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'S OPENING BRIEF ON THE MERITS

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

1.1. Issue Presented

Per this Court's order of April 28, 2021, the sole issue is: Can a public entity be held liable under Government Code section 830.8[1] for failure to warn of an allegedly dangerous design of public property that is subject to Government Code section 830.6[2] design immunity?

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[1] "Neither a public entity nor a public employee is liable under this chapter for an injury caused by the failure to provide traffic or warning signals, signs, markings or devices described in the Vehicle Code. Nothing in this section exonerates a public entity or public employee from liability for injury proximately caused by such failure if a signal, sign, marking or device (other than one described in Section 830.4) was necessary to warn of a dangerous condition which endangered the safe movement of traffic and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care." (Gov. Code, §830.8.)

[2] "Neither a public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of a construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved, if the trial or appellate court determines that there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor. Notwithstanding notice that constructed or

1.2. Summary of the Case

Plaintiff's decedent was riding his bicycle on a boulevard in the City of Rancho Palos Verdes. At an intersection, he tried to ride straight through a right-turn lane. He struck a tractor-trailer turning right and was killed. His mother sued the City and other defendants. She alleged that the City was liable under Government Code section 835[3] for a dangerous condition of public

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improved public property may no longer be in conformity with a plan or design or a standard which reasonably could be approved by the legislative body or other body or employee, the immunity provided by this section shall continue for a reasonable period of time sufficient to permit the public entity to obtain funds for and carry out remedial work necessary to allow such public property to be in conformity with a plan or design approved by the legislative body of the public entity or other body or employee, or with a plan or design in conformity with a standard previously approved by such legislative body or other body or employee. In the event that the public entity is unable to remedy such public property because of practical impossibility or lack of sufficient funds, the immunity provided by this section shall remain so long as such public entity shall reasonably attempt to provide adequate warnings of the existence of the condition not conforming to the approved plan or design or to the approved standard. However, where a person fails to heed such warning or occupies public property despite such warning, such failure or occupation shall not in itself constitute an assumption of the risk of the danger indicated by the warning." (Gov. Code, § 830.6.)

[3] "Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the

property: the lack of a bicycle lane on the stretch of boulevard leading up to the intersection. She further alleged that the City was liable under Government Code section 830.8 for failing to warn of a hidden trap, the absence of the bicycle lane.

The City obtained summary judgment based on design immunity under Government Code section 830.6, because the absence of the bicycle lane was reflected in approved plans. The trial court's order did not expressly address the failure to warn theory.

In a published decision, the Second District Court of Appeal, Division Four, affirmed that the City was entitled to design immunity. But it remanded the issue of whether the City was entitled to summary judgment of the failure to warn theory. The appellate court ruled that under *Cameron v. State of California* (1972) 7 Cal.3d 318, 326-327, the City's entitlement to design immunity does not necessarily preclude its liability for failure to warn. The appellate court expressly disagreed with

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dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:
(a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
(b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition." (Gov Code, § 835.)

Weinstein v. Department of Transportation (2006) 139 Cal.App.5th 52, 61's holding that entities entitled to design immunity for a dangerous condition may not be held liable for failure to warn of that dangerous condition.

1.3. Summary of Argument

Weinstein, *supra*, and *Compton v. City of Santee* (1993) 12 Cal.App.4th 591, 600 correctly hold that "[i]t would be illogical to hold that a public entity immune from liability because the design was deemed reasonably adoptable, could then be held liable for failing to warn that the design was dangerous."

Government Code section 830.6 sets forth a broad immunity: it immunizes a public entity from liability for an allegedly dangerous condition set forth in an approved design. By its terms, it covers all statutory liability arising under the chapter of the Government Claims Act addressing dangerous conditions of public property. It sets forth no exception for failure to warn of that condition. Instead, as amended in 1979, section 830.6 contains its own *limited* exception for failure to warn: If changed physical circumstances render the property no longer in conformity with a plan or design that could be reasonably approved, and the entity cannot remedy the property, the immunity remains "so long as the public entity shall reasonably attempt to provide adequate warnings of the existence of the

condition . . . ." That limited provision for loss of immunity is incompatible with liability for failure to warn.

Further, the failure to warn provision of Government Code section 830.8 is merely an exception to the limited immunity (for failure to provide warning signs) that section 830.8 provides. Nothing in that statute, or any other indicator of legislative intent, indicates that the legislature intended section 830.8's "concealed trap" provision to be an exception to section 830.6's broad immunity.

Interpreting a failure to warn exception into design immunity would also impose practical problems. A public entity that has met all of the requirements for summary judgment under section 830.6 (including the reasonableness element, decided by the court as an issue of law) would nevertheless be unable to obtain summary judgment for the immunized defect, so long as an issue of fact on failure to warn could be found. It is unclear how failure to provide warning signs can be considered separate from the design of a roadway, since in projects like the one at issue the signage is *part of* the design, as is the lack of signage. The impracticality and confusion of applying failure to warn to immunized designs is shown in this case, where the appellate court admitted it could not tell what kind of warning plaintiff claimed the City should have provided.

Further, the view that section 830.8 liability for failure to warn is not subject to section 830.6 immunity is based on a view of active versus passive negligence rooted in common law. This Court has clarified that public entity liability for dangerous property conditions must be based on Government Code section 835, rather than common law negligence. Section 830.6 design immunity applies to all liability under section 835 for constructed or improved property conditions that meet section 830.6's elements. Passive versus active negligence is irrelevant.

This Court's 1972 decision in *Cameron v. State*, *supra*, 7 Cal.3d 318 does not dictate otherwise. *Cameron*'s discussion of section 830.6's interaction with section 830.8 was arguably dictum. Further, it is outdated in light of both section 830.6's 1979 amendment and this Court's decisions emphasizing that public entity liability for dangerous conditions be based on statute, rather than on common law negligence principles. To the extent the Court disagrees, it should reconsider and overrule *Cameron*'s holding on the subject.

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2.0. Summary of Material Facts

2.1. The Accident

In 2016, decedent Jonathan[4] Tansavatdi was riding his bicycle south, at approximately 30-45 miles per hour, on Hawthorne Boulevard in the City of Palos Verdes. (1AA:12, 232-233, 244-245.) He kept up with the flow of traffic. (1AA:233.)

Sections of Hawthorne Boulevard along which Jonathan rode had a bicycle lane. While riding on those sections, Jonathan did not use the lane. (1AA:235-237, 239-241, 253, 263-264.) Instead, approaching the accident location, he used the number 2 lane. (1AA:235-236, 263-265.)

There was no bicycle lane on Hawthorne Boulevard between Dupre Drive and Vallon Drive. (1AA:324-325.) There is an eight percent downgrade approaching Vallon Drive. (1AA:284.) Approaching Vallon, there is signage advising those approaching to slow down. (1AA:284.)

Jonathan attempted to ride straight through the right-turn-only lane on southbound Hawthorne Boulevard at the intersection with Vallon Drive. (1AA:246.) A motorist honked, trying to alert Jonathan of an imminent collision with a truck turning in front of him. (1AA:238, 249, 250.)

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[4] Because the decedent and the plaintiff share the same last name, the decedent will be referred to as Jonathan. No disrespect is intended.

Jonathan looked up, and wobbled, apparently trying to stop. He hit the side of the truck. (1AA:238.) The collision killed him. (1AA:12.)

2.2. The Absence of a Bicycle Lane on Hawthorne between Dupre and Vallon Is Shown on an Approved Plan

Plans for a 2009 City of Rancho Palos Verdes street resurfacing project included the resurfacing and restriping of Hawthorne Boulevard. (1AA:137.) The plans included a bicycle lane in some portions of Hawthorne Boulevard. The plans did not include a bicycle lane in the portion of the boulevard between Dupre Drive and Vallon Drive. (1AA:137-160[5], 347-348.) The Director of Public Works for the City approved the plans on behalf of the City. (1AA:133, 137-160.) The City Council also approved the plans. (1AA:165, 176, 186, 188, 349.)

Between the date the plan was approved and implemented and the accident date, there were no changes in physical conditions in the area. (1AA:108, 161, 188, 349.)

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[5] The version of the plans in the Appellant's Appendix is reduced. Full-sized plans were lodged with the trial court, and with the Second District Court of Appeal. Photographs of plan details appear in the appellate decision, *Tansavatdi v. City of Rancho Palos Verdes* (2021) 60 Cal.App.5th 423 [274 Cal.Rptr.3d 512, 517].

In the decade before the accident, there had been only one accident in the area involving a bicycle. (1AA:336.)

2.3. Expert Evidence Regarding Warnings

In a declaration submitted in opposition to summary judgment, plaintiff Betty Tansavatdi's expert witness Edward Ruzak opined that the design of the roadway causes bicyclists to ride their bicycles at relatively high speeds, with an average of 35 miles per hour, due to the eight percent downgrade from Dupre Drive to Vallon Drive. (2AA:785.) Ruzak further opined that the absence of a bicycle lane between Dupre Drive and Vallon Drive amounted to a failure to warn of this condition:

> "To be safe for its intended and reasonably foreseeable use, at a minimum, Hawthorne Boulevard between Dupre Drive and Vallon Drive must be striped with a continuous Class 2 bicycle lane. Without a bicycle lane, Hawthorne Boulevard fails to warn users of the roadway, including bicyclists, about the dangerous condition. This dangerous condition endangers the safe movement of vehicles and bicyclists and is not reasonably apparent to and would not have been anticipated by a bicyclist or motorist using Hawthorne Boulevard approaching Vallon Drive. A Class 2 bicycle lane, among other things, provides positive and direct guidance to both

bicyclists and motorists as to the safe and intended use of the roadway, including redirecting bicyclists to areas of the roadway where they are least likely to be involved in a traffic collision." (2AA:786.)

Ruzak also opined that Class 2 bicycle lanes provide the motoring public warning of the likely presence of bicycles. (2AA:787.)

3.0. Procedural History

Jonathan's mother, Betty Tansavatdi (hereafter, "Tansavatdi"), sued the City and other defendants for Jonathan's death. (1AA:10-12.) She asserted a single cause of action: liability under Government Code section 835 for a dangerous condition of public property. (1AA:10, 12.) She alleged that the City created a dangerous condition. (1AA:12-15.) She further alleged that the City failed to provide signs, warnings, or other devices to warn of dangerous conditions that endangered the safe movement of traffic and that would not be reasonably apparent to or anticipated by a person exercising due care. (1AA:13-14.)

The City moved for summary judgment. The City argued that Government Code section 830.6's design immunity shielded it from liability for the absence of a bicycle lane. (1AA:27-29, 39-44.) The motion included an argument that under *Compton v. City of Santee* (1993) 12 Cal.App.4th 591, 600, the City's

entitlement to design immunity barred any liability for failure to warn under Government Code section 830.8. (1AA:44, fn. 2.)

The Los Angeles Superior Court granted the City summary judgment. (5AA:1536-1547.) The trial court ruled that Government Code section 830.6 was a complete defense to Tansavatdi's cause of action. (5AA:1546.) The trial court's order addressed Tansavatdi's failure to warn theory as a contention that the roadway design had become dangerous in practice. (5AA:1545.) The court ruled that the evidence supported on the failure to warn theory "does not demonstrate that there was any change in physical conditions from the time the plan was implemented to the date of decedent's accident." (5AA:1545.)

Tansavatdi appealed the judgment in the City's favor. (5AA:1580, 1592.)

On appeal, Tansavatdi contended design immunity did not apply. She alternatively argued that even if design immunity applied, her failure to warn theory should survive design immunity. (*Tansavatdi*, *supra*, 60 Cal.App.5th 423 [274 Cal.Rptr.3d 512, 519].)

On January 29, 2021, the Second District Court of Appeal, Division 4, issued a published decision affirming in part and reversing in part the trial court's decision. (*Tansavatdi*, *supra*, 60 Cal.App.5th 423 [274 Cal.Rptr.3d at p. 528].) The appellate court affirmed the trial court's ruling that the City was entitled

to the defense of design immunity. (*Id.* at p. 526.) But it ruled that "design immunity does not, as a matter of law, preclude liability under a theory of failure to warn of a dangerous condition." (*Ibid.*)

The appellate court held that in *Cameron v. State of California* (1972) 7 Cal.3d 318, 329, this Court "concluded that design immunity for a dangerous condition would not necessarily shield the state from liability for a failure to warn of the same dangerous condition." (*Tansavatdi*, *supra*, 60 Cal.App.5th 423 [274 Cal.Rptr.3d at p. 527].) The appellate court expressly disagreed with the reasoning in *Weinstein v. Department of Transportation*, *supra*, 139 Cal.App.4th 52, 61, that an entity entitled to design immunity for a dangerous condition of its property may not be held liable for failure to warn of the dangerous condition. (*Tansavatdi*, *supra*, 274 Cal.Rptr.3d at p. 527.)

"Thus," the appellate court concluded, "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. [Footnote.]" (*Tansavatdi*, *supra*, 60 Cal.App.5th 423 [274 Cal.Rptr.3d at pp. 527-528].)

The appellate court qualified its ruling on failure to warn with two footnotes.

First, when recounting Tansavatdi's theory that the absence of a bicycle lane at the accident area was a concealed trap, for which a warning was necessary, the court inserted a footnote: "It is unclear precisely what kind of warning appellant claims the city should have provided." (*Tansavatdi*, *supra*, 60 Cal.App.5th 423 [274 Cal.Rptr.3d at p. 526 & fn. 17].)

Second, the court footnoted its ruling that design immunity does not necessarily preclude liability for failure to warn with this elaboration:

> "Nothing in *Cameron*, however, suggests that design immunity cannot shield a failure to warn that is itself caused by a qualifying design under section 830.6. Indeed, as noted, the plaintiffs there alleged that the failure to warn 'was not the result of any design or plan which would confer immunity under section 830.6 ....' (*Cameron*, *supra*, 7 Cal.3d at 327, 102 Cal.Rptr. 305, 497 P.2d 777.) Thus, appellant may not assert that the absence of a bicycle lane itself *constituted* the failure to warn. As discussed above, design immunity shields the city's decision not to include a bicycle lane at the site of the accident." (*Tansavatdi*, *supra*, 60 Cal.App.5th 423 [274 Cal.Rptr.3d at p. 528 & fn. 18] [emphasis in original].)

The appellate court remanded the matter to the trial court to consider whether summary judgment is appropriate as to Tansavatdi's failure to warn theory. (*Tansavatdi*, *supra*, 60 Cal.App.5th 423 [274 Cal.Rptr.3d at p. 528].)

This Court granted the City's petition for review.

4.0. Discussion

4.1. *Compton v. City of Santee* and *Weinstein v. Department of Transportation* Properly Interpret Design Immunity as Applying to Liability for Failure to Warn

Both *Weinstein*, *supra*, 139 Cal.App.4th 52, 61 and the case it follows—*Compton*, *supra*, 12 Cal.App.4th 591, 600—base their holdings on logic: "It would be illogical to hold that a public entity immune from liability because the design was deemed reasonably adoptable, could then be held liable for failing to warn that the design was dangerous."

An analysis of sections 830.6 and 830.8 confirms that logic. Section 830.6 is a broad immunity covering any injury from a dangerous condition caused by a construction of or improvement to public property to which the three elements of design immunity apply, unless the immunity is lost under the provisions of that statute. Section 830.8's failure to warn provision is a limited exception to a limited immunity (for failure to provide

traffic regulatory or warning signs) that cannot in itself create liability without an underlying dangerous condition. (See *Pfeiffer v. County of San Joaquin* (1967) 67 Cal.2d 177, 184.) To hold that section 830.8's exception to one immunity trumps a different and broader immunity is illogical.

Further illustrating that illogic is the conflict between section 830.8's failure to warn provision and section 830.6's own provisions governing attempts to warn of a condition for which design immunity has been lost; and the conflict with the legislative intent that, if the first two elements of section 830.6 immunity are established as undisputed, the third element (substantial evidence of reasonableness) is determined by the court as an issue of law. Finally, the uncertainty expressed by the appellate court's qualifying footnotes in this case show how excepting failure to warn from design immunity is impractical and unworkable.

Logic therefore dictates that section 830.6 design immunity applies to section 830.8 failure to warn.

4.1.1. Rules of Statutory Construction: Government Code Immunity Prevails Over Statutory Liability unless Legislature Intended Otherwise

In the wake of this Court's decision in *Muskopf v. Corning Hospital Dist.* (1961) 55 Cal.2d 211, the Legislature adopted what

was then called the Tort Claims Act, and is now titled the Government Claims Act. (*Caldwell v. Montoya* (1995) 10 Cal.4th 972, 979-980; Gov. Code, § 810, subd. (b).) The Act "establishes the basic rules that public *entities* are immune from liability except as provided by statute ([Gov. Code,]§ 815, subd. (a)) . . . ." (*Id.* at p. 980 [emphasis in original].) The Act sets forth various statutory provisions for public entity liability, and numerous statutory immunities. (Gov. Code, § 815, et seq.)

"Normally, under the Tort Claims Act [now the Government Claims Act], immunities from the obligation to provide monetary compensation supersede statutory liability. It is generally recognized that a statutory governmental immunity overrides a statute imposing liability. ([Gov. Code] § 815, subd. (b).)" (*Gates v. Superior Court (Hirata)* (1995) 32 Cal.App.4th 481, 510.)

To illustrate that principle, the *Gates* court cited this Court's reasoning in *State of California v. Superior Court (Veta)* (1974) 12 Cal.3d 237, 246. (*Gates*, *supra*, 32 Cal.App.4th at p. 511.) In *Veta*, the Court rejected an argument that the Government Code immunities for permitting activities (Gov. Code, §§ 818.4, 821.2) did not apply in writ petition cases, because Code of Civil Procedure section 1095 (allowing damages in writ proceedings) superseded the immunities. The Legislature, the Court explained, could not have intended the

general provisions of section 1095 to prevail over the specific immunities granted in the Government Code. Otherwise, a plaintiff could nullify the immunities by simply combining a petition for a writ of mandate with every claim for damages for failure to issue a permit. (*Ibid.*) "The Legislature could not have intended to sanction evasion of the statutory immunity which it provided in sections 818.4 and 821.2 of the Government Code by such a simple pleading device." (*Ibid.*)

Accordingly, absent a clear indication of legislative intent that statutory immunity is withheld or withdrawn, a specific statutory immunity applies to shield a public defendant from liability imposed by a specific statute. (*O'Toole v. Superior Court (San Diego Community College District*) (2006) 140 Cal.App.4th 488, 504 [dealing with public employee defendants], citing *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 986 [same]; accord, *County of Los Angeles v. Superior Court (West)* (2009) 181 Cal.App.4th 218, 231.)

This analysis applies squarely to Government Code section 830.6 design immunity. *Mikkelsen v. State of California* (1976) 59 Cal.App.3d 621, 629-630 rejected the argument that a plaintiff could evade section 830.6 design immunity by pleading that a faulty design of a public improvement was a nuisance, for which the State could be held liable under Civil Code section 3479, rather than a dangerous condition of public property under

Government Code section 835. The core of the case, the *Mikkelsen* court explained, remained the allegedly defective plan or design of the improvement. (*Id.* at p. 628.) "To permit the effectiveness of the design immunity embodied in Government Code section 830.6 to depend upon whether a cause of action is pleaded on the theory of nuisance or on that of negligence would be to thwart the legislative purpose." (*Id.* at p. 630.)

As explained below, this principle applies squarely to section 830.6's interaction with section 830.8.

4.1.2. Design Immunity Applies Broadly, and Failure to Warn Is only an Exception to a Different Immunity; There Is No Clear Legislative Intent That the Former Is Withheld or Withdrawn from the Latter

Applying the rules described above to Government Code section 830.6's design immunity and Government Code section 830.8's failure to warn provision, there is no clear indication of legislative intent that section 830.6's statutory immunity is withheld or withdrawn from any liability for a dangerous condition of public property under section 830.8.

Government Code section 830.6 creates an affirmative defense to liability. (*Quigley v. Garden Valley Fire Protection Dist.* (2019) 7 Cal.5th 798, 809.) It "immunizes public entities for

injuries caused by a properly approved plan or design of public property." (*Ibid*.)

Government Code section 830.8 generally immunizes public entities and employees from liability for accidents caused by the entity's failure to provide a signal, sign, marking, or device to warn of a dangerous condition that endangers the safe movement of traffic. (Gov. Code, §830.8; *Sun v. City of Oakland* (2008) 166 Cal.App.4th 1177, 1193.) The immunity applies to all warning signs and devices that conform to the standards promulgated by the Department of Transportation. (*Kessler v. State of California* (1988) 206 Cal.App.3d 317, 321.)

Government Code section 830.8's immunity is qualified by a "concealed trap" exception: it does not apply "if a signal, sign, marking or device (other than one described in Section 830.4) was necessary to warn of a dangerous condition which endangered the safe movement of traffic and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care." (Gov. Code, § 830.8.)[6] The immunity

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[6] Government Code section 830.4 provides: "A condition is not a dangerous condition within the meaning of this chapter merely because of the failure to provide regulatory traffic control signals, stop signs, yield right-of-way signs, or speed restriction signs, as described by the Vehicle Code, or distinctive roadway markings as described in Section 21460 of the Vehicle Code."

therefore does not apply "where the failure to post a warning sign results in a concealed trap for those exercising due care . . . ." (*Kessler*, *supra*, 206 Cal.App.3d at pp. 321-322.)

Important to this analysis, this Court has established that section 830.8's failure to warn exception is not in itself a statutory ground for public entity liability. Instead, the exception does not come into play "unless existence of a 'dangerous condition' within the statutory definition is first shown." (*Pfeifer v. San Joaquin County*, *supra*, 67 Cal.2d 177, 184.) Therefore, unless the "concealed trap" is itself a dangerous condition of public property as defined by Government Code section 830, subdivision (a),[7] and meets the conditions for liability prescribed in Government Code section 835, the public entity is not liable for injury caused by that "trap."

Because "failure to warn" liability under section 830.8 is simply a kind of dangerous condition liability under section 835, the question is whether there is a clear indication of legislative intent that section 830.6's statutory immunity is withheld or

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[7] "As used in this chapter:
(a) 'Dangerous condition' means a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used." (Gov. Code, §830, subd. (a).)

withdrawn from dangerous conditions of public property that amount to "concealed traps." There is no such indication.

Analysis of the Legislature's intent in passing a statute begins (and often ends) with the statute's plain language. (*Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 860-861.) That language controls the Court's interpretation, unless its words are ambiguous. (*Kobzoff*, *supra*, at p. 861.)

Section 830.6's language does not show any legislative intent to withhold or withdraw the statute's immunity from any dangerous condition of public property that meets the statute's definition—unless the statute's express criteria for losing design immunity is met. (See *Cornette v. Department of Transp.* (2001) 26 Cal.4th 63, 69, 71.) Under section 830.6, "Neither a public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of a construction of, or an improvement to, public property" if the statutory criteria is satisfied. The "chapter" referred to is Chapter 2 of Part 2, Division 3.6, Title 1 of the Government Code. That chapter governs liability for dangerous conditions of public property. The language therefore covers every dangerous condition of public property that meets the statute's criteria.

Nothing in section 830.6's language exempts from that immunity dangerous conditions that are caused by concealed traps about which the entity failed to warn.

Turning to the language of section 830.8, nothing on the face of that statute exempts dangerous conditions that amount to concealed traps from section 830.6's design immunity. To the contrary, section 830.8's provisions are primarily directed toward conditions of improved or constructed public property—the type of property where "traffic or warning signals, signs, markings, or devices described in the Vehicle Code" might be necessary, and where "a dangerous condition which endangered the safe movement of traffic" might appear. (Gov. Code, § 830.8.) That is the sort of property addressed in section 830.6. Yet section 830.8 does not mention section 830.6's design immunity. Instead, section 830.8 sets forth a *separate* immunity (for failure to provide traffic or warning signs); and an exception *to that immunity*.

Nothing in this statutory language indicates—clearly or otherwise—that the Legislature intended section 830.8's exception to *section 830.8's immunity* to also serve as an exception to *section 830.6's immunity*. To the contrary, it indicates that any dangerous condition of constructed or improved public property that amounts to a "concealed trap" under section 830.8 is nevertheless subject to design immunity

under section 830.6. There is no construction of this language that would result in an interpretation that the dangerous conditions exempted from section 830.8's immunity are necessarily *also* exempted from section 830.6's immunity. There is therefore no ambiguity on this point. (See *City of Emeryville v. Cohen* (2015) 233 Cal.App.4th 293, 304 [defining statutory ambiguity].)

Courts are not free to add text to the language the Legislature selected. (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 350, citing Code Civ. Proc., § 1858 [interpreting Gov. Code, § 830.6].) The Court should not select an interpretation of sections 830.6 or 830.8 that conflicts with the statutes' language. (*Hampton*, *supra*, at p. 350.)

Section 830.6's broad immunization of dangerous conditions of constructed or improved property contains no exemption for conditions that are "concealed traps" under section 830.8. Reading an exemption into section 830.6 conflicts with the Legislature's chosen language. Interpreting section 830.8's failure to warn exception to section 830.8's warning-sign immunity as *also* applying to section 830.6's design immunity finds no support in either statute's language.

Should this Court disagree with these points, and consider section 830.6's or section 830.8's language ambiguous on this point, the Court may consider other aids, such as the statutes'

purposes, their legislative history, and public policy. (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 738.)

None of those sources indicate any legislative intent that section 830.6's broad immunity should not apply to the property conditions discussed in the failure to warn provision in section 830.8.

The purpose of section 830.6 design immunity is separation of powers: Preventing courts from reweighing public entities' and employees' discretionary decisions on the reasonableness of plans and designs. (*Hampton*, *supra*, 62 Cal.4th at p. 353.) That purpose is served by applying section 830.6 immunity to dangerous property conditions that include "concealed traps" covered by section 830.8's failure to warn exception. Separation of powers considerations apply to the design of such conditions.

The purpose of section 830.8 is straightforward: to confer immunity for failure to post warning signs and devices for which provision is made in the Vehicle Code, except in the "trap" situation mentioned in section 830.8. (Van Alstyne, Cal. Gov't Tort Liability Practice (Cont. Ed. Bar 1980) §3.40, p. 252; 4 Cal.L.Rev.Comm. Reports 801 (1963), Comment to section 830.8.) The immunity "prevents the imposition of liability *solely* on the basis of the failure to provide traffic regulatory or warning signals or devices of a type not listed in section 830.4." (*Hilts v.*

Solano County (1968) 265 Cal.App.2d 161, 174 [emphasis in original].) Section 830.8 "does, however, impose liability for failure to provide such a signal or device where the condition constitutes a trap to a person using the street or highway with due care." (*Ibid.*)

Nothing in section 830.8's purpose indicates a legislative intent that a condition not immunized under section 830.8, due to the trap exception, could not still be immunized by section 830.6.[8]

Nothing in the legislative histories of sections 830.6 and 830.8 indicate a legislative intent that section 830.6's immunity should not apply to a condition that is a "trap" under section 830.8.

Senate Bill No. 42 of 1963 (Chapt. 1681) added both statutes to California law. The legislative history of section 830.6 was discussed by this Court in *Hampton*, *supra*, 62 Cal.4th at pp. 349-351; *Cornette*, *supra*, 26 Cal.4th at pp. 69-72 [covering the original legislation, a 1969 amendment effort, and the 1979

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[8] In his treatise, Van Alstyne—consultant to the California Law Revision Commission during the drafting of the Government Claims Act in 1963—pointed out the incongruity of the case law holding that section 830.8's trap exception precludes application of design immunity, "even though the latter immunity, in terms, is declared to override any liability 'under this chapter,' *i.e.*, Chapter 2, which provides generally for dangerous condition liability and includes Govt C § 830.8." (Cal. Gov't Tort Liability Practice, *supra*, §3.40, p. 253 [italics in original].)

amendment]; *Cameron*, *supra*, 7 Cal.3d at p. 326; and *Baldwin v. State of California* (1972) 6 Cal.3d 424, 433.

As discussed in those cases, the legislative history addresses the legislature's intent that section 830.6 protect separation of powers, as discussed above. The legislative history of section 830.8 is set forth in the Legislative Committee Comment to the statute, discussed above.

Nothing in this legislative history indicates a legislative intent to limit the immunity conferred by section 830.6 by barring its application to conditions that are "traps" under section 830.8.

Finally, public policy does not support insulating conditions that amount to "traps" under section 830.8 from section 830.6 immunity.

Public policy is served by excluding from section 830.8's immunity for lack of warning signs conditions that would not be reasonably apparent to or anticipated by people exercising due care. The exception requires entities to warn people about conditions that they would not see or perceive without warning.

But no public policy is served by holding that a condition that meets all the criteria of section 830.6—inclusion in a discretionarily-approved plan or design, and substantial evidence of reasonableness—is nevertheless not subject to design

immunity, simply because users need to be warned about the condition.

Thus, under the rules of statutory construction, section 830.6 design immunity should apply to section 830.8's failure to warn.

4.1.3. It Is Illogical to Hold That a Public Entity Immune from Liability for a Property Condition under Design Immunity Could Then Be Held Liable for Failure to Warn of the Same Condition

Based on the above analysis, the courts that decided *Compton v. City of Santee*, *supra*, 12 Cal.App.4th 591, 600 and *Weinstein v. California Department of Transportation*, *supra*, 139 Cal.App.4th 52, 61 properly concluded that "[i]t would be illogical to hold that a public entity immune from liability because the design was deemed reasonably adoptable, could then be held liable for failing to warn that the design was dangerous."

In *Compton*, the plaintiff contended a traffic collision was caused by a sight restriction from the "cresting" and horizontal curve of a bridge near the intersection where the collision took place. The City asserted design immunity under section 830.6 applied. The plaintiff argued there was a triable issue of fact on the reasonableness of the design, because the plaintiff's expert opined "that the 'sight distances' were below recommended

standards and created a 'trap.'" (*Id.* at p. 596.) The appellate court determined that there was substantial evidence that the bridge design was reasonable, and that at a minimum reasonable minds could differ over the reasonableness, establishing the reasonableness element of design immunity. (*Id.* at p. 597.) The plaintiff then argued that because the sight restrictions created a "trap," there was a triable issue of fact, because the City was not immune under section 830.8. (*Id.* at p. 600.)

The *Compton* court rejected this contention:

> "While section 830.8 states that immunity for failure to provide warning signs does not apply where there is a dangerous hidden condition, *it in no way purports to create an exception to design immunity under section 830.6*. It would be illogical to hold that a public entity immune from liability because the design was deemed reasonably adoptable, could then be held liable for failing to warn that the design was dangerous. (See *Moritz v. City of Santa Clara* (1970) 8 Cal.App.3d 573, 575–577, 87 Cal.Rptr. 675 [no section 830.8 warning need be given where design, having met all applicable engineering standards, qualified for design immunity].) Even *Washington v. City and County of San Francisco* [(1990) 219 Cal.App.3d 1531] upon which Compton exclusively

relies, recognizes that *section 830.8 creates its own limited immunity (i.e., immunity for failure to provide warning signs), and that the "hidden trap" rule is an exception to section 830.8 immunity*. (219 Cal.App.3d at pp. 1536–1537, 269 Cal.Rptr. 58.)" (*Compton*, *supra*, 12 Cal.App.4th 591, 600 [emphases added].)

That reasoning comports with the analysis set forth above. Section 830.8's "trap" rule is an exception to section 830.8's warning sign immunity. There is no indication that the rule is also an exception to section 830.6's broader immunity. It would be illogical to hold that an alleged "trap" that would be immunized under section 830.6—because reasonable minds could find the design reasonable—could nevertheless be a source of dangerous condition immunity under section 830.8 because it is a "trap."

Weinstein, *supra*, 139 Cal.App.4th 52 involved another alleged "trap" in the design of a roadway. A northbound vehicle crossed over a highway median and hit a southbound vehicle. The plaintiffs asserted a "lane drop" occurred at that location "without warning" with "both horizontal and vertical sight distance restrictions," and that "cyclone fencing" in the median was "inadequate to prevent cross-over accidents." (*Id.* at p. 54.) As in

Compton, the public entity defendant sought summary judgment based on section 830.6; and the plaintiffs not only disputed the reasonableness of the design, but also contended that, "notwithstanding design immunity, defendant was liable for failing to warn motorists of the lane drop by placing a warning sign on the median side." (*Id.* at pp. 55-56.)

The trial court granted summary judgment based on design immunity. It ruled that the defendant had established the reasonableness element of the immunity. It further ruled that the absence of a warning sign "was not independent because it was part of the design." (*Weinstein*, *supra*, 139 Cal.App.4th at p. 56.)

The *Weinstein* appellate court agreed not only that the defendant had presented substantial evidence that the design was reasonable, but that the signage at the location (including the lack of a median side sign warning of the lane drop, allegedly a factor in making the property dangerous) was planned and installed in conformity with the state's approved standards, entitling the defendant to design immunity. (*Weinstein*, *supra*, 139 Cal.App.4th at p. 59.)

The *Weinstein* court turned to the plaintiffs' contention "that defendant's design immunity defense did

not bar them from recovering for defendant's failure to post a median-side warning sign." (*Id.*, 139 Cal.App.4th at p. 61.) The plaintiffs contended that a sign warning of a lane drop was necessary due to the various alleged defects of the design of the median, roadway alignment and shoulder width. (*Ibid.*)

"But defendant was entitled to immunity for each of these aspects of the roadway's design." (*Weinstein*, *supra*, 139 Cal.App.4th at p. 61.) The *Weinstein* court quoted the *Compton* court's holding on logic. (*Ibid.*) "Since defendant could not be held liable for these aspects of the roadway's design as dangerous conditions," the court ruled, "it could not be held liable for failing to warn of these same aspects." (*Ibid.*)

Weinstein's holding, like *Compton*'s, makes sense—particularly in a case where the signage and markings installed (and thus, presumably, the signage and markings omitted) are either set forth in a discretionarily-approved plan or design, or in accordance with standards previously so approved. (See Gov. Code, § 830.6.)

If the improvements at issue would be covered by design immunity, and the entity is therefore not liable for injuries caused by them, how could it make sense to hold the entity liable for the defendant's failure to warn of the

same improvements? The injuries would still be caused by the same dangerous condition: the improvements.

Further, how could excluding failure to warn from design immunity make sense where, as in *Weinstein*, the warnings present—and the decision to exclude other warnings—are themselves covered by design immunity?

The appellate court here declined to follow *Weinstein*. (*Tansavatdi*, *supra*, 60 Cal.App.5th 423 [274 Cal.Rptr.3d at p. 527].) It did so even though, as in *Weinstein*, the signs and markings approaching the accident scene were reflected in approved plans. (See *id*. at pp. 517, 521.) The lower court here did not address the logic of *Weinstein* (or the case it followed, *Compton*) at all. It simply held that this Court's holding in *Cameron v. State of California*, *supra*, 7 Cal.3d at pp.326-227 was binding, and that *Weinstein*'s interpretation of *Cameron* was mistaken. (*Tansavatdi*, *supra*, at pp. 527-528.) (That issue is discussed below under Heading 4.2.)

Compton and *Weinstein* are correct. As explained above, failure to warn is not an independent theory of liability. It does not create liability without an underlying dangerous condition. (See *Pfeifer v. San Joaquin County*, *supra*, 67 Cal.2d 177, 184.) If there can be no liability for the dangerous condition because it meets the elements of

design immunity, it is illogical to hold that failure to warn of that dangerous condition nevertheless supports liability for a dangerous condition of property.

4.1.4. Liability for Failure to Warn of an Immunized Condition Conflicts with Section 830.6's Provisions Concerning Warnings

As explained under Heading 4.1.2, nothing in the language of sections 830.6 and 830.8 indicates a legislative intent that section 830.6 immunity should not apply to failure to warn under section 830.8. In fact, exempting failures to warn from design immunity conflicts with the language of section 830.6, as amended in 1979.

The 1979 amendment added to section 830.6 the following language, which dealt with loss of design immunity:

> "Notwithstanding notice that constructed or improved public property may no longer be in conformity with a plan or design or a standard which reasonably could be approved by the legislative body or other body or employee, the immunity provided by this section shall continue for a reasonable period of time sufficient to permit the public entity to obtain funds for and carry out remedial work necessary to

allow such public property to be in conformity with a plan or design approved by the legislative body of the public entity or other body or employee, or with a plan or design in conformity with a standard previously approved by such legislative body or other body or employee. *In the event that the public entity is unable to remedy such public property because of practical impossibility or lack of sufficient funds, the immunity provided by this section shall remain so long as such public entity shall reasonably attempt to provide adequate warnings of the existence of the condition not conforming to the approved plan or design or to the approved standard. However, where a person fails to heed such warning or occupies public property despite such warning, such failure or occupation shall not in itself constitute an assumption of the risk of the danger indicated by the warning*." (Stats. 1979, chapt. 481, § 1, pp. 1638-1639 [emphasis added]; see *Cornette*, *supra* 26 Cal.4th at p. 71.)

Under these provisions, "the immunity continues for sufficient time to permit the public entity to remedy the dangerous condition, or, if it cannot remedy it, to post warnings." (*Cornette*, *supra*, 26 Cal.4th at p. 79.)

Further, the statute does not require that the entity actually provide warning of the dangerous condition; if the entity "reasonably attempt[s] to provide adequate warnings[,]" design immunity remains in place. (Gov. Code, §830.6.)[9]

A statutory provision that design immunity remains (despite the property no longer conforming with a reasonably-approvable design) "so long as such public entity shall *reasonably attempt to provide adequate warnings* of the existence of the condition" (emphasis added) cannot be reconciled with lack of design immunity for *failure to warn* of the condition.

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[9] "The Senate Committee on the Judiciary posed the following question regarding the proposed 1979 amendment: 'Should not the public entity be required to provide adequate warnings, rather than merely attempt to provide them?' Senate Committee on Judiciary, Comment, AB 893, 79-80 Sess. (May 31, 1989) (Knox) at 3. Apparently this question went unanswered and the Senate approved the Bill without change." (Girard Fisher, "Design Immunity for Public Entities" (1991) 28 San Diego L. Rev. 241, 261.)

4.1.5. Liability for Failure to Warn Conflicts with the Legislative Intent That if the First Two Elements of Design Immunity Are Established, Design Immunity Is an Issue of Law for the Court

Section 830.6's language provides that the reasonableness element of design immunity is to be determined by "the trial or appellate court" on a substantial evidence basis. (*Cornette*, *supra*, 26 Cal.4th at pp. 66, 72.) This provision serves the purpose of design immunity: "to prevent a jury from second-guessing the decision of a public entity by reviewing the identical questions of risk that had previously been considered by the government officers who adopted or approved the plan or design." (*Id.* at p. 69.)

Making reasonable approvability an issue for the court permits design immunity to be determined as an issue of law—often on summary judgment—where, as here, undisputed facts establish that the alleged injury-causing property condition is reflected in a discretionarily-approved plan. (See *Tansavatdi*, *supra*¸ 60 Cal.App.5th 423 [274 Cal.Rptr.3d 512, 521].) That serves the purpose of keeping design-related decisions out of the hands of juries.

But this goal would be thwarted if public entities could be held liable for failure to warn of alleged dangerous conditions that meet all of the elements of design immunity, but that the plaintiff nevertheless contends is a "concealed trap." While a court determines whether a condition is reasonably approvable, whether the same condition is a "trap" is an issue of fact unless the facts are undisputed. (See *Hilts*, *supra*, 265 Cal.App.2d at p. 174.)

While experts' disagreement on whether a plan was reasonable will establish the reasonableness element of design immunity (*Menges v. Department of Transportation* (2020) 59 Cal.App.5th 13, 21), a dispute between the same experts on whether the same condition is a "trap" that requires warnings may send that issue to the jury. (E.g., *Anderson v. City of Thousand Oaks* (1976) 65 Cal.App.3d 82, 91.)

The jury would then do exactly what design immunity was intended to prevent: second-guess the public entity's design decision by reviewing the identical questions of risk previously considered by the government officers who adopted or approved the plan or design, to determine whether the condition is a "trap."

As a commentator[10] noted, "Arguably, the design immunity would be completely eviscerated if plaintiff could circumvent it by simply alleging that the public entity failed to warn of the dangerous condition created by the design." (Fisher, "Design Immunity for Public Entities," *supra*, 28 San Diego L. Rev. at pp. 254-255.) The commentator writes that *Anderson*, *supra*, 65 Cal.App.3d at pp. 90-91 qualified this result by requiring that the entity have actual or constructive notice that the roadway is dangerous in operation. (Fisher, *supra*, at p. 255.)

Nevertheless, the problem persists: If failure to warn of "traps" is an exception to section 830.6 design immunity, every plaintiff who sues for an alleged roadway defect will contend that the defect is a "trap" that the public entity failed to warn about. And they will likely find experts willing to provide sufficient evidence to evade summary adjudication of that issue.

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[10] The undersigned discloses that the commentator is a retired partner of the undersigned's law firm.

4.1.6. The Lower Court's Uncertainty Here on How to Apply Section 830.8 Demonstrates the Impracticality of Exempting Section 830.8 Liability from Design Immunity

The consequences and confusion engendered by exempting failure to warn of a "trap" from design immunity is demonstrated by the lower court opinion in this case.

The lower court confirmed that the City established all of the elements of design immunity in its summary judgment motion. (*Tansavatdi*, *supra*, 60 Cal.App.5th 423 [274 Cal.Rptr.3d 512, 526].) Yet it vacated the judgment to the extent it extended to Tansavatdi's failure to warn theory, and remanded the theory to the trial court to consider whether summary judgment is appropriate on that issue. (*Id.* at pp. 527-528.)

The court's footnotes betray its uncertainty on how a failure to warn theory would operate here. For instance, when commenting on Tansavatdi's contention "that the absence of a bicycle lane at the area of the accident constituted a concealed trap for which a warning was necessary[,]" the court comments at footnote 17, "It is unclear precisely what kind of warning appellant claims

the city should have provided." (*Tansavatdi*, *supra*, 60 Cal.App.5th 423 [274 Cal.Rptr.3d at p. 526].)

Indeed, it is unclear what sort of warning would be necessary for the absence of a bicycle lane; or how the mere absence of a bicycle lane could be a "dangerous condition which . . . would not be reasonably apparent to, and would not be anticipated by, a person exercising due care." (Gov. Code, § 830.8.) Absent concealing factors (which were not alleged here), how could a bicyclist exercising due care who is using a bicycle lane (as decedent Jonathan was not) reasonably fail to notice that the lane has ended? How could that not be open and obvious to a user with due care? How could it be a "trap?"

Yet the exemption of section 830.8 "traps" from section 830.6 design immunity leads to the absurd result that a public entity that has established design immunity for such an open and obvious condition as an absent bicycle lane may be deprived of summary judgment on whether it had to give some unspecified warning of the same condition.

Further stoking confusion is footnote 18 of *Tansavatdi*, 274 Cal.Rptr.3d at p. 528:

> "Nothing in *Cameron*, however, suggests that design immunity cannot shield a failure to warn that is itself

> caused by a qualifying design under section 830.6. . . Thus, appellant may not assert that the absence of a bicycle lane itself *constituted* the failure to warn. As discussed above, design immunity shields the city's decision not to include a bicycle lane at the site of the accident." [Emphasis in original.]

Yet, as the lower court's opinion points out at 274 Cal.Rptr.3d 512, 517, the approved 2009 plans—the source for the design immunity the lower court affirmed—"included directions to install specific striping details, pavement markings, and signs." The opinion goes on to specify that the plans include bicycle lane signs on parts of Hawthorne, and not on other parts. (*Ibid.*)

Thus, as in *Weinstein*, *supra*, 139 Cal.App.4th at p. 60, the signage itself—that which was included in the plan, and that which was not included—would itself be protected by design immunity. Yet the appellate court ruled that failure to warn liability may apply despite design immunity.

If statutes are ambiguous, they should be interpreted to avoid absurd consequences. (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.) To hold an entity immune for the design of a roadway, yet potentially liable for failure to warn of that design, is an absurd consequence where the

alleged failure to warn is itself part of the immunized design.

The lower court decision demonstrates the impracticability of exempting failure to warn liability from design immunity.

4.1.7. Creation of a Dangerous Condition and Failure to Warn of the Condition Are Both Dangerous Condition of Public Property Liability under Government Code section 835

In light of the above considerations, what is the rationale in *Cameron*, *supra*, 7 Cal.3d at pp. 328-329 and *Flournoy v. State* (1969) 275 Cal.App.2d 806, 811-812 for holding that design immunity may not extend to section 830.8 liability for failure to warn?

Both cases base their conclusions on the concept that a plaintiff suing for failure to warn of a dangerous condition caused by a design is alleging two separate, concurrent theories of liability: active negligence in creating the defect; and passive negligence in failing to warn of the defect. Since design immunity covers injury caused by a plan or design, the reasoning goes, the immunity covers only the defect's creation. (*Cameron*, *supra*, at pp. 328-329; *Flournoy*, *supra*, at pp. 811-812.)

The problem with this approach is that under the Government Claims Act, all liability is statutory. (Gov. Code, § 815, subd. (a).) The Act does not set forth separate statutory grounds for liability for creation of a dangerous condition and failure to warn of a dangerous condition; or for active negligence versus passive negligence. Instead, under Government Code section 835, there is a single statutory ground for liability: Injury *caused by a dangerous condition of public property*.

True, there are two alternative paths to that ground: one where the negligent or wrongful act of a public employee created the dangerous condition (Gov. Code, § 835, subd. (a)); and one where the entity has notice of the dangerous condition a sufficient time before the injury to have taken measures to protect against the dangerous condition (Gov. Code, § 835, subd. (b).) But even those alternative paths do not break down into entity creation and entity failure to warn.

As explained above, section 830.8's "trap" provision is not an alternative statutory ground for liability. It is merely an exception to a statutory immunity to section 835 liability. (See *Pfeifer*, *supra*, 67 Cal.2d at p. 184; *Compton*, *supra*, 12 Cal.App.4th at p. 600.)

In *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1132, this Court stressed that a public entity's direct liability for property conditions is controlled by section 835; and that common law concepts of property owner negligence should be avoided in analyzing that liability:

> "In structuring Government Code section 835 to define the circumstances in which a public entity properly may be held liable for an injury caused by a dangerous condition of public property, the Legislature took into account the special policy considerations affecting public entities in their development and control of public property and made a variety of policy judgments as to when a public entity should or should not be liable in monetary damages for injuries that may occur on public property. These policy judgments would be undermined if an injured person could ignore the limitations embodied in Government Code section 835 and invoke the very general provisions of section 1714 of the Civil Code to impose liability on a public entity in circumstances in which such liability would not be permitted under section 835. Accordingly, we conclude that in determining the public entities' direct liability, we must evaluate plaintiffs' claim

under the provisions of Government Code section 835 alone." (*Zelig*, *supra*, 27 Cal.4th at p. 1132.)

Whether the injury is viewed as caused by the creation of the condition, or by failure to adequately warn of the condition, the injury is ultimately caused by the dangerous condition. The sole statutory liability for injury caused by a dangerous condition of public property is dangerous condition liability under Part 2, Chapter 2 of the Government Claims Act, governing Dangerous Conditions of Public Property; and specifically, Government Code section 835.

By its terms, Government Code section 830.6 governs "liabl[ity] under this chapter"—Chapter 2—"for an injury caused by the plan or design of a construction of, or an improvement to, public property . . . ."

It therefore covers liability under Government Code section 835 for injury caused by a property condition that meets the standards under section 830.6 for design immunity—whether the cause of the injury is the creation of the condition, or the failure to warn of it.

4.2. *Cameron* Should Be Overruled

The sole reason the lower court gave for remanding the failure to warn theory to the trial court despite

upholding design immunity was this Court's holding in *Cameron*, *supra*, 7 Cal.3d 318.

Unlike the lower court, this Court is not bound by its own decisions. Because of stare decisis, the Court is reluctant to overturn its own prior opinions. (*People v. King* (1993) 5 Cal.4th 59, 78.) Nevertheless, stare decisis permits this Court to reconsider, and ultimately depart from, its own precedent where appropriate. (*Ibid.*)

Here, there are multiple reasons why this Court should reconsider and overrule its conclusion in *Cameron* that design immunity may not apply to an alleged failure to warn of a dangerous condition.

4.2.1. *Cameron*'s Discussion of Section 830.6 and 830.8 Was Dicta

As *Weinstein*, *supra*, 139 Cal.App.4th 52, 61 observed, *Cameron*'s discussion on this point was arguably dictum.

The central holding of *Cameron* was that the defendant had failed to establish design immunity for the allegedly defective superelevation, because the defendant failed to produce evidence that the superelevation was reflected in an approved plan. (*Cameron*, *supra*, 7 Cal.3d at p. 326.) The Court observed, however, that "It is possible upon remand that the state could produce evidence to show

that the superelevation was the result of a reasonable design which was approved by an appropriate body or employee vested with discretionary authority." (*Id.* at p. 327, fn. 11.) The Court discussed the interaction of section 830.6 with section 830.8 "[f]or the guidance of the trial court on remand" should this hypothetical situation arise. (*Id.* at pp. 326-327.)

In *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, this Court split on whether statements by appellate courts responsive to issues raised on appeal, and intended to guide the parties and the court on remand are dicta. (See *id.*, pp. 1158-1159 [majority holds no], 1177-1178 [Chin, J., joined by Baxter, J., dissent on that point].)

The uncertainty of whether *Cameron*'s discussion was obiter dictum or ratio decidendi is reflected in *Weinstein*, *supra*, 139 Cal.App.4th at p. 61 and *Compton*, *supra*, 12 Cal.App.4th at p. 600—post-*Cameron* decisions that held that section 830.6 design immunity applies to failure to warn that immunized designs are dangerous.

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4.2.2. *Cameron* Pre-Dates the 1979 Amendment of Section 830.6, and Supreme Court Case Law Further Interpreting the Government Claims Act

Even if the Court's 1972 discussion of section 830.6's interaction with section 830.8 is binding precedent, it predates the 1979 amendment of section 830.6. As discussed above under Heading 4.1.4, the 1979 amendment added a provision to section 830.6 specifically dealing with attempts to warn of a dangerous condition (and resulting retention of design immunity) after changed circumstances render an immunized design no longer reasonably approvable. The *Cameron* court therefore did not have to deal with the potential for conflict between retention of immunity for reasonable attempts to warn, and lack of immunity for failure to warn.

Cameron also predates this Court's decisions in *Zelig*, *supra*, 27 Cal.4th 1112, 1132 and *Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1183, which directed analysis of direct public entity liability away from common law negligence concepts and toward the need for statutory bases for such liability. As discussed above under Heading 4.1.7, *Cameron*'s use of such common law concepts

of active negligence versus passive negligence (*Cameron*, *supra*, 7 Cal.3d at pp. 328-329) to analyze a public entity's liability for dangerous property conditions is outdated.

These are further reasons for the Court to overrule its discussion of sections 830.6 versus 830.8 in *Cameron*.

4.2.3. The Court's Discussion in *Cameron* Should Be Overruled

Even if the Court should determine that the discussion in *Cameron* is binding precedent that has not become outdated, the points discussed above under Heading 4.1 all point to the needs to overrule *Cameron*'s statement that section 830.6 design immunity may not apply to failure to warn of a "trap" under section 830.8. The broad design immunity prescribed in section 830.6 should apply to all theories of liability for any allegedly dangerous condition of public property that meets section 830.6's elements.

5.0. Conclusion

The answer to the question before this Court is no. A public entity cannot be held liable under Government Code section 830.8 for failure to warn of an allegedly dangerous design of public property that is subject to Government Code section 830.6 design immunity. There is only one

statutory source of public entity liability for dangerous property conditions: Government Code section 835. Section 835 liability is subject to section 830.6 immunity. The section 830.8 "concealed trap" provision is simply an exception to section 830.8's own limited immunity. It is not an independent source of liability, and it does not supersede section 830.6's broad immunity.

The City respectfully asks the Court to reverse the portion of the lower court's decision vacating the judgment and remanding the matter to the trial court to consider whether summary judgment is appropriate as to Tansavatdi's failure to warn theory. The City asks the Court to direct the lower court to affirm summary judgment for the City in full.

DATED: May 21, 2021 POLLAK, VIDA & BARER

By: _____
Daniel P. Barer
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6.0. Certificate of Word Count

In accordance with rule 8.520(c)(1) of the California Rules of Court, the undersigned certifies that the attached Opening Brief on the Merits contains 10,314 words, which is less than the total number of words permitted by Rule 520(c)(1). The undersigned relies on the word count of the computer program used to prepare the brief.

DATED: May 21, 2021 POLLAK, VIDA & BARER

By: _____
Daniel P. Barer
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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.

On May 21, 2021, I served the foregoing document described as PETITIONER'S OPENING BRIEF ON THE MERITS on the interested parties in this action as follows:

See attached service list.

[X] (BY EMAIL) I hereby certify that I electronically filed the foregoing with the California Supreme Court by using their electronic system on May 21, 2021 and service will be accomplished by the Court's electronic service system upon all participants in the case who are registered users.

[X] (BY MAIL) I deposited such envelopes in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid, as follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business.

Clerk's Office
Los Angeles Superior Court
Torrance Courthouse
825 Maple Ave
Torrance, CA 90503

[X] (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 21, 2021 at Los Angeles, California.

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Date

/s/Daniel P. Barer

Signature

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