, attorney general waived sovereign immunity]; *Richardson v. Fajardo Sugar Co.* (1916) 241 U.S. 44, 36 S.Ct. 476 [attorney general appeared, answered complaint but did not raise sovereign immunity until eight months later; defense deemed waived].)

In *Ford Motor Co v. Dept. of Treasury* (1945) 323 U.S. 459, 65 S.Ct. 347, however, the court abrogated that line of cases. In *Ford*, the Indiana attorney general defended the case on the merits through a trial and an appeal. When the case reached the Supreme Court, the state raised Eleventh Amendment immunity defense for the first time. The court held that a state could waive the immunity only by "'clear declaration'" of consent to suit against itself in federal court. (*Id.*, 323 U.S. at p. 465, 65 S.Ct. at p. 351.) The court then held that under the Indiana Constitution, only the legislature could waive immunity by a general law; a law permitting suit against the state did not amount to consent to suit in federal court; and, therefore, the attorney general had no power to waive the state's immunity. (*Id.*, 323 U.S. at pp. 468-469, 65 S.Ct. at pp. 352-353.) *Ford* became the springboard for the idea that prevailed over the following decades that only the state legislature can waive a sovereign immunity defense.

But the court reconsidered and unanimously overruled *Ford* in *Lapides v. Board of Regents of the Univ. System of Georgia* (2002) 535 U.S. 613, 122 S.Ct. 1640, 152 L.Ed.2d 806. The Court held that removing a case to federal court waived the state's Eleventh Amendment sovereign immunity. (*Id.*, 535 U.S. at pp. 619-620, 122 S.Ct. at p. 1644.). The court based its decision on fairness: it was not fair for the state to seek relief from

the federal court, then invoke immunity to claim the court did not have the power to decide the case. (*Id.*) A court has power to hold that sovereign immunity has been waived through litigation conduct based on "the judicial need to avoid inconsistency, anomaly, and unfairness, and not upon a state's actual preference or desire, which might, after all, favor selective use of 'immunity' to achieve litigation advantages." (*Id.*, 535 U.S. at p. 620, 122 S.Ct. at p. 1644. 152 L.Ed.2d.)

Lapides thus restored the pre-*Ford* rule, recognizing the difference between determining whether a state has generally waived sovereign immunity and consented to suit, which requires a clear declaration of intent, and determining whether the state has waived the immunity through its litigation conduct, which does not.

The Supreme Court concluded in *Lapides* that a court must have the power to hold state officials responsible for case-specific waivers of immunity whenever it is necessary to promote fairness in the litigation process. (*Id.* at 622-623.) "A rule of federal law that finds waiver [of immunity] through a state attorney general's invocation of federal court jurisdiction avoids inconsistency and unfairness. A rule of federal law that, as in *Ford*, denies waiver despite the state attorney general's state-authorized litigating decision, does the opposite." (*Id.* at p. 614, 122 S.Ct. at p. 1641.)

Applying *Lapides*, lower courts have held that states waive their immunity defenses by raising them belatedly, after extensive litigation on the merits. In *Ku v. State of Tennessee* (6th Cir. 2003) 322 F.3d 431, the state appeared in federal court, defended on the merits, engaged in extensive discovery, moved for but lost a motion for summary judgment, and then raised its Eleventh Amendment sovereign immunity defense. The trial court ruled that the state waived the immunity because it was raised too late. The Sixth Circuit affirmed.

> "Instead of asserting its Eleventh Amendment immunity defense, Tennessee engaged in extensive discovery and then invited the district court to enter judgment on the merits. It was only after judgment was adverse to the State that it revealed that it had its fingers crossed behind its metaphysical back the whole time. In our view, this type of clear litigation conduct creates the same kind of 'inconsistency and unfairness' the Supreme Court was concerned with in *Lapides*."

(*Ku v. Tennessee, supra*, 322 F.3d at p. 435.)

Thus, the court concluded, "appearing without objection and defending on the merits in a case over which the district court otherwise has original jurisdiction is a form of voluntary invocation of the federal court's jurisdiction that is sufficient to waive a State's defense of Eleventh Amendment immunity" (*Ibid.*)

The Ninth Circuit reached the same result on similar facts in *Arizona v. Bliemeister* (9th Cir. 2002) 296 F.3d 858. There, the state answered the complaint in an adversary proceeding in bankruptcy court. The state moved for summary judgment on the merits of the case, argued the motion, and received a preliminary unfavorable ruling. The state then moved to dismiss the case on the basis of sovereign immunity, which it had not previously asserted. The bankruptcy judge found that the state had waived sovereign immunity. The district judge affirmed. The Ninth Circuit concurred.

> "[T]he State benefitted from hearing the bankruptcy court's leanings. To allow a state to assert sovereign immunity after listening to a

> court's substantive comments on the merits of a case would give the state an unfair advantage when litigating suits. [¶] ... Once again, we see that a state 'hedged its bet on the .... outcome.' *Hill*, 179 F.3d at 756. Because [s]uch conduct undermines the integrity of the judicial system[,]' we hold that the State of Arizona waived any sovereign immunity it had available to it."

[*Id.* at p. 862.)

Like the government defendants in *Ku* and *Bliemeister*, respondents waived their sovereign immunity defense by appearing before the court, actively defending the case on the merits for four years, participating in discovery, moving for summary judgment, and joining in convening a jury trial, and went through two days of jury selection (see Register of Actions, 2 AA 413). But they did not raise section 850.4 immunity until after trial actually commenced.

Respondents voluntarily chose to seek relief on the merits and proceed to trial. They waived section 850.4 immunity.

B. Legislative history does not show that litigation conduct cannot waive immunities.

Respondents argue that the legislative history of the Act shows that immunities cannot be waived by litigation conduct. The Law Revision Commission did not address the issue in its report and recommendations, and respondents cite nothing from the Legislature itself regarding the issue.

But the portions of the legislative history respondents cite support Quigley's position that the dangerous condition of the unprotected sleeping area at the base camp that left her vulnerable to being run over while she slept is not a "condition of a fire protection or firefighting facility" within

the meaning of section 850.4. As respondents note (ABM at p. 51), the Legislature enacted the firefighting immunities "to protect the discretion of public officials in determining whether fire protection should be provided at all, and, if so, to what extent and with what facilities. The statutes recognize that these are essentially political, policymaking decisions that should not be second-guessed by judges or juries." (*State of California v. Superior Court* (*Nagel*) (2001) 87 Cal.App.4th 1409, 1413; see also L. Rev. Com. com. to § 850.) There were no political, policymaking decisions in failing to rope off or sign the sleeping area at the base camp. There was only an inexcusable disregard of mandatory duties imposed by the U.S. Forest Service Health and Safety Code and neglect of other reasonable steps that would protect people sleeping in the grassy infield.

The firefighting immunities also serve the purpose of relieving firefighters from the fear of liability that might deter them from making decisions under stressful circumstances and taking actions they deem necessary to fight a fire. (*Nagel, supra,* 87 Cal.App.4th at 1404; L. Rev. Com. com. to § 850.) The dangerous condition of the base camp sleeping area did not result from a snap decision during the stress of fighting the fire. Again, it was the result of the individual defendants' inexcusable but ordinary negligence in managing the camp.

III. THE CLAIM OF IMMUNITY UNDER SECTION 850.4 PRESENTED "NEW MATTER" THAT RESPONDENTS HAD TO ASSERT AS AN AFFIRMATIVE DEFENSE.

A. New matter must be pled as an affirmative defense.

Subdivision (b) of Code of Civil Procedure section 431.30 is clear, direct and unambiguous. "The answer to a complaint shall contain: ... (2) A statement of any new matter constituting a defense." Respondents argue nevertheless that they did not have to plead their claim of immunity under section 850.4 as an affirmative defense because the immunity "is not 'new

matter' that inserts a new issue into the case." (ABM at p. 59, citing Code Civ. Proc. § 590.) The argument fails.

The term, "new matter," "refers to something relied on by a defendant that is not put in issue by the plaintiff. [Citation.] Thus, where matters are not responsive to essential allegations of the complaint, they must be raised in the answer as 'new matter.'" (*In re Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 812, [*Quantification Cases*], *citing State Farm Mut. Auto. Ins. Co. v. Superior Court* (1991) 228 Cal.App.3d 721, 725.) New matter "*admits that all the material allegations of the complaint or petition are true, and consists of facts not alleged therein which destroy the right of action, and defeat a recovery.*'" (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 383, fn. 4 ["*FPI*"], quoting Pomeroy, Code Remedies (5th ed. 1929) § 549, pp. 900–901, italics in original.)

"New matter" is synonymous with "affirmative defense." (*Advantec Group, Inc. v. Edwin's Plumbing Co., Inc.* (2007) 153 Cal.App.4th 621, 627

B. Respondents' claim of section 850.4 immunity was new matter.

Quigley's complaint did not put section 850.4 immunity in issue. To prove respondents' liability for her injuries, section 835 required Quigley to establish only:

> "that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:

> (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or,
> (b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition."

(See also CACI No. 1100.) Those are the facts that Quigley alleged in her complaint. (1 AA p. 10, ¶¶ 25-26, p. 12-14, ¶¶ 38-44.)

Respondents answered with a general denial. (1 AA 52:23-25.) That did not put immunities at issue because the complaint had no allegations regarding immunity. "What is put in issue by a denial is limited to the allegations of the complaint." (*FPI, supra*, 231 Cal.App.3d at p. 383.) Respondents' claim of immunity on the ground that Quigley's injuries resulted from a condition of fire protection or firefighting facilities was "not responsive to essential allegations of the complaint"; it was new matter. (*Quantification Cases, supra*, 210 Cal.App.4th at p. 812.

"The statutory immunities under the Government Tort Claims Act [citation] are affirmative defenses which must be pleaded." (5 Witkin, *Cal. Procedure* (5th ed. (2008)), Pleading, § 1107, at p. 535). If not pled, an immunity, including the immunity provided by section 850.4, is waived. (*McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App.3d 683, 689, disapproved on unrelated grounds by *Bunch v. Coachella Valley Water Dist.* (1997) 15 Cal.4th 432, 447-448; see also 2 Schwing, *Cal. Affirmative Defenses* (2d ed. 2015) § 38:92, citing *McMahan's*; 34 Cal.Jur.3d (2017 update) Fires and Fire Protection, § 79; Cal. Civil Practice: Torts (West Group 2017 update) § 29:27.)

C. Quigley's complaint did not raise section 850.4 immunity as a matter of law.

Respondents contend that section 850.4 applies as a matter of law because the facts here are undisputed and, therefore, the immunity cannot be waived by litigation conduct and a court can consider it at any time. (ABM at p. 48.) The argument is non-sequitur. Even though undisputed facts may establish a defense as a matter of law, that does not mean the defense cannot be waived by conduct, such as failure to allege it properly or timely.

Respondents conflate and comingle two distinctly different issues: interpretation and application of section 850.4, and waiver of the immunity by their litigation conduct. (ABM at pp. 48-49, 52.) It is one thing to determine the meaning and intent of the statute and quite another to determine whether respondents waived the immunity and Quigley may prosecute her case for liability. (*See, e.g.*, *Cowan v. Superior Court* (1996) 14 Cal.4th 367, 373 [whether defendant in criminal prosecution may waive statute of limitations completely separate issue from legality of prosecuting an offense barred by the statute].)

Respondents contend that Quigley's allegations that that she was injured as the result of a dangerous condition of public property that was being used to house firefighters during a forest fire "raised the issue that the property was being used for firefighting purposes." (ABM at p. 60.) As shown in the opening brief on the merits, pp. 28-30, that is not enough to make the immunity applicable. The immunity applies only when injury results from a condition that impairs the operation, usefulness, or effectiveness of facilities "'involved in the conduct of *the actual firefighting operations*.'" *Varshock v. California Dept. of Forestry and Fire Protection* (2011) 194 Cal.App.4th 635, 649 ["*Varshock*"], quoting 4 L. Rev. Com. Rep. at p. 828 [court's italics].) (OBM at pp. 28-30.)

Respondents contend that the immunity is much broader, selectively quoting part of a sentence in *Varshock* that "'[u]nder section 850.4, the Legislature intended immunity to apply to any claim based on death, personal injury, or property damage that results from an act or omission of a public entity or employee while responding to or combating an actual fire." (OBM at p. 50, quoting *Varshock*, 194 Cal.App.4th at p. 643.) The quotation has nothing to do with the immunity for the condition of a firefighting facility. Respondents omit the preceding words: "In sum, we conclude that by relieving public entities and employees of liability 'for any injury caused *in fighting fires*'...." (*Ibid.*; [emphasis added.]) That immunity in section 850.4, which is the subject of the language respondents stands separate and apart from the immunity for the condition of firefighting facilities.

Respondents cite two cases in which the courts held that the trial courts properly awarded judgments for the defendants on affirmative defenses they did not plead. *Cruey v. Gannett Co.* (1998) 64 Cal.App.4th 356, 367 and *Superior Dispatch, Inc. v. Insurance Corp. of New York* (2010) 181 Cal.App.4th 175, 193-194, fn. 11. Neither case supports respondents' position that they could wait until trial commenced before raising section 850.4 immunity.

For one thing, neither case involved a public entity or a statutory immunity. But, even though defendants in those cases did not plead facts that should have been alleged as affirmative defenses, the defenses were raised by motions for summary judgment, which plaintiffs argued on the merits. In *Cruey*, the court held that summary judgment was an acceptable vehicle to assert the unpled defense of privilege, since the motion gave plaintiff adequate notice and opportunity to respond. (*Id.*, 64 Cal.App.4th at p. 367.) In *Superior Dispatch*, the trial court granted defendant summary judgment on the ground of misrepresentation in an insurance application

even though defendant had not alleged that as an affirmative defense. Plaintiff, however, did not object that the defendant could not raise the issue in a summary judgment because it had been pled as a defense and, in any event, plaintiff addressed the defense on the merits and so waived the pleading defect. (*Id.*, 181 Cal.App.4th at p. 193.)

D. Respondents had to make an affirmative showing to establish immunity for Quigley's injuries under section 850.4.

Respondents cite the court of appeal's holding that section 850.4 immunity does not have to be pled as an affirmative defense because it does not require an affirmative showing of facts. Respondents are wrong.

The statute required respondents to show that Quigley's injury was caused by a condition that adversely affected the operation, usefulness, or effectiveness of facilities "'involved in the conduct of *the actual firefighting operations*.'" (*Varshock, supra*, 194 Cal.App.4th at p. 649; see also OBM at pp. 28-30.) The only facts on which respondents ground their claim of immunity under section 850.4 are that Quigley's injuries resulted from a condition of public property that was being used as the base camp for a fire. There is no allegation or suggestion in the complaint that the property itself was involved in the actual firefighting operations.

Respondents assert that this Court "determined that section 850.4 does not require a factual showing for the statute to apply" in *Heieck and Moran v. City of Modesto* (1966) 64 Cal.2d 229, 230-233. (RBM at p. 62.) There is no such holding or determination in *Heieck*. In *Heieck*, the Court affirmed the dismissal of plaintiff's complaint after the trial court sustained the city's general demurrer without leave to amend. (64 Cal.2d at p. 230.) As the Court agreed that the facts alleged in the complaint showed that immunity applied, the Court had no occasion to hold that a public entity

does not have to make an affirmative showing to support immunity under section 850.4. (*Id.* at p. 233.)

E. Respondents' claim that they could not plead section 850.4 immunity because of uncertainty over the status of the individual respondents is belied by the facts.

Respondents contend that they did not raise section 850.4 immunity before trial because they were uncertain throughout the action whether the individual defendants were the respondent fire districts' employees or independent contractors. (ABM pp. 19-20, 71, fn. 6.) But section 850.4 does not immunize only public employees. "Neither a public entity, nor a public employee" is liable for an injury subject to the immunity. Regardless of what respondents thought about the employment status of the individual defendants, the public entity defendants could have raised 850.4 from the outset of the case. Respondents did allege other affirmative defenses applicable to public entities as well as public employees. (1 AA 60-61, 15th, 17th and 18th affirmative defenses.) Indeed, respondents also alleged immunity under section 820.4, which applies *solely* to public employees. (*Id.*, 20th affirmative defense.)

Respondents' actions in pleading these immunities speak louder than their illogical rationalization for not pleading section 580.4.

Respondents assert that the federal district court "determined the three [individual respondents] were not federal employees, but rather independent contractors." (ABM at p. 20.) The court made no such determination. The court merely ratified the United States Attorney General's determination that the individual respondents were not federal employees. (Appellant's Motion for Judicial Notice [**AMJN**], Exh. 1, Bates stamp pp. 21-24, Exh. 2, pp. 35-36.) Neither the Attorney General nor the district court determined that the individuals were independent contractors. (*Ibid.*)

F. Plaintiff had inadequate notice that respondents intended to assert the specific immunity of section 850.4.

1. Defendant failed to specifically plead immunity under section 850.4 as an affirmative defense.

Respondents acknowledge, "The primary function of a pleading is to give the other party notice so that it may prepare its case." (ABM at p. 63; *see also* OBM at p. 24.) They argue, however, that they are excused from pleading a particular immunity as an affirmative defenses because Quigley filed suit under the Act and, therefore, was on notice of all its immunities. (ABM at pp. 63-64).

Notice that the immunities exist does not put plaintiff on notice that defendant is putting any particular immunity at issue or give plaintiff fair opportunity to prepare his or her case and meet the immunity.

Respondents' argument inevitably leads to the absurd result that a government entity may answer a complaint with a general denial, assert no immunity as an affirmative defense, but wait until it suits the entity to spring an unpled immunity. That was the procedure governing defensive pleading that the Legislature did away with in 1851. (*Piercy v. Sabin* (1858) 10 Cal. 22, 27.) Nothing in the Act or its legislative history suggests that the Legislature intended to resurrect that long dead, unfair procedure for the benefit of government entity defendants.

2. The rules do not require a plaintiff to guess at the defendant's defenses.

Every plaintiff in every tort case has notice of privileges, immunities and other affirmative defenses that could prevent plaintiff from recovering. According to respondents, a defendant should be able to answer a complaint but hold back defenses until it suits defendant to assert them because the plaintiff is on notice of all defenses. Here, respondents alleged 38 affirmative defenses, including 11 statutory immunities. Quigley was

entitled to presume that the respondents and their counsel were knew all of the immunities that they could assert. It was not her obligation to ask them if they intended to allege more than the 11 they did plead. Indeed, considering the number of immunities they asserted, it was reasonable for her to believe that they had asserted all that might conceivably apply without being on notice that they also intended to raise another, undisclosed immunity defense.

Neither the Act nor the Code of Civil Procedure requires a plaintiff to be clairvoyant.

IV. RESPONDENTS DID NOT RAISE SECTION 850.4 IMMUNITY AT ANY TIME PRIOR TO TRIAL.

Defendants admitted that they did not raise section 850.4 prior to trial and did not have to, then abruptly U-turn and argue that they did raise the issue, both as an affirmative defense and throughout the action. The record does not support them.

A. The defense gave no notice that respondents were claiming immunity under section 850.4 or any other immunity in particular.

Respondents first contend that their 15th affirmative defense adequately pled section 850.4 immunity. The defense alleged: "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." (1 AA 60.) That did no more than invoke the entire Claims Act. It did not do what respondents concede the Code of Civil Procedure required them to do: state their defenses separately "'in a manner by which they may be intelligibly distinguished.'" (ABM at p. 65, quoting Code Civ. Proc. § 431.30, subd. (g).)

Respondents contend that "[t]here is no requirement that the *specific* statutory authority that provides the immunity must be pled." (ABM at p. 65 [italics in original].) That rings hollow in light of the fact that respondents pled 11 affirmative defenses alleging immunities under the Act *and* the specific statutory authority for each. [1 AA 61-63.] Respondents offer no reason why they did not do, and could not have done, the same with regard to section 850.4 immunity.

But Quigley does not contend that respondents had to plead a specific *statute*. Code of Civil Procedure section 431.30, subdivision (b) required them to plead *facts* supporting the immunity, "'averred as carefully and with as much detail as the facts which constitute the cause of action and are alleged in the complaint.'" (*FPI*, *supra*, 231 Cal.App.3d at p. 384.) "In other words, the general requirement of stating the ultimate facts applies and, where particularity in pleading is necessary in a complaint, it is equally necessary in an affirmative defense involving the issue." (5 Witkin, *Cal. Procedure* (5th ed. 2008 and 2017 supplement) Pleading, § 1107, at p. 535.)

B. *Hata* does not support the 15th affirmative defense.

1. Respondents rely on dictum in *Hata*.

Respondents ground their claim that the 15th affirmative defense adequately pled section 850.4 immunity on *Hata v. Los Angeles County Harbor/UCLA Medical Center* (1995) 31 Cal.App.4th 1791. The holdings in *Hata* on which respondents rely are dicta, unnecessary to the court's decision, which fully disposed of the case.

There, plaintiff sued for injuries he suffered as a patient in a county mental institution. The county moved for nonsuit at the close of plaintiff's case in chief based on the immunity provided in section 854.8, which the

county had not alleged as a defense.[4] The court held that the county did not have to plead the immunity because governmental immunity is jurisdictional, and, thus, can be raised at any time.

At the same time, the court distinguished the immunity pertaining to patients in public hospitals from cases involving section 850.4 immunity as a defense in an action for dangerous conditions of public property. (*Hata, supra*, at p. 1802).

The holding that the county did not have to plead section 954.8 immunity was fully dispositive of the case. Nevertheless, the court went on to discuss the county's arguments that it had adequately alleged the immunity in an affirmative defense and that plaintiff had waived any defect in the pleading by failing to demur to the answer. The discussion of those issues is entirely dictum, unnecessary to the decision.

2. The affirmative defense the court approved in *Hata* stated the specific type of immunity defendant was relying on.

The 10th affirmative defense in *Hata* alleged that plaintiff's claims were limited or barred "'by the terms of California Government Code §§ 854-856.'" (*Id.* at p. 1804.) The court said the defense adequately asserted immunity under section 845.8. The sections cited in the defense are in a single chapter of the Act directly related to medical activities. (*Id.* at p. 1805.) So, the affirmative defense gave sufficient notice that the county "was relying on a *specific type* of immunity defense." (*Id.* [emphasis added]). Review of the listed sections would have advised counsel of section 854.8. (*Id.* at p. 1807.) Plaintiff's counsel, thus, had the

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[4] Section 854.8, subdivision (a)(2), states, "Notwithstanding any other provision of [the Act], except as provided in this section and in Sections 814, 814.2, 855 and 855.2, a public entity is not liable for: [¶] An injury to an inpatient of a mental institution."

opportunity to identify the specific immunity statute, read it, and determine its application to plaintiff's case. (*Id.* at 1806.)[5]

The *Hata* holding that merely citing the statutes was sufficient to state a defense cannot be squared with the rule that an affirmative defense may not be "terse legal conclusions," but must state facts that constitute the defense. (*FPI, supra*, 231 Cal.App.3d at p. 384.)

Unlike the defense approved in *Hata*, respondents' 15th affirmative defense here did not give notice of *specific type* of immunity. The *Hata* defense at least "enumerated the immunities relating to a public entity's medical activities." (*Id.* at p. 1806.) Here, the 15th affirmative defense threw the entire Government Claims Act at plaintiff, asserting "all defenses and rights granted to them by the provisions of Government Code sections 810 through 996.6, inclusive." (1 AA 60.) That embraces hundreds of sections in an entire Division of the Government Code. The defense left her counsel clueless to guess which of the myriad defenses, immunities, and rights in that mass of statutes respondents might be asserting.

C. Respondents' motion for summary judgment did not give notice of the section 850.4 immunity.

Respondents include their motion for summary judgment as one way that they allegedly raised section 850.4. (ABM at p. 71.) Yet, they frankly admit that the motion was "based on governmental immunities, *albeit not section 850.4*." (*Ibid.* [italics added].) Arguing that a motion that was not based on section 850.4 raised the immunity is an oxymoron.

Ignoring the self-contradiction, they pivot and accuse Quigley of having "waited until trial to raise the waiver [of section 850.4] argument for the first time...." (ABM at p. 71.) Quigley had no occasion to raise the

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[5] In fact, plaintiff's counsel stated in her declaration supporting a new trial motion that defendants "'*did* mention'" the specific immunity statute in their affirmative defenses. (*Id.* at 1805, court's italics).

issue of waiver until respondents asserted the immunity after trial commenced. Quigley could not be expected to have argued earlier that respondents waived an immunity they had not raised.[6]

D. Respondents did not give notice of the firefighting immunity defense nor state any facts supporting it in discovery.

Respondents contend that they gave notice of section 850.4 immunity in discovery. The discovery response they rely on is a barrage of words running more than two pages that does not state facts to which section 850.4 applies: that Quigley's injuries resulted from the condition of fire protection or firefighting equipment or facilities. (OBM at p. 31; 1 AA 167-169.)

Nevertheless, they contend that their discovery response "provided Quigley notice of their immunity defenses" by stating, "Garden Valley Fire District, was and remains a public entity enjoying statutory immunity and Quigley's claims against it and its agents and employees were barred as a matter of law." (ABM at p. 71; 1 AA 169.) That is not a statement of fact; it is a bare legal conclusion.

But respondent contend that their answer put Quigley on notice that they were asserting immunity under 850.4 since the answer "asserted governmental immunities that apply to public entities and employees" and defendants are public entities and employees. (*Ibid.*) That is the same meritless argument they made regarding their 15th affirmative defense; saying only that respondents were public entities and employees and that

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[6] Respondents say that when they moved for summary judgment based on immunities but not section 850.4, "Quigley did not challenge [their] assertion of the other governmental immunities they that were raised." (ABM at p. 71.) The truth is otherwise. Quigley addressed each and every one in her opposition to the motion. (Motion to augment the record, Exh. 1, Bates stamp pp. 14-18.)

they asserted government immunities did not give notice of which immunity or immunities in particular they might be claiming.

Respondents again cite *Hata* in arguing that the discovery response was sufficient to give notice that they were asserting section 850.4 immunity. But, unlike the county in *Hata*, respondents' interrogatory answer did not give a clue as to even the "specific type" of immunity they were claiming. (*Id.*, 31 Cal.App.4th at p. 1806.) *Hata* did not hold that it is sufficient to give notice of a specific immunity by saying nothing more than that defendants are public entities and employees to which and whom governmental immunities apply.

Respondents also cite *Perez v. Southern Pacific Transportation Co.* (1990) 218 Cal.App.3d 462, 471. (ABM at p. 72.) *Perez* is even less helpful to respondents than *Hata*. In *Perez*, although the court held that defendant could obtain summary judgment based on a statutory immunity that was not pled as an affirmative defense, plaintiff was aware of the potential applicability of the immunity four years before defendant moved for summary judgment. (*Ibid.*) The record here does not show that Quigley knew or should have known, before trial that, in addition to the almost 40 affirmative defenses they pled, respondents were also claiming immunity under section 850.4.

V. ALLOWING A STATE TO RAISE A SOVEREIGN IMMUNITY DEFENSE FOR THE FIRST TIME AT TRIAL WOULD SUBVERT THE INTEGRITY OF THE JUDICIAL SYSTEM, WASTE THE RESOURCES OF THE COURT AND THE PARTIES, AND DEFEAT THE PURPOSE OF SOVEREIGN IMMUNITY.

The rule that respondents advocate for and the court of appeal adopted—that governmental defendants may assert sovereign immunity for

the first time at trial, or indeed at any time—undermines principles central to a fair and efficient judicial system and to sovereign immunity itself.

First, it encourages government defendants to game the justice system. When sued, the government defendant may litigate the case on the merits, as these defendants did, without any real risk of adverse consequences. The government can allow the lawsuit to proceed, hoping for a favorable judgment, but knowing that if it cannot avoid liability and loses at trial, it can still evade liability by asserting an unpled immunity. Permitting a governmental entity to defend a case on the merits while silently holding an immunity defense in reserve is a game of heads-I-win-tails-you-lose. It "undermines the integrity of the judicial system" (*Hill, supra*, 179 F.3d at p. 756), is "grossly inequitable" (*Sutton v. Utah State School for the Deaf & Blind* (10th Cir. 1999) 173 F.3d 1226, 1236) and "looks 'less like sovereign immunity than sovereign inequity'" (*Rusk State Hospital v. Black* (2012) 392 S.W.3d 88, 109 [Lehrman, J., concurring in part and dissenting in part]). (See also *Wisconsin Dept. of Corrections v. Schacht* (1998) 524 U.S. 361, 394 (Kennedy, J, concurring).

Second, it unnecessarily wastes scarce judicial resources. Respondents burdened two courts with the litigation, the superior court in Plumas County, and the United States District Court for the Eastern District of California to which respondents removed the case. (AMJN, Exh. 2.) While the case was in federal court, that court and the United States Attorney General's Office had to spend time and energy on the matter.

The superior court spent time and energy for over four years in hearing and deciding numerous pre-trial motions, discovery motions, motions for summary adjudication and summary judgment, almost 30 motions in limine, conducting settlement conferences, and more. (See Register of Actions, 2 AA 404-411.) The court empaneled potential jurors gathered from around the county and spent days in jury selection only to be

presented, after opening statements, with a motion based on an immunity that respondents had never before mentioned, but could have asserted when they filed their answer, an immunity that, they contended, divested the court of the power to decide the case.

As this case exemplifies, to permit a government defendant to belatedly raise what it considers to be a dispositive immunity ensures the needless, unjustified, and unjustifiable waste of judicial resources.

Third, allowing a government defendant to withhold an immunity defense unfairly penalizes plaintiffs. They must devote time, money, and resources to litigation even though, if the immunity defense is valid, the case should have been dismissed at the outset. Without notice of a particular immunity defense, plaintiffs are denied the opportunity to conduct discovery on the defense, file dispositive motions that may resolve the issue, or prepare to meet the defense at trial.

Fourth, it defeats one of the main the purposes of governmental immunity—to protect the government from the expense and diversion of time and resources needed to defend lawsuits. In defending a lawsuit, governmental employees have to meet with attorneys, gather documents, answer interrogatories, give depositions, and, if the case proceeds to trial, participate in the trial proceedings. The taxpayers not only have to pay the resulting expenses and face the risk of liability, they must also suffer diminution in the availability of government services from employees who must be occupied with the litigation.

In sum, allowing a public entity to raise an immunity defense for the first time at trial undermines the judicial system, sanctions unfair tactics, and wastes the resources of the courts, of plaintiffs, and of the public entity itself.

On the other hand, the rule of *Lapides* and the line of pre-*Ford* cases it reinstated, under which immunity is waived by actively litigating the

merits of an action but not asserting immunity, strikes a fair balance between the interests of the government, plaintiffs, and the judicial system.

Respondents argue that requiring public entities to timely plead all potential liabilities as affirmative defenses "promises significant expansion of public entity liability." (ABM at p. 64.) Not at all. The scope of liability under the Act remain unaffected; the Act's provisions for both liability and immunity continue to be fully effective. If a sovereign contends that an immunity applies to a case, all it has to do is plead it at the outset. It is not burdensome nor will it expand government liability to require government defendants to plead all of the immunities that they contend are applicable promptly and properly.

At the same time, requiring a government defendant to plead immunities to avoid waiving them provides a strong incentive to assert all immunities at the outset that may quickly end the litigation.

CONCLUSION

Respondents litigated this case aggressively for more than four years. They asserted dozens of defenses, moved the case to federal court, then were sent back to state court, where they sought summary judgment or adjudication on immunities they had pled. Quigley and her counsel spent time and money engaging in discovery, defeating summary judgment motions, preparing for trial, presenting and opposing motions in limine, selecting a jury, and making opening statements. In the process, respondents tested the waters, invoked the court's powers to decide substantive matters, sought but failed to obtain summary judgment, required citizens to appear for jury service, participated in selecting the jury, heard Quigley's opening statement, then unexpectedly sprang their sovereign immunity defense.

In *Hill*, the Ninth Circuit refused to sanction the government's conduct of litigating the case for years, then raise an immunity for the first

time at the beginning of trial. "To permit a defendant to litigate the case on the merits, and then belatedly claim Eleventh Amendment immunity to avoid an adverse result would work a virtual fraud on the federal court and opposing litigants." (*Hill, supra*, 179 F.3d at p. 758.) This Court should be no less tolerant of respondents' same gambit here.

The judgment of the court of appeal should be reversed.

DATED: April 16, 2018

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CERTIFICATE OF WORD COUNT

The text of this brief consists of 10,954 words according to the word count feature of the computer program used to prepare this brief.

Dated: April 16, 2018

JAY-ALLEN EISEN

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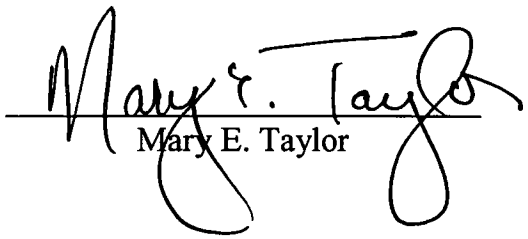

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