S259850

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

PRESBYTERIAN CAMP AND CONFERENCE CENTERS, INC.,

Petitioner,

v.

THE SUPERIOR COURT OF SANTA BARBARA COUNTY,

Respondent.

CALIFORNIA DEPARTMENT OF FORESTRY AND FIRE PROTECTION,

Real Parties in Interest.

On Review From The Court Of Appeal For the Second Appellate District,
Division Six, Civil No. B297195

After An Appeal From the Superior Court,
County of Santa Barbara, Case Number 18CV02968
Hon. Thomas P. Anderle

AMICI CURIAE SIERRA PACIFIC INDUSTRIES AND CALIFORNIA FORESTRY ASSOCIATION'S REQUEST FOR JUDICIAL NOTICE; [PROPOSED] ORDER

DOWNEY BRAND LLP
*WILLIAM R. WARNE (Bar No. 141280)
bwarne@downeybrand.com
MICHAEL J. THOMAS (Bar No. 172326)
mthomas@downeybrand.com
ANNIE S. AMARAL (Bar No. 238189)
aamaral@downeybrand.com
MEGHAN M. BAKER (Bar No. 243765)
mbaker@downeybrand.com
621 Capitol Mall, 18th Floor
Sacramento, California 95814
Telephone: 916.444.1000
Facsimile: 916.444.2100

Attorneys for Amici Curiae SIERRA PACIFIC INDUSTRIES and CALIFORNIA FORESTRY ASSOCIATION

REQUEST FOR JUDICIAL NOTICE

Pursuant to California Rules of Court, rules 8.252(a) & 8.520(g), and California Evidence Code sections 452 and 459, amici curiae Sierra Pacific Industries ("SPI") and California Forestry Association ("CFA") respectfully request the Court take judicial notice of the exhibits identified below and attached hereto. The exhibits are referenced in SPI and CFA's amici curiae brief.

Exhibit A: Excerpts from Appellant California Department of Forestry & Fire Protection's "Appellant's Opening Brief" in *Department of Forestry & Fire Protection v. Howell*, Court of Appeal of the State of California, Third Appellate District, Case No. C074879, filed on or about August 6, 2014.

Exhibit B: Excerpts from Respondents' "Response to Opening Brief Filed by Cal Fire" in *Department of Forestry & Fire Protection v. Howell*, Court of Appeal of the State of California, Third Appellate District, Case No. C074879, filed on or about March 4, 2015.

Exhibit C: Excerpts from California Department of Forestry & Fire Protection's "Petition for Review" in *Department of Forestry & Fire Protection v. Howell*, Supreme Court of the State of California, Case No. S246486, filed on or about January 17, 2018.

Exhibit D: Excerpts from Respondents' "Response to Petition for Review" in *Department of Forestry & Fire Protection v. Howell*, Supreme

Court of the State of California, Case No. S246486, filed on or about February 6, 2018.

MEMORANDUM OF POINTS AND AUTHORITIES

Amici curiae SPI and CFA request that the Court take judicial notice of the attached materials, described above, pursuant to Evidence Code section 452, subdivision (d)(1), Evidence Code section 459, and California Rules of Court, rules 8.252(a) & 8.520(g).

All of the materials of which judicial notice is requested are pertinent to arguments in SPI and CFA's amici curiae brief.

Exhibits A and B are excerpts from the opening brief filed by Plaintiff/Appellant California Department of Forestry & Fire Protection ("Cal Fire") and the response brief filed by Defendants/Respondents Sierra Pacific Industries, W.M. Beaty & Associates, Inc., Landowner Defendants, Eunice Howell dba Howell's Forest Harvesting, J.W. Bush, and Kelly Crismon ("Respondents"), respectively, in *Department of Forestry & Fire Protection v. Howell*, Court of Appeal of the State of California, Third Appellate District, Case No. C074879. These excerpts are portions of the briefs relevant to CFA and SPI's discussion of the arguments made by the parties in and the ultimate holding of the Third Appellate District in *Department of Forestry & Fire Protection v. Howell* (2017) 18 Cal.App.5th 154 ("*Howell*").

Exhibits C and D are excerpts from Cal Fire's Petition for Review and Respondents' Response to Petition for Review, respectively, filed in this Court in *Department of Forestry & Fire Protection v. Howell*, Supreme Court of the State of California, Case No. S246486. Again, these excerpts are portions of these filings that are relevant to CFA and SPI's discussion of the arguments made by the parties in seeking and opposing review of *Howell*.

Records of courts of this state, such as appellate briefs and petitions for review, may be judicially noticed under Evidence Code section 452, subdivision (d)(1). Appellate courts in California routinely take judicial notice of relevant appellate briefs. (See *Padron v. Watchtower Bible & Tract Society of New York, Inc.* (2017) 16 Cal.App.5th 1246, 1263, fn. 7; *Friends of Outlet Creek v. Mendocino County Air Quality Management Dist.* (2017) 11 Cal.App.5th 1235, 1238, fn. 1; *In re J.W.* (2015) 236 Cal.App.4th 663, 666, fn. 2.) Courts also take judicial notice of petitions for review filed with this Court. (See *Walker v. Superior Court of City and County of San Francisco* (2020) 51 Cal.App.5th 682, 702, fn. 4.)

Thus, amici curiae SPI and CFA respectfully request that the Court take judicial notice of the attached materials.

DATED: November 9, 2020 DOWNEY BRAND LLP

By: */s/ William R. Warne*
WILLIAM R. WARNE
Attorneys for Amicus Curiae
SIERRA PACIFIC INDUSTRIES

S259850

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

PRESBYTERIAN CAMP AND CONFERENCE CENTERS, INC.,

Petitioner,

v.

THE SUPERIOR COURT OF SANTA BARBARA COUNTY,

Respondent.

CALIFORNIA DEPARTMENT OF FORESTRY AND FIRE PROTECTION,

Real Parties in Interest.

On Review From The Court Of Appeal For the Second Appellate District,
Division Six, Civil No. B297195

After An Appeal From the Superior Court,
County of Santa Barbara, Case Number 18CV02968
Hon. Thomas P. Anderle

[PROPOSED] ORDER ON AMICI CURIAE SIERRA PACIFIC INDUSTRIES AND CALIFORNIA FORESTRY ASSOCIATION'S REQUEST FOR JUDICIAL NOTICE

The Court grants amici curiae Sierra Pacific Industries and California Forestry Association's Request for Judicial Notice and takes judicial notice of the following documents:

Exhibit A

Exhibit B

Exhibit C

Exhibit D

IT IS SO ORDERED.

DATED: _____, 2020

_____
JUSTICE OF THE SUPREME COURT

CERTIFICATE OF SERVICE

Presbyterian Camp & Conf. Centers, Inc. v. Superior Court of Santa Barbara
(Cal. Dept of Forestry & Fire Protection etc.)
SBSC Case No. 18CV02968 • COA 2/6 Case No. B297195
Cal. Supreme Court Case No. S259850

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Sacramento, State of California. My business address is 621 Capitol Mall, 18th Floor, Sacramento, CA 95814.

On November 9, 2020, I served true copies of the following document(s) described as **AMICI CURIAE SIERRA PACIFIC INDUSTRIES AND CALIFORNIA FORESTRY ASSOCIATION'S REQUEST FOR JUDICIAL NOTICE; [PROPOSED] ORDER** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY ELECTRONIC SERVICE: I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered users will be served by the TrueFiling system. Participants in the case who are not registered users will be served by mail or by other means permitted by the court rules.

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

Executed on November 9, 2020, at Sacramento, California.

/s/ Tammy R. Chacon
Tammy R. Chacon

Presbyterian Camp & Conf. Centers, Inc. v. Superior Court of Santa Barbara
(Cal. Dept of Forestry & Fire Protection etc.)
SBSC Case No. 18CV02968 • COA 2/6 Case No. B297195
Cal. Supreme Court Case No. S259850

Beth J. Jay
H. Thomas Watson
Daniel J. Gonzalez
Horvitz & Levy LLP
3601 West Olive Avenue,
8th Floor
Burbank, California 91505-4681
(818) 995-0800 • FAX: (844) 497-6592
bjay@horvitzlevy.com
htwatson@horvitzlevy.com
dgonzalez@horvitzlevy.com

Attorneys for Petitioner Presbyterian Camp And Conference Centers, Inc.

Lee H. Roistacher
Robert W. Brockman, Jr.
Garrett A. Marshall
Daley & Heft LLP
462 Stevens Avenue, Suite 201
Solana Beach, California 92075-2065
(858) 755-5666 • FAX: (858) 755-7870
lroistacher@daleyheft.com
rbrockman@daleyheft.com
gmarshall@daleyheft.com

Attorneys for Petitioner Presbyterian Camp And Conference Centers, Inc.

William Michael Slaughter, Esq.
Jonathan David Marshall, Esq.
Slaughter, Reagan & Cole, LLP
625 E. Santa Clara Street, Suite 101
Ventura, California 93001-3284
(805) 658-7800 • Fax: (805) 644-2131
slaughter@srllplaw.com
marshall@srllplaw.com

Attorneys for Real Party in Interest Charles E. Cook

Theodore A. B. McCombs, Esq.
Deputy Attorney General
Natural Resources Law Section
California Department of Justice
600 W. Broadway, Suite 1800
P.O. Box 85266
San Diego, California 92103-5203
(619) 738-9000
Theodore.McCombs@doj.ca.gov
docketinglaawt@doj.ca.gov

Attorneys for Real Party in Interest California Department of Forestry and Fire Protection

Xavier Becerra
Attorney General of California
Michael J. Mongan
Solicitor General
Janill L. Richards
Principal Deputy Solicitor General
Robert W. Byrne
Senior Assistant Attorney General
Samuel T. Harbourt
Deputy Solicitor General
Gary E. Tavetian
Supervising Deputy Attorney General
Jessica Barclay-Strobel
Caitlan Mcloon
Deputy Attorneys General
Kristin A. Liska
Associate Deputy Solicitor General
455 Golden Gate Ave.,
Suite 11000
San Francisco, CA 94102-7004
(415) 510-3919

Attorneys for Real Party in Interest California Department of Forestry and Fire Protection

Office of the Clerk
California Court of Appeal
Second Appellate District • Division Six
200 E. Santa Clara Street
Ventura, California 93001-2793
(805) 641-4700

Clerk of the Court
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-3600
(415) 865-7000

Hon. Thomas P. Anderle
Santa Barbara County Superior Court
Historic Anacapa Courthouse
1100 Anacapa Street, Dept. 3
Santa Barbara, CA 93101-2099
(805) 882-4570

Trial Court Judge • 18CV02968

Hard Copy via U.S. Mail

EXHIBIT A

EXHIBIT A

AMICI CURIAE SIERRA PACIFIC INDUSTRIES AND CALIFORNIA FORESTRY ASSOCIATION'S REQUEST FOR JUDICIAL NOTICE; [PROPOSED] ORDER

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

BRANDT, et al., Appellants, **v.** **SIERRA PACIFIC INDUSTRIES, et al.,** Respondents.	Case No. C074879

Plumas County Superior Court, Case No. CV09-00205
Hon. Leslie C. Nichols (Ret.), Judge

APPELLANT'S OPENING BRIEF

KAMALA D. HARRIS
Attorney General of California
ROBERT W. BYRNE
Senior Assistant Attorney General
*GARY E. TAVETIAN
State Bar No. 117135
Supervising Deputy Attorney General
EVAN EICKMEYER
State Bar No. 166652
DANIEL M. LUCAS
State Bar No. 235269
Deputy Attorneys General
300 South Spring Street, Suite 1702
Los Angeles, California 90013
Telephone: (213) 897-2639
Fax: (213) 897-2802
E-mail: Gary.Tavetian@doj.ca.gov
Attorneys for Appellant California Department of Forestry and Fire Protection (CAL FIRE)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

Case Name: *BRANDT, et al. v. SIERRA PACIFIC INDUSTRIES, et al.*

Court of Appeal No.: C074879

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

(Check One) **INITIAL CERTIFICATE** [ ] **SUPPLEMENTAL CERTIFICATE** [X]

Please check the applicable box:

[X] There are no interested entities or persons to list in this Certificate per California Rules of Court, rule 8.208(d).

[ ] Interested entities or persons are listed below:

Full Name of Interested Entity or Party	Party *Check One*	Non-Party *Check One*	Nature of Interest *(Explain)*
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	

The undersigned certifies that the above listed persons or entities (corporations, partnerships, firms or any other association, but not including government entities or their agencies), have either (i) an ownership interest of 10 percent or more in the party if an entity; or (ii) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Attorney Submitting Form

EVAN EICKMEYER
Deputy Attorney General
State Bar No. 166652
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 445-8188
Fax: (916) 327-2319
E-mail: Evan.Eickmeyer@doj.ca.gov

Party Represented

Attorneys for Appellant California Department of Forestry and Fire Protection (CAL FIRE)

Evan Eickmeyer
(Signature of Attorney Submitting Form)

8-5-14
(Date)

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258 ["one injured by inherently dangerous work performed by a hired contractor can seek tort damages from the person who hired the contractor"].)

Fourth, Beaty and the Landowners are liable for negligent management and use of property because they failed to exercise reasonable care in monitoring the logging activities on the Landowners' property. (Civ. Code, § 1714 [landowner is responsible for injury caused by "want of ordinary care or skill in the management of his or her property . . ."]; *Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 367-370 [possession and the right to control the property impose "an affirmative duty to act" to prevent harm caused by dangerous conditions on the property].) A landowner's duty of care is non-delegable. (*Davert v. Larson* (1985) 163 Cal.App.3d 407, 410-412.)

Based on the foregoing, CAL FIRE's evidence and legal theories presented a strong prima facie case that was sufficient to go to trial against each of the defendants.

II. THE TRIAL COURT ERRED AS A MATTER OF LAW BY GRANTING JUDGMENT ON THE PLEADINGS TO DEFENDANTS SPI, BEATY, AND THE LANDOWNERS.

The trial court erred as a matter of law by dismissing CAL FIRE's claims against SPI, Beaty, and the Landowners based on the conclusion that Health and Safety Code sections 13009 and 13009.1 permit recovery only against those who personally set fires or allow them to escape, and neither allow for vicarious liability nor incorporate common law theories of direct negligence.[88] The trial court's construction is contrary to the text, history,

[88] Defendants Mr. Crismon, Mr. Bush, and Howell's were not parties to this motion. The trial court concluded that Howell's could be liable not because its employees started the fire and allowed it to spread, but because (continued...)

and purpose of these statutes, and it undermines the Legislature's intent to compel those who are responsible for wildfires – and not the taxpayers – to bear the cost of suppressing them.

A. Sections 13009 and 13009.1 Authorize the Recovery of Fire Suppression Costs from Those Directly or Vicariously Liable for Negligently or Unlawfully Setting a Fire or Allowing a Fire to Spread.

The fundamental tenet of statutory interpretation is to ascertain and effectuate legislative intent, giving the words of the statute their usual and ordinary meaning. (*Ceja v. Rudolph & Sletten, Inc.* (2013) 56 Cal.4th 1113, 1119.) Once the legislative intent has been ascertained, courts should liberally interpret statutes to give effect to that intent. (*City of Alhambra v. County of Los Angeles* (2012) 55 Cal.4th 707, 726.) The most reliable indicator of the Legislature's intent is the words of the statute. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562; *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 29.)

1. Sections 13009 and 13009.1 incorporate vicarious liability.

Since 1872, Civil Code section 2338 has codified the common law rule of vicarious liability:

> [A] principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal.

The doctrine is not limited to employer and employee "but speaks more broadly of agent and principal [and] makes the principal liable for negligent and 'wrongful' acts committed by the agent" while transacting business

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(...continued)
Howell's may have negligently maintained the equipment that was involved in the fire start. (64 AA 18059:8-12.)

within the scope of the agency. (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 296, fn. 2; see also 3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency, § 4, p. 42.)

The plain language of section 13009 is consistent with that rule. Section 13009 imposes liability upon "[a]ny person . . . who negligently, or in violation of the law, sets a fire, allows a fire to be set, or allows a fire kindled or attended by him or her to escape onto any public or private property . . . ." (Health & Saf. Code, § 13009, subd. (a).) But the statute also carves out an exception to vicarious liability for mortgagees (lenders), stating that they are not responsible for the property possessor's failure to correct a fire hazard.[89] There would have been no need to carve out such an exception unless the statute generally allowed for vicarious liability in the first instance.

Section 13009 was enacted with the Legislature's presumed knowledge of the statutory and common law rule of vicarious liability, and there is nothing in the language of section 13009 to suggest that the Legislature intended to depart from this rule. "[T]he Legislature is deemed to be aware of existing laws and judicial decisions in effect at the time legislation is enacted." (*Apple, Inc. v. Superior Court* (2013) 56 Cal.4th 128, 146, internal quotes omitted.) Similarly, "'it is not to be presumed that the legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication.'" (*Big Creek*

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[89] That provision states that any person, "(2) other than a mortgagee, who, being in actual possession of a structure, fails or refuses to correct, within the time allotted for correction, despite having the right to do so, a fire hazard prohibited by law, for which a public agency properly has issued a notice of violation respecting the hazard," may be liable for fire suppression costs. (*Ibid.*)

Lumber Co. v. County of Santa Cruz (2006) 38 Cal.4th 1139, 1149-1150, quoting *County of Los Angeles v. Frisbie* (1942) 19 Cal.2d 634, 644; see also *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1193 ["[A]s a general rule, unless expressly provided, statutes should not be interpreted to alter the common law, and should be construed to avoid conflict with common-law rules"], internal quotes omitted; *C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1111-1112 (*Tenet Healthcare*).)

At least one court has held that "the general statutory provisions and case law governing compensatory damages must be read in conjunction with section 13009." (*People v. Southern Cal. Edison Co.* (1976) 56 Cal.App.3d 593, 604.) There is no reason why general statutory provisions and case law governing vicarious liability would not also be read in conjunction with section 13009.

Tenet Healthcare proves this point. In that case, the plaintiff sued a healthcare corporation under Civil Code section 51.9, which provides that "[a] person is liable in a cause of action for sexual harassment . . . when the plaintiff proves [four enumerated elements]." (Civ. Code, § 51.9, subd. (a).) The trial court sustained the defendant healthcare corporation's demurrer because it found that a corporation could not be held vicariously liable under Civil Code section 51.9 for sexual harassment committed by one of its employees. (*Tenet Healthcare, supra*, 169 Cal.App.4th at pp. 1111-1112.)

The court of appeal reversed, holding that a common-law theory of vicarious liability – ratification – applied to Civil Code section 51.9. The court explained that ratification, codified in Civil Code section 2307, "is a well established principle of California law" and that the court should not repeal that long established principle by implication. (*Tenet Healthcare, supra*, 169 Cal.App.4th at p. 1111.) The court noted that repeal by

implication is recognized only "where there is no rational basis for harmonizing two potentially conflicting laws." (*Ibid.*) The court found that nothing in Civil Code section 51.9 "indicates any intention to abrogate well established ratification principles, which impose potential liability on a corporation whose employees or agents engage in tortious conduct." (*Id.* at. p. 1112.)

Section 13009 is functionally identical to Civil Code section 51.9 in that both identify the putative defendant simply as a "person." Just as nothing in Civil Code section 51.9 "clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common-law rule" (*Tenet Healthcare, supra*, 169 Cal.App.4th at p. 1111), nothing in section 13009 does either. Accordingly, the common-law rule of vicarious liability must apply to claims under section 13009.

2. The history and purpose of section 13009 confirm the Legislature's intent to impose vicarious liability.

The history and purpose of section 13009 reinforce the Legislature's intent to impose liability broadly on those responsible for allowing the setting or spread of a fire under statutory and common-law theories of negligence. Indeed, section 13009 is designed to ensure that the costs of fire suppression will be borne by those responsible for causing fires rather than the taxpaying public.

Since 1919, the Legislature has authorized government agencies to recover fire suppression costs. (*County of Ventura v. So. Cal. Edison Co.* (1948) 85 Cal.App.2d 529, 536.) In construing section 13009's predecessor statute, the court of appeal explained:

> The clear intent of the fire liability law is to require reimbursement by the wrongdoer for expenses incurred in the suppression of fire. . . . The burden of suppressing a fire set to or allowed to spread to the property of another thus rests squarely upon him whose willful or negligent acts or omissions

> necessitated that expense, and not upon the government or careful property owner.

(*County of Ventura, supra*, 85 Cal.App.2d. at pp. 533-534.)

The trajectory of the law has been to maintain or expand the government's ability to recover the costs of suppressing fires against those who set fires or allow them to be set or spread. The Legislature has recodified the law three times—in 1935, 1939, and 1953. The Legislature expanded liability in 1971 (see *People v. Southern Pacific Co.* (1983) 139 Cal.App.3d 627, 637) and 1982 (see 78 Ops.Cal.Atty.Gen. 310 (1995)); expanded recovery in 1987 with the adoption of section 13009.1; and reaffirmed the law in 1987, 1992, and 1994. The trial court's analysis would turn back the clock almost one hundred years and override the Legislature's consistent policy decision that taxpayers be reimbursed for fires caused by negligent or illegal behavior.

Contrary to the trial court's conclusion that the Legislature meant to circumscribe liability under section 13009 when it amended the statute in 1971,[90] the amendment was intended to expand liability for those who set fires or allow them to be set. (*Southern Pacific, supra*, 139 Cal.App.3d at p. 637; 78 Ops.Cal.Atty.Gen. 310 (1995).) Before the 1971 amendment, section 13009 stated that "[t]he expenses of fighting any fires mentioned in Sections 13007 and 13008 are a charge against any person made liable by those sections for damages caused by such fires." (*Southern Pacific, supra*, 139 Cal.App.3d at p. 637.) However, sections 13007 and 13008 created liability only if the fire escaped from the property of origin, so section 13009, as then written, precluded recovery of suppression costs when the fire remained confined to the property where it started. (*People v. Williams* (1963) 222 Cal.App.2d 152.)

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[90] (64 AA 18057: 3-12.)

In response to *Williams*, the Legislature closed that loophole and expanded liability under section 13009 to allow for recovery of fire suppression expenses even if the fire did not escape from the property where it started. (*Southern Pacific*, *supra*, 139 Cal.App.3d at p. 637.) Although courts have differed on whether section 13009 in its post-1971 form captures the same defendants captured under section 13008, no court has found that section 13009 captures a smaller group of defendants than section 13007. For example, *Southern Pacific* concluded that section 13009 captures the same defendants as section 13007 (those who set a fire or allow it to be set), but does not reach as broadly as section 13008 (capturing those who do nothing to prevent the spread of fires from their own property that they had no role in starting). (*Southern Pacific*, *supra*, 139 Cal.App.3d at p. 638.) In *People v. Southern California Edison Co.* (1976) 56 Cal.App.3d 593, the court stated, "Health and Safety Code section 13009 was amended in 1971 to incorporate the substance of sections 13007 and 13008 into that section." (*Id.* at p. 597, fn. 1.)

Here, the trial court based its holding on the supposition that California policy opposes charging private entities for fire suppression costs because "the State has already accepted firefighting as an emergency expense, which will generally be borne by the taxpayers . . . ."[91] The Legislature, however, has adopted precisely the opposite policy, determining that the costs of fire suppression should be borne by those who are responsible for setting the fires or allowing them to spread, and not by the taxpaying public. (*County of Ventura*, *supra*, 85 Cal.App.2d. at pp. 533, 534 [interpreting the predecessor to section 13009].) The remedial purpose of such statutes is "to stimulate precautionary measures aimed at preventing the starting and spreading of fire, and thereby eliminate needless

[91] (64 AA 18058:12-13.)

conflagrations destructive of property and dangerous to the safety and welfare of the public." (*County of Ventura, supra*, 85 Cal.App.2d at p. 539; see also *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 314 [courts should construe statutes broadly that serve a remedial purpose for the public good].) The trial court's narrow reading of the statute constituted prejudicial error.

3. The trial court erred by basing its statutory interpretation on a flawed structural analysis of the differences between sections 13007 and 13009.

The trial court also erred in invoking section 13007 to support its conclusion that section 13009 does not authorize claims based on vicarious liability. Section 13007 provides:

> Any person who personally or through another willfully, negligently, or in violation of law, sets fire to, allows fire to be set to, or allows a fire kindled or attended by him to escape to, the property of another, whether privately or publicly owned, is liable to the owner of such property for any damages to the property caused by the fire.

The trial court held that because section 13007 contains the phrase "personally or through another" while section 13009 does not, the Legislature intended to impose vicarious liability under 13007 but not section 13009.[92] The trial court's analysis is erroneous.

The absence of the phrase "personally or through another" from section 13009 does not evince any legislative intent to limit liability only to those who "personally" set a fire or allow it to be set or spread. The Legislature's intent to impose vicarious liability under section 13009 is clear from the text, history, and purpose of the statute, particularly given the presumption that such longstanding common-law rules apply unless the Legislature "clearly and unequivocally" indicates otherwise. (*Tenet*

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[92] (64 AA 18055:12-18056:13.)

Healthcare, *supra*, 169 Cal.App.4th at p. 1111.) The fact that section 13009 uses different terminology than section 13007 is of no import, as the relevant language was enacted at different times—section 13007 in 1953, and section 13009 in 1971—and it is well settled that the Legislature may use different language to convey the same legal right. (See, e.g., *California Teachers Assn. v. Governing Bd. of Rialto Unified Sch. Dist.* (1997) 14 Cal.4th 627, 643 ["[B]ecause the Legislature has not consistently used any particular wording in the Education Code to create a preferential employment right, we find no significance in the fact its choice of words in section 44919(b) fails to duplicate language in any of the other statutes that create such a right"]; *Niles Freeman Equipment v. Joseph* (2008) 161 Cal.App.4th 765, 783 ["The Legislature is not required to use the same language to accomplish the same ends"].)

Here, the phrases "person who personally or through another" in section 13007 and "person" in section 13009 accomplish the same ends. Given Health and Safety Code section 19's definition of "person," coupled with Civil Code section 2338's codification of vicarious liability, the use of the phrase "personally or through another" in section 13007 may be surplusage because it does not appear to add meaning, at least not in the context of a vicarious liability analysis. Where surplusage exists, courts do not alter the meaning of the statute to try to give special meaning to the additional words. (*People v. Townsend* (1998) 62 Cal.App.4th 1390, 1399; see also *People v. Martinez* (1995) 11 Cal.4th 434, 448.)

The trial court below cited to *Wells Fargo Bank v. Superior Court* (1991) 53 Cal.3d 1082 (*Wells Fargo*) for the proposition that "where the Legislature has carefully employed a term in one place and excluded it in

another, it should not be implied where excluded."[93] In that case, one banking statute stated that a board of directors may *appoint or dismiss* officers. A companion statute stated that a board of directors may delegate the power to *appoint* officers to certain officers. The Supreme Court declined to imply the words "or terminate" into the second statute. (*Id.* at pp. 1094-1097.)

The trial court's reliance on *Wells Fargo* is misplaced because there is no need to imply words into section 13009 to find vicarious liability. Moreover, while *Wells Fargo* stated that courts should not imply words into statutes, the trial court did just that by reading the term "personally" into section 13009 where it does not exist, but not "or through another." (See also Code Civ. Proc., § 1858 ["In the construction of a statute . . . , the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted . . ."].)

Had the Legislature wanted to exempt section 13009 from the doctrine of vicarious liability, it could have done so. In fact, it would have had to do so expressly. (*Apple Inc. v. Superior Court*, *supra*, 56 Cal.4th at p. 1461; *Big Creek Lumber Co. v. County of Santa Cruz*, *supra*, 38 Cal.4th at pp. 1149-1150.)

B. The Trial Court Erred When It Held That Common Law Concepts of Negligence Do Not Apply to Sections 13009 and 13009.1.

The trial court erred when it held as a matter of law that CAL FIRE could not proceed against SPI, Beaty, or Landowners on CAL FIRE's alternative theories of common-law negligence. In addition to vicarious liability claims, CAL FIRE alleges that SPI, Beaty, and the Landowners are liable for negligent supervision and inspection, that SPI is liable under the

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[93] (64 AA 18056:10-13.)

peculiar risk theory, and that Beaty and the Landowners are liable for negligent management and use of property.[94] The trial court dismissed these claims on the ground that it was improper to "graft common law tort claims and theories into a cause of action that is [a] 'creature of statute.'"[95] The trial court's reasoning is incorrect.

Under California law, when the Legislature uses words that have an independent legal meaning, courts construe those words according to the "peculiar or appropriate meaning or definition" that the law gives them. (Civ. Code, § 13.) "Where statutes make use of words and phrases of well-known and definite sense in the law, they are to be received and expounded in the same sense in the statute. [Citations omitted]." (*Professional Engineers in California Government v. State Personnel Board* (2001) 90 Cal.App.4th 678, 700; see also *Personal Watercraft Coalition v. Board of Supervisors* (2002) 100 Cal.App.4th 129 [courts use common law as source to discern legislative intent and meaning].)

Section 13009 imposes liability for "negligently" setting a fire or allowing it to be set or escape. At common law, negligence includes concepts such as negligent supervision, negligent property management, and peculiar risk. (See, e.g., *Toland v. Sunland Housing Group* (1998) 18 Cal.4th 253, 258, and *Privette v. Superior Court* (1993) 5 Cal.4th 689, 695 [peculiar risk]; *Sprecher v. Adamson* (1981) 30 Cal.3d 358, 370, and *Davert v. Larson* (1985) 163 Cal.App.3d 407, 409-410 [negligent property management]; *Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1140, quoting Rest.3d Agency, § 213, com. d, and *Delfino, supra,* 145 Cal.App.4th at p. 815, *citing* 2 Dobbs, The Law of Torts (2001), § 333, p. 906 [negligent supervision].) In the absence of any contrary definition in

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[94] (1 AA 110:10-113:11.)
[95] (64 AA 18061:8-9.)

the statute itself, it is presumed that the Legislature's use of the term "negligently" is intended to incorporate the longstanding common law definition of negligence.

Here, the trial court also held that common law definitions of negligence do not apply because section 13009 only imposes liability on someone who sets a fire or allows a fire to be set.[96] But these common-law theories of negligence are wholly consistent with section 13009 because one who negligently supervises, negligently manages property, or hires another to perform an inherently dangerous task creates the condition that "allows" a fire to be set or spread. (*County of Ventura v. So. Cal. Edison* (1948) 85 Cal.App.2d 529, 532 ["[T]he word 'allow' has been found to import knowledge of the operative facts accompanied by acquiescence in, or abstinence from preventing, the occurrence of the particular act or event, where a duty and power to prevent existed [citations]"].)[97]

III. THE DISMISSAL UNDER *COTTLE* FOR FAILURE TO ESTABLISH A PRIMA FACIE CASE SHOULD BE REVERSED.

The trial court's determination that CAL FIRE failed to establish a prima facie case constitutes reversible error. As a matter of law, CAL FIRE's evidence was more than sufficient to establish a prima facie case that defendants are liable under section 13009. In dismissing the case prior to trial, the court improperly weighed the evidence and relied upon erroneous conclusions of law. Moreover, in the event that this Court finds

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[96] (64 AA 18060:19-23.)

[97] The trial court also misinterpreted *People v. Southern Pacific, supra,* 139 Cal.App.3d at p. 638, as extending liability only to instances in which the person directly started a fire, not to instances of negligent supervision or vicarious liability. (64 AA 18061:1-7.) *Southern Pacific* did not address these theories, but merely declined to extend liability under section 13009 to those who had *no* role in setting a fire, either directly or indirectly. (139 Cal.App.3d at pp. 637-638.)

testimony, or citations from deposition transcripts, even though CAL FIRE specifically requested the opportunity to do so.[154] In short, the trial court disposed of CAL FIRE's case through a proceeding in which it did not give CAL FIRE the chance to present its supporting evidence.

For example, CAL FIRE explained that it would prove through the testimony of lead investigator Chief White that defendants' failure to conduct a post-logging fire inspection caused the Moonlight Fire to spread.[155] Chief White was ready to testify that had defendants conducted that inspection, they would have located the fire in its incipient state in time for it to be suppressed before spreading.[156] But the trial court adopted SPI's rebuttal to that offer of proof, when SPI argued that the origin and cause report only stated that defendants "could" have found the fire.[157] Had the court allowed CAL FIRE the opportunity to cure after the hearing, CAL FIRE would have (1) located and presented to the court the deposition testimony where Chief White testified that defendants "*would*" have found the fire in its incipient stage, (2) presented a declaration from Chief White explaining his opinion, or (3) presented Chief White for live testimony.

CONCLUSION

The trial court here did everything that *Amtower* warns against. It "blindsided" CAL FIRE with late notice of a nonstatutory motion, "infringed" CAL FIRE's right to a jury trial by weighing evidence, failed to let CAL FIRE present all facts to prove its prima facie case, and "circumvented procedural protections" provided by statutory motions or by

---

[154] (8 RT 1898:18-22, 1909:19-1910:19, 1953:22-1954:3, 1971:6-23; 9 RT 2035:24-2041:23, 2077:9-24, 2182:17-2183:18.)

[155] (8 RT 1810:13-1811:23 [Court recognized that "He [Chief White] can offer testimony on it [to explain the causation issue]".)

[156] (65 AA 18371:20-18372:8.)

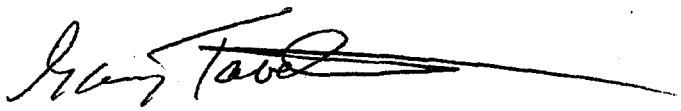
[157] (7 RT 1733:8-1734:1.)

trial on the merits. Those errors, coupled with the trial court's constrained view of Health and Safety Code section 13009—a view that is directly at odds with that of the Legislature's—led the trial court to dismiss this case in error. Accordingly, this Court should reverse the trial court's judgment and remand CAL FIRE's case for trial.

Dated: August 4, 2014

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California



GARY E. TAVETIAN
Supervising Deputy Attorney General
Attorneys for Appellant
California Department of Forestry and Fire Protection

CERTIFICATE OF COMPLIANCE

I certify that the attached Appellant's Opening Brief uses a 13 point Times New Roman font and contains 17,334 words.

Dated: August 4, 2014

KAMALA D. HARRIS
Attorney General of California

GARY E. TAVETIAN
Supervising Deputy Attorney General
Attorneys for Appellant California Department of Forestry and Fire Protection

EXHIBIT B

EXHIBIT B

AMICI CURIAE SIERRA PACIFIC INDUSTRIES AND CALIFORNIA FORESTRY ASSOCIATION'S REQUEST FOR JUDICIAL NOTICE; [PROPOSED] ORDER

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

BRANDT, et al., Appellants, v. SIERRA PACIFIC INDUSTRIES, et al., Respondents.	Case No. C074879

On Appeal From the Superior Court
of California, County of Plumas, Case No. CV09-00205
Hon. Leslie C. Nichols, Judge

RESPONSE TO OPENING BRIEF FILED BY CAL FIRE

WILLIAM R. WARNE (Bar No. 141280)
MICHAEL J. THOMAS (Bar No. 172326)
ANNIE S. AMARAL (Bar No. 238189)
MEGHAN M. BAKER (Bar No. 243765)
DOWNEY BRAND LLP
621 Capitol Mall, 18th Floor
Sacramento, CA 95814-4731
Telephone: (916) 444-1000
Facsimile: (916) 444-2100
bwarne@downeybrand.com
mthomas@downeybrand.com
aamaral@downeybrand.com
mbaker@downeybrand.com

Attorneys for Respondent Sierra Pacific Industries

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Clerk, Court of Appeal,
Third Appellate District

RICHARD S. LINKERT (Bar No. 88756)
JULIA M. REEVES (Bar No. 241198)
MATHENY SEARS LINKERT &
JAIME LLP
3638 American River Drive
Sacramento, CA 95864
Telephone: (916) 978-3434
Facsimile: (916) 978-3430
rlinkert@mathenysears.com
jreeves@mathenysears.com

Attorneys for Respondents W. M. Beaty & Associates, Inc., a Corporation and Ann McKeever Hatch, As Trustee of The Hatch 1987 Revocable Trust, et al.

PHILLIP R. BONOTTO (Bar No. 109257)
DEREK VANDEVIVER (Bar No. 227902)
RUSHFORD & BONOTTO, LLP
1010 Hurley Way, Suite 410
Sacramento, CA 95825
Telephone: (916) 565-0590
Facsimile: (916) 565-0599
pbonotto @rushfordbonotto.com
dvandeviver@rushfordbonotto.com

Attorneys for Respondents Eunice Howell, DBA Howell's Forest Harvesting, J.W. Bush, and Kelly Crismon

TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL, THIRD APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number: C074879
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): William R. Warne (SBN 141280) Annie S. Amaral (SBN 238189) DOWNEY BRAND LLP 621 Capitol Mall, 18th Floor, Sacramento, CA 95814 TELEPHONE NO.: (916)444-1000 FAX NO. (Optional): (916) 444-2100 E-MAIL ADDRESS (Optional): bwarne@downeybrand.com; aamaral@downeybrand.com ATTORNEY FOR (Name): Respondent, Sierra Pacific Industries	Superior Court Case Number: CV09-00205 FOR COURT USE ONLY
APPELLANT/PETITIONER: BRANDT, et al. RESPONDENT/REAL PARTY IN INTEREST: SIERRA PACIFIC INDUSTRIES, et al.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): ☒ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (name): Sierra Pacific Industries

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

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: 2/5/2014

Annie S. Amaral ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF PARTY OR ATTORNEY)

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Sierra Pacific Industries

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, THIRD APPELLATE DISTRICT, DIVISION

Court of Appeal Case Number: C074879

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):
RICHARD S. LINKERT (Bar No. 88756)
MATHENY SEARS LINKERT & JAIME LLP
3638 American River Drive
Sacramento, CA 95864
TELEPHONE NO.: (916) 978-3434 FAX NO (Optional): (916) 978-3430
E-MAIL ADDRESS (Optional): rlinkert@mathenysears.com
ATTORNEY FOR (Name): W. M. BEATY & ASSOCIATES, INC. and LANDOWNERS

Superior Court Case Number: CV09-00205

FOR COURT USE ONLY

FILED
JUL 29 2014
COURT OF APPEAL - THIRD DISTRICT
DEENA C. FAWCETT
BY _____ Deputy

APPELLANT/PETITIONER: BRANDT, et al.

RESPONDENT/REAL PARTY IN INTEREST: SIERRA PACIFIC INDUSTRIES, et al.

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party (*name*): W. M. BEATY & ASSOCIATES, INC. and LANDOWNERS

2. a. [ ] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. [X] Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (*Explain*):
(1) W. M. Beaty & Associates, Inc.	Corporation
(2) Ann McKeever Hatch, as Trustee of the	Landowner
(3) Hatch 1987 Revocable Trust;	
(4) Richard L. Greene, as Trustee of the	Landowner
(5) Hatch Irrevocable Trust U/A Dtd. 12/29/92;	

[X] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: July 29, 2014

RICHARD S. LINKERT (Bar no. 88756)
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PARTY OR ATTORNEY)

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Cal. Rules of Court, rules 8.208, 8.488

SHORT TITLE: BRANDT, et al. v. SIERRA PACIFIC INDUSTRIES, et al.	CASE NUMBER: C074879

4. Brooks Walker Jr., as Trustee of the Della Walker Van Loben Sels Trust for the Issue of Brooks Walker Jr. U/A Dtd. 10/26/89 and the Brooks Walker Jr. Revocable Trust U/A Dtd. 12/4/96;	Landowner
5. John C. Walker, Individually and as Trustee of the Della Walker Van Loben Sels Trust for the Issue of John C. Walker, U/A Dtd. 12/21/89;	Landowner
6. Kirby Walker, an individual;	Landowner
7. Jennifer Walker, individually and as Trustee for the Max Walker Silverman Trust, U/A Dtd. 5/5/93 and the Emma Walker Silverman Trust U/A Dtd. 12/6/94;	Landowner
8. Lindsey Walker, also known as Lindsey Walker-Silverman, individually and as Trustee of the Reilly Hudson Keenan Trust, U/A Dtd. 12/18/91, and the Madison Flanders Keenan Trust, U/A Dtd. 12/18/91;	Landowner
9. Wellington S. Henderson, Jr., as Trustee of the Henderson Revocable Trust U/A Dtd. 3/9/93;	Landowner
10. Charles C. Henderson, as Trustee of the Charles C. and Kirsten Henderson	Landowner

(Required for verified pleading) The items on this page stated on information and belief *(specify item numbers, not line numbers):*

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ADDITIONAL PAGE
Attach to Judicial Council Form or Other Court Paper

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Revocable Trust U/A Dtd. 1/3/97;

11. James A. Henderson, an individual; Landowner

12. Joan H. Henderson, an individual; Landowner

13. Elena D. Henerson, an individual; Landowner

14. Mark W. Henderson, as Trustee of the Mark W. Henderson Revocable Trust, U/A Dtd. 8/30/93; Landowner

15. Brooks Walker III, individually and as Trustee of the Myles Walker Danielsen Trust, U/A Dtd. 12/18/91, the Clayton Brooks Danielsen Trust, U/A Dtd. 12/18/91, the Benjamin Walker Burlock Trust, U/A Dtd. 6/27/94, and the Margaret Charlotte Burlock Trust, U/A Dtd. 11/3/97; Landowner

16. Leslie Walker, individually and as Trustee of the Brooks Thomas Walker Trust, U/A Dtd. 9/20/00, and the Della Grace Walker Trust, U/A Dtd. 12/6/04. Landowner

(Required for verified pleading) The items on this page stated on information and belief *(specify item numbers, not line numbers):*

TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL, THIRD APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number: C074879
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Phillip R. Bonotto, State Bar No. 109257 RUSHFORD & BONOTTO, LLP 1010 Hurley Way, Suite 410 Sacramento, CA 95825 TELEPHONE NO.: (916) 565-0590 FAX NO. (Optional): E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): Eunice Howell, dba Howell's Forest Harvesting	Superior Court Case Number: CV09-00205 FOR COURT USE ONLY
APPELLANT/PETITIONER: BRANDT, et al. RESPONDENT/REAL PARTY IN INTEREST: SIERRA PACIFIC INDUSTRIES, et al.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): Eunice Howell, dba Howell's Forest Harvesting

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

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	Nature of interest (Explain):
(1)		
(2)		
(3)		
(4)		
(5)		

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: March 3, 2015

Phillip R. Bonotto, Esq.
(TYPE OR PRINT NAME)

▶ [signature] for Phillip Bonotto
(SIGNATURE OF PARTY OR ATTORNEY)

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APP-008

COURT OF APPEAL, THIRD APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number: C074879
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Phillip R. Bonotto, State Bar No. 109257 RUSHFORD & BONOTTO, LLP 1010 Hurley Way, Suite 410 Sacramento, CA 95825 TELEPHONE NO.: (916) 565-0590 FAX NO. (Optional): E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): JW Bush	Superior Court Case Number: CV09-00205 FOR COURT USE ONLY
APPELLANT/PETITIONER: BRANDT, et al. RESPONDENT/REAL PARTY IN INTEREST: SIERRA PACIFIC INDUSTRIES, et al.	
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1. This form is being submitted on behalf of the following party (*name*): JW Bush

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

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
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Date: March 3, 2015

Phillip R. Bonotto, Esq.
(TYPE OR PRINT NAME)

▶ [signature] for Phillip Bonotto
(SIGNATURE OF PARTY OR ATTORNEY)

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL, THIRD APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number: C074879
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Phillip R. Bonotto, State Bar No. 109257 RUSHFORD & BONOTTO, LLP 1010 Hurley Way, Suite 410 Sacramento, CA 95825 TELEPHONE NO.: (916) 565-0590 FAX NO. (Optional): E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): Kelly Crismon	Superior Court Case Number: CV09-00205 FOR COURT USE ONLY
APPELLANT/PETITIONER: BRANDT, et al. RESPONDENT/REAL PARTY IN INTEREST: SIERRA PACIFIC INDUSTRIES, et al.	
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1. This form is being submitted on behalf of the following party (name): Kelly Crismon

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

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

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Date: March 3, 2015

Phillip R. Bonotto, Esq.
(TYPE OR PRINT NAME)

▶ [signature] for Phillip Bonotto
(SIGNATURE OF PARTY OR ATTORNEY)

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does not cite any facts in support of this theory. This argument is waived. (See *infra*, Part VII.A.)

Seventh, Cal Fire failed to make a prima facie showing during the *Cottle* proceedings that if Sierra Pacific, Landowners, and Beaty had injected themselves into Howell's operations on September 3, 2007, that would have made a difference in terms of the type of inspection that Howell completed. (See *infra*, Part VII.F.) On appeal, Cal Fire does not cite any facts in support of this theory, thereby waiving it too.

Finally, Cal Fire failed to make a prima facie showing during the *Cottle* proceedings that had Landowners and Beaty managed the property differently, Cal Fire would not have been damaged. Therefore, Cal Fire has waived this argument as well.

VI. THE TRIAL COURT PROPERLY GRANTED THE MOTION FOR JUDGMENT ON THE PLEADINGS

The trial court correctly determined that Cal Fire failed to allege and could not allege facts sufficient to state a cause of action against Sierra Pacific, Beaty, and Landowners under Health and Safety Code section 13009. Section 13009(a)(1) provides, in relevant part:

> (a) Any person (1) who negligently, or in violation of the law, sets a fire, allows a fire to be set, or allows a fire kindled or attended by him or her to escape onto any public or private property . . . is liable for the fire suppression costs incurred in fighting the fire and for the cost of providing rescue or emergency services, and those costs shall be a charge against that person. The charge shall constitute a debt of that person, and is collectible . . . in the same manner as in the case of an obligation under a contract, expressed or implied.

When interpreting statutory language, courts generally follow a three-step sequence. (*MacIsaac v. Waste Mgmt. Collection & Recycling*,

Inc. (2005) 134 Cal.App.4th 1076, 1083.) First, the court looks "to the plain meaning of the statutory language" in an effort to effectuate the intent of the Legislature. (*Ibid.* [citations omitted].) Second, "the court[] may turn to rules or maxims of construction 'which serve as aids in the sense that they express familiar insights about conventional language usage," and consider "extrinsic aids, including the statute's legislative history." (*Ibid.* [citations omitted].) Finally, the court may apply "reason, practicality, and common sense to the language at hand" and "consider not only the words used, but also other matters, 'such as context, the object in view, the evils to be remedied, the history of the times and of legislation upon the same.'" (*Id.* at 1084 [citation omitted].)

A. Cal Fire Cannot Recover Its Fire Suppression Costs Under Health and Safety Code Section 13009 Based on Vicarious Liability.

On appeal, Cal Fire argues that Sierra Pacific, Beaty, and Landowners are vicariously liable for the acts of Howell under agency law, and that Sierra Pacific is vicariously liable for the acts of Howell under the peculiar risk doctrine.[15] (AOB at 22-23.) The trial court correctly concluded that these vicarious liability theories do not apply to a statutory cause of action for the recovery of fire suppression costs under Health and

[15] In its briefing Cal Fire mistakenly characterizes the peculiar risk doctrine as a theory of direct liability, as opposed to a vicarious one. However, peculiar risk is a tort doctrine that, under certain circumstances, imposes vicarious liability for the negligence of others. (See *Toland v. Sunland Housing Grp. Inc.* (1998) 18 Cal.4th 253, 265.) As a result of its misunderstanding, Cal Fire does not address the peculiar risk doctrine in the portions of its briefing on whether fire suppression costs are recoverable under vicarious liability theories.

Safety Code section 13009.[16] (64 AA 18051-18063.) This Court should affirm the trial court's well-reasoned ruling.

1. Under the Common Law, Government Agencies Could Not Recover Fire Suppression Costs From a Tortfeasor Under Agency Law.

The interpretation of a statute typically begins with the words in the statute itself. (*MacIsaac, supra*, 134 Cal.App.4th at 1082.) Nevertheless, Cal Fire tellingly begins its argument by ignoring the language of Health and Safety Code section 13009, choosing to instead discuss the text of an entirely different statute, Civil Code section 2338. (AOB at 24.) Cal Fire reaches far to point out that this statute, enacted nearly 150 years ago, codifies the common law rule of agency. (*Ibid.*) Cal Fire then stretches further to argue that Health and Safety Code section 13009 should not be interpreted to "depart from," "overthrow," or "alter" this "long established principle" of the common law. (*Id.* at 24-26.)

The premise of Cal Fire's argument is fundamentally flawed. For section 13009 to "depart from" the common law, the common law would have to allow a government entity to recover its fire suppression costs, under agency law or otherwise. It does not. The common law rule provides that a government entity *cannot* recover the costs for police, fire, and other emergency services from any type of tortfeasor, direct or vicarious. (See *County of San Luis Obispo v. Abalone Alliance* (1986) 178 Cal.App.3d 848, 859; *City of Los Angeles v. Shpegel-Dimsey, Inc.* (1988)

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[16] The trial court did not address whether Howell could be found vicariously liable for the conduct of Bush and Crismon under the doctrine of respondeat superior. The trial court did not address this theory because Howell did not join in the motion for judgment on the pleadings and because, as discussed *infra*, Cal Fire arguably alleged facts against Howell that establish direct, as opposed to vicarious, liability under Health and Safety Code section 13009.

198 Cal.App.3d 1009, 1018, 1020.) Under the common law, "the cost of public services for protection from fire or safety hazards is to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates the need for the service." (*Shpegel-Dimsey, supra*, 198 Cal.App.3d at 1018 [citation omitted].) Thus, the government "can *never sue in tort* in its political or governmental capacity" to collect fire suppression costs. (*Ibid.* [emphasis added].)

Health and Safety Code section 13009 effectuates a departure from the common law because, contrary to common law, the statute allows for the recovery of fire suppression costs. For this reason, Cal Fire's reliance on *C.R. v. Tenant Healthcare* (2009) 169 Cal.App.4th 1094 is misplaced. Unlike the circumstances here, *Tenant* involves an injury that historically could be redressed under the common law and a statute that did not indicate any intention to depart from the common law.[17]

Cal Fire also cites authority for the proposition that statutes should be construed to avoid conflict with the common law. (AOB at 26.) However, its argument again incorrectly presupposes the recoverability of fire suppression costs under the common law. In order to avoid conflict

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[17] *Tenant* involved a statutory cause of action against an employer for sexual harassment, a type of injury that could be redressed under the common law, for example, through a direct cause of action for negligent hiring, supervision or retention, or through vicarious liability under the doctrine of respondeat superior. (*Tenant, supra,* 169 Cal.App.4th at 1097, 1110.) Furthermore, in *Tenant*, nothing about the sexual harassment statute indicated any intention to depart from or abrogate the common law. (See *id.* at 1112.) In fact, the statute provided that "nothing in this section shall be construed to limit application of any other remedies or rights provided under the law." (Civ. Code, § 51.9, subd. (c).) Unlike *Tenant*, the Moonlight Fire action involves a statutory cause of action for recovery of fire suppression costs, a type of expense that could not be redressed under the common law, through direct or vicarious liability. And, unlike *Tenant*, this case involves a statute that clearly indicates an intention to depart from the common law.

with the common law rule that precludes the recovery of such costs, Health and Safety Code section 13009 can only be read to allow recovery under the circumstances specifically delineated by the statute, *and to preclude recovery under any other common law theory.* Not surprisingly, courts have expressly or implicitly recognized this principle, finding that recovery is "*strictly limited* to that provided" in Health and Safety Code section 13009. (*Shpegel-Dimsey, supra*, 198 Cal.App.3d at 1020 [emphasis added]; see also *People v. Williams* (1963) 222 Cal.App.2d 152, 155.) Properly analyzed, it is abundantly clear that Cal Fire cannot rely on common law concepts such as agency to recover its fire suppression costs. Rather, Cal Fire must establish its right to recovery against each individual Defendant under the text of the statute.

2. The Plain Language of the Statute Does Not Give Rise to Vicarious Liability.

Health and Safety Code section 13009 delineates specific persons and specific circumstances whereby the government can recoup costs that, as a matter of public policy, are traditionally born by taxpayers. Specifically, the language of section 13009, subsection (a)(1), imposes liability on a specific class of persons: those persons who *set* a fire, *allow* a fire to be set, or *allow* a fire that person *kindled* or *attended* to escape. Additionally, section 13009 twice utilizes the words "that person" when delineating who suppression costs may be "charged against," thereby indicating that only a person who actually *sets* a fire, *allows* a fire to be set, or *allows* a fire that person kindled or attended to escape can be held liable under the statute. Moreover, the statute provides for recovery in contract or quasi-contract, neither of which historically extends liability through common law tort or vicarious liability concepts.[18] Accordingly, the only

[18] Before the trial court, Cal Fire argued that this contractual/quasi-contractual recovery language serves only to establish the venue for an

persons who can be held liable under Health and Safety Code subsection (a)(1) are those persons who set the fire, allowed the fire to be set, or allowed a fire that person kindled or attended to escape. (See generally *Smith v. Rickard* (1988) 205 Cal.App.3d 1354, 1361 ["If a statute enumerates the persons or things to be affected by its provision, there is an implied exclusion of others...It is an elementary rule of construction that the expression of one excludes the other. It is equally well settled that the court is without power to supply an omission."]; *Ex parte Peart* (1935) 5 Cal.App.2d 469, 472.)

Before the trial court, Cal Fire argued that the statute should be interpreted to "*extend liability* beyond the person who actually ignited the fire, or allowed it to be set or to escape." (63 AA 17791:24-17792:2 [emphasis added].) Although Cal Fire avoids the words "extends liability" in its appellate briefing, the thrust of its argument remains the same: that liability should be expanded through agency law or other tort concepts to persons who are not specifically delineated in the statute. (AOB at 24-25.)

In support of its argument, Cal Fire contends that the plain language of Health and Safety Code section 13009 is "consistent with" agency law. (See *id.* at 25.) But Cal Fire does not point to any language in the statute supporting its bald assertion. Nor can Cal Fire do so because section 13009 is devoid of any language suggesting that liability can be predicated on the acts of others. For example, the statute does *not* state "any person who *personally or through another*," which is the language the Legislature used elsewhere in the Health and Safety Code to invoke agency liability for

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action to recover fire suppression costs. (9 RT 2004:15-2008:14.) Additionally, Cal Fire argued that a cause of action under section 13009 sounded in tort, not contract. (*Ibid.*) Cal Fire advances neither of these arguments on appeal, so they are both waived. (See *Dieckmeyer*, *supra*, 127 Cal.App.4th at 260.)

property damages caused by fire. (Health & Saf. Code, § 13007.) Instead, section 13009 references only the person who engages in the requisite acts, and then specifies that costs may be charged against "that person."

Cal Fire points to language in subsection (a)(2) of section 13009, which Cal Fire characterizes as "carving out" an exception to vicarious liability. (AOB at 25.) Based on this erroneous premise, Cal Fire reasons there "would have been no need to carve out such an exception unless the statute generally allowed for vicarious liability in the first instance." (*Ibid.*) Cal Fire misreads and misconstrues this aspect of the statute. Subsection (a)(2) delineates an additional type of person from whom the government can recover fire suppression costs: someone "in actual possession of a structure" who fails or refuses to correct a fire hazard after receiving notice of that hazard from a public agency. As this language makes clear, liability under subsection (a)(2) turns on acts of the person in actual possession, not on the acts of an agent while transacting business within the scope of the agency. Thus, even under this subsection, liability is direct, not vicarious.

Cal Fire correctly notes that subsection (a)(2) excludes a mortgagee in actual possession of the structure (i.e. a lender who has foreclosed). However, had subsection (a)(2) not excluded lenders in actual possession, that lender's liability would be based on its *own* negligence for failing or refusing to correct a fire hazard, not on the negligent acts of an agent imputed to a principle. Therefore, subsection (a)(2) does not "carve out" an exception to vicarious liability. Instead, subsection (a)(2) "carves out" an exception to direct liability for lenders who are in actual possession, and therefore provides no support for Cal Fire's argument.

Since the language of the statute is not helpful to its position on any front, Cal Fire turns to *People v. Southern California Edison Co.* (1976) 56 Cal.App.3d 593 to argue that vicarious liability can be "read" into Health and Safety Code section 13009. (AOB at 26-27.) In that case, the

government argued that because "liability for fire suppression expenses is a liability created by statute, the amount of such expenses is assessable irrespective of its reasonableness . . . or proof that such expenses were not actually spent on the particular fire." (*Southern California Edison Co., supra,* 56 Cal.App.3d at 603.) In evaluating this argument, the appellate court turned to the language of the statute itself, but found that it unfortunately "gives no direction as to . . . the manner in which 'expenses' constituting the statutory debt are to be determined." (*Ibid.*) Because the statute failed to provide guidance, the court resorted to "principles of the law and damages" and "basic fairness," which the court said "demand that the person or entity being charged for such suppression expenses be given the opportunity to challenge whether such expenses were reasonably incurred or expended in suppression of the fire." (*Ibid.*)

Cal Fire contends that because *Southern California Edison* relied on "principles of the law and damages," this Court can rely on principles of vicarious liability when interpreting the statute. (AOB at 26.) Cal Fire ignores that *Southern California Edison* had no choice but to resort to "principles of the law and damages" as well as "basic fairness" because the statute was silent on the manner in which suppression expenses are determined. Here, in contrast, section 13009 provides explicit direction and specifically delineates the persons who can be held liable. Accordingly, this Court need not resort to general "principles of the law." Moreover, to the extent this Court considers "principles of the law," the applicable principle is not vicarious liability, but rather that the government cannot recover the cost of emergency services, either directly or vicariously, unless specifically authorized by the statute itself. (See *Shpegel-Dimsey, supra,* 198 Cal.App.3d at 1018-1020.)

3. The Statutory Scheme Proves that Recovery under Section 13009 Cannot Be Based on Vicarious Liability.

As part of its analysis of section 13009, the trial court examined other fire liability statutes within the Health and Safety Code, and in particular, section 13007. (64 AA 18055-18056.) Cal Fire contends the trial court's decision to do so was an error – a contention that reviewing courts have repeatedly rejected. (See *Graphic Arts Mut. Ins. Co. v. Time Travel Intern., Inc.* (2005) 126 Cal.App.4th 405, 415 [explaining that the words of a statute cannot be read "in isolation," but must be considered "in the light of the statutory scheme"] [citing *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735]; *Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063 [explaining that a statute should be considered "in the context of . . . the statutory scheme of which it is a part, giving significance to every word, phrase, sentence, and part of an act . . . ."].)

The fire liability laws appear in Health and Safety Code sections 13000 through 13011. With only *one* exception, these statutes impose liability only on the "person" who engages in the prohibited conduct. The *single* exception established by the California Legislature lies in section 13007, which applies to landowners whose property is damaged by the fire. Section 13007 provides the following:

> Any person who *personally or through another* willfully, negligently, or in violation of law, sets fire to, allows fire to be set to, or allows a fire kindled or attended by him to escape to, the property of another, whether privately or publicly owned, is liable to the owner of such property for any damages to the property caused by the fire.

([emphasis added].) Importantly, the language of section 13009 is nearly *identical* to the language of section 13007, except that section 13009 does not contain the "personally or through another" language that appears in

section 13007. Additionally, section 13007 does not include references to "that person" whom fire suppression costs can be "charged against," while section 13009 does. These important differences in the statutes reveal that the Legislature knew the distinctions it was drawing, and chose only to extend liability to those who did not engage in the prohibited conduct, but who acted through another, under section 13007.

The plain language of these statutes therefore makes clear that agency law as no application to section 13009, but that it does have application to section 13007. Cal Fire admitted as much in the trial court. Specifically, Cal Fire conceded that "personally or through another" as used in section 13007 "is a wholesale importation of agency concepts." (9 RT 2008:20-2010:15.) Additionally, Cal Fire conceded that because section 13009 does not contain the "personally or through another" language, Cal Fire does "have a higher burden in terms of who we can assert liability against . . . ." (9 RT 2009:18-25.)

On appeal, Cal Fire has switched tactics. Despite its admissions before the trial court, Cal Fire now conveniently claims that agency law applies to section 13009. (See AOB at 30-31.) Additionally, Cal Fire now contends that the "personally or through another" language in section 13007, and the absence of this same language in section 13009, means absolutely nothing. (See *ibid.*) But it is hornbook law that where the Legislature has carefully employed a term in one place and excluded it in another, the term should not be implied where excluded. (See *Wells Fargo Bank v. Superior Court* (1991) 53 Cal.3d 1082, 1096-97 [citing *Russello v. United States* (1983) 464 U.S. 16, 23].)[19] Here, the Legislature included the

[19] Cal Fire claims that the trial court's reliance on *Wells Fargo* is "misplaced because there is no need to imply words into section 13009 to find vicarious liability." (AOB at 32.) But Cal Fire has to read words into the statute to create vicarious liability since the common law is inapplicable

"through another" language in section 13007, and omitted that same language from section 13009. Accordingly, the words "through another" cannot be implied or inserted in section 13009, which is precisely what Cal Fire seeks to do by applying agency law.

Cal Fire also argues that different language can be used to achieve the same result. (AOB at 31.) From that premise, Cal Fire suggests that the word "person" in section 13009 "accomplishes the same ends" as the words "person who personally or through another" in section 13007.[20] (*Ibid.*) But again, that is not what Cal Fire argued in the trial court, and for good reason. Such a counter-intuitive reading would improperly render the words "personally or through another" in section 13007 nugatory, inoperative, and meaningless. (See *Comm. for Responsible Sch. Expansion v. Hermosa Beach City Sch. Dist.* (2006) 142 Cal.App.4th 1178, 1189 ["Courts should interpret statutes . . . so as to give force and effect to every provision and not in a way which would render words or clauses nugatory, inoperative or meaningless."]; *Graphic Arts, supra*, 126 Cal.App.4th at

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to causes of action for the recovery of fire suppression costs. *Wells Fargo* is directly on point, and Cal Fire's effort to distinguish it fails.

[20] Cal Fire cites *California Teachers Association v. Governing Board of Rialto Unified School District* (1997) 14 Cal.4th 627, which involved a comparative analysis of seven different statutes with respect to whether they created a preferential right of reemployment. (*Id.* at 642-643.) All seven statutes used "different phraseology," leading the California Supreme Court to conclude that the Legislature "has not used consistent language" to create the right. (*Id.* at 643.) With respect to the fire liability laws, the Legislature did not use seven different word variations when referencing the same right. Instead, the fire liability laws consistently use the term "person," with the sole exception of section 13007, which uses the uniquely different language "person who personally or through another." The terminology does not reference the same "right," but rather delineates the different classes of persons from which recovery can be sought.

415-416 ["An interpretation that renders related provisions nugatory must be avoided."].)

Cal Fire characterizes the words "personally or through another" as mere "surplusage," and then cites a handful of cases wherein the courts refused to give meaning to surplusage in a statute. (AOB at 31.) But those exceptions have no application here, as the general rule is clearly "against interpreting statutory language in a manner that would render some part of the statute surplusage . . . ." (*People v. Rizo* (2000) 22 Cal.4th 681, 687.) Cases not following this rule fit a common theme: the surplusage in the statute would defeat the legislative intent or produce an "absurd" result. (See *ibid.* [explaining that the "rule against interpreting statutory language in a manner that would render some part of the statute surplusage . . . will not be used to defeat legislative intent or provide an absurd result"] [citation and quotation marks omitted].) Interpreting the words "person who personally or through another" to give rise to agency liability would not defeat any legislative intent or produce an "absurd" result. Rather, such an interpretation would simply give property owners a broader range of recovery than government agencies.

Finally, Cal Fire argues "that section 13009 uses different terminology than section 13007 is of no import, as the relevant language was enacted at different times . . . ." (AOB at 31.) But as Cal Fire itself recognizes, the operative language of section 13009 was enacted *after* the operative language of section 13007. (*Ibid.*) As Cal Fire readily points out elsewhere in its briefing, the "'Legislature is deemed to be aware of existing laws . . . in effect at the time legislation is enacted." (*Id.* at 25 [citing *Apple Inc. v. Superior Court* (2013) 56 Cal.4th 128, 146].) As discussed further below, at the time the Legislature drafted section 13009, it knew that section 13007 used the language "personally or through another," and yet chose *not* to replicate that language in the otherwise nearly

identically worded section 13009. Therefore, the timing of the enactments actually further proves the legislative intent to not extend liability in section 13009 for the acts of others.[21]

4. The Legislative History Also Establishes that Recovery Under Section 13009 Cannot Be Based on Vicarious Liability.

Cal Fire claims that the history of section 13009 demonstrates a legislative intent to "impose liability broadly . . . under statutory and common-law theories of negligence," including agency, but points to nothing in the legislative history to support this assertion. (AOB at 27.) Instead, Cal Fire premises its argument on the so-called "trajectory of the law to maintain or expand the government's ability to recover the costs of suppressing fires . . . ." (*Id.* at 28.) However, any time the government's ability to recover fire suppression costs has expanded, that expansion has been effectuated by the Legislature, not the courts. Indeed, the legislative history of section 13009 illustrates why this Court should decline Cal Fire's invitation to re-write the law here.

Health and Safety Code sections 13007, 13008, and 13009 have been codified together in one form or another for nearly 100 years, and historically have been collectively referred to as the "Fire Liability Law."

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[21] Cal Fire contends that the Legislature "presumably knew" about agency law when enacting section 13009, and suggests that the Legislature therefore intended this law to be applicable. (See AOB at 25.) What the Legislature presumably knew, however, was that the government could not recover it fire suppression costs, under agency law or otherwise, and that the government would be strictly limited to recovery as provided in the statute. Moreover, the Legislature also knew that section 13007 imposed liability against a "person who personally or through another" engaged in the prohibited conduct. With this knowledge, the Legislature proceeded to authorize the recovery of fire suppression expenses in section 13009 only against the "person" who engages in the prohibited conduct.

(See generally *Ventura County v. S. Cal. Edison Co.* (1948) 85 Cal.App.2d 529, 531-532.) As originally drafted, former section 13009 allowed the government to recover the cost of suppressing fires from any person made liable by former sections 13007 or 13008. (See *ibid.* [language as of 1948]; *Williams*, *supra*, 222 Cal.App.2d at 154-155 [language as of 1963]; *Globe Indem. Co. v. State of California* (1974) 43 Cal.App.3d 745, 748 fn. 1 [language as of 1970].) Consequently, liability under section 13009 was originally co-extensive with liability under sections 13007 and 13008.

Because former section 13007 contained (and still contains) the language "personally or through another," the government could, under former section 13009, recover fire suppression costs based on agency principles. However, because former sections 13007 and 13008 only applied (and still apply) to fires that escape to property owned by others, the government could not, under former section 13009, recover fire suppression costs when the fire remained contained to one property. (*Williams*, *supra*, 222 Cal.App.2d at 155.) Recognizing this limitation in the statutory scheme, the court in *Williams* rejected an effort by the government to "extend liability to a person who causes a fire which is contained to his own land." (*Ibid.*) The court reasoned: "To find liability under section 13009, when the fire is contained to the property of defendant, words would have to be read into the section which are not there. This we are not permitted to do." (*Ibid.*)

In 1971, eight years after *Williams* was decided, the Legislature amended section 13009. In doing so, the Legislature chose to largely parrot the language in section 13007, but with several important differences. (See *People v. S. Pac. Co.* (1983) 139 Cal.App.3d 627, 637 ["[T]he conditions for liability for firefighting expenses under Health and Safety Code section 13009, subdivision (a) are substantially the same as the conditions for damages to property under section 13007 . . . ."], 638 ["The 1971

amendment to section 13009 incorporated the language of section 13007"].) Importantly, the Legislature did not copy the "property of another" language from section 13007 into the new section 13009, and also did not copy the "personally or through another" language from section 13007 into the new section 13009.[22] (Compare *id.* at 633 fn. 3 [language of section 13007], with *id.* at 636 [language of section 13009 post-1971 amendment].) Here, the trial court correctly reasoned that this amendment expanded the circumstances under which the government could collect fire suppression costs (i.e. when the fire remained contained to one property), but also narrowed the classes of persons from whom these costs could be collected (i.e. the person who set the fire, allowed the fire to be set, etc.).

Cal Fire argues that this logical interpretation is flawed because the 1971 amendment was not intended to contract the conditions of liability under section 13009, but to expand them. (See AOB at 28.) Addressing a similar argument that this amendment was intended to expand liability, albeit in a different manner, one court of appeal reasoned:

> That may be the case, or the Legislature, viewing the issue more closely than previously, may have decided that liability for firefighting expenses should not be imposed in the absence of responsibility for the existence of the fire. In any event, we are bound by the rule that the primary indicator of legislative intent is the language of the statute.

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[22] Cal Fire cites a footnote in *Southern California Edison* for the proposition that "Health and Safety Code 13009 was amended in 1971 to incorporate the substance of sections 13007 and 13008 into that section." (AOB at 29 [citing 56 Cal.App.3d at 597 fn. 1].) But this dicta in *Southern California Edison* is imprecise. While it is true that the 1971 amendment to section 13009 incorporated language from section 13007, as noted above, it did not incorporate all of it. And, as subsequently recognized in *Southern Pacific, supra*, 139 Cal.App.3d at 638, the 1971 amendment to section 13009 did not incorporate the language of section 13008.

(*S. Pac., supra*, 139 Cal.App.3d at 638.) Here, the post-1971 section 13009 omits the "personally or through another" language included in section 13007, indicating that the Legislature affirmatively determined that liability under the former statute should not be predicated on the acts of others.

Other amendments are also informative regarding the substantive reach of the statute. For example, in 1987, the Legislature added subsections (a)(2) and (a)(3) to section 13009 in order to "extend liability" for fire suppression costs. (Stats. 1987, Ch. 1127, No. 208 West's Cal. Legis. Service.) Specifically, the Legislature added two new classes of persons who could be held liable: persons in actual possession of a structure, and persons who have an obligation under other provisions of law to correct a fire hazard, who fail or refuse to correct that fire hazard after receiving notice of the hazard from a public agency. (See Health & Saf. Code, § 13009 [West 1987].) Therefore, when the Legislature has wanted to expand liability to additional persons, it has done so, *and felt compelled to do so*, through specific, statutory enactments.

Viewed separately or together, the 1971 and 1982 amendments provide powerful evidence that the Legislature did not intend for agency or other vicarious liability theories to be read into section 13009. This Court should decline Cal Fire's invitation to upend the Legislature's decision. (Civ. Code, § 1858 ["In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted . . . ."].)

5. Public Policy Weighs in Favor of an Interpretation of Health and Safety Code section 13009 That Precludes Vicarious Liability.

Cal Fire asserts that public policy supports grafting agency law into Health and Safety Code section 13009 because the statute was designed so

that the costs of fire suppression "will be borne by those responsible for causing fires rather than the taxpaying public." (AOB at 27.) While true that the statute serves a compensatory purpose,[23] Cal Fire overlooks the countervailing public policies that weigh strongly against any reading that expands the scope of liability beyond the confines of the statute.

Specifically, Cal Fire ignores the fact that a tortfeasor "does not anticipate a demand for reimbursement" when "emergency services are provided by the government and the costs are spread by taxes" because the government has already created a "fair system for spreading the costs of accidents" among the public. (*Abalone Alliance, supra*, 178 Cal.App.3d at 859 [citation omitted].) Consequently, when "a generally fair system for spreading the costs of accidents is already in effect – as it is here through assessing taxpayers the expense of emergency services . . . the argument for judicial adjustment of liabilities . . . [is not] compelling . . . especially . . . where a governmental entity is the injured party." (*Ibid.*) "It is critically important to recognize that the government's decision to provide tax-supported services is a legislative policy determination. It is not the place of the courts to modify such decisions. Furthermore, it is within the power of the government to protect itself from extraordinary emergency expenses by passing statutes or regulations that permit recovery from negligent parties." (*Ibid.*) "Accordingly, in the absence of a statute expressly authorizing recovery of public expenditures . . . the cost of public services for protection from fire or safety hazards is to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates the

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[23] As the courts have recognized, section 13009 "is a compensatory statute for expenses incurred in fighting fires," but "is not intended to exact pecuniary punishment or a penalty against a person or entity liable under the statute." (*S. Cal. Edison, supra*, 56 Cal.App.3d at 603-604 [citing *Gould v. Madonna* (1970) 5 Cal.App.3d 404, 407-408].)

need for the service.'" (*Shpegel-Dimsey, supra*, 198 Cal.App.3d at 1018 [citing *Abalone Alliance, supra*, 178 Cal.App.3d at 859].) A narrow reading of section 13009 comports with these important public policies.

Additionally, the distinctions that the Legislature drew between the persons liable under sections 13007 and 13009 comport with reason, practicality, and common sense. While the government *cannot* sue in tort to collect fire suppression costs, property owners *can* do so, including under agency theories. Also, property owners do not receive taxpayer money to redress property damages. For these reasons, it makes perfect sense that property owners have broader-based recovery for property damages than government agencies have for fire suppression costs. The trial court correctly reasoned that the statutory scheme is consistent with the notion that while the government has already accepted firefighting as an emergency expense generally borne by the taxpayers, landowners do not have the same type of taxpayer funding to fall back on, and thus should be allowed broader recovery. (7 RT 1609:22-1610:8.)

B. Cal Fire Cannot Recover Its Fire Suppression Costs by Grafting Common Law Negligence Causes of Action Into Health and Safety Code Section 13009.

In addition to its vicarious liability theories, Cal Fire pled direct causes of action against Sierra Pacific, Beaty, and Landowners for negligent supervision, as well as a direct cause of action against Landowners for negligent maintenance and use of land.[24] (1 AA 110-114.)

[24] In the portion of its brief outlining its legal theories against Sierra Pacific, Beaty, and Landowners, Cal Fire does not discuss a cause of action for retained control. (AOB 21-23.) Cal Fire includes a passing reference to this doctrine later in its brief, but does so without citation to any facts provided to the trial court. (AOB 55.) As a result, this issue is waived. (See *infra* Part VII.A.) To the extent Cal Fire did not waive the issue, this cause of action fails for the reasons discussed in Part VI.

As explained earlier, Cal Fire unquestionably cannot recover fire suppression costs based on these common law negligence causes of action. (See *Shpegel-Dimsey, supra*, 198 Cal.App.3d at 1018.)

Consequently, on appeal, Cal Fire attempts to characterize these direct causes of action as mere "concepts of negligence" that can be read into Health and Safety Code section 13009 to expand the categories of persons liable for fire suppression costs. (AOB at 32-34.) But negligent supervision and negligent maintenance of land are not just "concepts." They are separate causes of action with specific and distinct elements.[25] (See CACI No. 426 [negligent supervision instruction], CACI Nos. 1000-1001 [premises liability instructions].) A change in the terminology does nothing to alter the analysis. As the trial court observed, allowing Cal Fire to graft "concepts" of negligence into a statutory cause of action under the Health and Safety Code would circumvent the well-established rule that Cal Fire can never sue in tort to recoup its fire suppression costs. (7 RT 1611:23-1612:8 ["Doesn't that in effect negate the rule that . . . [recovery of fire suppression costs] is statutory only?"].)

Cal Fire's approach would also controvert the plain language of the statute. Health and Safety Code section 13009 does not state that fire suppression costs are recoverable by a government agency to the extent allowed under the common law. Nor does the statute state that anyone who negligently hires, supervises, or retains the person who sets a fire, allows a fire to be set, or allows a fire kindled or attended by that person to escape is liable for fire suppression costs. Had the Legislature intended to allow Cal Fire to recoup fire suppression costs to the extent allowed under the

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[25] Additionally, in order to establish a claim for negligent supervision with respect to an independent contractor, as was Howell, the plaintiff must establish that the defendant assumed a duty to supervise that contractor. (See generally *McDonald v. Shell Oil. Co.* (1955) 44 Cal.2d 785, 788.)

common law, or pursuant to a negligent supervision cause of action, the Legislature could have easily done so. It did not. (See generally *Debbie Reynolds Prof. Rehearsal Studios v. Sup. Ct.* (1994) 25 Cal.App.4th 222, 231-32 [declining to interpret limitations period of former Code of Civil Procedure section 340.1 to include common law claims for negligent supervision, noting that "[b]y its plain terms, section 340.1 applies . . . only to those defendants who perpetrate . . . certain intentional criminal acts," and that the proffered interpretation "would require this court to assume that our Legislature chose a surprisingly indirect route to convey an important and easily expressed message"].)

Likewise, the statute does not state that anyone who negligently maintains and uses property is liable for suppression costs. Instead, the statute spells out in subsections (a)(2) and (a)(3) the specific circumstances under which negligent management gives rise to liability. As noted earlier, these subsections (a)(2) and (a)(3) were added years after subsection (a)(1) to "extend liability" for fire suppression costs. (Stats. 1987, Ch. 1127, No. 208 West's Cal. Legis. Service.) But of course, there would be no need for the Legislature to "extend liability" through subsections (a)(2) and (a)(3) if the common law "concept" of negligent use and management of property already could be read into subsection (a)(1). The fact that the Legislature added subsections (a)(2) and (a)(3) demonstrates its understanding that common law concepts could not and would not be read into the statute.

Importantly, grafting the "concept" of negligent use and management of property into subsection (a)(1) would improperly render subsections (a)(2) and (a)(3) nugatory, inoperative and meaningless. (See *Comm. for Responsible Sch. Expansion, supra*, 142 Cal.App.4th at 1189; *Graphic Arts, supra*, 126 Cal.App.4th at 415-416.) That is because liability for negligent use and management of property is broader than the liability delineated by the Legislature under subsections (a)(2) and (a)(3). As a

result, Cal Fire's argument would improperly render an *entire amendment* mere surplusage.

Importing negligence causes of action (or "concepts") into a statutory cause of action under section 13009 not only conflicts with the language of the statute, but also with the applicable case law. For example, in *Southern Pacific*, the government argued that a railroad was liable under section 13009 for negligently failing to suppress a fire and negligently failing to clear combustible vegetation from the area where the fire started. (139 Cal.App.3d at 633, 637.) Although these allegations certainly suggested "some negligent conduct," the court held that the railroad could not be found liable under section 13009 based merely on "some negligent conduct." (*Id.* at 637-638.) Instead, the court indicated that the alleged negligence must be tethered to the specific acts delineated in the statute, i.e. setting a fire, allowing a fire to be set, or allowing a fire kindled or attended by the railroad to escape. (*Id.* at 638.) The court therefore found that a jury instruction "was erroneous insofar as it may have suggested to the jury that it could find in favor of the State on the basis of 'some negligent conduct' on the part of defendant, without finding that defendants were responsible for setting or kindling the fire." (*Ibid.*)

Similarly here, Cal Fire improperly relies on so-called negligence "concepts," such as negligent supervision and negligent use of land, in an effort to show "some negligent conduct" on the part of Sierra Pacific, Beaty and Landowners. But as the trial court correctly held, Cal Fire cannot state a claim against these Defendants under section 13009 by merely alleging "some negligent conduct."[26] (64 AA 18061:1-12.)

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[26] In a footnote, Cal Fire argues that the trial court "misinterpreted" *Southern Pacific* "as extending liability only to instances in which the person directly started a fire, not to instances of negligent supervision or vicarious liability." (AOB at 34 fn. 97.) This is not an accurate

Shpegel-Dimsey is also instructive. In that case, decided prior to the applicability of subsections (a)(2) and (a)(3), the court held that the City of Los Angeles could not recover its fire suppression costs from a plastics company that had received approximately 55 citations for various Fire Code violations, had neglected or refused to correct the cited conditions, and had fires ignite on its property that would have been confined to a small area had the violations had been corrected. (198 Cal.App.3d at 1015-1016, 1020 fn. 2.) Despite this conduct, the court found that liability could not be imposed under pre-1987 section 13009 because "defendant comes within none of the classes of persons held liable" under the statute. (*Id.* at 1019-1020 [indicating that the defendant could not be found liable because it did not "*set*[] a fire, *allow*[] a fire to be set, or *allow*[] *a fire kindled or attended*" by the defendant to escape].) Just as the plastics company could not be found liable based on "some negligent conduct" relating to the use and management of its land, neither can Beaty and Landowners.

Against this backdrop, Cal Fire suggests that the definition of the word "negligently" "includes concepts such as negligent supervision, negligent property management and peculiar risk." (AOB at 33.) However, Cal Fire does not and cannot point to any case in which a court interpreted the word "negligently" in a statute to mean the whole panoply

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characterization of the trial court's ruling, which does not discuss "extending liability" to a person who starts a fire, but rather to limiting liability to the terms of the statute. (See, e.g., 64 AA 18061:1-7.)

Cal Fire suggests *Southern Pacific* "merely declined to extend liability . . . to those who had *no* role in setting a fire, either directly or directly." (AOB at 34 fn. 97 [emphasis in original].) But *Southern Pacific* did not turn solely on the fact that the railroad did not set the fire, but on the fact that the railroad had not engaged in *any* of the conduct prohibited by the statute, whether that be setting the fire, attending the fire, or otherwise. (*Southern Pacific, supra,* 139 Cal.App.3d at 638 [rejecting an argument that the railroad "attended the fire" within the meaning of the statute].)

of negligence causes of action or "concepts." The courts have consistently interpreted this well-known legal term to mean conduct falling below the applicable standard of care. (See, e.g., *Wingfield v. Fielder* (1972) 29 Cal.App.3d 209, 220 [term "negligence" in statute prohibiting "faulty, careless, or negligent" conduct signifies "the failure to observe, for the protection of the interests of another person that degree of care, precaution and vigilance which the circumstances justly demand...."] [citation and quotation marks omitted]; see also *Gore v. Bd. of Med. Quality Assurance* (1980) 110 Cal.App.3d 184, 196 [term "gross negligence" in statute prohibiting "grossly negligent" practice of psychology refers to "an extreme departure from the standard practice of psychology"] [citation and quotation marks omitted]; *Stephenson v. S. Pac. Co.* (1894) 102 Cal. 143, 148 ["The term 'negligence' signifies and stands for the absence of care"].) Secondary authorities are in accord. (See generally 65 C.J.S. Negligence § 4 ["'Negligence' is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm . . . . In a legal sense, negligence means nothing more or less than substandard care. Among the definitions of negligence are want or absence of care; absence or want of care required by the circumstances; and failure to exercise care which the circumstances reasonably require or justly demand."].) The word "negligently" therefore means conduct that falls below the applicable standard of care, nothing more, and nothing less.[27]

Finally, Cal Fire suggests that "common-law theories of negligence are wholly consistent with section 13009 because one who supervises negligently maintains property or hires another to perform an inherently

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[27] Importing all negligence concepts into section 13009 would render other portions of the statute meaningless too. For example, if the concept of negligence per se could be imported into the statutory scheme, then the "violation of law" aspect of section 13009 would be surplusage.

dangerous task creates the condition that allows a fire to be set or spread." (AOB at 34.) Cal Fire premises this argument on *Ventura, supra*, 85 Cal.App.2d 529, where the trial court found that a utility company could be held liable for a fire due to its negligent construction and maintenance of power and telephone lines it owned and maintained. (*Id.* at 531.) On appeal, the utility company argued that its negligence did not provide a basis for liability under section 13009 because its negligence was not the consequence of a "direct and affirmative act," but rather an indirect one. (*Id.* at 532.) The appellate court rejected this argument, finding that the language in the statute "allows a fire to be set" encompassed passive negligence, i.e. negligence resulting from a failure or omission in acting. (*Ibid.*) The appellate court found that the utility company "allowed the fire to be set" because its "failure to construct and maintain its equipment was the proximate cause of the [fire]." (*Ibid.*)

Therefore, *Ventura* does not stand for the proposition that common law tort causes of action or negligence "concepts" can be read into the statute as Cal Fire suggests. Instead, *Ventura* stands for the proposition that liability can be predicated upon "the direct . . . commission of the act of starting a fire," as well as on the "indirect act" of allowing a fire to be set, which requires "knowledge of the operative facts accompanied by acquiescence in, or abstinence from preventing, the occurrence of the particular act or event, where a duty and power to prevent existed." (*Ventura, supra,* 85 Cal.App.3d at 532.)

Thus, while *Ventura* addresses active and passive negligence, it does not address the issue of imputed negligence. Nothing in *Ventura* suggests that someone who had a contractual relationship with the utility company – like Sierra Pacific did with Howell – could be held liable for the direct or indirect negligence of the utility company itself under common law theories. At most, *Ventura* suggests that Howell could be held liable, even

if Howell did not engage in the affirmative act of setting the fire, and instead allowed the fire to be set by negligently maintaining its equipment, just as the utility company *Ventura* did with its power lines. *Ventura* therefore does not support the proposition that liability can or should be extended to Sierra Pacific, Beaty, and/or Landowners.

For these reasons, and those detailed earlier in this brief, Cal Fire cannot graft common law negligence theories into a cause of action that is a "creature of statute." (See *Shpegel-Dimsey, supra*, 198 Cal.App.3d at 1018 ["It is well settled that "an action to recover fire suppression costs . . . is a creature of statute."].) Accordingly, the trial court correctly held that Cal Fire could not establish liability under section 13009 by reading common law negligence claims (or "concepts") into the statute.

C. Cal Fire Failed to Allege and Cannot Allege Facts to State a Cause of Action Against Sierra Pacific, Beaty, and Landowners Under Section 13009.

Because Health and Safety Code section 13009 does not extend liability based on vicarious liability or based on common law negligence concepts, Cal Fire must allege that each of the Defendants unlawfully or negligently engaged in one of the acts delineated in the statute. More specifically, Cal Fire must allege that Defendants set the Moonlight Fire, Defendants allowed the Moonlight Fire to be set, or Defendants allowed a fire they kindled or attended escape onto public or private property. Cal Fire does not contend that Sierra Pacific, Beaty, or the Landowners set the Moonlight Fire. Nor does Cal Fire contend that they kindled or attended the fire and allowed its escape.[28]

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[28] In *Southern Pacific, supra*, 139 Cal.App.3d at 638, the court explained that the word "attended" likely refers to "controlled fires, such as burning operations . . . ." Cal Fire does not contend that the Moonlight Fire resulted from burning operations.

Before the trial court, Cal Fire suggested that Sierra Pacific, Beaty and the Landowners could be found liable for a fire allegedly caused by Howell driving over a rock on the grounds that these specific Defendants "allowed the fire to be set."[29] But on appeal, Cal Fire makes no such suggestion. Nowhere in its extensive briefing does Cal Fire argue that it can state a claim against Sierra Pacific, Beaty and the Landowners without resorting to vicarious liability theories or importing common law concepts of negligent supervision or management of land into Health and Safety Code section 13009. (AOB at 23-33.) Cal Fire has therefore waived any argument that it can state a viable cause of action against Sierra Pacific, Beaty, and the Landowners without resorting to vicarious liability or negligence concepts. (See *Dieckmeyer*, *supra*, 127 Cal.App.4th at 260; *Mansell v. Bd. of Admin.* (1994) 30 Cal.App.4th 539, 545-546.)

Moreover, before the trial court, Cal Fire proffered no additional facts that it believed could cure the defects in its pleading, despite an express invitation from the court to do so. (9 RT 1999:7-2000:20.) Instead, Cal Fire simply urged the trial court to grant its motion for leave to amend to file its Third Amended Complaint, which contained no new facts, but

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[29] In support of this argument in the trial court, Cal Fire primarily relied on *Ventura*, *supra*, 85 Cal.App.2d 529. The trial court reasoned that while *Ventura* supports the proposition that Howell could be held liable, even if Howell did not engage in the affirmative act of setting the fire and instead indirectly caused the fire to start by negligently maintaining its equipment, it does not support the proposition that liability can or should be extended to Sierra Pacific, Beaty, and/or the Landowners. The trial court also correctly noted that had the *Ventura* court engaged in such an analysis, its holding would be inapplicable here because the statutes at issue in *Ventura* (the pre-1971 Fire Liability Law, discussed *supra*) imposed liability on those persons who act "through another." Because current section 13009 does not contain the "through another" language which modifies and informs the phrase "allows a fire to be set," Cal Fire's reliance on *Ventura* at the trial court was unavailing with respect to Sierra Pacific, Beaty, and the Landowner Defendants.

simply relabeled its "causes of action" as "counts." (See *ibid.*; 63 AA 17800; see also 62 AA 17633-17641.) Under these circumstances, and in light of the fact that the parties had already conducted nearly four years of discovery, and had a fully developed record, the trial court was well within its discretion to deny Cal Fire leave to amend. Cal Fire makes no attempt to suggest otherwise. The trial court's ruling on the motion for judgment on the pleadings should be affirmed.

VII. THE TRIAL COURT CORRECTLY HELD THAT CAL FIRE FAILED TO MAKE A *PRIMA FACIE* CASE

Cal Fire bears the burden of demonstrating that the trial court erred in finding that Cal Fire failed to establish a prima facie case under Health and Safety Code section 13009. (See *Winograd, supra*, 68 Cal.App.4th at 631 [stating the "burden of demonstrating error rests on the appellant"].) Cal Fire cannot do so. Despite having had three days in the trial court to present evidence, read from deposition transcripts, cite documents and make whatever other offers of proof Cal Fire desired, it failed to make the requisite showing. The trial court's order should be affirmed.

A. Cal Fire Waived Any Arguments Based on Evidence Not Presented to the Trial Court.

To demonstrate that the trial court erred, Cal Fire must point to specific evidence or offers of proof made during the three-day pretrial hearing, and then explain how this evidence or offers of proof satisfy its burden. (See, e.g., *Lockheed Corp., supra*, 134 Cal.App.4th at 218.) Instead of doing that, however, Cal Fire devotes the vast majority of its appellate briefing to discussing materials that *Cal Fire never presented or otherwise called to the attention of the trial court during the course of the three day hearing.* As discussed in detail below, Cal Fire cannot rely on these materials in an effort to demonstrate trial court error.

been acknowledged and that everyone has been accorded the full measure of justice." (9 RT 2199:22-2209:25.)

VIII. CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court affirm the order granting the motion for judgment on the pleadings and affirm the *Cottle* dismissal order for failure to make a prima facie case.

Dated: March 4, 2015

DOWNEY BRAND LLP

By: _____

WILLIAM R. WARNE
MICHAEL J. THOMAS
ANNIE S. AMARAL
MEGHAN M. BAKER
Attorneys for Respondent Sierra Pacific Industries

Dated: March ____, 2015

MATHENY SEARS LINKERT & JAIME, LLP

By: _____

RICHARD S. LINKERT
JULIA M. REEVES
Attorneys for Respondents W. M. Beaty & Associates, Inc., a Corporation and Ann McKeever Hatch, As Trustee of The Hatch 1987Revocable Trust, et al.

Dated: March ____, 2015

RUSHFORD & BONOTTO, LLP

By: _____

PHILLIP R. BONOTTO
DEREK VANDEVIVER
Attorneys for Respondents Eunice E. Howell, Individually d/b/a Howell's Forest Harvesting, J.W. Bush, and Kelly Crismon

Dated: March ____, 2015

DOWNEY BRAND LLP

By:_____
WILLIAM R. WARNE
MICHAEL J. THOMAS
ANNIE S. AMARAL
MEGHAN M. BAKER
Attorneys for Respondent
Sierra Pacific Industries

Dated: March 2, 2015

MATHENY SEARS LINKERT & JAIME, LLP

By:_____
RICHARD S. LINKERT
JULIA M. REEVES
Attorneys for Respondents W. M. Beaty & Associates, Inc., a Corporation and Ann McKeever Hatch, As Trustee of The Hatch 1987Revocable Trust, et al.

Dated: March ____, 2015

RUSHFORD & BONOTTO, LLP

By:_____
PHILLIP R. BONOTTO
DEREK VANDEVIVER
Attorneys for Respondents Eunice E. Howell, Individually d/b/a Howell's Forest Harvesting, J.W. Bush, and Kelly Crismon

Dated: March ____, 2015

DOWNEY BRAND LLP

By:_____
WILLIAM R. WARNE
MICHAEL J. THOMAS
ANNIE S. AMARAL
MEGHAN M. BAKER
Attorneys for Respondent Sierra Pacific Industries

Dated: March ____, 2015

MATHENY SEARS LINKERT & JAIME, LLP

By:_____
RICHARD S. LINKERT
JULIA M. REEVES
Attorneys for Respondents W. M. Beaty & Associates, Inc., a Corporation and Ann McKeever Hatch, As Trustee of The Hatch 1987Revocable Trust, et al.

Dated: March 4, 2015

RUSHFORD & BONOTTO, LLP

By: PR Bonotto
PHILLIP R. BONOTTO
DEREK VANDEVIVER
Attorneys for Respondents Eunice E. Howell, Individually d/b/a Howell's Forest Harvesting, J.W. Bush, and Kelly Crismon

CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.204(c)(1) I certify that the text of this brief, including footnotes, contains approximately 49,903 words as counted by the computer program used to prepare this brief.

DATED: March 4, 2015

DOWNEY BRAND LLP

By: 

WILLIAM R. WARNE
Attorneys for Respondent
Sierra Pacific Industries

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Downey Brand LLP, 621 Capitol Mall, 18th Floor, Sacramento, California, 95814-4731. March 4, 2015, I served the within document(s):

RESPONSE TO OPENING BRIEF FILED BY CAL FIRE

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☐ **BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

☒ **BY PERSONAL DELIVERY:** by causing personal delivery by **ON DEMAND,** of the document(s) listed above to the person(s) at the address(es) set forth below:

Tracy L. Winsor, Esq. / Evan Eickmeyer
Office of Attorney General
1300 I Street, Suite 125
Sacramento, CA 95814
Telephone: (916) 445-9995
Facsimile: (916) 327-2319
tracy.winsor@doj.ca.gov

Attorneys for Plaintiff Cal Fire

☐ **BY OVERNIGHT MAIL:** by causing document(s) to be picked up by an overnight delivery service company [FEDERAL EXPRESS] for delivery to the addressee(s) on the next business day.

☒ **BY MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as set forth below:

Phillip Bonotto, Esq.
Derek Van Deviver, Esq.
Rushford & Bonotto, LLP
1010 Hurley Way, Ste. 410
Sacramento, CA 95825
Telephone: (916) 265-2389
Facsimile: (916) 565-0599
dvandeviver@rushfordbonotto.com

Attorneys for Howell Defendants

Mitchell E. Green
Law Offices of Mitchell E. Green
P.O. Box 630550
Simi Valley, CA 93063
Telephone: (805) 823-0915
Facsimile: (805) 823-0916
MitchGreenLaw@aol.com

Attorneys for Grange Insurance

Richard S. Linkert, Esq.
Matheny Sears Linkert & Jaime, LLP
3638 American River Drive
Sacramento, CA 95825
Telephone: (916) 978-3434
Facsimile: (916) 978-3434
rlinkert@mathenysears.com

Attorneys for Beaty/Walker Defendants

Kenneth Roye, Esq.
142 West 2nd Street, Suite B
Chico, CA 95928
Telephone: (530) 893-2398
Facsimile: (530) 893-2396

Attorney for Plaintiffs Brandt, et al.

G. Chris Andersen, Esq.
Anderlini & McSweeney LLP
411 Borel Avenue, Ste. 501
San Mateo, CA 94402
Telephone: (650) 212-0001
Facsmile: (650) 212-0081
candersen@aelawllp.com

Attorneys for Plaintiff Richard A. Guy and John and Christine Cosmez

Gary Garfinkle
Attorney at Law
1205 Via Gabarda
Lafayette, CA 94549
Telephone: (925)932-3737
ggarfinkle@comcast.net

Attorney for Plaintiffs Brandt, et al.

Gary E. Tavetian
Supervising Deputy Attorney General
300 S. Spring Street, Suite 1702
Los Angeles, California 90013
Telephone: (213) 897-0628
Facsimile: (213) 897-2802
Gary.Tavetian@doj.ca.gov

Dave Dun
Dun & Martinek
2313 I Street
Eureka, CA 95501
Telephone: (707) 442-3791
dhd@dunmartinek.com

Attorneys for Sierra Pacific Industries

Clerk of the Court for delivery to
The Honorable Ira R. Kaufman
The Honorable Leslie C. Nichols (Ret.)
Judge of the Plumas Co. Superior Court
Dept. 1
520 Main Street
Quincy, CA 95971

California Supreme Court
(via Electronic Service)

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Linda Puzar

EXHIBIT C

EXHIBIT C

AMICI CURIAE SIERRA PACIFIC INDUSTRIES AND CALIFORNIA FORESTRY ASSOCIATION'S REQUEST FOR JUDICIAL NOTICE; [PROPOSED] ORDER

In the Supreme Court of the State of California

DEPARTMENT OF FORESTRY AND FIRE PROTECTION, et al.,

Plaintiffs and Appellants,

v.

EUNICE E. HOWELL, et al.,

Defendants and Respondents.

Case No. _____

Court of Appeal, Third Appellate District,
Case Nos. C074879, C076008
Superior Court of California, County of Plumas, Case No. CV09-00205
Hon. Leslie C. Nichols (Ret.), Judge

PETITION FOR REVIEW

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
JANILL L. RICHARDS
Principal Deputy Solicitor General
ROBERT BYRNE
Senior Assistant Attorney General
*CHRISTINA BULL ARNDT
State Bar No. 175403
Deputy Solicitor General

GARY E. TAVETIAN
State Bar No. 117135
Supervising Deputy Attorney General
EVAN EICKMEYER
State Bar No. 166652
DANIEL M. LUCAS
State Bar No. 235269
Deputy Attorneys General
300 S. Spring Street, Suite 1702
Los Angeles, CA 90013
(213) 269-6383
Christina.Arndt@doj.ca.gov
Attorneys for Plaintiff and Appellant California Department of Forestry and Fire Protection

PETITION FOR REVIEW

Appellant, the California Department of Forestry and Fire Protection (CAL FIRE), respectfully petitions this Court for review of the published decision of the Third District Court of Appeal in *Department of Forestry and Fire Protection v. Howell* (C074879, C076008), filed on December 6, 2017, and ordered published in full on December 8, 2017. A copy of the slip opinion and the publication order are attached. (Cal. Rules of Court, rule 8.504(b).) In addition, this Court should order the decision below depublished on grant of review to avoid creating any further confusion in the law in the interim. (Cal. Rules of Court, rule 8.1105(e)(2).)[1]

ISSUES PRESENTED

1. Should Health and Safety Code sections 13009 and 13009.1—which provide that any "person . . . who negligently, or in violation of the law, sets a fire, [or] allows a fire to be set" is liable for the costs of suppressing and investigating the fire—be interpreted narrowly to apply to only those natural persons whose direct actions cause harm, and to exclude long-established common law and statutory principles of liability for employers and principals, such as respondeat superior?

2. Does a trial court abuse its discretion by imposing post-judgment terminating sanctions without explaining why intermediate sanctions are

[1] CAL FIRE anticipates that it will submit a separate request for depublication within the time allowed under rule 8.1125(a)(4).

not sufficient, and where this extreme remedy is not necessary to serve a remedial purpose?

WHY REVIEW IS NECESSARY

California has a long history of large and deadly wildland fires. In the last decade, these fires have increased in number and size; in 2017 there were over 7,000 fires in California that burned more than 500,000 acres, compared with a five-year average of just over 4,800 fires on about 200,000 acres.[2] Last year saw the largest fire on record in the State's history—the Thomas Fire—which alone burned over 280,000 acres in Ventura and Santa Barbara Counties, and the most destructive fire—the Tubbs Fire—which destroyed more than 5,600 structures and took 22 lives in Sonoma County.[3] With these changes in fire events, suppression costs are escalating.[4]

This Court's review is necessary to settle an important question of law in the context of rising fire suppression costs: Where the Legislature

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[2] <http://cdfdata.fire.ca.gov/incidents/incidents_stats?year=2017> [as of Jan. 16, 2018].

[3] <http://www.fire.ca.gov/communications/downloads/fact_sheets/Top20_Acres.pdf> [as of Jan. 10, 2018]; <http://www.fire.ca.gov/communications/downloads/fact_sheets/Top20_Destruction.pdf> [as of Jan. 16, 2018].

[4] <https://www.fs.fed.us/sites/default/files/2015-Fire-Budget-Report.pdf> [as of January 16, 2018]; see also <https://www.scpr.org/news/2016/08/19/63757/why-fighting-california-s-wildfires-cost-more-than/> [as of January 16, 2018].

has determined that such costs should be borne by those who set a fire or allow it to be set through their negligence or violation of law, are employers and principals responsible for the acts or omissions of their employees and agents, consistent with longstanding common law and statutory principles? The Court of Appeal decision can be read to hold that these fire liability laws preclude vicarious liability—even standard respondeat superior liability of a corporate employer. Such an interpretation would lead to perverse results—for example, holding individual employees responsible for massive money judgments (which they almost certainly cannot pay), while allowing companies that benefit from and can shape their employees' actions to escape any consequences. If such a narrow view of the fire liability laws stands, the public will bear substantial fire-fighting costs attributable to negligence and violation of law—contrary to the Legislature's intent. In the words of dissenting Justice Robie, this is "an enormously important case with vast ramifications beyond the facts of this proceeding." (Dis. opn. of Robie, J., p. 8.)

Review is also warranted to address the issue of whether and when a trial court may impose terminating sanctions. The Court of Appeal affirmed the trial court's award of terminating sanctions against CAL FIRE, even though the trial court acted *after* judgment had already been entered against CAL FIRE, had imposed no previous discovery sanctions on these issues, and failed to analyze whether more narrowly tailored sanctions

could address the asserted harm. The decision is contrary to longstanding precedent holding that terminating sanctions are a last resort, allowed only if no lesser sanctions would address the violations, and imposed only to remedy a wrong, as opposed to punishing a violator. The Court should clarify that this most extreme sanction must be fully explained, and its use justified as opposed to lesser sanctions, and cannot be "impulsively" imposed. (See dis. opn. of Robie, J., at pp. 6, 7.)

LEGAL BACKGROUND: FIRE LIABILITY LAWS

The California Health and Safety Code shifts the financial cost of fighting fires from the general public to those who bear responsibility for the fires. Those responsible for the fires are liable for property damages (see generally Health & Saf. Code, §§ 13007, 13008, and 13009.2), the costs of suppressing the fires and related emergency expenses (§ 13009), and administrative and investigative costs (§ 13009.1).[5]

With a limited exception for mortgagees not relevant here, Health and Safety Code sections 13009 and 13009.1 (the fire suppression liability laws) both impose liability on "[a]ny person [ ] who negligently, or in violation of the law, sets a fire, allows a fire to be set, or allows a fire kindled or attended by him or her to escape onto any public or private property . . . ." (§§ 13009, subd. (a), 13009.1, subd. (a).)

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[5] References are to the Health and Safety Code unless otherwise noted.

sanctions. (*Id.* at p. 8.) Finally, the dissent stated that because the trial judge "was manifestly biased and did not provide a fair and impartial forum for litigation," a new trial judge should be assigned on remand. (*Ibid.*)

A petition for rehearing was filed in the Court of Appeal on December 14, 2017 by James H. Brandt and Grange Insurance Association, et al., plaintiffs and appellants. A joinder in that petition was filed by Richard A. Guy and John Cosmez, et al., plaintiffs and appellants, on December 21, 2017. The Court of Appeal denied the petition for rehearing on January 3, 2018.

DISCUSSION

I. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THE SCOPE OF LIABILITY UNDER THE FIRE SUPPRESSION LIABILITY LAWS

A. The Court Should Settle Whether the Fire Suppression Liability Laws Allow for Vicarious Liability

By rejecting vicarious liability (opn. at pp. 24-27), the Court of Appeal adopted an extremely narrow construction of the fire suppression liability laws that is not required by the statutes' text, and conflicts with the common understanding of employer-employee and principal-agent tort liability, as well as legislative intent and public policy.

The fire suppression liability statutes, sections 13009 and 13009.1, impose liability on those who act negligently or in violation of law. In general, tort liability encompasses various types of vicarious liability.

Under the doctrine of respondeat superior, for example, an employer is liable for the actions of its employees "arising out of the employment." (*Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 968, quoting *George v. Bekins Van & Storage Co.* (1949) 33 Cal.2d 834, 843.) Where a plaintiff can prove that the tortfeasor was acting in the scope of employment, the employer is liable for the tort. (*Ibid.*; *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 208.) "Respondeat superior is based on 'a deeply rooted sentiment' that it would be unjust for an enterprise to disclaim responsibility for injuries occurring in the course of its characteristic activities. [Citations.]" (*Mary M.*, 54 Cal.3d at p. 208.)

Moreover, accepted principles of principal-agent liability, as codified in Civil Code section 2338, provide that "a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal." (See also *Doe v. Roman Catholic Archbishop of Los Angeles* (2016) 247 Cal.App.4th 953, 969 [principal is liable for acts of agent "in performing service on behalf of principal"].) And both fire suppression liability statutes incorporate section 19, which defines "person" to mean entities including corporations—which can act only through their agents. (See dis. opn. of Robie, J., p. 1.) The

plain text of these provisions thus suggests that the Legislature intended to incorporate longstanding and accepted principles of vicarious liability.

The Court of Appeal rejected an interpretation encompassing vicarious liability based on a comparison between the fire suppression liability statutes and the property damage statute. It noted that section 13007, governing liability for property damage, begins with the phrase "any person who personally or through another," whereas sections 13009 and 13009.1, governing liability for governmental fire suppression and investigative/administrative costs, do not. (Opn., p. 25.) Relying on that distinction, as well as the fact that sections 13009 and 13009.1 had also previously contained the language "personally or through another" by reference to section 13007, which the Legislature deleted in recent amendments, the Court of Appeal held that the Legislature must have intended that sections 13009 and 13009.1 not encompass liability for anyone other the individual who personally set the fire. (Opn., pp. 24-25.)

Granted, the structure of the fire liability laws is not a model of clarity, but nothing in the language of these statutes requires the courts to remove fire liability from general and longstanding principles governing negligence. Indeed, as detailed by the dissent, the complex statutory history of these provisions and of section 19, which defines "person" to include corporations, can be read to support inclusion of vicarious liability,

and apparent inconsistencies can be harmonized. (Dis. opn. of Robie, J., pp. 2-6.)

Interpreting the statutes narrowly as the majority did would appear to work against legislative intent and sound public policy. As construed by the dissent, the Court of Appeal's opinion would not even allow for corporate liability based on an employee's negligent conduct. (Dis. opn. of Robie, J., p. 3 [noting that majority's reading "would result in corporations or companies never being held liable for fire suppression costs"].)[10] Under this view of the law, in many circumstances, only individuals can be held responsible for a fire—individuals who generally will have neither the resources to pay for the damages nor the full ability to prevent them. Such an interpretation of the fire liability laws would eviscerate the Legislature's intent that the party responsible for setting the fire or allowing it to be set bear financial responsibility for the costs of the fire suppression, and not the general public. (See *County of Ventura v. Southern California Edison Co.* (1948) 85 Cal.App.2d 529, 533-534, 539-540.) A broader and more traditional view of liability, on the other hand, incentivizes those with

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[10] Even if the Court of Appeal did not intend to reject long-established respondeat superior liability—although it does not refute the dissent's characterization to that effect—its decision is clear in rejecting other theories of employer, principal, and entity liability under California's fire liability laws. (Opn., pp. 26-27 [rejecting negligent supervision, negligent hiring, negligent inspection, negligent management and use of property, and peculiar risk]; see discussion in section I.B., below.)

control over the individual actor to take precautionary measures—such as supervision, training, and management—to avoid damages. (See *Mary M. v. City of Los Angeles*, *supra*, 54 Cal.3d at p. 209 [imposing respondeat superior liability on employers, based solely on the fault of the employee, serves the purposes of deterring tortious conduct and ensuring that losses would be "equitably borne by those who benefit from the enterprise that gave rise to the injury"].)

This Court should grant review to settle the important question of whether the Legislature intended to exclude vicarious liability from the fire liability laws.

B. The Court Should Settle Whether the Statutory Term "Negligently" Reflects Longstanding Interpretations of Negligent Behavior

The Court should also clarify the meaning of "negligently," as used in the statute, and whether it includes longstanding forms of negligence, such as negligent supervision and negligent management, all of which are based on fundamental principles of duty, breach, causation, and damages. The Court of Appeal held, without explanation, that interpreting the fire suppression liability laws to encompass these forms of negligence authorized by statutory and common law "is simply too attenuated a construction to be plausible." (Opn., p. 26.) But these forms of negligence are within the commonplace legal understanding of the concept of negligence. (See, e.g., *Kesner v. Superior Court* (2016) 1 Cal.5th 1132,

1159-1160 ["liability for harm caused by substances that escape an owner's property is well established in California law," such as "negligently allowing fires to escape to others' property"]; *Travelers Indem. Co. v. Titus* (1968) 265 Cal.App.2d 515, 518 [holding that landowner could be contributorily negligent for fire damages foreseeably caused by failure to use ordinary care in property management; noting "striking the match is not controlling"]; *Wilson v. Rancho Sespe* (1962) 207 Cal.App.2d 10, 17, citing Rest., Torts, § 318 [landowner liable for fire damage caused by third party invitee]); see also *Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 815 ["[l]iability for negligent supervision and/or retention of an employee is one of direct liability for negligence"].)

One can be negligent in a variety of ways, and in any action taken. One can negligently operate a bulldozer, negligently hire a contractor (e.g., by failing to exercise reasonable care in employing a contractor with the requisite training or skills), or negligently supervise an employee (e.g., by failing to inform the employee of standards or requirements, or to properly oversee the employee's work). Under accepted legal principles, all of these are forms of negligence. (See Civ. Code, § 1714, subd. (a) [codifying the general legal principle that "[e]veryone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person"].)

In ruling otherwise, the majority opinion is contrary to longstanding California statutory and case law explaining that where the Legislature uses a word in a statute that has an understood legal meaning—such as "negligently"—courts should construe that word consistent with that meaning. (See Civ. Code, § 13 ["words and phrases [that] . . . have acquired a peculiar and appropriate meaning in law, . . . are to be construed according to such peculiar and appropriate meaning"].) The language of statutes should be construed consistent with the common law unless doing so is "repugnant" to the statute. (See *Gray v. Sutherland* (1954) 124 Cal.App.2d 280, 290.) "A statute will be construed in light of common law decisions, unless its language 'clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common-law rule concerning the particular subject matter . . . .'[citations]" (*California Assn. of Health Facilities v. Dept. of Health Services* (1997) 16 Cal.4th 284, 297; see also *Dillingham-Ray Wilson v. City of Los Angeles* (2010) 182 Cal.App.4th 1396, 1407 [where there is no expressed intent to abrogate the common law and a statute can be read compatibly with common law, courts will construe it that way]; *Dry Creek Valley Assn., Inc. v. Board of Supervisors* (1977) 67 Cal.App.3d 839, 844 [statute "will be presumed *not* to be out of harmony with the common law principle at issue, unless it is found to *expressly so provide*"], original italics.)

Indeed, the fire suppression liability statutes themselves impose liability on those who set a fire and also on those who "allow the fire to be set." Thus, the statutory language should permit a determination of liability not just for those who are directly responsible for the damage, but also those who are responsible because they create conditions that allow someone else to cause damage. Those who "allow the fire to be set" are those who are negligent in their supervision, management, or oversight of the individual who started the fire, or of the property where the fire ignited. (See *County of Ventura v. Southern California Edison Co.*, *supra*, 85 Cal.App.2d at p. 532 ([liability for "allow[ing] fire to be set" is predicated "upon a negligent acquiescence in, or failure to prevent known conditions, circumstances, or conduct which might reasonably be expected to result in the starting of a fire"].)

The Court of Appeal's decision runs contrary to established principles of statutory construction, rejects normal negligence principles, and makes it more difficult to hold employers, principals, corporations, and landowners liable for their actions contributing to fires. The narrow ruling creates serious issues for CAL FIRE and similarly situated public entities because it may in practice eliminate the ability to recoup the costs of fire suppression, as the statutes intend, thus creating public responsibility where there previously was none.

This Court should review the Court of Appeal's restrictive interpretation of the scope of liability under sections 13009 and 13009.1 to bring clarity to this increasingly important area of California law.

II. THIS COURT SHOULD GRANT REVIEW TO CLARIFY WHETHER AND WHEN TERMINATING DISCOVERY SANCTIONS MAY BE IMPOSED

The Court of Appeal affirmed the imposition of terminating discovery sanctions after judgment had been entered against CAL FIRE, despite the trial court's failure to thoroughly consider whether lesser sanctions—including the monetary sanctions it imposed at the same time—would have sufficed. Because terminating sanctions are a drastic measure, there is not a large body of precedent, but the Court of Appeal's decision is in conflict with prevailing appellate case law that terminating sanctions are a measure of last resort and should serve only remedial and not punitive ends. This Court has never addressed whether and when terminating discovery sanctions are appropriate; accordingly, it should grant review in this case to clarify the circumstances in which such extreme sanctions may be appropriate, and what justifications a trial court must provide to support their imposition.[11]

[11] If review is granted, CAL FIRE intends to brief why, as a legal and factual matter, terminating sanctions would be inappropriate in the circumstances of this case.

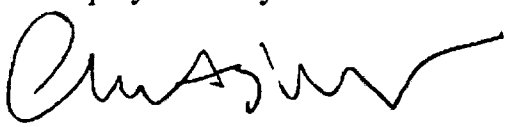
CONCLUSION

CAL FIRE's petition for review should be granted.

Dated: January 17, 2018

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
JANILL L. RICHARDS
Principal Deputy Solicitor General
ROBERT BYRNE
Senior Assistant Attorney General
GARY E. TAVETIAN
Supervising Deputy Attorney General
EVAN EICKMEYER
DANIEL M. LUCAS
Deputy Attorneys General



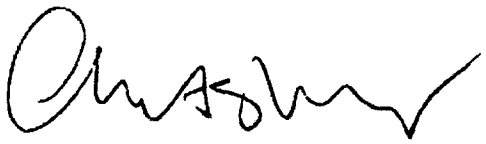
CHRISTINA BULL ARNDT
Deputy Solicitor General
Attorneys for Plaintiff and Appellant California Department of Forestry and Fire Protection

CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 5,114 words.

Dated: January 17, 2018

XAVIER BECERRA
Attorney General of California



CHRISTINA BULL ARNDT
Deputy Solicitor General
Attorneys for Plaintiff and Appellant

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: ***Department of Forestry and Fire Protection, et al. v. Eunice E. Howell, et al.***
No.: ***Court of Appeal of the State of California, Third Appellate District, C074879***

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On January 17, 2018, I electronically served the attached **PETITION FOR REVIEW** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on January 17, 2018, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Clerk of the Court
Plumas County Superior Court
520 Main Street, Room 104
Quincy, CA 95971

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

Annie S. Amaral
William R. Warne
Downey Brand LLP
621 Capitol Mall, 18th Floor
Sacramento, CA 95814-4731
Telephone: (916) 444-1000
Facsimile: (916) 444-2100
Email: aamaral@downeybrand.com
bwarne@downeybrand.com
Counsel for respondent Sierra Pacific Industries, Inc.

David Dun
Dun & Martinek
2313 I Street
Eureka, CA 95501
Telephone: (707) 442-3791
Email: dhd@dunmartinek.com
Counsel for respondent Sierra Pacific Industries, Inc.

Richard S. Linkert
Julia M. Reeves
Matheny Sears Linkert & Jaime, LLP
3638 American River Drive
Sacramento, CA 95864
Telephone: (916) 978-3420
Facsimile: (916) 978-3430
Email: rlinkert@mathenysears.com
Counsel for respondents WM Beaty & Associates and Landowner respondents (Brooks Walker, et al.)

Phillip R. Bonotto
Rushford & Bonotto, LLP
1010 Hurley Way, Ste. 410
Sacramento, CA 95825
Telephone: (916) 565-0590
Facsimile: (916) 565-0599
Email: pbonotto@rushfordbonotto.com
Counsel for respondents Eunice Howell, Howell's Forest Harvesting, JW Bush, Kelly Crismon

Gary Garfinkle
Attorney at Law
1205 Via Gabarda
Lafayette, CA 94549
Telephone: (925) 932-3737
Facsimile: (925) 932-2048
Email: ggarfinkle@comcast.net
Counsel for appellants Brandt, et al., and Grange Insurance Association

Kenneth P. Roye
Attorney at Law
142 West 2nd Street, Suite B
Chico, CA 95928
Telephone: (530) 893-2398
Facsimile: (530) 893-2396
Email: ken@kenroyelaw.com
Counsel for appellants Brandt, et al.

Terry Anderlini
G. Chris Andersen
Anderlini & McSweeney LLP
411 Borel Avenue, Suite 501
San Mateo, CA 94402
Telephone: (650) 212-0001
Facsimile: (650) 212-0081
Email: tanderlini@aelawllp.com
candersen@aelawllp.com
Counsel for appellants Richard Guy, et al., and John Cosmez, et al.

Deborah J. La Fetra
Lawrence G. Salzman
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
Email: djl@pacificlegal.org
lgs@pacificlegal.org
Counsel for amicus curiae Pacific Legal Foundation

Sean D. Reyes
Utah Attorney General
Parker Douglas
Chief Federal Deputy
Aaron Murphy
Assistant Solicitor General
Attorney General's Office
350 North State Street, Suite 230
Salt Lake City, UT 84114
Telephone: (801) 538-9600
Facsimile: (801) 366-0184
Email: aaronmurphy@utah.gov
Counsel for State of Utah and amici States Attorney General

Christopher J. Carr
William M. Sloan
Navi Dhillon
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105-2482
Telephone: (415) 268-7000
Email: NDhillon@mofo.com
Counsel for amicus curiae Michael Cole and Tom Hoffman

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 17, 2018, at Los Angeles, California.

Alfred Palma	/s/ Alfred Palma
Declarant	Signature

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EXHIBIT D

EXHIBIT D

AMICI CURIAE SIERRA PACIFIC INDUSTRIES AND CALIFORNIA FORESTRY ASSOCIATION'S REQUEST FOR JUDICIAL NOTICE; [PROPOSED] ORDER

Case No. S246486

IN THE SUPREME COURT OF CALIFORNIA

DEPARTMENT OF FORESTRY AND FIRE PROTECTIONS, et al.,

Plaintiff and Appellant,

v.

EUNICE E. HOWELL, et al.,

Defendants and Respondents.

Court of Appeal of the State of California, Third Appellate District
Case Nos. C074879, C076008
Superior Court of the State of California, County of Plumas
Case No. CV09-00205
Hon. Leslie C. Nichols (Ret.), Judge

RESPONSE TO PETITION FOR REVIEW

WILLIAM R. WARNE (Bar No. 141280)
MICHAEL J. THOMAS (Bar No. 172326)
ANNIE S. AMARAL (Bar No. 238189)
MEGHAN M. BAKER (Bar No. 243765)
DOWNEY BRAND LLP
621 Capitol Mall, 18th Floor
Sacramento, CA 95814-4731
Telephone: (916) 444-1000
Facsimile: (916) 444-2100
bwarne@downeybrand.com
mthomas@downeybrand.com
aamaral@downeybrand.com
mbaker@downeybrand.com
Attorneys for Defendant and Respondent Sierra Pacific Industries

RICHARD S. LINKERT
(SBN: 88756)
MATHENY SEARS LINKERT & JAIME
3638 American River Drive
Sacramento, CA 95864
Telephone: (916) 978-3434
Facsimile: (916) 978-3430
rlinkert@mathenysears.com

Attorneys for Defendants and Respondents W. M. Beaty & Associates, Inc., a Corporation and Ann McKeever Hatch, As Trustee of The Hatch 1987 Revocable Trust, et al.

PHILLIP R. BONOTTO (SBN: 109257)
RUSHFORD & BONOTTO, LLP
1010 Hurley Way, Suite 410
Sacramento, CA 95825
Telephone: (916) 565-0590
Facsimile: (916) 565-0599
pbonotto @rushfordbonotto.com

Attorneys for Defendant and Respondent Eunice Howell, individually, DBA Howell Forest Harvesting

Nontheless, the next day, on January 17, 2018, Cal Fire renewed its efforts, this time attaching the required appellate court opinion and proof of service. The Clerk then filed the petition on this Court's docket. However, Cal Fire's belated efforts did not cure what Cal Fire had telegraphed it understood the day before – that its deadline was actually January 16, 2018. The petition must therefore be denied as untimely.

IV.
CAL FIRE FAILS TO SUBSTANTIATE ANY GROUND UPON WHICH THIS COURT MAY GRANT REVIEW

In the unlikely event this Court determines that Cal Fire's petition was somehow timely, the Court should still deny the petition on substantive grounds.

A. There Are No Grounds For Granting Review of the Court of Appeal's Correct Interpretation of Health and Safety Code Section 13009.

The Court of Appeal correctly affirmed the trial court's order granting judgment on the pleadings in favor of a subset of Defendants: Sierra Pacific, Beaty, and the Landowners. As confirmed by the Court of Appeal, Cal Fire failed to allege and could not allege facts sufficient to state a cause of action under Health and Safety Code sections 13009 and 13009.1 (collectively, "section 13009") against these three defendants. Instead, Cal Fire alleged that Howell employees Crismon and/or Bush started the fire when operating Howell's bulldozer, and that Howell was hired as a licensed independent contractor for Sierra Pacific.

1. Nothing in the Court of Appeal's Decision Can Be Read to Preclude Respondeat Superior Liability of a Corporate Employer.

Cal Fire first utilizes a strawman in what appears to be an effort to raise unwarranted alarm, stating that the Court of Appeal's ruling "can be read to hold that these fire liability laws preclude vicarious liability – even standard respondeat superior liability of a corporate employer." (Pet. at 8.) Cal Fire is incorrect: the ruling cannot be read in this manner.

Cal Fire alleged that Howell's employees Bush and/or Crismon started the fire with a Howell bulldozer. Importantly, Howell never moved for judgment on the pleadings, and Cal Fire's claim against Howell was never dismissed on that ground. (63 AA 17791, fn. 1, 17900; 64 AA 18052.) Thus, neither the trial court nor the Court of Appeal were ever called upon to determine whether Cal Fire stated a cause of action under section 13009 against Howell as the employer of the individuals who allegedly started the fire.

Cases are not authority for propositions not considered therein. (See *Hart v. Burnett* (1860) 15 Cal. 530, 598; *Siskiyou County Farm Bureau v. Department of Fish & Wildlife* (2015) 237 Cal.App.4th 411, 437, fn. 11.) Here, neither the trial court nor the appellate court addressed whether section 13009 liability can be imposed on an employer for the actions of an employee. Thus, despite Cal Fire's unwarranted arm waving, there is nothing in the Court of Appeal's ruling that can be read to preclude the

application of respondeat superior as a means to impose liability upon a company.

There is a reason Howell never moved for judgment on the pleadings at the trial court level, even though all of its co-Defendants did. Simply stated, the Legislature wrote section 13009 in a manner that clearly and expressly applies to companies for fires kindled by their employees. Section 13009 states: "Any *person* (1) who negligently, or in violation of the law, sets a fire, allows a fire to be set . . . is liable for the fire suppression costs . . . ." (Emphasis added.) Health and Safety Code section 19 defines a "person" as "any person, firm, association, organization, partnership, business trust, corporation, limited liability company, or company." Thus, companies that act through their employees fit within the definition of a "person" who may fall within section 13009.

The errors in Cal Fire's argument track the errors in the dissent issued by one appellate justice. Those errors are most clearly illustrated by the following passage in the dissent itself:

> I believe sections 13009 and 13009.1 can be read to hold companies vicariously liable for the acts of their employees. *I cannot agree with my colleagues' conclusion to the contrary.* With this interpretation of the statute *and the resulting denial of the motion for judgment on the pleadings,* I too would reverse the award of costs to defendants, but in its entirety, not just for the reasons the majority finds the court's ruling infirm.

(Dissent at 6, emphasis added.)

There are two flaws in this argument. First, contrary to the dissent's assertion, nowhere in the majority opinion is there any language that remotely holds that companies cannot be held vicariously liable for the acts of their employees through respondeat superior. Indeed, the majority opinion specifically notes that "person" as defined in section 19 includes business entities. (Op. at 23, fn. 13.) Second, the argument then wrongly concludes that a "resulting denial of the motion for judgment on the pleadings" would necessarily flow from a holding that employers can be held liable for the acts of their employees. (Dissent at 6.) No support is offered for this conclusion.

Again, Howell employed Bush and Crismon, and Howell did not move for judgment on the pleadings. Thus, even if the Court of Appeal had gone out of its way to state the obvious – that section 13009 imposes liability on companies for their employees' acts – such dicta would not have changed the outcome of the motion by Sierra Pacific, Beaty, and the Landowners.

Finally, Cal Fire's petition confirms that it does not subscribe to its own argument. Instead, Cal Fire argues that the Court of Appeal's decision "*can be read*" as eliminating vicarious liability. (Pet. at 8 [emphasis added].) Cal Fire also states that "*[a]s construed by the dissent,* the Court of Appeal's opinion would not even allow for corporate liability based on an employee's negligent conduct." (*Id.* at 20, emphasis added.)

Cal Fire threads this needle for a reason. Cal Fire urges this Court to misconstrue the Court of Appeal's decision in an effort to increase the chances of success for its petition, yet Cal Fire simultaneously attempts to preserve its ability to argue the exact opposite in other cost recovery actions against corporate defendants. There is little doubt that if Cal Fire's petition is denied, it absolutely will not be taking the unwarranted step of filing dismissals in all of its other pending section 13009 actions reliant upon respondeat superior. If it were planning to do so, certainly Cal Fire would have said so in its petition.

2. The Court of Appeal's Ruling on Section 13009 Will Not Impact Other Cases.

Based on the published case authorities, it appears that the Moonlight Fire marks the first instance where Cal Fire litigated its effort to stretch liability under section 13009 to defendants based not on their or their employees' own direct actions in starting a fire, but instead on the actions of an independent contractor, which allegedly started a fire through that contractor's own instrumentality and its own employees' alleged lack of due care. As the Court of Appeal correctly observed, "Cal Fire has not cited for this court any published case that has imposed liability under such circumstances, and we have not found any such cases." (Op. at 26.) Thus, without any cases to conflict with the appellate court's interpretation of

section 13009, there is necessarily no lack of uniformity to warrant review by this Court. (See Cal. Rules of Court, rule 8.500(b)(1).)

There also is nothing in the appellate court's decision that raises an important question of law. Given the published cases, there is little doubt that, apart from its corrupt and tainted effort in this case – as incentivized by an illegal, off-books bank account – the vast majority of Cal Fire's section 13009 cost recovery actions are premised on the direct actions of a defendant or an entity defendant's employees in allegedly setting a fire. Both instances would fall within the ambit of a "person" as defined in section 19, and as indicated by the Court of Appeal. Put differently, Cal Fire's petition fails to identify any cases where the government would have any incentive or need to stretch the scope of section 13009 in the manner it has attempted here. Thus, Cal Fire has failed to articulate any important question of law that warrants review.

3. The Court of Appeal Correctly Interpreted and Applied Section 13009.

The Court of Appeal held that the Legislature's inclusion of the adverb "negligently" in section 13009 cannot be read to incorporate or graft all common law theories of negligence or vicarious liability into the statutes. Cal Fire now contends that the Court of Appeal reached this conclusion "*without explanation.*" (Pet. at 21, emphasis added.) But Cal Fire mischaracterizes the Court of Appeal's decision and ignores its

painstaking statutory textual analysis, historical contextual analysis, and thorough examination of the legislative intent, all of which amply support its holding.

a. The Government's Ability to Recover Fire Suppression Costs Is Purely a Creature of Statute.

Absent express statutory authorization, the default rule is that the government has no cognizable claim whatsoever against its citizenry for reimbursement of fire suppression expenses. At common law, a government entity *cannot* recover the costs for police, fire, and other emergency services from any type of tortfeasor, direct or vicarious. (See *County of San Luis Obispo v. Abalone Alliance* (1986) 178 Cal.App.3d 848, 859; *City of Los Angeles v. Shpegel-Dimsey, Inc.* (1988) 198 Cal.App.3d 1009, 1018, 1020.) Thus, the government "can *never sue in tort* in its political or governmental capacity" to collect fire suppression costs. (*Ibid.*, emphasis added.) Strangely, Cal Fire's petition does not disclose the existence of this default rule, nor does it apprise this Court of the seminal case on this point, *Shpegel-Dimsey,* or its progeny.

b. The Plain Language of Section 13009 Demonstrates that the Legislature Did Not Intend to Incorporate All Common Law Negligence and Tort Theories.

Against the common law backdrop explicated in *Shpegel-Dimsey*, the Court of Appeal conducted an in-depth analysis of the plain language of the statute with a broad view toward effectuating the legislative intent.

As explained by the Court of Appeal, "negligently," as used in section 13009, is an adverb modifying three potential verb phrases: (1) "sets a fire," (2) "allows a fire to be set," or (3) "allows a fire kindled or attended by him or her to escape." According to Black's Law Dictionary, "Negligently" means "failed to comply with a standard of conduct with which any ordinary reasonable man could and would have complied: a standard requiring him to take precautions against harm." (Op. at 26 [citation omitted].) Had the Legislature not included the adverb "negligently," the statute would have imposed absolute strict liability for suppression costs on any person who starts a fire, regardless of whether that person exercised the utmost due care and took all conceivable precautions. Thus, by inserting "negligently" as an adverb modifying the specific modes of conduct identified, the Legislature necessarily intended to *restrict and narrow* section 13009's reach, not broaden it.

Nevertheless, Cal Fire ignores this reality, and urges this Court to turn the statute on its head so as to wildly *broaden* the scope of liability. Indeed, Cal Fire appears to contend that the Legislature's effort to restrict section 13009 by including the narrowing adverb "negligently" accidentally embedded a Trojan horse, such that the statute imposes liability for government fire suppression expenses under any and all common law tort theories of recovery available to private litigants, including negligent supervision, negligent hiring, negligent inspection, negligent management

and use of property, and peculiar risk. According to Cal Fire, "one can be negligent in a variety of ways, and in any action taken." (Pet. at 22.) But Cal Fire makes this argument in a vacuum, ignoring the Legislature's careful selection of only three very specific actions (rather than "any action") which may give rise to liability. Had the Legislature intended to allow Cal Fire to recoup fire suppression costs to the extent allowed under common law, the Legislature could easily have done so expressly. It did not. (See generally *Debbie Reynolds Prof. Rehearsal Studios v. Superior Court* (1994) 25 Cal.App.4th 222, 231-232 [refusing to "assume that our Legislature chose a surprisingly indirect route to convey an important and easily expressed message"].)

After painstaking review of the legislative history and careful analysis of the plain language of the statute, the Court of Appeal correctly observed that Cal Fire's interpretation was "too attenuated a construction to be plausible." (Op. at 26.) Indeed, all of the prior cases interpreting section 13009 are consistent with the Court of Appeal's conclusion. In this regard, Cal Fire's reliance upon *County of Ventura v. Southern California Edison Co.* (1948) 85 Cal.App.2d 529 is misplaced. Cal Fire cites this case for the proposition that section 13009 imposes liability on "those who are responsible because they create conditions that allow someone else to cause damage." But as the Court of Appeal correctly observed, *Southern California Edison* is inapposite because it involved imposition of "liability

not on a third party with some responsibility to supervise or oversee the actor, but on the actor itself that failed to properly maintain its own equipment that directly caused the fire." (Op. at 27.) Moreover, that case was not based on section 13009, but on a former statute before amendments that affect the outcome of this action.

Cal Fire also argues that the Court of Appeal's conclusion is contrary to the common understanding of the term "negligently" as used in the case law, and that it "rejects normal negligence principles" because it supposedly fails to read the statute in "harmony" with the common law. But Cal Fire ignores the context of section 13009, and the import of *Shpegel-Dimsey*, *supra*, 198 Cal.App.3d at 1020. At common law, the government has no common law right of action. (*Ibid.*) Governmental actions for recovery of fire suppression costs have never been based on "normal negligence principles." They are purely creatures of statute. (*Ibid.*) Thus, it is Cal Fire that attempts to read section 13009 in a manner incongruous with common law.

Finally, if Cal Fire's broad interpretation of the term "negligently" in section 13009 were adopted, it would subsume and render nugatory subdivisions (a)(2) and (a)(3). The Legislature added these subsections in 1987 to expand liability in certain instances. Just as it fails to address *Shpegel-Dimsey*, Cal Fire's petition does not even attempt to grapple with these amendments.

c. The Plain Language of Section 13009 Demonstrates the Legislature Did Not Intend to Incorporate Vicarious Forms of Liability.

The Court of Appeal correctly rejected Cal Fire's contention that section 13009 should be read to impose broad vicarious liability that would have allowed Cal Fire to bridge (or daisy-chain) its claims from one company to another, regardless of how remote from the res gestae of the incident. Cal Fire urges this unprecedented and expansive application of the statute (what it claims is a "broader more traditional view") even though Sierra Pacific, Beaty, and the Landowners did not start the fire, did not own or control the instrumentality that allegedly started the fire, and did not employ those individuals alleged to have started the fire.

Cal Fire predictably begins its argument by ignoring the actual language of section 13009, which is unhelpful to Cal Fire, and instead focuses on Civil Code section 2338. That statute, enacted some 150 years ago, is simply a codification of the respondeat superior concept, which is already addressed in section 13009 through the definition of "person." Cal Fire then argues that "nothing in the language of these statutes [sections 13009 and 13009.1] requires the courts to *remove* fire liability from general and longstanding principles governing negligence." (Pet. at 19, emphasis added.) Once again, Cal Fire ignores the proper starting point – by failing to acknowledge that liability for governmental fire suppression expenses has never been within the purview of "longstanding" negligence or tort law.

The courts cannot "remove" something from a body of law that was never present to begin with. Thus, neither the existence of section 2338 nor the tort cases Cal Fire cites as examples of agency/respondeat superior liability advance its argument.

The Court of Appeal also engaged in a comparative analysis between the broad language in section 13007, which codifies an expansive right of action for fire property damage, with the narrow language in section 13009 enacted thereafter, which provides for a more limited governmental right of recovery of fire suppression expenses. The Court of Appeal observed that before 1971, liability exposure for private or public property damage *and* for governmental fire suppression expenses was essentially co-extensive for "[a]ny person who: [¶] (1) [p]ersonally or through another, and (2) [w]ilfully, negligently, or in violation of law, commits any of the following acts: (1) [s]ets fire to, (2) [a]llows fire to be set . . . ." (Op. at 22 [citation omitted]; see also Op. at 22-24.) This changed in 1971, when the Legislature revised section 13009 and elected not to include the "personally or through another" language. In stark contrast, the Legislature left untouched the "personally or through another" language in section 13007, where it persists to this day. (Op. at 24.) Since 1971, the Legislature has amended section 13009 four times, added section 13009.1 in 1984, and amended that statute in 1987. (*Id.* at 24-25.) Yet the

Legislature has never re-inserted the "personally or through another" language. (*Ibid.*)

Cal Fire refuses to confront the obvious problem with its interpretation, namely, that reading sections 13009 and 13007 as co-extensive would impermissibly render the "personally or through another" language that persists in section 13007 as mere surplusage. (See *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1038.) Indeed, the absence of the language in 13009, and its presence in the closely related section 13007, strongly indicates the legislative intent. (*Los Angeles County Metropolitan Transportation Authority v. Alameda Produce Market, LLC* (2011) 52 Cal.4th 1100, 1108.)

As a result, neither the legislative history nor the plain language of the statutes themselves supports Cal Fire's unprecedented effort to expand vicariously the scope of liability for government fire suppression expenses. As explicated in *Shpegal-Dimsey*, "It is critically important to recognize that the government's decision to provide tax-supported services is a legislative policy determination. (198 Cal.App.3d at 1018 [quoting *Abalone Alliance*, *supra*, 178 Cal.App.3d at 858].) "It is not the place of the courts to modify such decisions." (*Abalone Alliance*, *supra*, 178 Cal.App.3d at 859.)

ineffectual." (110 AA2 31480.) The appellate court explicitly referenced this analysis, stating: "[The trial court] found that less severe sanctions would be unworkable and ineffectual, which certainly implies that it considered imposing monetary, issue, and evidentiary sanctions and found them insufficient." (Op. at 51.) Its decision to affirm creates no conflict on this issue, and Cal Fire's representation otherwise is merely an effort to justify what would be an unwarranted and unnecessary use of this Court's resources.

Finally, Cal Fire's cursory argument that this Court should grant review to address whether and when terminating discovery sanctions are appropriate is equally without merit. As referenced above, terminating sanction orders are reviewed for abuse of discretion, and trial courts have for decades been capably and carefully applying these legal rubrics. There is nothing about the trial court's decision, or the appellate court's review of it, that somehow elevates this question to one requiring this Court's oversight.

V.
CONCLUSION

For the foregoing reasons, Cal Fire's petition should be denied.

DATED: February 6, 2018 DOWNEY BRAND LLP

By: *s/ William R. Warne*

WILLIAM R. WARNE
MICHAEL J. THOMAS
ANNIE S. AMARAL
MEGHAN M. BAKER
Attorneys for Appellant
SIERRA PACIFIC INDUSTRIES

DATED: February 6, 2018 MATHENY SEARS LINKERT & JAIME, LLP

By: *s/ Richard S. Linkert (as auth'd on 2/06/18)*

RICHARD S. LINKERT
Attorneys for Appellants W. M. Beaty & Associates, Inc., and Ann McKeever Hatch, As Trustee of The Hatch 1987Revocable Trust, et al.

DATED: February 6, 2018 RUSHFORD & BONOTTO, LLP

By: *s/ Phillip R. Bonotto (as auth'd on 2/06/18*

PHILLIP R. BONOTTO
Attorneys for Appellants Eunice Howell, individually, DBA Howell Forest Harvesting

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Dated: February 6, 2018 DOWNEY BRAND LLP

By: /s/ *William R. Warne*
WILLIAM R. WARNE
Attorneys for Respondent and Defendant SIERRA PACIFIC INDUSTRIES

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Gary E. Tavetian
Christina Arndt
300 S. Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-0628
Facsimile: (213) 897-2802
Gary.Tavetian@doj.ca.gov
Christina.Arndt@doj.ca.gov

Attorneys for
California Dept of Forestry & Fire Protection

Evan Eickmeyer
Office of Attorney General
1300 I Street, Suite 125
Sacramento, CA 95814
Telephone: (916) 445-9995
Facsimile: (916) 327-2319
evan.eickmeyer@doj.ca.gov

Attorneys for
California Dept of Forestry & Fire Protection

Gary Garfinkle
Attorney at Law
1205 Via Gabarda
Lafayette, CA 94549
Telephone: (925)932-3737
ggarfinkle@comcast.net

Attorney for Appellants
James H. Brandt, et al and Grange Insurance Association

Kenneth Roye, Esq.
142 West 2nd Street, Suite B
Chico, CA 95928
Telephone: (530) 893-2398
Facsimile: (530) 893-2396
ken@kenroyelaw.com

Attorney for Appellants
James H. Brandt, et al.

P. Terry Anderlini
G. Chris Andersen
Anderlini & McSweeney LLP
411 Borel Avenue, Suite 501
San Mateo, CA 94402
Telephone: (650) 212-0001
Facsmile: (650) 212-0081
tanderlini@amlawoffice.com
candersen@aelawllp.com

Attorneys for Appellants
Richard A. Guy, et al and John Cosmez, et al

Phillip Bonotto
Rushford & Bonotto
Rushford & Bonotto, LLP
1010 Hurley Way, Ste. 410
Sacramento, CA 95825
Telephone: (916) 265-2389
Facsimile: (916) 565-0599
pbonotto@rushfordbonotto.com

Attorneys for
Howell's Forest Harvesting

Richard S. Linkert
Matheny Sears Linkert & Jaime, LLP
3638 American River Drive
Sacramento, CA 95825
Telephone: (916) 978-3434
Facsimile: (916) 978-3434
rlinkert@mathenysears.com

Attorneys for
W.M. Beaty & Associates

Deborah J. La Fetra
Lawrence G. Salzman
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: djl@pacificlegal.org
lgs@pacificlegal.org

Counsel for amicus curiae
Pacific Legal Foundation

Sean D. Reyes
Utah Attorney General
Parker Douglas
Chief Federal Deputy
Aaron Murphy
Assistant Solicitor General
Attorney General's Office
350 North State Street, Suite 230
Salt Lake City, UT 84114
Telephone: (801) 538-9600
Facsimile: (801) 366-0184
Email: aaronmurphy@utah.gov

Counsel for State of Utah and
amici States Attorneys
General

Christopher J. Carr
William M. Sloan
Navi Dhillon
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105-2482
Telephone: (415) 268-7000
Email: NDhillon@mofo.com

Counsel for amicus curiae
Michael Cole and Tom
Hoffman

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

BY MAIL ONLY:
Clerk of the Court
Plumas County Superior Court
520 Main Street, Room 104
Quincy, CA 95971

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Supreme Court of California

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Supreme Court of California

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Case Number: **S259850**
Lower Court Case Number: **B297195**

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Robin Steiner Horvitz & Levy LLP	rsteiner@horvitzlevy.com	e-Serve	11/9/2020 10:01:48 PM
H. Thomas Watson Horvitz & Levy 160277	htwatson@horvitzlevy.com	e-Serve	11/9/2020 10:01:48 PM
Beth Jay HORVITZ & LEVY LLP 53820	bjay@horvitzlevy.com	e-Serve	11/9/2020 10:01:48 PM
Melissa Fassett Price, Postel & Parma	mjf@ppplaw.com	e-Serve	11/9/2020 10:01:48 PM
Samuel Harbourt Office of the Attorney General 313719	samuel.harbourt@doj.ca.gov	e-Serve	11/9/2020 10:01:48 PM
Kathy Turner Horvitz & Levy LLP	kturner@horvitzlevy.com	e-Serve	11/9/2020 10:01:48

			PM
Daniel Gonzalez Horvitz & Levy 73623	dgonzalez@horvitzlevy.com	e-Serve	11/9/2020 10:01:48 PM
Theodore Mccombs Attorney General of California, Natural Resources Law Section	theodore.mccombs@doj.ca.gov	e-Serve	11/9/2020 10:01:48 PM
William R. Warne 141280	bwarne@downeybrand.com	e-Serve	11/9/2020 10:01:48 PM
Annie S. Amaral 238189	aamaral@downeybrand.com	e-Serve	11/9/2020 10:01:48 PM

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/s/William Warne

Signature

Warne, William (141280)

Last Name, First Name (PNum)

Downey Brand LLP

Law Firm