S267453

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BETTY TANSAVATDI,
Plaintiff and Appellant,

v.

CITY OF RANCHO PALOS VERDES,
Defendant and Respondent.

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION FOUR, CASE NO. B293670
HON. ROBERT B. BROADBELT, TRIAL JUDGE
LOS ANGELES COUNTY SUPERIOR COURT, CASE NO. BC633651/BC652435

OPPOSITION TO PETITION FOR REVIEW

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I.

THERE ARE NO GROUNDS FOR REVIEW

Despite Defendant and Respondent's attempts to manufacture dispute, there is no conflict in the law. The Court of Appeal's holding that "the city's entitlement to design immunity for its failure to include a bicycle lane at the site of Jonathan's accident does not, as a matter of law, necessarily preclude its liability under a theory of failure to warn" is a straightforward application of this Court's holding in *Cameron v. State of California* (1972) 7 Cal.3d 318, 327 that "where the state is immune from liability for injuries caused by a dangerous condition of its property because the dangerous condition was created as a result of a plan or design which conferred immunity under section 830.6, the state may nevertheless be liable for failure to warn of this dangerous condition where the failure to warn is negligent and is an independent, separate, concurring cause of the accident."

Moreover, because the Court of Appeal simply reversed and remanded the matter to the Superior Court to consider Plaintiff's failure to warn claim in the "first instance," there is no issue worthy of this Court's review. Review should be denied.

II.

IN THE ALTERNATIVE, SHOULD THE COURT ACCEPT REVIEW AS REQUESTED BY THE CITY, THE COURT'S HOLDING AS TO THE SUPPOSED APPLICATION OF DESIGN IMMUNITY SHOULD ALSO BE REVIEWED

Should this Court accept review as requested by the City, the Court should further review the aspect of the court's opinion affirming the lower's court decision that design immunity, as provided in Government

Code section 830.6, shields the City for liability caused by the absence of a bicycle lane at this location. (Cal. Rule of Court, 8.500, subd. (a)(2).)

A. Additional Issue.

Can design immunity apply to immunize a decision which, according to the public entity it did not make? Specifically, where Plaintiff's claim is based on the absence of a bike lane and the public entity denies the bike lane ever existed at the subject location, can the entity nevertheless rely on a design plan that omits any reference to a bike lane or its removal, to argue that a decision to remove the bike lane is protected by design immunity as a matter of law?

B. Design Immunity Cannot Stretch to a Decision that Was Never Made by the City.

As noted in *Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931, 940 "[d]esign immunity does not immunize decisions which were not made." (*Id*. at p. 940.) Should the Court review this matter, Petitioners also seek review of the grant of design immunity because Defendants and Respondents were granted design immunity for a decision they never made.

A factual issue contested by the parties below and on appeal concerned whether there ever was a bike lane between on the portion of Hawthorne Boulevard between Dupre and Vallon Drives. The City moved for summary judgment making the factual representation that there was never a bike lane in that area, and their intentional decision not to place one there was subject to immunity. Specifically, as outlined in the Opinion, the City moved for summary judgment on the ground that a 2009 resurfacing plan conferred design immunity to the City as a matter of law. According to the City, in 2001, the City made a discretionary, intentional decision not to include a continuous bicycle lane on Hawthorne Boulevard, because of what it identified as concerns related to on-street parking. (Ex. A, at 8.) Then in 2009, the City resurfaced and re-striped several city roads,

including Hawthorne Boulevard. These 2009 plans did not include a bike lane on the portion of Hawthorne Boulevard between Dupre and Vallon Drives. (Ex. A, at 8; 1 AA 59-60.) There were no 2001 "plans" submitted by the City in support of its motion for summary judgment. Rather, the City submitted and relied exclusively on the 2009 plans.

In response, Plaintiff noted that Defendant's factual history was incorrect, that there was conclusive evidence that there was an existing bike lane between Dupre and Vallon until Hawthorne, that the evidence showed it was repaved in 2009, that there was no documentation whatsoever submitted as to why it was repaved or that it was repaved pursuant to an approved plan, and, from all of this, the evidence allowed a reasonable inferenced that the elimination of the bicycle lane was not done intentionally.

In its Opinion, the Court of Appeal acknowledges in a footnote that such a factual dispute existed. (Ex. A, at 10 fn. 8.) Specifically, the Opinion noted: "Appellant submitted evidence seeking to establish that there had previously been a bicycle lane on the relevant portion of Hawthorne Boulevard, but that the city had removed it, contrary to Jules's testimony that there had never been a bicycle lane there. Although the parties continue to debate this point on appeal, we need not address it to resolve the dispositive issues." (Id.)

The court's analysis was in error and reflects a sweeping application of design immunity warranting review. Again, "[d]esign immunity does not immunize decisions which were not made." (*Grenier, supra,* at p. 940.) According to the City, bike lanes are rarely—if ever—removed in the City of Rancho Palos Verdes. (2 AA 697; 2 AA 704.) To do so, it would take the express approval of the City Council, not individual engineers, no matter how senior they might be. (2 AA 703–704.) And according to the City itself, the City Council would never agree to remove a bike lane unless

it was "very clear and obvious that it was more important to provide what was replacing it." (2 AA 703–704.) By the City's own concession, none of this occurred.

According to the City's position that there never was a bike lane at this location, there necessarily could be no decision to remove the bike lane in the 2009 plans. For this same reason, no discretionary approval to remove the bike lane pursuant to the 2009 plans can be demonstrated. Also, it is unclear how a decision to remove a bike lane under the 2009 plans can be reasonable, and thus entitled to design immunity, when according to the City no such decision was even made in 2009.

The triable issue of fact as to whether the City intentionally *removed* an existing bike lane in the 2009 plans precluded an order granting summary judgment on the City's affirmative defense of design immunity. Because the City denied that there ever was a bike lane at the location, the City could not establish that the removal of the bike lane was a "*result of* a design or plan" as required to establish design immunity. (*Cameron v. State of California* (1972) 7 Cal.3d 318, 326; *Grenier, supra,* 57 Cal.App.4th at p. 940.)

By rejecting the relevance of this issue in footnote 8 of the Opinion, the court of appeal diverged from the established principle that a public entity does not obtain discretionary immunity for decisions it never made.

For this reason, should this Court grant review of the issue identified by the City, review should also be granted for the above issue.

III.

CONCLUSION

For the foregoing reasons, the City's petition for review should be denied. Alternatively, if review is granted, Plaintiff respectfully requests that the Court grant review of its additional issue as well.

Dated: March 25, 2021

MARDIROSSIAN & ASSOCIATES, INC.

THE LINDE LAW FIRM

ESNER, CHANG & BOYER

By: *s/ Holly N. Boyer*
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Supreme Court of California

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