Supreme Court Number S242250

In the Supreme Court of the State of California

REBECCA MEGAN QUIGLEY,

Plaintiff and Appellant,

v.

GARDEN VALLEY FIRE PROTECTION DISTRICT, et al.,

Defendants and Respondents.

After a Decision by the Court of Appeal
For the Third Appellate District
Third Civil Case Number C079270
Superior Court of the State of California
For the County of Plumas, Case No. CV10-00225
The Honorable Janet Hilde

ANSWER BRIEF ON THE MERITS

LEWIS BRISBOIS BISGAARD & SMITH LLP
Joseph A. Salazar, Jr., SBN 169551
joe.salazar@lewisbrisbois.com
Jeffry A. Miller, SBN 126074
jeff.miller@lewisbrisbois.com
Lann G. McIntyre, SBN 106067
lann.mcintyre@lewisbrisbois.com
Jonna D. Lothyan, SBN 298650
jonna.lothyan@lewisbrisbois.com
701 B Street, Suite 1900
San Diego, California 92101
Tel.: 619.233.1006/Fax: 619.233.8627

Attorneys for Defendants and Respondents
GARDEN VALLEY FIRE PROTECTION DISTRICT, et al.

CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

S242250 - QUIGLEY v. GARDEN VALLEY FIRE PROTECTION DISTRICT

Full Name of Interested Entity/Person	Party / Non-Party		Nature of Interest
No interested parties	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
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Submitted by: Jonna D. Lothyan

/s/ Jonna D. Lothyan

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ISSUE PRESENTED

"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."

INTRODUCTION

Respondents, Garden Valley Fire Protection District, Jeff Barnhart, Frank DelCarlo and Mike Jellison ("the firefighter defendants") will demonstrate that immunity for firefighting

activities as described in Government Code section 850.4[1] may be raised for the first time at trial.

In California, courts possess jurisdiction to adjudicate public entity tort liability only if a statute provides for liability. Otherwise, courts lack subject matter jurisdiction because the government is generally immune from tort liability under the Government Tort Claims Act ("Act"). Under the Act, the only means by which a public entity may be held liable for tortious conduct is by specific statutory provision. Although here the firefighter defendants alleged a range a of government immunities as an affirmative defense in their answer, which included section 850.4, no California statute provides that governmental immunities may be waived by litigation conduct, such as by failing to allege immunity as an affirmative defense or failing to raise it in discovery responses or a dispositive motion.

The legislative history and intent of the Act—and that of section 850.4 in particular—establishes that Rebecca Megan Quigley ("Quigley") has it precisely backwards; it is the *plaintiff's burden* to establish liability under the Act and to plead around immunity, not the public entity's burden to plead immunity as an affirmative defense.

The Legislature's enactment of a comprehensive statutory scheme rigidly delineating public entity and public employee

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1 All further statutory references are to the Government Code unless otherwise noted.

immunity is premised on the idea that the Legislature, not the courts, should decide what protections ought to be afforded to the state's resources for functions the state must provide. Indeed, under the statutory scheme, public entity immunity is so significant that it is jurisdictional in nature. The Act does not contemplate or permit implicit consent to liability by litigation conduct where, by statute, immunity is absolute.

The policy of providing notice of a defendant's defenses—the policy that underlies the general rule that affirmative defenses must be pled in an answer—offers no reason to treat section 850.4 as an affirmative defense that must be pleaded or waived. A complaint alleging public entity conduct, together with specific application of provisions of the Act, necessarily places governmental immunity in issue.

The immunity for firefighting activities contained in section 850.4 is not conditioned on factual showings that constitute "new matter." The very circumstances alleged in Quigley's complaint give rise to governmental immunity for firefighting activities. Indeed, this court in *Heieck & Moran v. Modesto* (1966) 64 Cal.2d 229 (*Heieck*), concluded the application of section 850.4 can be decided on demurrer, as the application of the statute to the allegations of the complaint tests the sufficiency of the pleadings, without consideration of evidence, and is purely a question of law. Thus, immunity under section 850.4 can be raised at any time, even for the first time at trial or on appeal. The trial court and appellate court correctly decided the issue as a matter of law.

Finally, here, the firefighter defendants did not raise section 850.4 immunity for the first time at trial.[2] They alleged in an affirmative defense in their answer they were immune from Quigley's claims and identified a range of applicable Government Code immunity statutes, within which section 850.4 was contained. The firefighter defendants were not required to assert each specific statute as a separate affirmative defense. The range of governmental immunity statutes pled sufficiently raised the defense.

FACTUAL AND PROCEDURAL HISTORY

A. The Parties.

The United States Forest Service ("USFS") employed Quigley as a firefighter. [RT 6.] Chester Fire Protection District ("Chester Fire") is a public entity that provides local firefighting services. [1 AA 205.] Chester Fire employed DelCarlo and Jellison. [*Id.* at pp. 8, 89, 205; RT 56.] Garden Valley is also a public entity that provides local firefighting services. Garden Valley employed Barnhart. [1 AA 205.]

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[2] Although the court has asked for briefing on whether section 850.4 may be raised for the first time at trial, the firefighter defendants in fact raised section 850.4 immunity as an affirmative defense in a range of immunities (Gov. Code, §§ 810-996.6) pled in their answer. [1 AA 60.] The legal sufficiency of the firefighter defendants' pleading of section 850.4 is addressed in Section VI.

B. The Silver Fire and Silver Fire Camp.

The Plumas County Fairgrounds ("fairgrounds") is public property owned and operated by Plumas County. [1 AA 10, 201.] In 2009, a fire known as the "Silver Fire" broke out in the Plumas National Forest. [*Id.* at pp. 10, 209.] The USFS set up a fire camp at the fairgrounds in response to the Silver Fire ("fire camp") to house all USFS personnel required to fight the fire. [*Id.* at pp. 201, 205.] A team of about 50 people, referred to as the NorCal 1 Team, took control over the Silver Fire and established the fire camp. [RT 9-10.] Barnhart, DelCarlo and Jellison, members of NorCal 1, worked at the fire camp. [*Id.* at p. 10.] Barnhart acted as the safety officer, DelCarlo as a facility unit leader, and Jellison as a logistics chief. [*Id.* at p. 1.]

On September 20, 2009, 300 people were present at the fire camp. [RT 16.] Shower units had been set up near the grassy racetrack infield area of the fire camp. [*Id.* at p. 12.] Vehicles drove through the grassy infield to deliver clean water and remove gray water from the shower units. [*Id.* at p. 15.] By the next day, the population had doubled to 600 people working in response to the Silver Fire. [*Id.* at p. 21.] When Quigley returned from fighting the fire, she slept in the infield near the showers and away from her hotshot team. [*Id.* at pp. 21-22; 1 AA 210.] A sanitation truck removing gray water from the showers drove though the infield and accidentally ran over Quigley while she slept. [RT 22-23.]

C. Quigley's First Amended Complaint.

Quigley filed governmental tort claims against the public entities pursuant to section 910 of the Act. [1 AA 10-11, 19-50.] The public entities rejected Quigley's claims and Quigley sued the firefighter defendants and others as a result of injuries she sustained in the accident. [*Id.* at pp. 6, 10-11.] Quigley alleged causes of action for: (1) negligence; (2) dangerous condition of public property; and (3) failure to warn. [*Id.* at pp. 11-14.] Quigley contended she was a firefighter engaged in fighting a fire at the time of the incident. [*Id.* at pp. 10-11.]

According to Quigley, the firefighter defendants were responsible for the safety and planning of the fire camp sleeping areas. [1 AA 13.] Quigley claimed the firefighter defendants maintained the fairgrounds in a manner that created a dangerous condition, including designing a sleeping area for firefighter crews on the lawn of the racetrack, failing to mark roads adequately and exposing firefighters to an unreasonable risk of harm to traffic passing though the sleeping area. [*Id.* at pp. 12-13.] Finally, Quigley alleged the firefighter defendants failed to provide adequate markings, routes, or warnings of trucks driving through the sleeping area, causing Quigley to sustain injuries. [*Id.* at pp. 14-15.]

The firefighter defendants answered Quigley's first amended complaint. [1 AA 57.] They asserted affirmative defenses for immunity, including Government Code sections 810 through 996.6. [*Id.* at p. 60.] At the time they answered the

complaint and throughout the action, the firefighter defendants were not certain whether the State of California, the federal government, or the fire districts employed DelCarlo, Jellison, and Barnhart in their roles regarding the Silver Fire, or whether they acted as independent contractors. [*Id.* at pp. 201-202.] In fact, because the USFS set up the fire camp and maintained exclusive control over the Silver Fire, the firefighter defendants believed they may have been federal government employees during the Silver Fire. Thus, the case was removed to federal court for the district court to determine whether DelCarlo, Jellison and Barnhart acted as federal employees. Following application to the United States Attorney General, the district court determined the three were not federal employees, but rather independent contractors. The district court remanded the case to state court. [*Id.* at p. 202.]

The firefighter defendants defended the case under the assumption that DelCarlo, Jellison, and Barnhart were independent contractors. Accordingly, in later responses to discovery, they stated that they considered DelCarlo, Jellison, and Barnhart to be independent contractors hired by the USFS. [1 AA 168.] Consistent with this understanding, the firefighter defendants based their summary judgment motion on DelCarlo, Jellison and Barnhart acting as independent contractors at the time of the incident, rather than as government employees. [*Id.* at pp. 201-203.]

D. The Case Proceeds to Trial.

At the time of trial, the firefighter defendants were the only remaining defendants in the case. The other parties had settled for substantial amounts. [RT 59.] At the trial readiness conference, the individual defendants' employment status was finally resolved when the parties stipulated that DelCarlo and Jellison were employees of Chester Fire and Barnhart was employed by Garden Valley. [1 AA 201-202.] The parties also stipulated that DelCarlo, Jellison, and Barnhart acted within the course and scope of their employment at the time of the accident. [*Id.* at pp. 85, 89-91.]

E. Quigley's Opening Statement.

During opening statements, Quigley's counsel argued that DelCarlo, Jellison, and Barnhart were part of the NorCal 1 Team that arrived on the morning of September 20, 2009, to take over the fire camp. [RT 9-10.] They were paid for being on duty 24 hours a day. [*Id.* at p. 11.]

DelCarlo's responsibilities as the facility unit leader included the layout and operations of the fire camp. He was responsible for signing and roping off sleeping areas for resting firefighters and other personnel working at the fire camp. He also provided fire camp maps to truck drivers. [RT 27.]

Quigley's counsel described the showers that were set up in the grassy infield. [RT 12-13.] DelCarlo ordered a crew to set up tents by the showers. [*Id.* at pp. 13-14.] According to Quigley's

counsel, DelCarlo knew vehicles serviced the shower area and would be driving in and out of the grassy infield area. [*Id.* at p. 14.] DelCarlo gave firefighters permission to sleep in the grassy infield area. Quigley's counsel argued DelCarlo failed to sign and rope off the designated sleeping area in the infield as required. [*Id.* at pp. 14-15.]

Jellison, the logistics chief, helped with the camp layout, including sleeping areas. [RT 18-19.] He monitored the base camp population to determine whether additional sleeping areas were needed and prepared the fire camp for an influx of firefighters. [*Id.* at pp. 31-32.]

Quigley's counsel argued Jellison and DelCarlo failed to provide a safe sleeping area. [RT 19.] The fire camp doubled from 300 to 600 people, but Jellison and DelCarlo did not expand the sleeping area, so Quigley slept in the grassy infield. [*Id.* at pp. 21-22.]

Barnhart, the safety officer, was responsible for walking through the camp to check for safety. Quigley's counsel argued Barnhart had a responsibility to make sure the sleeping area in the grassy infield was roped off, but he failed to do so. When Barnhart inspected the showers and sleeping area he checked-off the inspection form that sleeping areas were separate from parking. [*Id.* at pp. 20-21.] The sleeping area was not roped off and did not have signs posted. [*Id.* at p. 21.]

On September 21, 2009, at 10:00 p.m., a sanitation truck ran over Quigley while servicing the showers. [RT 22.] Quigley's counsel argued the truck did not need to service the showers at night, but the firefighter defendants did not give the driver any direction. [*Id.* at p. 26.] DelCarlo did not provide a fire camp map to the truck driver or set up a traffic route away from the sleeping area in the infield. [*Id.* at pp. 27-28.]

Quigley's counsel argued the firefighter defendants caused Quigley's injuries and damages by creating an unsecured infield sleeping area, which included failing to: (1) sign and rope off the sleeping area; (2) provide a fire camp map to the truck driver; (3) set a traffic route for the truck driver; (4) provide a schedule to the truck driver; (5) increase sleeping areas; and (6) identify safety hazards. [RT 29-30, 34-38.]

F. The Firefighter Defendants Move for Nonsuit.

The firefighter defendants moved for nonsuit at the completion of Quigley's opening statement. [RT 52; 1 AA 68.] They relied on statutory immunity under Government Code sections 815, 815.2, 818.6, 820.2, 821.4, 850.2 and 850.4, and argued that Barnhart, DelCarlo and Jellison were employees of a public entity and entitled to immunity. [1 AA 70-72; RT 56.] Thus, because Garden Valley and Chester Fire employed Barnhart, DelCarlo and Jellison, but did not own the fairgrounds, the immunities applied. [RT 57-59.]

The court provided Quigley an opportunity to submit written opposition to the nonsuit motion. [RT 60-61; 1 AA 92.]

Quigley argued, among other things, that the firefighter defendants waived sections 850.2 and 850.4 because they failed to raise these immunities in their answer to the complaint, their summary judgment motion, or in discovery responses. [1 AA 99.] Quigley also submitted declarations from expert witnesses regarding the meaning of a "firefighting facility" as described in section 850.4. [*Id.* at pp. 113-116.]

The court ordered the parties to appear for further argument the following day and requested further briefing on the waiver issue. [RT 70, 102.] Quigley argued that the firefighter defendants waived their right to assert immunity because they did not adequately plead immunity in the affirmative defenses section of their answer. [*Id.* at pp. 103-104.] The firefighter defendants asserted that the 15th affirmative defense raised in their answer adequately pled the immunities as a defense. [*Id.* at pp. 117-120.] They also raised immunity as a defense in discovery responses. [*Id.* at p. 121.]

The court granted nonsuit on the grounds that the firefighter defendants were immune from liability pursuant to section 850.4. [RT 136.] The court stated the matter was a purely legal question regarding the meaning of "firefighting facilities" in section 850.4. For this reason, the court did not consider the expert declarations Quigley submitted in opposition because expert declarations do not tell a court "what the statute says." [1 AA 177, 183-186.] The court granted the nonsuit motion. [*Id.* at pp. 122-126.]

G. Quigley Moves for New Trial.

Quigley moved for a new trial. [1 AA 136, 146.] She argued the court erred in not denying the nonsuit motion due to waiver and in finding the fire camp was a firefighting facility as a matter of law within the meaning of section 850.4. [*Id.* at pp. 136-146.] Quigley also argued that the firefighter defendants' counsel engaged in misconduct by concealing the immunity defense. [*Id.* at pp. 146-147.]

In opposition, the firefighter defendants argued they did not waive governmental immunity as a defense. Rather, they adequately pled section 850.4 as an affirmative defense in their answer. They also raised the immunity defense in responses to discovery. [2 AA 292-297.] Finally, counsel did not willfully conceal material evidence as counsel did in fact disclose the immunity defense prior to trial. [*Id.* at pp. 302-304.]

The court denied the new trial motion finding that the firefighter defendants did not waive the immunity defense and no error of law occurred. [2 AA 390, 394.]

H. Appellate Court Opinion.

The Court of Appeal affirmed the judgment of nonsuit holding, inter alia, that governmental immunity is jurisdictional and may be raised at any time. (*Quigley v. Garden Valley Fire Protection Dist.* (2017) 10 Cal.App.5th 1135, 1141 (*Quigley*).) The appellate court reasoned that this is especially true for section

850.4 because it provides absolute, not qualified, immunity for public entities and public employees.

The court disagreed with and distinguished the holding in *McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App.3d 683 (*McMahan's*) that section 850.4 was an affirmative defense because, in reaching that conclusion, *McMahan* relied upon *De La Rosa v. City of San Bernardino* (1971) 16 Cal.App.3d 739, which analyzed qualified design immunity under former section 830.6, not absolute immunity, which applies to firefighting activities and facilities. The court stated that "[u]nder former section 830.6, the public entity was immune from liability 'for maintaining a dangerous condition of public property *as long as the maintenance conforms to the original plan or design.*'" (*Quigley, supra,* at p. 1142, original italics, quoting *De La Rosa,* at p. 747.) "Thus, to trigger the immunity, the public entity had to affirmatively show the dangerous condition alleged by the plaintiff conformed to a plan or design. There is no such required showing under section 850.4, which applies, as alleged in this case, if the complained-of injury resulted from the condition of a firefighting facility." (*Quigley, supra,* at p. 1142.)

LEGAL ARGUMENT

I. Section 850.4 Can Be Raised at Any Time Because, Absent a Statute Allowing Imposition of Liability, Public Entities and Employees Are Immune from Liability and Courts Lack Jurisdiction to Adjudicate the Matter.

A. In Enacting the Government Tort Claims Act, the Legislature Abolished All Judicially Declared Forms of Liability for Public Entities and Employees.

The law in California has long held that governmental immunity is jurisdictional. The Legislature has provided a comprehensive statutory scheme that strictly limits public entity liability solely pursuant to statute. By no other means may a court impose liability on a public entity.

A proper understanding of the Legislative history and intent in creating the Act—to invoke a general rule of public entity immunity and to limit liability of public entities to only those instances provided by statute—is critical to the waiver issue presented here. The statutory scheme confirms that section 850.4 immunity is absolute, cannot be waived by litigation conduct, and may be raised for the first time at trial.

For centuries, the prevailing rule in California was that states and public entities enjoyed sovereign or governmental immunity from suit. Then, in *Muskopf v. Corning Hospital District* (1961) 55 Cal.2d 211, and *Lipman v. Brisbane Elementary School District* (1961) 55 Cal.2d 224, this court

proclaimed what proved to be a brief detour from that rule, holding that the doctrine of sovereign immunity would no longer protect public entities from civil liability for their torts. (*Muskopf, supra,* at pp. 213-215 & fn. 1; *Lipman, supra,* at p. 229.)

The Legislature immediately noted the significance of the judicial abolishment of governmental immunity as a result of the *Muskopf* opinion. In the legislative session immediately following *Muskopf*, the Legislature suspended the decision's effect and directed the California Law Revision Commission (the "Commission") to conduct a study of whether the doctrine of sovereign immunity should be abolished or revised. (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 830 (*Brown*), citing Stats. 1961, ch. 1404, pp. 3209-3210.)

> Following extensive research, the Commission published a recommendation that public entities across the board should remain immune from liability unless liability is imposed by a specific statute. (*Brown, supra,* 4 Cal.4th at p. 830, citing Recommendation Relating to Sovereign Immunity, No. 1, Tort Liability of Public Entities and Public Employees, 4 Cal. Law Revision Com. Rep. (Jan. 1963) p. 801; Legis. Analyst, analysis of Sen. Bill No. 42 (Apr. 9, 1963) [Request for Judicial Notice, "RJN," Exh. A].) The recommendation became the Tort Claims Act (Stats. 1963, ch. 1681, p. 3266). (*Brown, supra,* at p. 830; see also *State Dept. of State Hospitals v. Superior Court* (2015) 61 Cal.4th 339, 348.)

In its report, the Legislature recognized that the government is fundamentally different from a private person in the public functions it performs, such as making laws and issuing

and revoking professional and occupational licenses. And significantly, unlike in the private sector, a public entity often cannot reduce its risk of potential liability by refusing to engage in a particular activity, for the government must continue to govern and is required to furnish services that cannot be adequately provided by any other agency. (Release Re: Six-Bill Package Re: Public Entity Liability (Jan. 10, 1963) [RJN, Exh. B].) Thus, the Legislative Committee comments to section 815 described the Legislature's intent to restrict public entity liability to that defined by statute: "[t]his section abolishes all common law or judicially declared forms of liability for public entities, except for such liability as may be required by the state or federal constitution. . . ." (Legis. Com. com., Gov. Code, § 815; see also *Becerra v. County of Santa Cruz* (1998) 68 Cal.App.4th 1450, 1457.)

The Legislature noted that public entity liability was a matter of statewide concern and should be subject to uniform rules established by legislative action alone. (Legis. Com. com., Gov. Code, § 815.) Consequently, the Law Revision Commission affirmed its intent that public entities are immune from suit unless they are declared to be liable by specific statute and that these rules apply broadly to all public entities. (Gov. Code, § 815, subd. (a).)

Senate Bill 42 was introduced with the intent of providing public entities and employees not only wide discretionary immunity, but also a great number of specific immunities. These

immunities recognize that, unlike private persons or corporations, there are many services and functions the government must provide because no one else can, such as jails, prisons and firefighting facilities. (Sen. Bill No. 42, Floor Statement, pp. 1-2 [RJN, Exh. C].) The Office of Legislative Counsel Senate Bill 42 Report set forth comprehensive rules governing liability and nonliability of public entities as well as rules relating to liability and immunity of public employees arising out of these services and functions. The report's reference to the Act as "comprehensive" confirms the Legislature's intent that liability statutes apply only where there are no applicable specific immunity statutes. (Legis. Counsel, Rep. on Sen. Bill No. 42 (July 3, 1963) p. 1 [RJN Exh. D].)

Section 815 of the Act describes the fundamental rule regarding the interplay of immunity and liability:

> Except as otherwise provided by statute:
>
> (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.
>
> (b) The liability of a public entity established by this part (commencing with Section 814) is subject to any immunity of the public entity provided by statute, including this part, and is subject to any defenses that would be available to the public entity if it were a private person.

Thus, under section 815, subdivision (a), "there is no common law tort liability for public entities in California; instead, such liability must be based on statute." (*Guzman v. County of*

Monterey (2009) 46 Cal.4th 887, 897.) Further, subdivision (b) provides that the immunity provisions will, as a general rule, prevail over all sections imposing liability. The Act "abolishes all common law or judicially declared forms of liability. . . ." (Legis. Com. com., Gov. Code, § 815.)

The Act only allows suit against a public entity for tort liability when permitted by statute. In cases against public entities and their employees, a statute must expressly authorize liability for personal injuries: "Absent some constitutional requirement, 'public entities may be liable *only* if a statute declares them to be liable.'" (*Tuthill v. City of San Buenaventura* (2014) 223 Cal.App.4th 1081, 1088, original italics, quoting *Cochran v. Herzog Engraving Co.* (1984) 155 Cal.App.3d 405, 409 (*Cochran*); see also Gov. Code, § 815.) 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. (*Brown, supra,* 4 Cal.4th at p. 829, citing *Williams v. Horvath* (1976) 16 Cal.3d 834, 838.) Indeed, immunity is the rule, and liability is the exception. (*Amylou R. v. County of Riverside* (1994) 28 Cal.App.4th 1205, 1213.)

Quigley's reliance on *Muskopf* and *Lipman*, which were decided before the Act and expressly superseded by the Legislature, is misplaced. So, too, is reliance on Supreme Court cases that seemingly continue to apply the *Muskopf* principle that liability is the rule. (See AOB, p. 20, citing *Johnson v. State of California* (1968) 69 Cal.2d 782, 798; *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.)

Quigley's analysis begins with the untenable premise that liability is the rule and immunity the exception. Yet, as Quigley concedes, this court more recently has acknowledged that the Legislature has provided clear immunity under the Act and in California, immunity is the rule and liability the exception. [AOB, p. 21.] (See *B.H. v. County of San Bernardino* (2015) 62 Cal.4th 168, 179 [governmental tort liability must be based on statute, unless a statutory exception to the general rule of public entity immunity is provided]; *Williams v. Horvath, supra,* 16 Cal.3d at p. 838; *Brown, supra,* 4 Cal.4th at p. 830; *DiCampli-Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983, 991 [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"; immunity is waived only if the various requirements of the Act are satisfied]; *Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 933 [to avoid the general rule of immunity, a suit must find statutory support].)

Reflecting its ongoing acknowledgement of the primacy of governmental immunity, this court again in *Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, held a public entity may be liable for dangerous condition of public

property based upon the location and design of a bus stop, but that a "plaintiff suing on this ground would have to overcome the general statutory immunity public entities enjoy from liability for injuries arising from discretionary choices regarding a facility's 'plan or design' [citation] [and] [o]ther statutory immunities. . . ." (*Id.* at p. 155.) Justice Brown, in a dissenting opinion, elaborated that in California, governmental immunity is the rule and liability is the exception. Dangerous condition of public property is an exception to the general rule of governmental immunity. (*Id.* at p. 160.)

These opinions are consistent with the purpose of the Act as expressed by the Legislature, which committed considerable time and attention to creating a comprehensive statutory scheme of immunity, allowing liability in only specific and limited circumstances covering all areas of government and public functions. The Legislative history and intent of the Act establishes that the Act not only restores governmental immunity after *Muskopf*, but creates a rule of immunity that prevails over liability. This is the premise from which the immunity analysis must begin. The Act does not merely restore sovereign immunity as a defensive matter, but declares sovereign immunity the overarching rule, limiting the ability to bring action against a government defendant unless expressly permitted by statute. Thus, Quigley's approach, which begins with a presumption of liability, is unsustainable.

B. The Rule in California Has Long Been Clear—Courts Lack Jurisdiction to Impose Liability on California Public Entities Absent a Specific Statute Providing an Exception to Immunity.

This court has long held that governmental immunity is jurisdictional. (*County of Sacramento v. Superior Court* (1972) 8 Cal.3d 479, 481; *Yarrow v. State of California* (1960) 53 Cal.2d 427, 433; *People v. Superior Court* (1947) 29 Cal.2d 754, 756 (*Pierpont*).) Quigley asks this court to ignore these holdings here because the court did not elaborate on, or explain, what it meant by the term "jurisdictional." [AOB, pp. 45-46.] Numerous decisions addressing this issue provide convincing explanation and examples of the meaning of the term "jurisdictional" in the context of the Act.

Courts in California have held in broad ranging circumstances governmental immunity is a jurisdictional bar to a claim for money damages against a public entity or employee. (See *Hooper v. City of Chula Vista* (1989) 212 Cal.App.3d 442, 454, fn. 11 [section 854.8 immunity from liability for injury caused by an escaping prisoner is a jurisdictional matter that can be raised for the first time on appeal even if "not adequately asserted in the trial court"]; *Kemmerer v. County of Fresno* (1988) 200 Cal.App.3d 1426, 1435 [section 820.2 and 821.6 immunities raise jurisdictional issues that may be raised for the first time on appeal]; *State of California v. Superior Court* (1984) 150 Cal.App.3d 848, 853-858 [section 815 immunity applies to Department of Real Estate's failure to conduct an investigation];

Buford v. State of California (1980) 104 Cal.App.3d 811, 826-827 [section 854.8 immunity from liability for conduct by escapee of mental institution raises an issue of the court's jurisdiction]; *County of Santa Barbara v. Superior Court* (1971) 15 Cal.App.3d 751, 754 [section 854.8 and 846 immunities from liability for injuries caused by an escaped prisoner and failure to make an arrest are jurisdictional issues]; *State of California v. Superior Court* (1968) 263 Cal.App.2d 396, 398-400 [section 835, subdivision (b) immunity requiring actual or constructive notice of defective condition raises a jurisdictional question]; *Gould v. Executive Power of the State* (1952) 112 Cal.App.2d 890, 891 [sovereign immunity from suit presents a jurisdictional question]; see also *Inland Empire Health Plan v. Superior Court* (2003) 108 Cal.App.4th 588, 592 ["governmental immunity from liability is a jurisdictional matter that can be raised for the first time on appellate review"]; *Hata v. Los Angeles County Harbor/UCLA Medical Center* (1995) 31 Cal.App.4th 1791, 1804 *Hata*) [governmental immunity is jurisdictional and can properly preclude a cause of action].)

Quigley concedes in her opening brief that governmental immunities are jurisdictional, but "only in the broader sense of the word." [AOB, p. 32.] She contends governmental immunity in California is not jurisdictional in the "fundamental" sense because the state can "consent" to be sued pursuant to California Constitution, Article III, section 5. [*Id.* at p. 37.] Quigley's strained attempt to distinguish the deep body of jurisprudence

holding that governmental immunity under the Act is jurisdictional [*id.* at pp. 45-46] is simply unavailing.

For example, in *Paterson v. City of Los Angeles* (2009) 174 Cal.App.4th 1393, the plaintiff contended the police officer defendants waived immunity provided under section 821.6 because the immunity was not sufficiently asserted in the answer. (*Id.* at p. 1404, fn. 5.) The court rejected the contention, stating "[g]overmental 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 the defense." Rather, "'[i]t is a *plaintiff's responsibility* to plead "facts sufficient to show his or her cause of action lies outside the breadth of any applicable statutory immunity."' (*Ibid.*, italics added.)

Because immunity is the rule and liability is strictly limited to specific statutes, the court lacks subject matter jurisdiction to hear cases against a public entity where immunity applies because no cause of action exists—period. Indeed, the failure to plead sovereign immunity cannot create a cause of action where none existed because immunity is the rule.

C. The Vast Majority of Other States Treat Public Entity Immunity As a Jurisdictional Issue That Cannot Be Waived.

Quigley contends courts in other states have abandoned the rule that sovereign immunity is a jurisdictional bar and cannot be waived. [AOB, pp. 42-43.] That view, however, is not the prevailing view.

The overwhelming majority of jurisdictions hold that the sovereign's consent to be sued must be given by the Legislature, as the only appropriate body to speak in this regard on behalf of the sovereign. In the absence of specific authority conferred by an enactment of the Legislature, the sovereign's immunity from suit cannot be waived through the imposition of procedural requirements or be deemed forfeited by procedural defaults. (See *Mack v. Wilcox County Board of Education* (Ala. 2016) 218 So.3d 774, 777 [sovereign immunity is "not an affirmative defense," but rather a "jurisdictional bar"]; *Janowski v. Division of State Police* (Del. 2009) 981 A.2d 1166, 1168-1169 [there can be no inadvertent waiver of sovereign immunity]; *District of Columbia v. North Washington Neighbors, Inc.* (D.C. 1976) 367 A.2d 143, 148, fn. 7 [because sovereign immunity is a jurisdictional issue, appellate court is obliged to consider it, even on its own motion]; *Horak v. State* (1976) 171 Conn. 257, 260 [sovereign immunity is a bar to the jurisdiction of the court because the state is immune from suit unless the state, by legislation, consents to be sued]; *Board of Regents of the University System of Georgia v. Myers* (2014) 295 Ga. 843, 845 [sovereign immunity relates to subject matter jurisdiction]; *Smith v. Jones* (1986) 113 Ill.2d 126, 130 [subject matter jurisdiction cannot be waived and sovereign immunity requires dismissal of complaint]; *McNair v. State* (1943) 305 Mich. 181, 187 [failure to plead defense of sovereign immunity cannot create a cause of action where none existed before].)

Unless the Legislature provides a statutory waiver of governmental immunity, immunity cannot be waived by litigation conduct, or otherwise. In *Charles E. Brohawn Brothers v. Board of Trustees of Chesapeake College* (Md.Ct.App. 1973) 269 Md. 164, the Maryland Court of Appeals held that because of the doctrine of sovereign immunity, a litigant is precluded from asserting an otherwise meritorious cause of action against a sovereign state or one of its agencies that has inherited its sovereign attributes, unless expressly waived by statute or by a necessary inference from the legislative enactment. In the absence of statutory authorization, neither counsel for the state nor any of its agencies may, either by affirmative action or by failure to plead the defense, waive the defense of governmental immunity. (*Id.* at pp. 165-166.)

Similarly, the North Carolina Supreme Court held in *Orange County v. Health* (1972) 282 N.C. 292, the common law rule of governmental immunity prevails. Under this rule, a municipality is not liable for the torts of its employees or agents committed while performing a governmental function. In the absence of clear statutory authorization by the lawmaking body, a municipality has no power to waive its governmental immunity. The concept of sovereign immunity is so firmly established that it should not and cannot be waived by indirection or by procedural rule. Any such change should be by plain, unmistakable mandate of the lawmaking body. (*Id.* at p. 296.)

The Supreme Court of Kansas agreed in *Heman Construction Co. v. Capper* (1919) 105 Kan. 291:

> As we understand the rule relating to the immunities attaching to sovereignty, such attributes are never to be considered as waived or surrendered by any inference or implication. The surrender of an attribute of sovereignty being so much at variance with the commonly accepted tenets of government, so much at variance with sound public policy and public welfare, the courts will never say that they have been abrogated, abridged, or surrendered, except in deference to plain, positive legislative declarations to that effect.

(*Id.* at pp. 293-294; *Lister v. Board of Regents of the University Wisconsin System* (Wis. 1976) 240 N.W.2d 610, 618 [the Legislature is the proper body to authorize suits against the state; an agency or officer of the state may not waive the state's immunity from suit unless specifically authorized to do so]; *Afzall v. Commonwealth* (2007) 273 Va. 226, 230 [sovereign immunity may be raised for the first time on appeal because if sovereign immunity applies, the court is without subject matter jurisdiction to adjudicate the claim].)

Likewise, in *Wallace v. Dean* (Fla. 2009) 3 So.3d 1035, the Florida Supreme Court stated that sovereign immunity relates to subject matter jurisdiction. Parties may not confer subject matter jurisdiction by waiver, failure to object, or consent where none is given by law. Governmental immunity may be raised at any time. (*Id.* at p. 1044, fn. 4.)

In *North v. State* (Iowa 1987) 400 N.W.2d 566, the Iowa Supreme Court stated that "[b]ecause the 'issue whether the legislature intended to waive its sovereign immunity with respect to a particular type of claim is a matter of jurisdiction,' the State may raise the issue at any time, even initially on appeal." (*Id.* at p. 570.)

Because public entity liability results in public expenditures, the Legislature, not the courts, is best suited to deem how and when a public entity may be subject to liability. In *City of New Braunfels v. Carowest Land, Ltd.* (Tex.Ct.App. 2014) 432 S.W.3d 501, the court affirmed that Texas courts have no subject matter jurisdiction over suits brought against governmental agencies because "the Legislature, not the judiciary, is best suited to make the policy-laden judgments as to how the resources of Texas governmental units should be expended." (*Id.* at p. 513.) The court confirmed that the Texas high court has "squarely rejected the notion that a governmental entity with authority to enter contracts, or an agent acting on its behalf, can contractually waive immunity from suit." It has similarly declined repeated requests to recognize a "waiver by conduct." (*Id.* at pp. 520-522.)

New Hampshire's statutory scheme is similar to California's. In New Hampshire, sovereign immunity rested on common law until the Legislature enacted statutes that adopted sovereign immunity "as the law of the state," except where a statute might provide an exception. In *Lorenz v. New Hampshire*

Office of the Courts (2005) 152 N.H. 632, the New Hampshire Supreme Court held that sovereign immunity is a jurisdictional question not to be waived by conduct or undermined by estoppel. It is not a defense that must be affirmatively pled. (*Id.* at p. 634.) The court explained that New Hampshire courts lack subject matter jurisdiction to hear an action against the state unless the Legislature has "prescribed the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted." (*Id.* at p. 634.) The doctrine "serves two general public policy considerations: the protection of the public against profligate encroachment on the public treasury, and the need for the orderly administration of government, which, in the absence of immunity, would be disrupted if the state could be sued at the instance of every citizen." (*Ibid.*)

In *Davis v. State* (2017) 297 Neb. 955, Nebraska's highest court overruled Nebraska cases holding that a statutory immunity provision under the state's Tort Claims Act is an affirmative defense that the state must plead and prove. The court held that the state's waiver of tort immunity presented a question of law. (*Id.* at p. 968.) After an exhaustive analysis of United States Supreme Court and circuit case law applying sovereign immunity under the Federal Tort Claims Act ("FTCA") and the Eleventh Amendment, the Nebraska Supreme Court concluded that sovereign immunity is jurisdictional in nature. (*Id.* at pp. 973-975.) Because courts have a duty to determine whether they have subject matter jurisdiction, treating the FTCA exceptions as waivable affirmative defenses places courts in an

impossible position when a jurisdictional problem appears on the face of a plaintiff's complaint. (*Id.* at pp. 973-978.) Thus, the court held that an exception to the state's waiver of immunity is an issue that the state may raise for the first time on appeal and is one that a court may consider sua sponte. (*Id.* at p. 979.)

Like the Act in California, Maine's statutory reformulation of the doctrine of sovereign immunity provides that all governmental entities shall be immune from suit "except as otherwise expressly provided by statute." (Me. Rev. Stat. Ann., tit. 14, § 8103.) In *Drake v. Smith* (Me. 1978) 390 A.2d 541, the Supreme Court of Maine held in the absence of specific authority conferred by an enactment of the Legislature, the sovereign's immunity from suit cannot be waived through the imposition of procedural requirements or be deemed forfeited by procedural defaults. (*Id.* at p. 543.)

This long line of out-of-state cases holding governmental immunity to be jurisdictional express principles that echo the legislative intent behind California's Act in codifying government liability and limiting public entity liability strictly as provided by statute. The California Legislature has statutorily defined public entity immunity from liability for firefighting activities. Without a statutory provision for liability, courts lack jurisdiction to decide the matter. Immunity cannot be waived through litigation conduct. When an immunity applies, there is no subject matter jurisdiction. As stated in *Drake v. Smith, supra,* 390 A.2d 541, the Legislature's enactment of the Act demonstrates that absent

specific authority conferred by the Legislature, immunity from suit cannot be waived by procedural requirements or deemed forfeited by procedural defaults. (*Id.* at p. 543.)

II. Neither the Common Law Doctrine of Sovereign Immunity Nor the Eleventh Amendment Apply or Lend Support to the Theory That Governmental Immunity May Be Waived by Failing to Assert It Before Trial.

Quigley relies heavily on the common law doctrine of sovereign immunity and the Eleventh Amendment for the proposition that a public entity must assert immunity, or it is waived. [AOB, pp. 36-38.] Quigley is mistaken.

A. Common Law Sovereign Immunity Is Preempted by the Act.

The Act renders the common law doctrine of sovereign immunity inapplicable in two very distinct ways: (1) the Act is a comprehensive statutory scheme that expressly mandates immunity unless a statute provides otherwise and (2) the plaintiff carries the burden of establishing liability, unlike under the common law doctrine of sovereign immunity, where the public entity claiming the immunity carries the burden of proof. (*People v. Miami Nation Enterprises* (2016) 2 Cal.5th 222, 242-243, citing *ITSI T.V. Productions, Inc. v. Agricultural Assns.* (9th Cir. 1993) 3 F.3d 1289, 1291.) Indeed, under the Act, the plaintiff must first establish liability. The only manner in which a public entity may be held liable is pursuant to statute and only when there is no applicable immunity statute. (Gov. Code, § 815, subd.

(b) ["[t]he liability of a public entity . . . is subject to any immunity of the public entity provided by statute . . . and is subject to any defenses that would be available to the public entity if it were a private person"]; *Brown, supra,* 4 Cal.4th at p. 829, citing *Williams v. Horvath, supra,* 16 Cal.3d at p. 838.)

B. Eleventh Amendment Immunity Principles Have No Application in State Court Tort Actions.

Quigley also argues states may waive immunity provided by the Eleventh Amendment because it is a personal privilege and not a limitation on the court's subject matter jurisdiction, relying primarily on *Hill v. Blind Industries & Services of Maryland* (9th Cir. 1999) 179 F.3d 754. (AOB, pp. 38-40.) None of the cases cited, however, offer support for Quigley's contention.

First, the Eleventh Amendment affords sovereign immunity to public entities in cases filed in federal court, not state court. The Eleventh Amendment is inapplicable in this state court action and offers no guidance on the issue presented here.[3]

Second, *Hill* involved not a tort action, but an action arising from a public entity's failure to make payments under a contract. The Act, however, applies only to tort actions and expressly excludes actions arising under contract. Indeed, when a public

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[3] Although defendants removed this case to federal court, the case was remanded to state court, where it was decided under California law.

entity enters into a contract, it may be held liable for a breach of its agreement and governmental immunity does not apply. (See Gov. Code, § 814; *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 741; *Souza & McCue Constr. Co. v. Superior Court of San Benito County* (1962) 57 Cal.2d 508, 510-511; *Roe v. Cal.* (2001) 94 Cal.App.4th 64, 69-70.) Thus, *Hill's* analysis does not address the same immunity statute, the same theory of liability, or the same policy concerns and is inapposite.

C. The FTCA's Treatment of Immunity As Jurisdictional Offers Relevant Guidance.

If federal court treatment of the jurisdictional nature of governmental immunities in California were considered, cases applying the FTCA provide a more relevant analytical framework than those involving the Eleventh Amendment.

The FTCA provides a general rule of liability, subject to specified exceptions. However, if a claim on its face falls within an immunity statute, the court lacks subject matter jurisdiction. The FTCA authorizes personal injury actions against the United States in the same manner as a private person could face liability. (28 U.S.C. §§ 1346(b), 2674.) The general rule of liability, however, is severely limited by several statutory exceptions to liability contained in title 28 of the United States Code section 2680. (*Morris v. United States* (9th Cir. 1975) 521 F.2d 872, 874.) If a plaintiff's tort claim falls within one of the exceptions, the district court lacks subject matter jurisdiction. (*Richardson v. United States* (9th Cir. 1991) 943 F.2d 1107, 1110,

citing 28 U.S.C. § 2680(a) [suit may not be brought when the act or omission complained of is "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government"].)

Several circuit courts have held that the statutory exceptions to liability clearly limit the jurisdiction of federal courts. For example, in *Carlyle v. United States Department of the Army* (6th Cir. 1982) 674 F.2d 554 (*Carlyle*), the Sixth Circuit held that a plaintiff can invoke jurisdiction only if the complaint is facially outside the section 2680 exceptions. (*Id.* at p. 556.) This does not mean the plaintiff must disprove every exception to establish jurisdiction pursuant to the FTCA. What it does mean, though, is that a plaintiff may not invoke federal jurisdiction by pleading matters that clearly fall within the exceptions. (*Ibid.*) Only after a plaintiff has successfully invoked jurisdiction by a pleading that facially alleges matters not excepted by section 2680 does the burden fall on the government to prove the applicability of a specific provision of section 2680. Any other reading of the FTCA would conflict with the general rule that a party invoking federal jurisdiction must allege facts necessary to establish subject matter jurisdiction. (*Ibid.*)

Although under the FTCA the burden falls on the government to prove the applicability of a specific exception provision under title 28 of the United States Code section 2680, the exceptions are not considered affirmative defenses that can

be waived because the exceptions are an impairment of the court's power to adjudicate. (*Carlyle, supra,* 674 F.2d at p. 556; *Prescott v. United States* (9th Cir. 1991) 973 F.2d 696, 702.) As such, governmental immunities under the FTCA are jurisdictional in nature. The court lacks jurisdiction when immunity applies. (*Ibid.*)

One Seventh Circuit case, *Stewart v. United States* (7th Cir. 1952) 199 F.2d 517, held the FTCA "conferred general jurisdiction of the subject matter of claims coming within its purview, and the exceptions are available to the government as a defense only when aptly pleaded and proven." (*Id.* at p. 519.) The court in *Stewart* viewed the discretionary function exception as a waivable affirmative defense rather than an impairment of its power to adjudicate. *Stewart*, however, is clearly an outlier.

Neither the Ninth Circuit nor any other circuits, including the Seventh Circuit, follow *Stewart*'s line of reasoning. (*Richardson v. United States, supra,* 943 F.2d at p. 1113; see, e.g., *Roberts v. United States* (9th Cir. 1989) 887 F.2d 899, 900 ["if the discretionary function applies, the claims should be dismissed for lack of jurisdiction"]; *Frigard v. United States* (9th Cir. 1988) 862 F.2d 201, 203 [if "the discretionary function applies . . . the courts lack jurisdiction"]; *McQuade v. United States* (9th Cir. 1988) 839 F.2d 640, 642 [affirming district court's dismissal for lack of subject matter jurisdiction stating that if the claim is within an exception to the FTCA, "the court lacks subject matter jurisdiction"]; *Garcia v. United States* (9th Cir. 1987) 826 F.2d

806, 809 ["federal courts do not have subject matter jurisdiction over tort actions based on federal defendants' performance of discretionary functions"]; *Chamberlin v. Isen* (9th Cir. 1985) 779 F.2d 522, 526 [affirming district court's dismissal for lack of subject jurisdiction because the discretionary function immunity applied]; *Cisco v. United States* (7th Cir. 1985) 768 F.2d 788, 790 [same].)

As can be seen by the circuit courts' treatment of subject matter jurisdiction under the FTCA, where liability exceptions are present, they are jurisdictional in nature. The same reasoning applies to California's immunity statutes. Under the Act in California, in the absence of a statutory exception to immunity, courts lack subject matter jurisdiction to determine tort claims against government entities and employees.

III. Section 850.4 Is Not Required to Be Pleaded As an Affirmative Defense Because It Is a Matter of Law That May Be Raised at Any Time.

A. Application of Section 850.4 Immunity Involves a Matter of Law and Cannot Be Waived by Litigation Conduct.

Section 850.4 is an absolute immunity provided as a matter of law that the court may consider at any time, including for the first time at trial, or even on appeal. "Section 850.4 provides for absolute immunity from liability for injury caused in fighting fires . . . or from failure to properly maintain fire protection equipment. (*Heieck, supra*, 64 Cal.2d at p. 233, fn. 3, citing 4 Cal. Law Revision Com. Rep., p. 862.)

The proper interpretation of statutory provisions and the application of a statute to undisputed facts are questions of law. (*Lozada v. City & County of San Francisco* (2006) 145 Cal.App.4th 1139, 1149, citing *People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432 [interpretation of the Act and the applicability of the Act "clearly present questions of law"]; *Redevelopment Agency of City of Long Beach v. County of Los Angeles* (1999) 75 Cal.App.4th 68, 74.)

Here, the court granted nonsuit after Quigley's opening statement and before evidence was presented. The court determined that the firefighter defendants were immune from liability for Quigley's damages because the camp was a firefighting "facility" within the meaning of section 850.4. [1 AA 125-126, 135.] The predominant issue both the trial court and the Court of Appeal addressed was whether a fire camp was a "firefighting facility" within the meaning of section 850.4. This issue involved statutory interpretation. The trial court refused to consider evidence Quigley presented in opposition to the nonsuit motion precisely because the issue was one of law, not fact. [*Id.* at pp. 139, 177.]

The legislative history of section 850.4 and the historical circumstances behind its enactment further supports that interpretation of the statute is one made as a matter of law and cannot be waived by litigation conduct. Section 850.4 was enacted as part of the Act in 1963 exactly as it was proposed by the California Law Revision Commission in its Recommendation

Relating to Sovereign Immunity, Number 1—Tort Liability of Public Entities and Public Employees. (4 Cal. Law Revision Com. Rep., pp. 807-886.) The report of a commission that proposes a statute subsequently adopted is given "substantial weight" in construing the statute, especially where, as here, the proposed statute is adopted by the Legislature without any change. (*Varshock v. Department of Forestry & Fire Protection* (2011) 194 Cal.App.4th 635, 647.)

In discussing the immunity provision contained in section 850.4, the California Law Revision Commission concluded there are adequate incentives to careful maintenance of fire equipment without imposing tort liability. 4 Cal. Law Revision Com. Rep., p. 862.) Significantly, the Commission characterized section 850.4 as providing "absolute immunity." (See *Bettencourt v. State of California* (1975) 51 Cal.App.3d 892, 895; see also *Varshock v. Department of Forestry & Fire Protection* (2011) 194 Cal.App.4th 635, 649; *Heimberger v. City of Fairfield* (1975) 44 Cal.App.3d 711, 714; *Cochran, supra,* 155 Cal.App.3d at p. 413.)

Section 850.4 is not to be construed narrowly. "[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." (*Varshock, supra,* 194 Cal.App.4th at p. 643.)

The statute is clear and unambiguous. It explicitly provides absolute sovereign immunity for any injury caused in fighting

fires or resulting from the condition of fire protection or firefighting equipment. (4 Cal. Law Revision Com. Rep., p. 826.) Thus, section 850.4 immunizes public entities and public employees from negligence. (*Razeto v. City of Oakland* (1979) 88 Cal.App.3d 349, 353.)

The Legislature enacted section 850.4 and related firefighting statutes, such as section 850.2, "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." (*State of California v. Superior Court* (2001) 87 Cal.App.4th 1409, 1413.) Looking to the California Law Revision Commission comments, the Court of Appeal in *State of California* described the statutes as recognizing "that these are essentially political, policymaking decisions that should not be second-guessed by judges or juries." (*Ibid.*)

The court in *State of California, supra,* 87 Cal.App.4th 1409, further reasoned that decisions during the course of firefighting must often be made under stressful circumstances and require a balancing of risks against the odds of success, which is necessarily imperfect at best. The Legislature has determined that the wisdom of such decisions is unlikely to be affected for the better by a fear of financial liability. (*Id.* at p. 1413.) Thus, insofar as section 850.4 protects actions taken in the course of firefighting, it validly confers immunity for actions and decisions made under crisis conditions. (*Id.* at p. 1415.) Finding public employees and their employing entities immune from

liability for such "operational" negligence under the evolving circumstances surrounding a wild fire promotes the ability of public entities and their employees to provide firefighting support without fear of financial liability for their decisions in doing so. (*Ibid.*)

This court in *Heieck, supra,* 64 Cal.2d 229, similarly concluded that application of section 850.4 is a matter of law when it decided on demurrer that section 850.4 barred the plaintiff's action. (*Id.* at pp. 233-234.) Indeed, application of the statute to the allegations of the complaint tests the sufficiency of the pleadings, without consideration of evidence, and is purely a question of law. Thus, immunity under section 850.4 can be raised at any time, even for the first time at trial or on appeal.

The Legislature has not consented to public entities being sued with respect to firefighting activities. Rather, the Legislature affirmed that public entities would enjoy absolute immunity from suit in cases involving claims that fall within section 850.4. The statutory scheme is a codification of the general principle that no subject matter jurisdiction exists to sue the government. Hence, the immunity from suit is not subject to waiver by litigation conduct.

B. Section 835 Could Not Provide a Basis for Liability Because It Is Subject to Section 850.4, Which Specifically Limits Public Entity Liability for Fire Protection and Firefighting Services.

Plaintiffs have the burden of overcoming the general rule of immunity by establishing a statutory basis for liability against a public entity. (*Brown, supra,* 4 Cal.4th at pp. 824, 830, citing *Williams v. Horvath, supra,* 16 Cal.3d at p. 838.) The very statute under which Quigley seeks to impose liability on the firefighter defendants for a dangerous condition of public property—section 835—provides it is the plaintiff's prima facie obligation to establish the elements of a dangerous condition of public property. (*Brown, supra,* 4 Cal.4th at pp. 824, 830, citing *Williams v. Horvath, supra,* 16 Cal.3d at p. 838.) Section 835, itself, provides that other statutes may preclude public entity liability for a dangerous condition of public property:

> *Except as provided by statute,* a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes . . . .

(Gov. Code, § 835, italics added.)

The plain language of the statute and its legislative history confirm, as this court has previously held, that public entity liability is subject to and superseded by applicable immunity statutes. (See *B.H. v. County of San Bernardino, supra,* 62 Cal.4th at p. 179, citing *Creason v. Department of Health Services* (1998) 18 Cal.4th 623, 635; *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 986 (*Caldwell*).)

In addition, section 815, subdivision (b), provides that: "[t]he liability of a public entity established by this part . . . is subject to any immunity of the public entity provided by statute. . . ." (Gov. Code, § 815, subd. (b); *Heieck, supra,* 64 Cal.2d at pp. 232-233, see also *Cairns v. County of L.A.* (1997) 62 Cal.App.4th 330, 334.) Section 815.2, subdivision (b) also states that "[e]xcept as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability."

Thus, to begin with, a plaintiff cannot make out a prima facie case alleging a section 835 dangerous condition of public property if an absolute immunity like section 850.4 precludes liability, and any such claim can be disposed of by demurrer. (*Heieck, supra,* 64 Cal.2d at pp. 232-233.)

This court has rejected attempts to extend governmental liability further than intended. In *Brown, supra,* 4 Cal.4th 820, this court rejected the appellate court's holding that application of the res ipsa loquitur presumption alone could establish a prima facie case under section 835. (*Id.* at pp. 837-838.) Application of the res ipsa loquitor presumption would render inapplicable the assumptions that underlie the Legislature's waiver of sovereign immunity for dangerous conditions created by public employees. It would also extend liability further than the Legislature intended. For that reason, the Supreme Court held that the res ipsa loquitor presumption does not, by itself,

establish a prima facie case of liability against a public entity under section 835. (*Ibid.*)

In *Heieck, supra,* 64 Cal.2d 229, this court affirmed an order sustaining a demurrer, rejecting the plaintiff's contention that he defendant's liability arose from section 815.2 when sections 815, subdivision (b), 850.2 and 850.4 expressly provided immunity. (*Id.* at pp. 232-233.) This court decided, "the conclusion is inescapable that the Legislature intended to establish immunity under the circumstances alleged by plaintiff." (*Id.* at p. 233.) The court specifically noted that section 850.4 provides "absolute immunity." (*Id.* at fn. 3.)

Moreover, in *Paterson v. City of Los Angeles, supra,* 174 Cal.App.4th 1393, a case addressing statutory immunity for acts performed in judicial or administrative proceedings under section 821.6, which is applicable to city police officer investigators, the court noted, "[i]t is a plaintiff's responsibility to plead 'facts sufficient to show his or her cause of action lies outside the breadth of any applicable statutory immunity.'" (*Id.* at p. 1404, fn. 5.) This is consistent with the Legislative history and intent to define finite areas of tort liability for public entities. (Gov. Code, § 815, subds. (a)-(b); *Brown, supra,* 4 Cal.4th at pp. 824, 830; *Caldwell, supra,* 10 Cal.4th at p. 986 [850.4 immunity cannot be abrogated by a statute which simply imposes a general legal duty or liability on persons, including public employees, such as section 835. "Such a statute may indeed render the employee

liable for his violations unless a specific immunity applies, but it does not remove the immunity.")

Indeed, the Act includes statutes that apply specifically to fire protection activities and specifically provide for immunity. (See Gov. Code, § 850 et seq.) The provisions of the Act directed to firefighting are phrased in the language of immunities with specified narrow exceptions. Immunity from liability for injuries resulting from fire protection activities is the rule, and liability for those injuries is the exception. (See Gov. Code., § 850 et seq.; 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 310.) Section 850.4 is an immunity rule that may itself be subject to exceptions and distinctions. It expressly provides immunity from liability for failure to provide fire protection facilities or for the condition of fire protection facilities and equipment. (See Gov. Code, § 850.4; 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, §§ 310-311.)

That specific statutory immunities provided by section 850.4 preclude liability, despite a general liability statute such as section 835, is further confirmed by the fact that before 1961, public entities could be held liable for dangerous conditions of public property, including fire department property. However, under the Act, the Legislature eliminated any potential liability by developing the specific statutes providing immunity for conditions of fire protection equipment and facilities. (*Razeto v. Oakland, supra,* 88 Cal.App.3d at p. 353 ["[T]he statute is clear and unambiguous. It explicitly provides sovereign immunity for

any injury resulting from the 'condition of fire protection or firefighting equipment'"].)

The Legislature clearly intended to provide immunity to public entities, especially for acts such as firefighting, by limiting liability solely when provided by statute. (Gov. Code, § 815.) As liability can only be imposed based on statute, allowing litigation conduct—such as failing to raise immunity as an affirmative defense—to waive immunity is wholly inconsistent with the legislative intent of allowing liability *only* pursuant to a statutory provision providing for such liability. A conclusion that immunity can be waived by failure to raise the defense until trial would create an unintentional rule of liability that shifts the burden to the public entity to prove immunity exists before trial, when the Legislature expressly conferred immunity and placed the burden on the plaintiff to demonstrate liability exists despite the immunity.

Concluding that section 850.4 is waived if not raised before trial would vitiate the intent of the Act and would revert the law back to the common law doctrine of sovereign immunity in place prior to the enactment of the Act. Prior to the Act, sovereign immunity was an affirmative defense and the public entity had the burden of proving immunity existed. Now, it is not. Following *Muskopf* and two years of studies, the Legislature spent significant time and effort to create the Act, which consists of hundreds of statutes providing exclusive, specific circumstances in which public entities may be held liable for their acts or

omissions. The Act places the burden on the plaintiff to establish a statutory basis for liability, rather than on the public entity to establish immunity.

Here, Quigley's argument for liability under section 835—for dangerous conditions on public property—does not address the specific immunity provided to firefighting facilities and services under section 850.4. The immunity afforded by section 850.4 is part of the comprehensive statutory scheme that must be considered as a condition to asserting liability against a public entity. The specific, unqualified immunity provided by section 850.4 is the rule. Quigley could not make out a prima facie case for liability when she alleged her injuries were the result of a dangerous condition of public property when the property was being used for firefighting at the time of her injury.

C. Section 850.4 Does Not Present New Matter and Thus Need Not Be Asserted As an Affirmative Defense.

The Court of Appeal held that the immunity provided by section 850.4 could not be waived by failure to raise it earlier because section 850.4 provides absolute, not qualified immunity and requires no "affirmative showing" of facts to apply. (*Quigley, supra*, 10 Cal.App.5th at p. 1142.) The court was correct. Moreover, the trial court refused to consider new matter in ruling on the motion for nonsuit and ruled that whether section 850.4 applies is purely a legal question for the court to decide, not the jury. [1 AA 177, 183-186.]

Quigley nonetheless argues section 850.4 is new matter that must be pleaded in the answer. Immunity provided by section 850.4, however, is not "new matter." Firefighting immunities are part of the same comprehensive statutory scheme on which Quigley based her action.

An answer is a pleading by the defendant in response to the complaint that raises issues of fact. Under Code of Civil Procedure section 590, "an issue of fact arises: (1) [u]pon a material allegation in the complaint controverted by the answer and (2) [u]pon new matters in the answer, except an issue of law is joined thereon."

The absolute immunity provided by section 850.4 is not "new matter" that inserts a new issue into the case. Indeed, once a plaintiff such as Quigley brings an action against a public entity based on one of the statutes under the Act, the plaintiff has placed the entire Act, including all immunity statutes, at issue in the lawsuit because section 815 explicitly states that any action brought under the Act is subject to the immunities under the Act.

Where the complaint alleges facts indicating applicability of a statutory immunity defense, there is no requirement the immunity be specifically alleged as a defense. (*Cruey v. Gannett Co.* (1998) 64 Cal.App.4th 356, 367; accord, *Superior Dispatch, Inc. v. Insurance Corp. of New York* (2010) 181 Cal.App.4th 175, 193-194, fn. 11.) The allegations in Quigley's complaint did just

that. The facts concerning alleged firefighter negligence necessarily invoked applicable immunity under section 850.4.

Quigley's action alleged dangerous condition of public property liability pursuant to section 835. [1 AA 12-14.] Quigley alleged that public property was being used to house firefighters during the fighting of a forest fire, and that the property was maintained in a dangerous condition. [*Id.* at pp. 11-13.] As such, Quigley's complaint raised the issue that the property was being used for firefighting purposes. Negligence liability for the acts alleged in Quigley's complaint is prohibited pursuant to the absolute immunity for firefighting activities provided by section 850.4.

The language of section 850.4 is sweeping and is to be broadly construed by courts. (*Cochran, supra,* at p. 412.) Allegations that on their face fall within section 850.4 do not raise any new issue or new matter into the action.

The Court of Appeal here correctly held no factual showing is required under section 850.4, which applies, as alleged in this case, "if the complained-of injury resulted from the condition of a firefighting facility." (*Quigley, supra,* 10 Cal.App.5th at p. 1142.) In reaching this conclusion, the court correctly relied on *Hata, supra,* 31 Cal.App.4th 1791, 1804, which held absolute governmental immunities are jurisdictional and disagreed with *McMahan's, supra,* 146 Cal.App.3d 683, which held that section 850.4 is considered an affirmative defense. Both *Hata* and the

Court of Appeal here address the flawed reasoning that led to this conclusion in *McMahan's*.[4]

First, *McMahan's* does not analyze the jurisdictional nature of the governmental immunities and specifically the absolute immunity provided by section 850.4 for firefighting activities and facilities as established by preceding authority such as, *E. L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 510-512, fn. 10, *Gates v. Superior Court* (1995) 32 Cal.App.4th 481, 509-510, and *Buford v. State of California, supra,* 104 Cal.App.3d 811, 826-827. "It is axiomatic that cases are not authority for propositions not considered." (*In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388.)

Second, in reaching its conclusion, the court in *McMahan's* relied on *De La Rosa v. City of San Bernardino, supra,* 16 Cal.App.3d 739, which did not address section 850.4, but rather analyzed qualified design immunity under former section 830.6, which provided immunity "for maintaining a dangerous condition of public property *as long as the maintenance conforms to the original plan or design.*" (*Id.* at pp. 746-748, italics added.) This conditional language contained within former section 830.6 requires an affirmative showing on behalf of the public entity to

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[4] Notably, the court in *Hata* contrasted the assertion of absolute government immunities with Code of Civil Procedure section 458, which requires pleading the specific section of a statute of limitations defense, which is inapplicable to other defenses. (*Hata, supra,* at p. 1806; *Jessen v. Mentor Corp.* (2008) 158 Cal.App.4th 1480, fn. 3.)

trigger the immunity. Indeed, section 830.6 "design immunity" is an exception to liability imposed under section 835 for a dangerous condition of property where the injury was caused by the plan or design of a construction or an improvement on the property and the public entity is required to make an affirmative showing the plan or design was reasonably adopted or approved. (See *Hata, supra*, 31 Cal.App.4th at p. 1802.) There is no such conditional language under section 850.4.

As such, the Court of Appeal here correctly relied on *Hata* in holding that section 850.4 is jurisdictional and does not require a factual showing. (*Quigley, supra*, 10 Cal.App.5th at p. 1142.)

In *Heieck, supra*, 64 Cal.2d 229, this court agreed when it affirmed a trial court's order sustaining the city's demurrer. (*Id.* at pp. 230-233.) Based on the pleadings, this court stated that sections 850.2 and 850.4 expressly provided immunity based on the complaint's allegations that city employees, while acting in the scope of their employment, closed a water valve and left it closed. "Thus whether the alleged injury to plaintiff's premises be viewed as resulting from 'failure to provide or maintain sufficient . . . fire protection facilities' (§850.2), or from the closed 'condition' of the water valve (§ 850.4) the conclusion is inescapable that the Legislature intended to establish immunity under the circumstances alleged by plaintiff." (*Id.* at p. 233.) This court has already determined that section 850.4 does not require a factual showing for the statute to apply. The requirements for asserting

affirmative defenses do not apply to the absolute immunity provided by section 850.4.

D. A Plaintiff Bringing an Action Under the Act Has Notice of Governmental Immunities and Can Ascertain Their Existence Without a Defendant Pleading a Specific Affirmative Defense.

"The primary function of a pleading is to give the other party notice so that it may prepare its case, and a defect in a pleading that otherwise properly notifies a party cannot be said to affect substantial rights." (*Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 482, citing *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 240.) However, the policy of requiring a defendant to plead its defenses to provide the plaintiff notice does not apply when a plaintiff is asserting liability under the Act because a plaintiff bringing an action under one of the statutes that impose liability is on notice of the immunities provided under the Act.

Indeed, section 815, which governs the ability to sue a public entity, places a plaintiff on notice in subdivision (b) that liability of a public entity under the Act is subject to any immunity provided by statute. Moreover, section 815.2, subdivision (b) precludes liability against a public entity for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability. As such, a plaintiff seeking to impose liability under a statute within

the Act cannot claim lack of notice of the immunity statutes provided under the Act.

A plaintiff, such as Quigley, suing a public entity under the Act based on firefighting activities, cannot genuinely claim surprise when the defendant seeks application of the immunity under the Act. All of Quigley's claims involved firefighting activities and she named several public entities as defendants. Quigley alleged application of the Act. [1 AA 6-17.] The very activities and entities involved are, at their core, governmental firefighting activities. The very nature of these claims would put any litigant on notice of immunities provided by the Act. It is entirely proper to impose the responsibility on plaintiffs in such cases to determine whether immunity applies, and whether it can be pleaded around.

Public policy does not demand the contrary. In fact, requiring public entities to assert all potential immunity statutes as affirmative defenses is contrary to public policy and promises significant expansion of public entity liability—the exact opposite of what the Legislature intended. As explained more fully below, the Legislative intent of the Act is to make public entities immune unless they are declared to be liable by specific statute and to confine potential governmental liability to rigidly delineated circumstances. Plaintiffs suing under the firefighting provisions of the Act are most certainly placed on notice that the Act's immunities will apply unless an exception is adequately pled.

IV. Section 850.4 *Was* Raised Before Trial As an Affirmative Defense and Throughout the Action.

Quigley's arguments are premised on the contention that the firefighter defendants never raised section 850.4 until trial. This court's issue statement at least impliedly assumes the firefighter defendants did not assert section 850.4 immunity until the start of trial. This is simply not true. The firefighter defendants pleaded governmental immunity as its 15th affirmative defense and asserted a range of applicable statutes in compliance with the general pleading requirements. [1 AA 60.][5]

Code of Civil Procedure section 431.30, subdivision (g), provides that "[t]he defenses shall be separately stated, and the several defenses shall refer to the causes of action which they are intended to answer, in a manner by which they may be intelligibly distinguished." There is no requirement that the *specific* statutory authority that provides the immunity must be pled. (See *Hata, supra,* 31 Cal.App.4th at p. 1795.) Specific statutory authority in an answer must be pleaded only when alleging the statute of limitations as an affirmative defense. (Code Civ. Proc., § 458.) There is no such statute requiring specific pleading of governmental immunities. Rather, as provided by Code of Civil Procedure section 459, it is sufficient to

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[5] The 15th affirmative defense alleges: "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.]

refer to a private statute, or an ordinance of a county or municipal corporation, or a right derived therefrom in a pleading.

In the trial court and on appeal, Quigley relied on *McMahan's, supra,* 146 Cal.App.3d 683, to support her argument that the firefighter defendants waived section 850.4, and the firefighter defendants relied upon *Hata* to establish that they adequately raised section 850.4 in their answer. There is no conflict between *McMahan* and *Hata* as they address different circumstances.

In *McMahan's,* the plaintiffs sued the city of Santa Monica for inverse condemnation. At trial, the city claimed that vandalism caused the plaintiff's damage. The city did not rely on immunity as a defense. The trial court found for the plaintiff. (*McMahan's, supra,* 146 Cal.App.3d at p. 688.) On appeal, the city argued for the *first time* that it was immune from liability under Government Code section 850.4. (*Id.* at p. 689.) The Court of Appeal refused to consider the city's immunity defense because it was never part of the record as the city had neither pled immunity as a defense nor proved that it was immune at trial. (*Ibid.*) The court held that section 850.4's immunity is an affirmative defense that needs to be pled or proven. (*Ibid.*) As demonstrated herein, *McMahon's* is incorrect on this point. Further, here, the firefighter defendants did plead immunity and properly raised immunity in their discovery responses and at trial. They did *not* raise section 850.4 for the first time at trial or on appeal. Thus, *McMahan's* is simply inapplicable.

Hata, supra, 31 Cal.App.4th 1791, addresses the very situation presented in this case where a range of governmental immunities is pleaded. In *Hata*, the plaintiff, a patient of a mental hospital, sued the county for injuries he sustained at the county's facility. (*Id.* at p. 1796.) The county's answer stated that the plaintiff's causes of action and damages claims were "limited and/or barred by the terms of California Government Code § 854-856.6." (*Id.* at p. 1797.) The county moved for a nonsuit based on section 854.8, which provides immunity to a hospital for an injury to an inpatient of a mental institution. (*Id.* at p. 1798.) The court granted the nonsuit motion. The plaintiff moved for a new trial on the grounds of surprise and error of law. The trial court granted the motion on the ground that the county waived its right to rely on this particular immunity defense by failing to properly plead the specific code section as an affirmative defense and raise the issue before trial. (*Id.* at p. 1795.)

The Court of Appeal reversed, holding that the section 854.8 immunity defense was neither hidden nor omitted from the defendant's answer, which provided the plaintiff with notice that the defendant was relying on a specific type of immunity defense. (*Hata, supra*, 31 Cal.App.4th at p. 1805.) According to the court, "aside from the lack of legal authority to support the finding that governmental immunities are to be pleaded with the specificity required of limitations defenses, County adequately and sufficiently pleaded the immunity affirmative defenses" because "[t]his separately stated defense complied with the general

pleading requirement of Code of Civil Procedure section 459." (*Ibid.*)

Hata is directly on point. The firefighter defendants pleaded governmental immunity in their answer to Quigley's complaint and identified a specific range of statutes in its 15th affirmative defense. Section 850.4 was one of the statutes within that range. [1 AA 60.] Quigley argues, just as the plaintiff did in *Hata*, that defendants waived the defense of immunity under section 850.4 because the firefighter defendants did not separately plead that particular code section as an affirmative defense. Governmental immunities, however, are not required to be pled with specificity, but rather, may be generally pled. (*Hata, supra*, 31 Cal.App.4th at p. 1805.) Thus, the firefighter defendants adequately pleaded section 850.4 because their 15th affirmative defense complies with general pleading requirements.

The firefighter defendants' answer was required only to minimally advise the opposing party of the nature of the defense. (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 385.) The allegations of a pleading must be liberally construed when determining its effect. (Code Civ. Proc., § 452.) The firefighter defendants' defenses alleged in their answer are responsive to Quigley's allegations that the firefighter defendants are either a public entity or public employees, and that plaintiff was "a firefighter engaged in fighting a fire at the time of the incident." [1 AA 7-8, 10.] It can come as no surprise that

governmental immunity defenses relating to firefighting and public entity immunity may apply.

Moreover, section 850.4 addresses the material allegations of the complaint—that Quigley, a firefighter engaged in fighting a fire—was injured at the base camp set up to house firefighters in response to the Silver Fire. As such, only a general denial was required to respond to the material allegations in the complaint. (Code Civ. Proc., § 431.30, subd. (d).)

Additionally, Quigley could have, and indeed was required to, challenge the sufficiency of the answer by demurring to the answer if she considered it insufficiently specific. If the party against whom a complaint has been filed fails to object to the pleading, either by demurrer or answer, that party is deemed to have waived the objection *unless* it is an objection that the court has no jurisdiction of the subject of the cause of action alleged in the pleading or an objection that the pleading does not state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.80.) In *Hata*, the court held that failure to demur or object to the answer waives the right to challenge the pleading. (*Hata, supra*, 31 Cal.App.4th at pp. 1804-1805.) Quigley waived the right to challenge any alleged lack of specificity in the firefighter defendants' affirmative defenses by failing to raise the issue until trial.

Because the governmental immunity affirmative defense put Quigley on notice of the defense, failure to challenge the sufficiency of the answer properly results in a waiver of the right

to do so at trial. *FPI Development, Inc. v. Nakashima, supra,* 231 Cal.App.3d 367, is instructive. In affirming summary judgment based on the parol evidence rule, the Court of Appeal addressed the adequacy of the defendant's affirmative defenses. (*Id.* at p. 375.) The court stated that despite the failure to demur to the answer, the plaintiffs could have objected to the introduction of evidence addressed to these defenses. (*Id.* at pp. 384-385.) It would be unfair to base a ruling on the inadequacy of the pleadings if the pleadings give notice to the plaintiffs of a potentially meritorious defense. If the plaintiffs had openly challenged the adequacy of the defendants' pleading, and the defendants tendered a potentially meritorious unpled defense, it is likely that they would have been allowed to amend their answer. Thus, the court held the plaintiffs' failure to challenge the sufficiency of the pleading of affirmative defenses operated as a partial waiver. (*Id.* at p. 385.)

Similarly, here, had Quigley demurred to the firefighter defendants' answer, they could have amended their pleading. Indeed, amendment of pleadings is liberally allowed, even during trial. (Code Civ. Proc., § 576; *Norager v. Nakamura* (1996) 42 Cal.App.4th 1817, 1819 [motion to amend complaint allowed on last day of four-day trial].) Quigley was on notice of the immunity defenses asserted by the firefighter defendants and had the opportunity to, but failed to seek clarification regarding the governmental immunities being asserted. Quigley's assertion for the first time at trial and on appeal that more specificity is required comes too little too late.

The firefighter defendants also moved for summary judgment based on governmental immunities, albeit not section 850.4. Quigley did not challenge the firefighter defendants' assertion of the other governmental immunities that were raised. [1 AA 203, 212-214.] Rather, Quigley waited until trial to raise the waiver argument for the first time, only contending then that the firefighter defendants waived governmental immunity because they did not adequately plead section 850.4.[6]

The firefighter defendants also provided Quigley notice of their immunity defenses in their discovery responses. They stated in discovery that 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. [1 AA 151, 169.] This response put Quigley on notice that the firefighter defendants asserted governmental immunities that apply to public entities and employees. Section 850.4 is one of several governmental immunities that apply to public entities and public employees and falls within the range of code sections identified in the 15th affirmative defense.

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[6] Section 850.4 was not raised in the summary judgment motion because at that time the firefighter defendants believed the individual defendants were not state employees, but rather independent contractors. [1 AA 168, 202-204.] It was not until later that the individual defendants were determined to be state employees.

Quigley provides no authority mandating that a governmental immunity affirmative defense must specify a particular code section or result in a waiver. Quigley was on notice of the section 850.4 defense immunity by virtue of her own pleadings and the answer setting forth an applicable range of relevant immunities relating to firefighting activities. (*Hata, supra,* 31 Cal.App.4th at pp. 1804-1806; *Perez v. Southern Pacific Transportation Co.* (1990) 218 Cal.App.3d 462, 471.)

CONCLUSION

Based upon the foregoing, the firefighter defendants respectfully request the Court of Appeal's decision be affirmed.

Respectfully submitted,
LEWIS BRISBOIS BISGAARD & SMITH LLP
Joseph A. Salazar, Jr.
Jeffry A. Miller
Lann G. McIntyre
Jonna D. Lothyan
Defendants and Respondents
GARDEN VALLEY FIRE PROTECTION DISTRICT, et al.

CERTIFICATE OF COMPLIANCE WITH RULE 8.520

I, the undersigned, Jeffry A. Miller, declare that:

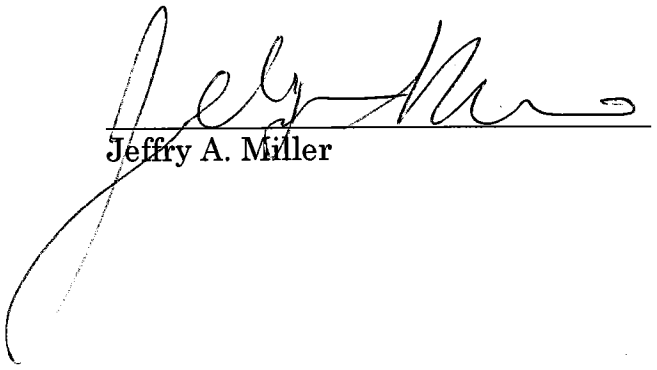
1. I am an attorney licensed to practice in all courts of the state of California and a partner at the law firm of Lewis Brisbois Bisgaard & Smith LLP, attorneys of record for defendant and appellant Garden Valley Fire Protection District, et al.

2. This certificate of compliance is submitted in accordance with rule 8.520 of the California Rules of Court.

3. This brief was produced with a computer. It is proportionately spaced in 13 point Century Schoolbook typeface. The brief contains 13,815 words, including footnotes.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at San Diego, California, on March 7, 2018.



Jeffry A. Miller

PROOF OF SERVICE

Quigley v. Garden Valley Fire Protection District, et al.
Supreme Court Number S242250

I, Sherry Bernal, state:

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is 701 B Street, Suite 1900, San Diego, California 92101.

On March 7, 2018, I served the following document described as **ANSWER BRIEF ON THE MERITS** on all interested parties by overnight mail. I am readily familiar with the firm's practice for collection and processing correspondence for overnight delivery. I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed below. The envelope or package was deposited for collection and delivery to an office or a regularly utilized drop box of the overnight delivery carrier.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 7, 2018, at San Diego, California.

Sherry Bernal

SERVICE LIST

Quigley v. Garden Valley Fire Protection District, et al.
Supreme Court Number S242250

Jay-Allen Eisen
Jay-Allen Eisen Law Corporation
621 Capitol Mall, 18th Floor
Sacramento, CA 95814-4731
Attorneys for Plaintiff and Appellant, Rebecca Megan Quigley

Todd E. Slaughter
Russell Reiner
Law Offices of Reiner & Slaughter, LLP
2851 Park Marina Drive, Suite 200
Redding, CA 96049
Attorneys for Plaintiff and Appellant, Rebecca Megan Quigley

Plumas County Superior Court
Hon. Janet Hilde
520 Main Street, #104
Quincy, CA 95971

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

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