Case No. S242250

IN THE SUPREME COURT OF CALIFORNIA

REBECCA MEGAN QUIGLEY,

Plaintiff and Appellant,

v.

GARDEN VALLEY FIRE PROTECTION DISTRICT, et al.,

Defendants and Respondents.

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

APPELLANT'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

Respondents misstate facts, misstate law, and contradict themselves.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Eleventh Amendment immunity principles apply.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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