No.: S242250

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

REBECCA MEGAN QUIGLEY, Plaintiff and Appellant, *vs.* GARDEN VALLEY FIRE PROTECTION DISTRICT, et al. Defendants and Respondents.	Third Appellate District No.: C079270 Plumas County Superior Court No.: CV1000225

Appeal from a Judgment Following a Nonsuit
Honorable Janet Hilde, Judge

APPLICATION TO FILE AND AMICUS CURIAE BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF REBECCA MEGAN QUIGLEY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S242250

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

This is the initial certificate of interested entities or persons submitted on behalf of Amicus curiae for appellant Consumer Attorneys of California in the case number listed above.

The undersigned certifies that there are no interested entities or persons that must be listed in this Certificate under California Rules of Court, rule 8.208.

Dated: May 16, 2018 By: /s/ Alan Charles Dell'Ario

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Statutes:

Other:

AMICUS CURIAE BRIEF

BRIEF IN SUPPORT OF REBECCA MEGAN QUIGLEY BY CONSUMER ATTORNEYS OF CALIFORNIA

APPLICATION TO FILE AMICUS BRIEF

Consumer Attorneys of California requests that the attached amicus brief be submitted in support of plaintiff Rebecca Megan Quigley. Counsel are familiar with all of the briefing filed in this action to date. The concurrently-filed amicus brief addresses the fallacy of the defense argument that immunities under the Tort Claims Act[1] (the Act) are jurisdictional in a fundamental sense. It also addresses the undesirable and unjust consequences that would ensue if governmental immunities were jurisdictional. No party to this action has provided support in any form with regard to the authorship, production or filing of this brief.

STATEMENT OF INTEREST

Consumer Attorneys of California ("CAOC") is a voluntary membership organization representing over 6,000 associated consumer attorneys practicing throughout California. The organization was founded in 1962. Its membership consists primarily of attorneys who represent individuals who are injured or killed because of the negligent or wrongful acts of others,

[1] Government Code section 810, et seq.

including governmental agencies and employees. CAOC has taken a leading role in advancing and protecting the rights of Californians in both the courts and the Legislature.

As an organization representative of the plaintiff's trial bar throughout California, including many attorneys who represent plaintiffs injured or killed as the result of negligence, CAOC is interested in the significant issues presented by the court of appeal's decision in this case, particularly with respect to the determination of whether the immunities under the Tort Claims Act are jurisdictional.

I. The courts possess the jurisdictional power to adjudicate government tort claims where statutory immunities are at issue.

The fundamental flaw in the Court of Appeal's analysis–one which the district never comes to grips with– is that the statutory immunities in the Act are jurisdictional in the fundamental sense so that they can never be waived.

"How it became in the United States the basis for a rule that the federal and state governments did not have to answer for their torts has been called 'one of the mysteries of legal evolution.' (Citation.)" (*Muskopf v. Corning Hosp. Dist.* (1961) 55 Cal.2d 211, 214–15 *(Muskopf).*) Although the Legislature subsequently limited public-agency liability "except as otherwise provided by statute" (Gov. Code, § 815), "the 1963 Tort Claims Act did not alter the basic teaching of *Muskopf* : 'when there is negligence, the rule is liability, immunity is the exception.'

Accordingly, courts should not casually decree governmental immunity." (*Johnson v. State* (1968) 69 Cal.2d 782, 798 *(Johnson).*)

"In a civil case, ordinarily, one who claims the benefit of an exception from the prohibition of a statute has the burden of proving that his claim comes within the exception." (*Green v. State* (2007) 42 Cal.4th 254, 269.) The cases standing for this proposition are legion. Yet the Court of Appeal has ignored this well-settled principle by permitting the defendant district to raise its claim of immunity after trial has commenced.

The court reasoned that governmental immunity is "jurisdictional" and thus could be raised at any time. (Opn. 5–6.) But the cases on which the court relied fail to support its conclusion when the authority on which those cases rely is examined closely. The lead case the court cited, *Paterson v. City of Los Angeles* (2009) 174 Cal.App.4th 1393, 1404 fn. 5, states without analysis, "'governmental immunity is a jurisdictional question,'" citing *Kemmerer v. Cnty. of Fresno* (1988) 200 Cal.App.3d 1426, 1435 *(Kemmerer). Richardson-Tunnell v. Sch. Ins. Program etc.* (2007) 157 Cal.App.4th 1056, 1061 likewise cites to *Kemmerer* without analysis. But *Kemmerer* itself lacks analysis, citing without discussion to *Buford v. State of California* (1980) 104 Cal.App.3d 811, 826 *(Buford). Buford*, too, fails to offer any analysis beyond a citation "cf. *State of California v. Superior Court* (1968) 263 Cal.App.2d 396, 398." (*Ibid.*)

Nothing in *State of California* supports the proposition for which *Buford* has now become the lead authority. *State* involved a writ petition challenging the trial court's refusal to grant a summary-judgment motion based on sovereign immunity. The

question was whether a common-law writ of prohibition would lie.[2] (*State of California v. Superior Court*, *supra*, 263 Cal.App.2d at p. 398.) The state had asserted immunity based on its lack of notice of a dangerous condition of public property. Relying on cases that predated *Muskopf* and the Act, the court held that prohibition did lie and entertained the writ. (*Ibid.*) On this thin reed, rests the Court of Appeal's conclusion that immunities are "jurisdictional."[3]

The notion that immunities are "jurisdictional" and may be raised at any time not only lacks support in California precedent, it fails to comport with the Court's jurisprudence that distinguishes between fundamental jurisdiction and acts in excess of jurisdiction. In the first place, the Court presumes fundamental jurisdiction exists.

In *Kabran v. Sharp Mem'l Hosp.* (2017) 2 Cal.5th 330 *(Kabran)*, the Court concluded that the statutory deadline[4] for filing affidavits in support of a motion for new trial is not jurisdictional.

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[2] The issue could not arise today because writ review of an order denying a summary judgment motion is prescribed by Code of Civil Procedure section 437c, subdivision (m).

[3] Moreover, not all immunities have been held to be jurisdictional. Some of those associated with dangerous conditions of public property (Gov. Code, §§ 830–840) — design immunity (§ 830.6), recreational road and trails (§ 831.4), and reasonable conduct (§ 835.4) — have been held to be affirmative defenses that must be pleaded and proven by the public entity. (See generally, T. Coates, et al., Cal. Govt. Tort Liab. Prac. (CEB 2017) § 12.139.)

[4] Code of Civil Procedure section 659a.

> [W]e generally presume courts have jurisdiction unless specifically curtailed by the Legislature. Our case law reflects a preference for the resolution of litigation and the underlying conflicts on their merits by the judiciary. While the courts are subject to reasonable statutory regulation of procedure and other matters, they will maintain their constitutional powers in order effectively to function as a separate department of government. Consequently an intent to defeat the exercise of the court's jurisdiction will not be supplied by implication.

(*Kabran, supra*, 2 Cal.5th at pp. 342–343.)

Kabran relied on *Lara v. Superior Court* (2010) 47 Cal.4th 216 *(Lara)* where the Court "grappled with the question of whether a failure to meet a statutory deadline deprives a court of jurisdiction." (*Id.* at p. 224.) Defendant Lara had been tried for false imprisonment of a child, found not guilty by reason of insanity (NGI), and committed to a state hospital. The petition to extend his commitment had been filed too late. (*Id.* at p. 221.) Lara contended the failure to do so deprived the trial court of jurisdiction to proceed. The Court disagreed. In doing so, the Court explained the distinction between judicial acts taken where jurisdiction is fundamentally lacking and judicial acts that are in excess of jurisdiction.

> When courts use the phrase lack of jurisdiction, they are usually referring to one of two different concepts, although, as one court has observed, the distinction between them is hazy. A lack of jurisdiction in its fundamental or strict sense results in an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties. On the other hand, a court may have

> jurisdiction in the strict sense but nevertheless lack jurisdiction (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites. When a court fails to conduct itself in the manner prescribed, it is said to have acted in excess of jurisdiction.
>
> The distinction is important because the remedies are different. Fundamental jurisdiction cannot be conferred by waiver, estoppel, or consent. Rather, an act beyond a court's jurisdiction in the fundamental sense is null and void ab initio. Therefore, a claim based on a lack of fundamental jurisdiction may be raised for the first time on appeal. In contrast, an act in excess of jurisdiction is valid until set aside, and parties may be precluded from setting it aside by such things as waiver, estoppel, or the passage of time.

(*Lara, supra*, 47 Cal.4th at pp. 224–225.)

In a sense, a statutory immunity is like a statute of limitations. Properly raised, it operates as a bar to the action. But it does not preclude the court from acting. The public entity's failure to raise the immunity operates as a waiver.

> A properly raised objection to an untimely complaint may require that the court dismiss it, and the court's failure to dismiss is reversible on appeal. But a party cannot raise the untimeliness for the first time on appeal or in a collateral attack. If an untimely complaint results in a judgment, the judgment will not be disturbed on timeliness grounds if the defendant did not properly preserve a statute of limitations defense.

(*Kabran*, *supra*, 2 Cal.5th at p. 371.)

The Court recently had occasion to affirm these principles in *People v. Chavez* (Cal. Apr. 26, 2018, No. S238929) 2018 WL 1956018. The question was whether a court can dismiss, over objection, a criminal action that is no longer pending. The defendant received a suspended sentence and concluded his probation. The court still had fundamental jurisdiction. "Despite having fundamental jurisdiction, the court acts in excess of its jurisdiction, as conferred by section 1385, if it dismisses an action under that section that is no longer pending." (*Id.* at *8.) Of significance to this case, the Court noted "a defendant may be estopped to complain that a court acts in excess of its jurisdiction if he consents to such jurisdiction." (*Ibid.*) Failing to raise a statutory immunity until after trial commences operates as an estoppel or waiver of any right to complain about jurisdiction.

Here the Court of Appeal uncritically accepted the line of cases holding immunities to be "jurisdictional" without examining their antecedents and without considering this Court's teachings on the subject. In so doing, the Court of Appeal perpetuated a flawed jurisdictional analysis that neither this Court nor the Legislature has sanctioned. Nothing in the Act deprives a court of fundamental jurisdiction where a possible immunity is involved. A court that fails or refuses to recognize a valid claim of immunity at worst acts in excess of jurisdiction. Thus, the district's failure to raise the immunity in a timely way amounted to a waiver.

II. Recognizing a statutory immunity to be jurisdictional in a fundamental sense would undermine the principles of the finality of judgments.

"Our judicial system is intended for the resolution of disputes, rather than their perpetuation through the ages." (*Weikel v. TCW Realty Fund II Holding Co.* (1997) 55 Cal.App.4th 1234, 1251.) Without finality of judgments, there would be no stability in transactions, and no doctrine of res judicata in furtherance of this interest. (Rest.2d Judgments (1982) Introduction, p. 11.) The importance to society of finality will generally transcend an individual's perception of an unjust result from an arguably incorrect application of the law; an erroneous judgment is thus entitled to the same effect as any other. (*People v. Cotton Belt. Ins. Co.* (1983) 143 Cal.App.3d 805, 808.)

A judgment may not be collaterally attacked on the grounds that it was procured by the use of forged documents or perjured testimony. (*Pico v. Cohn* (1891) 91 Cal. 129, 133–134.) Under the principles of finality, no cause of action exists for spoliation of evidence. (*Cedars–Sinai Med. Ctr. v. Superior Court* (1998) 18 Cal.4th 1, 10.) The finality principles also support the litigation privilege.

> [T]he law places upon litigants the burden of exposing during trial the bias of witnesses and the falsity of evidence, thereby enhancing the finality of judgments and avoiding an unending roundelay of litigation, an evil far worse than an occasional unfair result

(*Silberg v. Anderson* (1990) 50 Cal.3d 205, 214.)

A lack of fundamental jurisdiction results in the entire absence of power to hear or determine the case. (*Thompson Pac. Constr., Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 538.) A judgment rendered by a court lacking in fundamental, subject-matter jurisdiction, is void. (*Lara, supra,* 47 Cal.4th at p. 225.) Under such circumstances, "an ensuing judgment is void, and thus vulnerable to direct or collateral attack at any time." (*People v. Am. Contractors Indem. Co.* (2004) 33 Cal.4th 653, 660.) So if the Court of Appeal's analysis were to be upheld, an otherwise final judgment against a public entity could be collaterally attacked on the grounds that an immunity existed voiding the judgment. (*Ibid.*)

Suppose a party injured as a result of a public employee's negligence recovers a judgment and collects it. (Gov. Code, §§ 815.2, 820.) Could the public agency decide years later that its employee's negligence was immunized as an exercise of discretion (§ 820.2), collaterally attack the judgment, and recover the amounts it had paid? (See *Johnson, supra,* 69 Cal.2d at p. 798.) What if Quigley had proceeded to judgment and recovered? Could the district come back years later and seek restitution of the amounts it had paid her?

If a statutory immunity divests a court of fundamental jurisdiction, the answer to these questions is "yes." The Legislature could not have intended such a result.

III. The statutory immunities in the Tort Claims Act do not implicate sovereign immunity.

The parties' extended discussion concerning sovereign immunity and whether it can be waived by litigation conduct over-complicates the issue before the Court. With its adoption of the Tort Claims Act, the Legislature exercised its authority to waive the state's sovereign immunity "only if the various requirements of the act are satisfied." (*Williams v. Horvath* (1976) 16 Cal.3d 834, 838.)

The entire Act operates as the sovereign immunity waiver. Its sections must be interpreted *in pari materia*.[5] Thus, the individual provisions in the Act are subject to waiver by the litigation conduct. Does a plaintiff have to negate each immunity set forth in the Act? Merely framing the question highlights the fallacy of the district's position. Whether or not a statutory immunity applies in a given context does not implicate the larger issue of sovereign immunity.

CONCLUSION

The Court of Appeal's analysis does not withstand scrutiny. The existence of a statutory immunity under the Tort Claims Act

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[5] "Statutes are considered to be in pari materia when they relate to the same person or thing, to the same class of persons [or] things, or have the same purpose or object. Characterization of the object or purpose is more important than characterization of subject matter in determining whether different statutes are closely enough related to justify interpreting one in light of the other." (*Walker v. Superior Court* (1988) 47 Cal.3d 112, 124, fn. 4.)

does not deprive a court of fundamental jurisdiction. The district's failure to raise the immunity in a timely manner waives it. Any other conclusion leaves all judgments against public entities subject to collateral attack. The Legislature could not have intended its waiver of sovereign immunity to operate in such a perverse manner.

Respectfully submitted,

Dated: May 16, 2018

By: /s/ Alan Charles Dell'Ario

Attorney for Amicus curiae
for appellant

CERTIFICATE OF COMPLIANCE

This brief is set using **13-pt Century Schoolbook**. According to TypeLaw.com, the computer program used to prepare this brief, this brief contains **2,308** words, excluding the cover, tables, signature block, and this certificate.

The undersigned certifies that this brief complies with the form requirements set by California Rules of Court, rule 8.204(b) and contains fewer words than permitted by rule 8.520(c) or by Order of this Court.

Dated: May 16, 2018 By: /s/ Alan Charles Dell'Ario

Attorney for Amicus curiae
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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PROOF OF SERVICE

I declare:

At the time of service I was at least 18 years of age and not a party to this legal action. My business address is 1561 3rd St Ste B, Napa, CA 94559. I served document(s) described as Amicus Curiae Brief as follows:

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

Dated: May 16, 2018 By: /s/ Alan Charles Dell'Ario