IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

No. S213132

RANDALL KEITH HAMPTON, ET AL.,

Plaintiffs and Appellants,

v.

COUNTY OF SAN DIEGO,

Defendant and Respondent.

Court of Appeal
Fourth Appellate District, Division One
No. D061509

Superior Court of San Diego County
No. 37-2010-00101299-CU-PA-CTL

REPLY TO ANSWER TO PETITION FOR REVIEW

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DISCUSSION

A. Review is necessary to resolve confusion regarding the causation *and* discretionary-approval elements of design immunity.

The Hamptons imagine this Court occasionally receives an opposition to a petition for review that actually does a better of job of highlighting the need for review than the petition itself.

Despite insisting review is unnecessary, the County's answer not only confirms the need for clarity regarding the discretionary-approval element of design immunity, it actually reveals a split of published appellate authority regarding the causation element as well.

1. In the 41 years since *Cameron*, the Courts of Appeal are still confused regarding the scope of the causation element.

The confusion among the Courts of Appeal regarding section 830.6 is perhaps best illustrated by the fact that *both* sides of the debate claim fidelity to this Court's 41-year-old opinion in *Cameron v. State of California* (1972) 7 Cal.3d 318 (*Cameron*).

In *Cameron* it was alleged that the super-elevation of a curve on a state highway constituted a dangerous condition. In declining to award design immunity, this Court emphasized the absence of evidence "that the super-elevation which was actually constructed on the curve in question . . . was the

result of or conformed to a design approved by the public entity vested with discretionary authority." (*Id.* at p. 326.)

The Fourth District cites *Cameron* for the proposition that the omission of the alleged dangerous condition from the plans at issue speaks *exclusively* to the causation element. (Slip. opn., pp. 22–23, quoting *Cameron*, *supra*, 7 Cal.3d p. 326.)[1] Thus, in the Fourth District's mind, any impact the omission of the embankment from the plans might have had on the County's design-immunity defense was nullified when the Hamptons conceded "that the County established the existence of a causal relationship between the design and the accident." (Slip. opn., pp. 23, fn. 11; *id.* at pp. 29–30.)

The Fourth District's conclusion that *Cameron* was specifically referring to the causation element is questionable. That belief is based on the bare fact that *Cameron* used the word "caused" in its observation that "there was no basis for concluding that any liability for injuries **caused** by this uneven superelevation was immunized by section 830.6." (*Cameron*, *supra*, 7 Cal.3d at p. 326, quoted with emphasis at Slip opn., p. 22.) But saying that

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[1] References to the Court of Appeal's opinion are abbreviated as (**Slip opn., p. [page].**) References to the Appellant's Appendix are abbreviated as (**[volume] AA [page]:[line].**). References to the County's answer to the petition for review are abbreviated as (**Answer, p. [page].**) Finally, references to the County's respondent's brief in the Court of Appeal are abbreviated as (**RB, p. [page].**)

the accident was not "caused by a design worthy of design immunity" is not the same as saying the accident was not "caused by the design."

Regardless, even if *Cameron* was referring to the causation element, nothing in the opinion even comes close to suggesting that such evidence relates to causation *exclusively*, a fact that precludes *Cameron* from being cited as support for any sort of causation-exclusive principle. (*Kinsmand v. Unocal Corp.* (2005) 37 Cal.4th 659, 680 [an opinion is "not authority for propositions not considered"].)

This is not to mention that the Hamptons do not contend the embankment's omission from the plans is fatal to discretionary-approval element in and of itself. Rather, the embankment's absence in this case is relevant to discretionary approval for the sole reason that it obscured the substandard nature of the design at issue. This makes the Hamptons' case quite unlike *Cameron* where "the plans were in accordance with [then-governing] standards of design." (*Cameron*, *supra*, 7 Cal.3d at p. 325.)

How do we know approval here depended on sight-distance measurements taken directly from the plans themselves? Because the plans "include[d] a profile that enable[d] a traffic engineer to draw a line of sight between a driver who is about to reach the intersection on westbound Miller Road and a vehicle northbound on Cole Grade Road to determine the . . . sight distance at the intersection." (Answer, pp. 2–3.)

Because "it is presumed that an official regularly performs his or her official duties," (Answer, pp. 14–15, citing Evid. Code, § 664), we must presume that the engineer followed the County's written protocols when he attempted to verify sight distance from the plans. And yet, the embankment limits sight distance when measured according to the County's written protocols. (E.g., RB, p. 6; 2 AA 363:17–364:4.)

All of the above fosters the inference that when the engineer attempted to verify sight distance from the plans during the approval process, he inevitably drew his measurement line across open space on the plans that, in reality, is occupied by the embankment. This, in turn, gives rise to the inference that the engineer approved the design on the mistaken belief it provided the minimum sight distance County standards require.

To suggest, as the Fourth District does, that this two-step inference is not relevant to the discretionary-approval element of the design-immunity defense, and speaks, if at all, only to the causation element, is inconsistent with the plain meaning of section 830.6.

Traditionally, the "caused by" language in section 830.6 has been understood in its most plain and intuitive sense – "whether . . . the accident was caused by a design defect, and not some other cause." (*Alvis v. County of Ventura* (2009) 178 Cal.App.4th 536, 550.) "Other cause" refers to situations

in which misconduct *other than* negligent design gave rise to the dangerous condition.

Mozzetti v. City of Brisbane (1977) 67 Cal.App.3d 565 (*Mozzetti*), illustrates this distinction. In *Mozzetti*, a motel owner sued a city after a municipal drainage system allegedly caused a flood that damaged his property. The court concluded the city failed to meet *all three* elements of design immunity. Regarding the causation element, the court held:

> Last, but not least, there is overwhelming evidence negating the requisite causal relationship between the design defect and the flooding in question. As pointed out earlier, the record is replete that the inundation of respondents' premises and the damages resulting therefrom *were not attributable solely to the design defect of the Project*, but were caused, at least partially, *by the poor maintenance and clogging of the drainage system.* It is a longstanding proposition articulated in numerous cases that by the force of its very terms, design immunity is limited to a design-caused accident.

(*Mozzetti*, *supra*, 67 Cal.App.3d at p. 574, emphasis added.)

Mozzetti's emphasis on a "design-caused accident" thus confirms a crucial fact: A party cannot bring a pure design-defect lawsuit against a public entity without simultaneously conceding a causal relationship between the design and the accident at issue. (E.g., *Alvis*, *supra*, 178 Cal.App.4th at p. 551 ["The County may rely on the allegations of the complaint to establish causation."].) Indeed, the County's *entire* discussion of the causation element in its motion for summary judgment consisted of the observation that the

Hamptons' complaint alleged a design defect and that "[t]here is no allegation by Plaintiffs that the accident was caused by the County in some other manner." (1 AA 014.)

In so arguing, the County understood something the Fourth District does not: The embankment's presence or absence on the design plans does not alter the fact that, at bottom, the Hamptons' complaint alleges "a design-caused accident." Thus, the Fourth District's suggestion that the outcome might have been different had the Hamptons not conceded causation is unrealistic.

In light of the foregoing, it is perhaps no surprise that the Fourth District's reading of *Cameron* is controversial. Twenty-five years after *Cameron*, the Second District – citing divergent published appellate opinions – observed that "[i]t is not clear whether" the omission of the injury-producing feature from the design plans "relates to the element of causation or discretionary approval." (*Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931, 941, fn. 7 [comparing cases].) Ultimately, *Grenier* characterized the distinction as "academic," and wisely concluded that the omission conceivably impacts *both* factors: "If the injury-producing element was not a part of the discretionarily approved design, immunity is defeated." (*Ibid.*)

Obviously, the Fourth District does not think the distinction is "academic," and is adamant that, under *Cameron*, the omission of the

embankment from the plans at issue was relevant *only* to the causation element. (Slip opn., p. 23, fn. 11; *id.* pp. 29–30.) It has been over 40 years since *Cameron* was decided; it is perhaps time to determine who is right.

2. The County's answer only further confirms a split of authority regarding whether the discretionary-approval element requires proof of a conscious design choice.

Like the Fourth District, the County begins its answer by mischaracterizing the proposition for which *Levin* and *Hernandez* stand. This occurred when the County distinguished a subsequent, unpublished Court of Appeal case, *Shen v. City of San Ramon* (Aug. 29, 2012, A13056), from *Levin* and *Hernandez* on the grounds that *Shen* "does not address whether the discretionary approval element of design immunity requires a showing of compliance with the entity's own standards." (Answer, p. 6.)

But again, neither *Levin* nor *Hernandez* hold that the discretionary-approval element requires compliance with the entity's own standards. Rather, those cases stand for the simple proposition that *if* the design deviates from governing standards, the discretionary-approval element requires the public entity to show that the official who approved the plans *knew they deviated from governing standards.*

Oddly, a few pages after mischaracterizing *Levin* and *Hernandez*, the County perfectly echoed the central theses from those cases when it wrote:

> Thus, section 830.6 provides immunity based on *either* the employee's exercise of discretion in weighing and balancing the risks of a particular design, *or* the entity's exercise of discretion in adopting standards as a matter of policy.

(Answer, p. 13, emphasis in original.)

Implicit here is the belief that when the design deviates from governing standards, the entity must at least demonstrate that the employee who approved the deviation "weigh[ed] and balanc[ed] the risks" of the nonconforming design. And, obviously, one cannot "weigh[] and balanc[e] the risks of a nonconforming design without appreciating the nonconformity in the first place. *Levin* and *Hernandez* could not have said it better.

Of course, the County vehemently disagrees that the intersection design deviated from governing standards. But given the conflicting evidence from the County's own documents and personnel, that is a fight the County cannot win on summary judgment. (*Kerns v. CSE Ins. Group* (2003) 106 Cal.App.4th 368, 396.)

When it was not unknowingly endorsing *Levin* and *Hernandez*, the County was busy advancing a number of arguments in support of the Fourth District's opinion, most of which are borrowed from the opinion itself.

Among these arguments is the County's observation that, "in the 30 years since *Levin* was decided, the only published opinion to follow it on the relevant point is *Hernandez*." (Answer, p. 6.) From that, the County deduces

that "the Hamptons fail to establish a split of authority on an important issue of law necessitating review by this Court." (*Ibid.*)

The County's math is accurate, but its deductive reasoning is not. In emphasizing that only one published opinion followed *Levin* in the case's 30-year history, the County overlooks the fact that, until the Fourth District's opinion, no published appellate decisions disagreed with it either.[2]

Shortly after overlooking *Levin*'s 30-year run as uncontroverted precedent, the County – citing *Becker v. Johnston* (1967) 67 Cal.2d 163; *Baldwin v. State* (1972) 6 Cal.3d 424; *Ramirez v. City of Redondo Beach* (1987) 192 Cal.App.3d 515; *Grenier, supra*, 57 Cal.App.4th 931; *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242 – claims that the Fourth District's holding is supported by a "long line of cases."

But with the possible exception of *Laabs*, none of those cases involved a substandard design or a dangerous condition that was not disclosed in the plans (let alone a combination of both). Where plans are presumably accurate and/or the design conforms to governing standards, it is

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[2] That the Fourth District would be the court to end *Levin*'s 30-year run is ironic given the court has long emphasized the Legislature's presumptive awareness of published appellate opinions construing its enactments, and therefore that one can infer a degree of acquiescence if the Legislature has not acted to correct the case law in question. (See *Conrad v. Medical Board of California* (1996) 48 Cal.App.4th 1038, 1051, quoting *People v. Pacific Health Corp.* (1938) 12 Cal.2d 156, 160–161.)

unremarkable to say that mere approval by an authorized official satisfies the discretionary-approval element. But that conclusion does not necessarily carry over to cases involving misleading plans and substandard designs. (See *Kinsmand, supra*, 37 Cal.4th at p. 680.)

To be sure, the Fourth District's opinion is an outlier, a fact that becomes even more apparent when one looks at its foundational legal assumptions. Take, for example, the Fourth District's ultimate holding:

> With respect to the discretionary approval element, we conclude that the trial court properly determined that the County presented evidence establishing that *an employee with discretionary authority approved the Plans* for the redesign of the intersection at issue, and that *nothing more is required to establish the [discretionary-approval] element of design immunity.*

(Slip opn., p. 30, emphasis added.)

This directly conflicts with the holding in *Mozzetti, supra*, 67 Cal.App.3d 565, wherein the court held that mere approval by an authorized official (or officials) was insufficient:

> When tested by the foregoing standards, an independent review of the record reveals that the evidence falls short of showing that the plans or design of the Project was approved in advanced of construction by the city council or an authorized offer. *Although there was testimony to the effect that the mall Project was approved by the city council,* the evidence is uncontradicted that the one-page surface drawing so approved *did not show the requisite details of the road design; . . .*"

Also problematic is the Fourth District's conclusion that the discretionary-approval element does not require proof of a conscious design

choice (e.g., slip opn., p. 20), a conclusion that conflicts with *Anderson v. City of Thousand Oaks* (1976) 65 Cal.App.3d 82.

In *Anderson*, a plaintiff alleged that an intersection was dangerous due to the absence of signage. Like this case, "the existence of the first element [i.e., causation] [was] undisupted." (*Id.* at p. 89.) Thus, the *Anderson* court confined its decision to "the latter two elements" – discretionary approval and the reasonableness of the design. (*Ibid.*) In analyzing the discretionary-approval element, the court emphasized evidence that traffic signs "had been considered and rejected" and therefore that their omission must have been "a conscious design choice." (*Id.* at p. 90.)

Finally, the Fourth District's conclusion that the omission of a dangerous condition relates exclusively to the causation element (slip opn., p. 23, fn. 11; *id.* pp. 29-30), directly conflicts with *Grenier*, *supra*, 57 Cal.App.4th 931, which the Fourth District and County continue to mistake as a friendly opinion.

It is true that *Grenier* concluded that the discretionary-approval element had been met in light of evidence that the plans were approved by the city engineer. (*Id.* at p. 941.) But *Grenier* did not involve an allegedly substandard design, nor was the dangerous condition at issue missing from the design plans. Yet the *Grenier* court was careful to note that such evidence would have changed the outcome in its case, concluding that "[i]f the injury-

producing element was not a part of the discretionarily approved plans, immunity is defeated" regardless of whether such evidence is analyzed under "the element of causation or discretionary approval." (*Id.* at p. 941, fn. 7.)

B. This case is an ideal opportunity to resolve the split of authority regarding Government Code section 830.6.

It should be clear by now that the Fourth District's opinion marks a split of published appellate authority on important questions of law. And if the Hamptons' counsel have done their job, this Court likely regards the Fourth District's opinion with a healthy dose of skepticism. If so, the only remaining question is why the Court should use this *particular* case to resolve that split of authority.

1. The Hamptons are entitled to a reversal if *Levin* and *Hernandez* are good law.

In their petition, the Hamptons emphasized that one virtue of granting review is that a resolution of these legal issues would be outcome determinative for the Hamptons' appeal. (Petition, p. 7.) Although the County denies that this should factor into the Court's decision to grant review, it tellingly argues that design immunity would still be warranted even if the Court regards *Levin* and *Hernandez* as good law.

The County begins by claiming that the design "required drivers to stop at a limit line and roll forward past the embankment for an unobstructed view of traffic." (Answer, p. 1.)

But the County's written standards require 550 feet of sight distance looking south from a very specific point on Miller Road – 10 feet back from the pavement edge on Cole Grade Road). (1 AA 162-163.) While County engineers could, theoretically, decide to abandon that standard in favor of the increased sight distance a motorist can achieve by rolling past the pavement edge and up to the lane line, there is absolutely no proof the County engineer who approved the plans intended to do so. After all, how could he approve plans on the assumption that drivers would "roll forward past the embankment for an unobstructed view of traffic," if he did not know the embankment was there in the first place?

The answer cannot be that engineers simply approve intersections on the assumption motorists will roll past whatever impediments to sight distance they encounter. If so, County officials would not have bothered to "previously so approve[]" very specific sight distance standards.

The County's next argument is the false assertion that the Hamptons and their expert "agreed the County's plans improved sight distance at the intersection." (Answer, p. 2; *id.* at p. 3, citing 2 AA 368-369; *id.* at p. 10.)

But there were at least two impediments to sight distance at the intersection: the slope of Cole Grade Road and the now-familiar embankment on the southeast corner of the intersection was the second.

The 1995 project addressed the first impediment by lowering Cole Grade Road by five vertical feet over a horizontal distance of 500 feet. All the Hamptons have conceded is this obviously reduced the impediment to sight distance presented by the crest of Cole Grade Road. (2 AA 368-369.)

But the Hamptons never conceded that the 1995 project *taken as a whole* resulted in a net gain of sight distance for westbound Miller Road motorists. As a purely factual matter, they could not make that concession because, again, the plans do not specify what the sight distance was before the project (or how much, if any, sight distance would be gained). Moreover, as discussed in the petition for review, all indications are that the project likely made the embankment a *bigger* problem by adding turn pockets to Cole Grade Road, which caused engineers to move the northbound lane of Cole Grade Road closer to westbound Miller Road. This made the embankment a bigger impediment to sight distance for the same reason that rolling forward toward Cole Grade Road makes it a smaller one. (1 AA 152:27-28; see also 2 AA 363:17-364:4.)[3]

The County's arguments against granting review in this case conclude with the assertion that, in any event, *Levin* and *Hernandez* are "factually distinguishable from this case." (Answer, p. 7.)

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[3] It is perhaps no coincidence, then, that the field engineer who first recommended lowering the surface of Cole Grade Road recommended *against* adding turn pockets to the intersection. (1 AA 092.)

The County's belief that *Levin* is distinguishable is based on the absurd assumption that because the Hamptons conceded the causation element, the courts and parties must pretend the embankment is present on the plans. The County demonstrated this bizarre logic when it wrote:

> *Levin* analogized the situation before it to the one before the Court in *Cameron* [citation], where the feature that allegedly caused the injury was not part of the approved design plan. [Citation.] By contrast, *it is undisputed that the feature allegedly causing the injury in this case was part of the design plan.*

(Answer, p. 7, emphasis added.)

But the Hamptons' acknowledgement that the causation element has been met does not alter the *fact* that the embankment is not on the design plans at issue, a trait which brings this case swiftly in line with *Levin*. (See *Levin*, *supra*, 146 Cal.App.3d at p. 418 ["Here, as in *Cameron*, the design plan contained no mention of the steep slope of the embankment."].)

The County's attempt to distinguish *Hernandez* is similarly misguided. Essentially, the County makes much of the fact that the plaintiff in *Hernandez* presented affirmative evidence that "applicable guidelines required the design to obtain formal approval, which would be recorded in a 'project approval document.'" (*Hernandez*, *supra*, 114 Cal.App.4th at pp. 380–381.)

In so arguing, the County overlooks the fact that in *Hernandez*, the substandard nature of the design was apparent from the face of the plans,

thus prompting the plaintiff to resort to circumstantial evidence that the deviation from applicable standards was not a conscious design choice.

By contrast, the substandard nature of *these* plans is obscured by the embankment's absence from them, since the embankment is *the reason they are substandard in the first place.* In light of the County's insistence that the plans served as the basis for the approval process (e.g., Answer, pp. 2–3), this is all the Hamptons needed in order to create a triable issue of fact on the issue of discretionary approval.

This is not to mention that because design immunity is the County's affirmative defense and as the moving party on summary judgment, it was the County's burden to establish discretionary approval of the substandard intersection design, not the Hampton's burden to conclusively negate it. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.)

2. Review of the Fourth District's opinion is the only reliable way to prevent inconsistent judgments in the future.

As discussed in the petition, the other virtue of granting review in this case is that it would allow this Court to nip a burgeoning split of authority in the proverbial bud. The benefits of doing so need little elaboration. Indeed, assuming the manifest deficiencies in the Fourth District's opinion are not lost on the wise Justices of this Court, perhaps the better question is not

whether the Court should act, but whether the Court should simply depublish the Fourth District's opinion in lieu of a full-dress review.

The obvious answer is that while doing so might spare future litigants a similar fate, it will be of little consolation to the Hamptons.

The less obvious answer is that merely depublishing the Fourth District's opinion will, much like severing a weed from its roots, do little to prevent the problem from resurfacing. This is because, as the Fourth District's opinion itself demonstrates, a court intent on departing from *Levin* and *Hernandez* can read support for that position into other published opinions long on the books.

Cameron is the most obvious example. If its "caused" language inspired the Fourth District's strict holding in this case, it can surely inspire another court to draw similar conclusions in the future. In fact, it arguably has, in *Higgins v. State of California* (1997) 54 Cal.App.4th 177, which treated the omission of the dangerous condition from design plans as a causation issue. (Though, to be fair, *Higgins* did not go so far as to hold that such evidence is relevant to causation *exclusively*.)

And, of course, there is *Alvis*, *supra*, 178 Cal.App.4th 536, and its remark that "section 830.6 does not state the approval must be knowing or informed." (*Id.* at p. 552.) If a court to deviate from *Levin* and *Hernandez*, it is hard to think of more superficially tempting language than that.

These examples demonstrate that while the Fourth District's opinion might be the manifest "head of the monster," cutting that head off by depublishing the opinion will not prevent something equally dangerous from growing back in its place. In the interest of a lasting peace, then, the only real option is to grant review of *this* case and resolve decades' worth of disagreement once and for all.

II.

CONCLUSION

The Fourth District held that a public entity is entitled to design immunity for a substandard design, even when the dangerous condition that renders that design substandard was not depicted on the plans used during the approval process. It insists that this conclusion was compelled by this Court's opinion in *Cameron*, and might have been avoided had the Hamptons not conceded the causation element.

But this strained reading of *Cameron* conflicts with the plain meaning of Government Code section 830.6. Not surprisingly, numerous Courts of Appeal have implicitly, if not expressly, rejected the Fourth District's interpretation of *Cameron*.

This case presents an ideal opportunity to clarify *Cameron* and resolve this split of published appellate authority. Accordingly, the Hamptons pray this Court will grant review of the Fourth District's decision.

Dated: October 3, 2013

By: _____
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CERTIFICATE OF COMPLIANCE

As required by California Rules of Court, rule 8.504(d), I certify that, according to the word-count feature in Microsoft Word 2011, this "Reply to Answer to Petition for Review" contains **4,188** words, including footnotes, but excluding any content identified in rule 8.504(d)(3).

Dated: October 3, 2013

By: _____

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PROOF OF SERVICE

I, the undersigned, say: I am over 18 years of age, employed in the County of San Diego, California, and not a party to the subject cause. My business address is 2550 Fifth Ave., Ste. 1100, San Diego, California, 92103.

On Oct 3, 2013, I served the attached:

Reply to Answer to Petition for Review

of which a true and correct copy of the document filed in the cause is affixed by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Thomas E. Montgomery
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Hon. Timothy Taylor
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330 West Broadway
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California Court of Appeal
Fourth Appellate District, Division One
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Each envelope was then sealed, and with the postage thereon fully prepaid, deposited in the United States mail by me at San Diego, California, on Oct 3, 2013.

I declare under penalty of perjury that the foregoing is true and correct, and this declaration was executed at San Diego, California, on Oct 3, 2013.

Diane DeCarlo