SUPREME COURT NO. S267453

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

BETTY TANSAVATDI
Plaintiff and Appellant,

v.

CITY OF RANCHO PALOS VERDES
Defendant and Respondent,

PETITIONER CITY OF RANCHO PALOS VERDES'S ANSWER TO AMICUS CURIAE BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA

After a Decision by the Court of Appeal
Second Appellate District, Division Four Case No. B293670
(Los Angeles Superior Court Nos. BC633651/BC652435)

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1.0. Introduction

In its amicus brief, Consumer Attorneys of California ("CAOC") attempts to shore up the argument in plaintiff Betty Tansavatdi's Answer Brief on the Merits. It does not succeed.

As the City noted in its Reply Brief on the Merits, the Answer Brief appeared to be drawn (without attribution) in large part from Justice Peters's dissent in *Cabell v. State of California* (1967) 67 Cal.2d 150, 159-161. The City explained why the argument based on the dissent should be rejected. (RBM:40-43.) CAOC tries to salvage the *Cabell* argument by depicting it as part of a continuity in developing design immunity law that culminated in this Court's decisions in *Baldwin v. State of California* (1972) 6 Cal.3d 424 and *Cameron v. State of California* (1972) 7 Cal.3d 318 and subsequent lower court decisions. (CAOC Amicus Brief ["CAOCAB]:12-25.)

That line of authority, CAOC contends, establishes that Government Code[1] section 830.6's design immunity applies only to liability under subdivision (a) of Government Code section 835 (liability for negligent creation of a dangerous condition), and not to liability under subdivision (b) of section 835 (liability for notice of a dangerous condition and failure to take protective measures).

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[1] Unless otherwise specified, citations to statutes in this brief are citations to the Government Code.

(CAOCAB:11-12,17.) CAOC notes that failure to warn of a dangerous condition is a failure to take protective measures under section 835, subdivision (b). Based on this premise, CAOC urges, *Cameron*'s exemption of failure to warn from design immunity was correct and should be followed. (CAOCAB:26-34.)

There are several flaws in CAOC's analysis.

The biggest flaw is that the assertion design immunity does not apply to section 835, subdivision (b) liability is wrong. This Court has squarely held that design immunity *does* apply to subdivision (b) liability. The sole exception—as established by this Court and the 1979 amendment of Government Code section 830.6—is loss of design immunity through *changed physical conditions*. Accepting CAOC's proposition that design immunity is limited to subdivision (a) of section 835 would require the Court to throw out all that law—something that even Tansavatdi has not asked the Court to do.

Another flaw is that CAOC's argument ignores the plain language of section 830.6. That language does not limit design immunity to any particular subdivision of Government Code section 835.

A third flaw is that the CAOC brief—like Tansavatdi's Answer Brief—assumes that design immunity applies to *all* dangerous roadway conditions; and that Government Code

section 830.8 liability for failure to warn must be exempted from section 830.6 to give section 830.8 any meaning. That assumption is incorrect. Design immunity applies only to injuries caused by plans or designs. It does not apply to potholes, construction ditches, live wires, or other non-design roadway hazards. Nor does it apply to constructions or improvements that might have been covered by the immunity, but for which the elements of design immunity have not been established.

A fourth flaw is CAOC's contention that the City must justify the policy behind applying design immunity to dangerous conditions that are traps under section 830.8. The City has no such burden. The plain language of sections 830.6 and 830.8 compels that conclusion. The Legislature has determined that public policy justifies applying design immunity where the elements of that defense are met, and where immunity has not been lost due to changed physical conditions. The City need not justify the Legislature's decision.

The City respectfully asks the Court to reject CAOC's contentions, and interpret the statutes as written. As written, Government Code section 830.6 applies to all design-based dangerous condition liability—including liability for failure to warn.

2.0. Discussion

2.1. This Court and the Legislature Have Established That Design Immunity Applies to Liability under Subdivision (b) of Government Code Section 835

CAOC's premise that Government Code section 830.6's design immunity does not apply to liability under Government Code section 835, subdivision (b) liability (notice of a dangerous condition and failure to take protective measures) cannot withstand this Court's express holding that it *does* apply to subdivision (b):

> "Section 835, subdivision (b) provides that a public entity is liable for injury proximately caused by a dangerous condition of its property if the dangerous condition created a reasonably foreseeable risk of the kind of injury sustained, and the public entity had actual or constructive notice of the condition a sufficient time before the injury to have taken preventive measures. [Footnote and citation.] The state's failure to erect median barriers to prevent cross-median accidents may result in such liability. [Citation.]

> However, under section 830.6, *the public entity may escape such liability* by raising the affirmative defense of 'design immunity.'" (*Cornette v. Department of Transp.* (2001) 26 Cal.4th 63, 68–69 [emphasis added].)

Nearly 50 years of design immunity jurisprudence and legislative action support this principle. It is established that design immunity immunizes public entities from liability under Government Code section 835, subdivision (b) when an entity receives notice that a design or plan of a construction of or improvement to public property has become dangerous—*except* where changed physical conditions result in loss of design immunity. (*Cornette*, *supra*, 26 Cal.4th at pp. 70-71; *Baldwin v. State of California* (1972) 6 Cal.3d 424, 434-435, 438-439; *Dammann v. Golden Gate Bridge, Highway & Transportation Dist.* (2012) 212 Cal.App.4th 335, 348-349, 354 [recounting history of "changed physical conditions" exception, and defining what constitutes changed physical conditions].)

Further, "In 1979, the Legislature responded to Baldwin by amending section 830.6 to specify the circumstances under which a public entity retains its design immunity despite having received notice that the

plan or design has become dangerous because of a change of physical conditions." (*Cornette*, *supra*, 26 Cal.4th 63, 71.) The amendment's language "indicates that, notwithstanding the public entity's *notice* that its design immunity *may* have become unreasonable, its immunity continues to provide it with reasonable time and opportunity to remedy or warn of the inadequacy of the existing design." (*Id.* at pp. 79-80 [italics in original].)

The 1979 amendment therefore confirms that even if the elements of section 835, subdivision (b) are met—notice that a design or plan has become dangerous—design immunity applies, *unless*

> "(1) the plan or design has become dangerous because of a change in physical conditions; (2) the public entity had actual or constructive notice of the dangerous condition thus created; and (3) the public entity had a reasonable time to obtain the funds and carry out the necessary remedial work to bring the property back into conformity with a reasonable design or plan, or the public entity, unable to remedy the condition due to practical impossibility or lack of funds, had not reasonably attempted to provide adequate warnings." (*Cornette*, *supra*, 26 Cal.4th 63,

72 [listing the elements a plaintiff must prove to demonstrate loss of design immunity].)

Accepting CAOC's theory that design immunity does not apply to liability under section 835, subdivision (b) would mean throwing out all these rules. Under CAOC's theory, public entities would lose design immunity whenever they received notice a design or plan covered by the immunity was actually dangerous. They would be liable for any purported failure to take sufficient protective measures (including failure to warn). This Court's limitation of loss of design immunity to changed physical conditions (*Baldwin*, *supra*, 6 Cal.3d at pp. 434-435) would disappear. The 1979 amendment's extension of design immunity, despite changed circumstances, while the entity takes remedial measures (Gov. Code, § 830.6) would be judicially repealed. So would the amendment's specific provisions regarding warnings.

CAOC fails to show otherwise.

CAOC argues that both *Baldwin* and *Cameron v. State of California* (1972) 7 Cal.3d 318 support its contention that design immunity does not apply to section 835, subdivision (b) liability. (CAOCAB:17-23.) But in analyzing *Baldwin*, CAOC downplays the Court's

limitation of loss of design immunity to changed circumstances. (CAOCAB:17-20.) In analyzing *Cameron*, CAOC points out that in that case the Court followed *Flournoy v. State of California* (1969) 275 Cal.App.2d 806, which did ground its active vs. passive negligence analysis on the different subdivisions of section 835. (CAOCAB:20-23; see *Cameron*, *supra*, at pp. 328-329.) But while *Cameron* adopted *Flournoy*'s distinction between active and passive negligence—and extended design immunity only to the former (a conclusion the City has urged the Court to reconsider in this case)—*Cameron*, unlike *Flournoy*, did not base this distinction on the different subdivisions of section 835. (*Cameron*, *supra*, at pp. 326-329.)

Neither *Baldwin* nor *Cameron* ruled or suggested that design immunity applies only to liability under subdivision (a) of section 835.

CAOC also relies on *Anderson v. City of Thousand Oaks* (1976) 65 Cal.App.3d 82. (CAOCAB:24-25.) *Anderson* indeed holds that design immunity applies only to subdivision (a) of section 835 (*id.* at p. 88); and interprets *Cameron* as holding that, "In spite of respondent's immunity for a defectively designed roadway, a second independent ground of liability under subdivision (b) of Government Code section 835 exists for its failure to warn

of the dangerous condition if it had actual or constructive notice of such a condition." (*Id.* at p. 91.)

Anderson's holding that design immunity does not apply to section 835, subdivision (b) liability cannot withstand this Court's holding 25 years later in *Cornette*, *supra*, 26 Cal.4th at pp. 68–69 that design immunity *does* apply to it. Further, *Anderson*'s discussion ignores *Baldwin*, *supra*, 6 Cal.3d at pp. 434-435's changed-conditions limitation on loss of design immunity. *Anderson* also predates the 1979 amendment to section 830.6, codifying the changed-conditions rule and imposing further limitations on liability under section 835, subdivision (b). Finally, CAOC does not point to any other opinion published in the 45 years following *Anderson* that has followed *Anderson*'s holding that design immunity does not apply to section 835, subdivision (b) liability.

CAOC also cites as support multiple other Court of Appeal decisions that "recognize that section 830.6 design immunity does *not* immunize a public entity for failure to warn of a dangerous condition." (CAOCAB:24 [emphasis in original].) They include the lower court decision here. (CAOCAB:24, fn. 3.) But apart from *Anderson*, *supra*, 65 Cal.App.3d 82, none of the cases cited hold design

immunity inapplicable to section 835, subdivision (b) liability regardless of whether the elements of loss of design immunity are met. (See *Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931, 945; *Hefner v. County of Sacramento* (1988) 197 Cal.App.3d 1007, 1018, abrogated on other grounds by *Cornette*, *supra*, 26 Cal.4th 63; *Thomson v. City of Glendale* (1976) 61 Cal.App.3d 378, 386–387.)

To the contrary, one of the cases CAOC cites—*Grenier v. City of Irwindale*, *supra*, 57 Cal.App.4th 931—confirms that under the 1979 amendment to Government Code section 830.6, "a change in physical conditions is necessary to defeat design immunity . . . *Baldwin's* requirement of changed physical conditions is a prerequisite to the loss of design immunity." (*Id.* at p. 945.)

When this Court interprets statutes such as Government Code section 830.6, its goal is to ascertain the Legislature's intent in order to effectuate the law's purpose. (*Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 860.) Accepting CAOC's interpretation would thwart the Legislature's intent, and prevent effectuation of the law's purpose. This Court should reject CAOC's argument.

2.2. Government Code section 830.6 Expressly Applies Design Immunity to All Liability under the Government Code Chapter Addressing Dangerous Conditions of Public Property

As explained in the City's Reply Brief on the Merits, Government Code section 830.6's plain language extends design immunity to all liability "under this chapter"—i.e., the chapter dealing with dangerous conditions of public property. (RBM:26.) That includes both subdivisions of Government Code section 835.

Accepting CAOC's argument that design immunity applies only to subdivision (a) of section 835, but not to subdivision (b), would require the Court to ignore the plain language of section 830.6. This Court does not ignore statutory language. "The statute's plain meaning controls the court's interpretation unless its words are ambiguous. If the plain language of a statute is unambiguous, no court need, or should, go beyond that pure expression of legislative intent." (*Kobzoff*, *supra*, 19 Cal.4th at p. 861.)

This is another reason to reject CAOC's argument.

2.3. Since Design Immunity Does Not Apply to Dangerous Conditions in Roadways Not Caused by Designs, Design Immunity and Trap Liability for Non-Design Conditions Can Coexist

In her answer brief, Tansavatdi appeared to assert that design immunity applies to any dangerous condition in a roadway; and that unless section 830.8 trap liability were exempted from design immunity, "a public entity would never again have to provide a warning about the danger in any roadway . . . ." (AB:26.)

CAOC's amicus brief takes up this refrain. It quotes Justice Peters's dissent in *Cabell*, *supra*, 67 Cal.2d at p. 160, fn. 4 that because all roads are built based on plans, the City's construction of section 830.8 would read section 830.8's trap exception of the code. (CAOCAB:29-30.) It argues that the City's position "would effectively allow public entities to withhold effective warnings for known hazards despite a mounting body count" and "allow governmental entities to consciously disregard known, ongoing hazards to the public." (CAOCAB:31.) It contends that section 830.8's language shows the Legislature "clearly assumed" that section 830.8 creates an exception to section 830.6. (CAOCAB:29.)

And CAOC recasts the City's argument that design immunity does not apply to conditions for which the elements of design immunity cannot be met, those for which design immunity has been lost, and those that are not plans and designs (RBM:46-47) as a "suggest[ion]" that section 830.8 "limit[s] liability to a negligent failure to warn about dangerous conditions arising out of unmaintained roads, or roads that do not have the benefit of design immunity." (CAOCAB:29.)

The premise that design immunity applies to any dangerous condition on a designed roadway is wrong. Design immunity, by definition, applies where the injury is caused by the plan or design of a construction of or improvement to public property (and the other elements of the immunity are met). (Gov. Code, § 830.6.) Even if every roadway is planned or designed, not every dangerous condition of that roadway is part of the plan or design.

Instead, "a dangerous condition exists when public property is physically damaged, deteriorated, or defective in such a way as to foreseeably endanger those using the property . . . ." (*Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 148.)

That definition leaves ample room for dangerous conditions that have nothing to do with designs or plans for roadways. Examples include roadway construction ditches for which the warning lights and barricades are insufficient (*Vinson v. Ham Bros. Constr., Inc.* (1970) 7 Cal.App.3d 900, 996); a live wire in or at the edge of a public highway (*Chavez v. Merced County* (1964) 229 Cal.App.2d 387, 394); a hole in a highway median, caused by damage and disrepair (*Morris v. State of California* (1979) 89 Cal.App.3d 962, 965-966); and potholes (*Stathoulis v. City of Montebello* (2008) 164 Cal.App.4th 559, 569–570).

Further, even a design-based dangerous condition is not covered by design immunity if section 830.6's elements are not met. (E.g., *Cameron*, *supra*, 7 Cal.3d at p. 326 [superelevation in highway]; *Castro v. City of Thousand Oaks* (2015) 239 Cal.App.4th 1451, 1460 [warning beacon that was not part of approved plan or design was allegedly hidden trap].)

If any of these dangerous conditions that are not covered by design immunity amount to a trap under Government Code section 830.8, a public entity may be held liable for failing to warn of them, despite the immunity that would otherwise apply under section 830.8.

Applying design immunity to traps under section 830.8 will not judicially repeal section 830.8's trap provision. The trap exception simply applies to dangerous conditions to which design immunity does not apply.

2.4. The City Does Not Have the Burden of Justifying the Existence of Design Immunity

At CAOCAB:30, CAOC argues that "the City fails to offer a principled reason to impose a duty to warn about a dangerous condition stemming from the entity's failure to maintain the roadway, but to absolve a public entity of any duty to warn about a dangerous condition inherent in the roadway's design."

This is a straw man argument that attempts to impose upon the City a burden the City does not bear.

The City does *not* argue that a public entity has no "duty" to warn of design-based dangerous conditions. What it argues is that if the entity meets the elements set forth in section 830.6, the entity is *immune* from liability for breaching any such duty.

"When addressing the [Government Claim] Act's application," this Court has explained, "we have consistently regarded actionable duty and statutory

immunity as separate issues, holding that in general, an immunity provision need not even be considered until it is determined that a cause of action would otherwise lie against the public employee or entity." (*Caldwell v. Montoya* (1995) 10 Cal.4th 972, 985.) "Conceptually, the question of the applicability of a statutory immunity does not even arise until it is determined that a defendant otherwise owes a duty of care to the plaintiff and thus would be liable in the absence of such immunity." (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 201–202.) Immunity is not abrogated by the existence of duty; and duty is not established by the absence of immunity. (*Id.* at p. 202.)

This distinction is important, because "the very purpose of the Act is to afford categories of immunity where, but for its provisions, public agencies or employees would otherwise be liable under general principles of law." (*Caldwell*, *supra*, 10 Cal.4th at p. 985.) Thus, under the Act, "*specific immunities* should prevail over *general rules of actionable duty* . . . ." (*Id.* [emphases in original].)

Every immunity statute in the Government Claims Act represents a legislative policy decision. (See *Baldwin*, *supra*, 6 Cal.3d at p. 436.) For each immunity, legislators weighed the need to protect various government activities

or functions against "the important societal goal of compensating injured parties for damages caused by willful or negligent acts . . . " (quote from *Baldwin*, *supra*); and concluded that the need for immunity outweighed competing considerations.

Section 830.6's design immunity is no different: The Legislature has determined that protecting public entity design decisions from being second-guessed by courts and juries outweighs the policies that would otherwise favor imposing liability for those decisions. (See *Baldwin*, *supra*, 6 Cal.3d at pp. 434-435; *Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 349.)

The City therefore has no obligation to "offer a principled reason" for imposing dangerous condition liability (including liability under the trap exception to section 830.8) for failures to maintain roadways in safe condition, while immunizing entities from liability for failure to "warn about a dangerous condition inherent in the roadway's design." (CAOCAB:30.) That is the essence of design immunity. The Legislature has made that decision.[2]

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[2] The City notes that the lower courts have rejected equal protection attacks on section 830.6 design immunity. (*Thomson*

The City owes no obligation to explain why section 830.6 should be interpreted exactly as written.

3.0. Conclusion

CAOC, like Tansavatdi, has failed to provide any persuasive reason for this Court to ignore the plain language of section 830.6—extending immunity to all liability for design-based dangerous conditions of public property—and exempt from design immunity liability under section 830.8's trap exception. The City respectfully requests that the Court reverse the portion of the lower court's decision addressing section 830.8 liability.

DATED: November 22, 2021

POLLAK, VIDA & BARER

/s/ Daniel P. Barer

By: _____

Daniel P. Barer
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v. City of Glendale, *supra*, 61 Cal.App.3d 378, 386; *Mikkelsen v. State of California* (1976) 59 Cal.App.3d 621, 632.

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 11500 West Olympic Boulevard, Suite 400, Los Angeles, California 90064.

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Executed on November 22, 2021, at Los Angeles, California.

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STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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