S213132

IN THE

SUPREME COURT OF CALIFORNIA

RANDALL KEITH HAMPTON, ET AL.,

Plaintiffs and Petitioners,

v.

COUNTY OF SAN DIEGO,

Defendant and Respondent.

After a decision by the California Court of Appeal
Fourth Appellate District, Division One
(No. D061509)

OPENING BRIEF ON THE MERITS

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QUESTION PRESENTED

Does a public entity establish discretionary approval of a design as a matter of law simply by showing the design was approved by an authorized official, even when the design deviates from governing standards and there is reason to believe the official was unaware of that fact when he approved the design?

INTRODUCTION

This appeal arises out of a split among the Courts of Appeal regarding what will suffice to establish discretionary approval of a design under Government Code section 830.6 when the design deviates from the public entity's own standards.

The First and Second Districts held that where a design "deviated . . . from applicable standards," a public entity is not entitled to design immunity unless it shows the "deviation was knowingly approved" by someone with "discretionary authority to disregard the standards." (*Levin v. State of California* (1983) 146 Cal.App.3d 410, 417–418 (*Levin*); *Hernandez v. Department of Transportation* (2003) 114 Cal.App.4th 376, 387–388 (*Hernandez*).)

The Fourth District disagreed, and concluded that a public entity establishes discretionary approval under section 830.6 as a matter of law merely by showing the plans were approved by a public employee possessing discretionary authority, regardless of whether the plans conform to governing standards. (Slip opn. at pp. 18, 30.)

But the Fourth District's opinion conflicts with the plain language of Government Code section 830.6, which requires not mere *possession* of discretionary authority, but proof that authority was actually *exercised* in the particular case. Accordingly, this Court should endorse the First and Second District's opinions in *Levin* and *Hernandez*, respectively, and overrule the Fourth District.

STATEMENT OF FACTS

This case arose out of a collision at the intersection of Cole Grade Road and Miller Road in a rural area of San Diego County. (1 AA 088.)[1/]

In 1995, a County engineer approved plans for a change to the Cole Grade/Miller Road intersection. (1 AA 099–104.) In addition to lowering the roadbed of Cole Grade Road by several feet, the plans called for the addition of "turn-pockets" on Cole Grade Road. (*Ibid.*) The turn pockets were intended to prevent rear-end collisions by giving traffic on Cole Grade Road a place to wait for the intersection to clear before turning left onto Miller Road.

To accommodate the turn pockets, the plans shifted the northbound lane of Cole Grade Road further east. (1 AA 099–104.) In doing so, the plans aggravated a preexisting sight-distance problem at the intersection presented by an embankment on the southeast corner. (1 AA 152:27–28.) The embankment—a steep slope covered with trees and shrubs (e.g., 1 AA 269, 303)—already impaired sight distance for motorists looking south down Cole Grade Road from

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[1] References to the Appellants' Appendix are abbreviated as **([vol.] AA [page]:[line].)**. References to the Court of Appeal's opinion are abbreviated as **(Slip opn. at p. [page].)**. References to the County's brief in the Court of Appeal and its Answer to the Hamptons' petition for review are abbreviated as **(CoA RB at p. [page])** and **(Ansr. at p. [page].)**, respectively.

westbound Miller Road even before the 1995 project. (E.g., 1 AA 092, 097.)[2/]

For a 55 mile-per-hour road like Cole Grade Road, the County's written standards required at least **550 feet** of sight distance for westbound Miller Road motorists. (1 AA 162–163.) But because of the embankment, the 1995 project left the intersection with just **214 feet** of sight distance. (1 AA 152:14–15.)

How did the project receive approval despite this vast disparity? As it turns out, the embankment on the southeast corner of the intersection was not included on the plans reviewed during the approval process. (1 AA 099–104, 151:21–26.) Nor did the plans specify what the sight-distance figures would be under the new

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[2] Understanding this case depends in no small part on one's ability to understand the geography of the Cole Grade/Miller Road intersection. Reviewing three particular pages of the Appellants' Appendix — **pages 48, 268,** and **300** — may help avoid confusion.

Page 48 is a diagram of the intersection prepared by the CHP. Cole Grade Road runs vertically on this diagram. The arrow just beyond the limit line on Miller Road represents Keith Hampton's car. The longer arrow represents the truck that hit Hampton. The embankment is depicted on this diagram as the curved line that follows the contour of the southeast corner of the intersection.

Page 269 shows the embankment from the perspective of a westbound motorist on Miller Road stopped just before Cole Grade Road.

Page 300 is a series of photos depicting northbound Cole Grade Road approaching the Miller Road intersection. The embankment is visible on the right side of this photograph running parallel to the street.

design. (*Ibid.*) As a result, the engineer who reviewed and approved those plans could have easily been misled into thinking the design provided more sight distance than it actually did.

While on his way to work early one morning, Keith Hampton was broadsided by a truck heading northbound on Cole Grade Road as Hampton, heading westbound on Miller Road, attempted to cross Cole Grade Road. Hampton survived the crash, but suffered severe brain damage.

STATEMENT OF THE CASE

A. The trial court awarded design immunity based on the mere fact the plans were approved by a County engineer.

The legal controversy in this case arose when the County filed a motion for summary judgment, arguing it was entitled to design immunity under Government Code section 830.6. (1 AA 002:10–11.)

Regarding the first element of design immunity—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, 551 (*Alvis*)—the County noted 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; see *Alvis, supra,* 178 Cal.App.4th at p. 551 ["The County may rely on the allegations of the complaint to establish causation."].)

Regarding the second element of design immunity—discretionary approval of the design plans—the County emphasized that the design plans were signed by a County engineer with authority to approve plans generally. (1 AA 086:25–087:3.)

Finally, as to the third element of design immunity—whether there is "substantial evidence supporting the reasonableness of the plan or design" (*Alvis, supra,* 178 Cal.App.4th at p. 551)—the County pointed to the declaration of a current County engineer who, not surprisingly, concluded that the design was "reasonable." (1 AA 002:15–19.)

The Hamptons opposed the County's motion by noting that while the County's written sight-distance standards required **550 feet** of "corner sight distance," and **388 feet** of "operational stopping sight distance," the 1995 project left the intersection with just **214 feet** of corner sight distance and **320 feet** of operational stopping sight distance.

The Hamptons further pointed out the plans concealed the sight-distance deficiency because the impediment to sight distance—the embankment on the southeast corner of the intersection—was absent from the plans. Accordingly, the Hamptons insisted that under *Levin, supra,* 146 Cal.App.3d 410, and *Hernandez, supra,* 114 Cal.App.4th 376, the County's motion should be denied.

The trial court granted the County's motion for summary judgment. (2 AA 382.) Its analysis of discretionary approval consisted solely of its observation that the plans were signed by "a licensed civil engineer and traffic engineer" who "was in charge of the County of San Diego Design Engineering Section." (2 AA 385.) The trial court's order did not address the evidence that the design violated the County's own standards, nor did it discuss *Levin* or *Hernandez.*

B. The Court of Appeal affirmed, rejecting *Levin* and *Hernandez*.

The Hamptons filed a timely appeal, arguing the County was not entitled to design immunity under *Levin* and *Hernandez*. The County responded by arguing that both cases were distinguishable.

The Court of Appeal agreed with the Hamptons' characterization of *Levin* and *Hernandez*, but surprisingly declined to follow either case:

> In arguing that the trial court erred in concluding that the County established the discretionary approval element, the Hamptons cited two cases, *Levin v. State of California* [citation], and *Hernandez v. Department of Transportation* [citation]. The Hamptons argue "*Levin* and *Hernandez* teach that where, as here, there is evidence the design at issue violated the public entity's own standards, the public entity cannot establish the second element of design immunity—discretionary approval—unless it shows that the engineer who approved the plans (1) knew it was substandard, (2) elected to disregard the standards, and (3) had authority to do so." We agree that *Levin* and *Hernandez* support this proposition. [Citations.] However, for reasons we explain below, we do not find either decision persuasive in this regard, and we therefore decline to follow *Levin* or *Hernandez* with respect to the nature of the evidence that the governmental entity must present to establish the discretionary approval element.

(Slip. opn., p. 18.)

To the Court of Appeal, evidence the plans were not only substandard, but deceptively so was irrelevant to the discretionary-approval element of the design-immunity defense. In the court's view, all that mattered was that the plans were signed by a County engineer with authority to approve plans generally:

> 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-authority*] *element of design immunity.*

(*Id.*, p. 30, emphasis added.)

DISCUSSION

"Design immunity" is the colloquial name for the absolute tort immunity conferred by Government Code section 830.6, the pertinent portion of which reads as follows:

> 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.

From this text, courts have crafted a three-element test for design immunity:

1. A causal relationship between the plan or design and the accident;

2. Approval of the design in advance of construction by a legislative body or officer exercising discretionary authority; and

3. "Substantial evidence" of the design's reasonableness.

(*Mozzetti v. City of Brisbane* (1977) 67 Cal.App.3d 565, 574 (*Mozzetti*).)

This appeal concerns the second element, commonly known as the "discretionary-approval" element. More specifically, the issue is whether a public entity satisfies the discretionary-approval element *as a matter of law* merely by showing the plans at issue were approved by an authorized official.

In answering that question, the balance of this brief proceeds in two distinct parts:

The first part demonstrates that the Fourth District erred when it held a public entity establishes discretionary approval as a matter of law simply by showing the design was approved by an authorized official.

The second part demonstrates why the County failed to establish discretionary approval in this particular case.

A. The Fourth District erred in holding that mere approval by an authorized official is sufficient to establish discretionary approval as a matter of law.

Design immunity, like all governmental immunities, reflects the judicial branch's understandable reluctance to "second-guess[] the decisions of a public entity by reviewing the identical questions of risk that had been considered by public officials." (*Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 69 (*Cornette*).) For public officials, these decisions arise primarily, if not exclusively, in two contexts.

Perhaps the most obvious examples are the broad, "quasi-legislative" policy decisions made by public entities in the course of

adopting standards or rules regarding scenarios its employees are likely to encounter in the course of their day-to-day work. (E.g., Veh. Code, § 17004.7 [granting immunity to public entities that have adopted a written policy governing vehicular pursuits by its law-enforcement officers].)

Less obvious but equally significant examples are situations in which a public official perceives a compelling need for a deviation from the public entity's own standards in an exceptional case. (E.g., *Hernandez, supra,* 114 Cal.App.4th at pp. 380–381 ["Any deviation from [Caltrans] guidelines required the designer to obtain formal approval, which would be recorded in a 'project approval document.'"].)

In either case—whether selecting standards as a general matter or choosing to set them aside in a particular one—the public entity's careful consideration of the risks and benefits of its course of action forecloses subsequent judicial scrutiny of that decision. (E.g., *Cornette,* 26 Cal.4th at p. 69.)

Not coincidentally, Government Code section 830.6 contemplates the same two scenarios in awarding design immunity when it discusses (1) designs that conform to standards previously adopted by the public entity in the exercise of its quasi-legislative discretion *and* (2) designs that deviate from those standards, but which were nonetheless approved after careful consideration of the risks and benefits of doing so.

This is evident when, for example, section 830.6 distinguishes between designs that were approved "by the legislative body of the public entity or by some other body or employee *exercising discretionary authority*" and those that were "prepared in conformity with standards *previously so approved.*" (The "previously so approved" language in the latter clause is undoubtedly a reference to "discretionary authority" in the first.)

Thus, it is a public entity's discretion—either in the selection of standards used as the basis for its designs, or in the decision to deviate from those standards in a particular one—that entitles it to immunity under Government Code section 830.6.

Surprisingly, this was not lost on the Fourth District, which emphasized that "[section 830.6] provides that the discretionary element may be established *either* by evidence of appropriate discretionary approval *or* evidence that the plan conformed with previously adopted standards." (Slip opn. at 21, emphasis in original.)

But if the Fourth District agrees that a design's failure to conform to previously adopted standards shifts the focus to whether the design received "appropriate discretionary approval," why did it conclude the County had established discretionary approval in this case?

It is not because the Fourth District believed the design conformed to County standards. To the contrary, the court

specifically acknowledged evidence that the sight distance in the plans fell below the County's minimum standards. (E.g., Slip opn. at p. 8, fn. 7; *id.* at p. 10.)

Rather, the Fourth District's belief the County had established the discretionary-approval element of its design-immunity defense is predicated on the Fourth District's definition of "appropriate discretionary approval," which, in the Fourth District's view, means simply that the plans were approved by an authorized official:

> [W]e 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. at p. 30, emphasis added.)

But as set forth below, there are at least three problems with the Fourth District's definition of "discretionary approval."

1. The Fourth District's definition of "discretionary approval" conflicts with the text of Government Code section 830.6.

By its very terms, section 830.6 awards design immunity to plans that deviate from governing standards only if they were nonetheless approved by a public employee "*exercising* discretionary authority." (Emphasis added.)

The Fourth District's opinion thus raises an interesting question: In the context of a design that deviates from governing

standards, does a public entity meet this requirement simply by showing the design was approved by a person who possesses discretionary authority, or must the public entity demonstrate that this discretion was actually exercised in the particular instance?

In holding that the County established discretionary authority as a matter of law simply by showing "that an employee with discretionary authority approved the [p]lans" and "that nothing more is required to establish the [discretionary-approval] element of design immunity," the Fourth District clearly believes the former. (Slip opn. at p. 30.)

By contrast, in holding that a public entity is not entitled to design immunity unless it shows the "deviation was knowingly approved" by someone with "discretionary authority to disregard the standards" (*Levin, supra,* 146 Cal.App.3d at pp. 417–418; *Hernandez,* 114 Cal.App.4th at pp. 387–388), the First and Second Districts clearly endorse the latter view.

As it turns out, this Court already resolved this *exact* dispute nearly a half-century ago in *Johnson v. State* (1968) 69 Cal.2d 782, 794, fn. 8:

> This conclusion disposes of the question, extensively briefed by the parties, whether the governmental entity, to be entitled to immunity, must show that its employee actually reached a considered decision knowingly and deliberately encountering the risks that give rise to plaintiff's complaint. The Attorney General relies on [citations], all of which refer to the "nature of the [employee's] duty" and to whether the employee

> engages in a "discretionary activity," to support the argument that the state need only demonstrate that the employee's general course of duties is 'discretionary' and need not prove that, as to the specific conduct giving rise to the suit, the employee consciously assumed certain risks in making a policy decision. Plaintiff, on the other hand, points out that [Government Code] section 820.2 posits immunity on whether "the act or omission was the *result of the exercise of the discretion*"; accordingly, plaintiff contends that the state must prove that the employee, in deciding to perform the act that led to plaintiff's injury, consciously exercised discretion in the sense of assuming certain risks in order to gain other policy objectives.
>
> In light of our previous discussion, plaintiff's position must prevail. Immunity for "discretionary" activities serves no purpose except to assure courts refuse to pass judgment on policy decisions in the province of coordinate branches of government. Accordingly, to be entitled to immunity, the [public entity] must make a showing that such a policy decision, consciously balancing the risks and advantages, took place. The fact that an employee normally engages in "discretionary activity" is irrelevant if, in a given case, the employee did not render a considered decision."

Johnson thus confirms that *mere possession* of discretionary authority is *insufficient* to establish discretionary approval under section 830.6, which conditions immunity on proof any substandard plans were approved by an employee "*exercising* discretionary authority."

The fact that Fourth District's holding conflicts with the plain text of section 830.6 is a touch ironic given that the Fourth District's primary reason for rejecting *Levin* and *Hernandez*'s view of "discretionary approval" was because "[t]he text of section 830.6, from which the discretionary approval element is derived, does not contain any requirement of *informed* discretion." (Slip opn. at p. 20.)

But the reason section 830.6 does not include the terms "informed" or "conscious" is because doing so would have been redundant. Courts interpret statutory language according to the plain and ordinary meaning of the text. (*Wilson v. Safeway Stores, Inc.* (1997) 52 Cal.App.4th 267, 273.) The plain and ordinary meaning of the word "discretion" is "an exercise of judgment or choice." (See Black's Law Dict. (8th ed. 2004) p. 499, col. 2; see also *Morgan v. Yuba* (1964) 230 Cal.App.2d 938, 942 ["A discretionary act is one which requires 'personal deliberation, decision, and judgment.'"]; *Burgdorf v. Funder* (1966) 246 Cal.App.2d 443, 449 ["A discretionary act is one which requires the exercise of judgment or choice."].) Of course, one cannot truly exercise judgment or make a choice without an awareness of what is to be judged or chosen. (Webster's 9th New Collegiate Dict. (1991) p. 653 [defining "judgment" as "the process of forming an opinion or evaluation by discerning and comparing"].)

Thus, only an engineer who realizes a design does not conform to governing standards can truly make a discretionary decision to approve the design despite its nonconformity. By

contrast, an engineer who approves a nonconforming design on the mistaken belief it conformed to governing standards has acted through inadvertence, not discretion.

2. The Fourth District's approach to discretionary approval conflicts with a long line of cases.

The Fourth District's other basis for rejecting *Levin* and *Hernandez* were numerous appellate decisions it read as holding that "the discretionary approval element is satisfied by proof that the plans were approved by a public employee having discretionary authority to effectuate such approval." (Slip opn. at p. 24, citing *Becker v. Johnson* (1967) 67 Cal.2d 163, 172–173 (*Becker*); *Laabs v. City of Victorville* (2011) 163 Cal.App.4th 1242, 1263 (*Laabs*); *Ramirez v. City of Redondo Beach* (1987) 192 Cal.App.3d 515, 525 (*Ramirez*); *Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931, 941 (*Grenier*).)

But the Fourth District read too much into those cases. Rather than hold that proof of approval by an authorized employee establishes the discretionary-approval element as a matter of law, California courts regard such proof as "persuasive evidence" of discretionary approval that suffices to establish discretionary approval only in the absence of contrary evidence.

Arguably the best example is this Court's own opinion in *Cameron v. State of California* (1972) 7 Cal.2d 318 (*Cameron*). The plans at issue in *Cameron* "had been prepared . . . by . . . the then county surveyor, at the direction of the Santa Cruz Board of Supervisors and within the scope of his employment," and were prepared "in

accordance with [then-governing] standards of design." (*Id.* at p. 325.) In light of that evidence, this Court concluded "that the state has presented facts sufficient to establish the *initial applicability* of an immunity under section 830.6." (*Ibid,* emphasis added.)

But this Court did not stop there. Instead, it turned to the plaintiff's contrary proof; namely, that the plans did not contain the alleged dangerous condition. (*Ibid.* ["However, plaintiffs introduced evidence to show that the design plans contained no specification of the superelevation; . . ."].) Ultimately, in light of that omission from the plans, this Court concluded "there would be no reexamination of a discretionary decision in contravention of the design[-]immunity policy because there has been no such decision proved." (*Id.* at p. 326.) Accordingly, this Court concluded that any initial showing of discretionary authority the State might have established was rebutted by the plaintiff's evidence.

Subsequent cases would mirror *Cameron*'s approach to discretionary approval. A good example is *Grenier, supra,* 57 Cal.App.4th 931. Regarding "[t]he second element, discretionary approval," the *Grenier* court held that "[a] detailed plan, drawn up by a competent engineering firm, and approved by a city engineer in the exercise of his or her discretionary authority, is persuasive evidence of the element." (*Id.* at p. 940.) But immediately thereafter, the court cautioned that any presumption of discretionary approval would be destroyed if "the injury-producing feature" was not "part

of the plan approved by the governmental entity." (*Id.* at p. 941 & fn. 7.)

Similarly, in *Anderson v. City of Thousand Oaks* (1976) 65 Cal.App.3d 82 (*Anderson*), the court held that "Respondent's showing of a detailed plan, drawn up by a competent engineering firm, and approved by the city council in the exercise of its discretionary authority, is certainly persuasive evidence" of the second element of the design-immunity defense. The court then turned to the plaintiff's allegation that discretionary authority had not been proven because the plans lacked required signage. Ultimately, the court found discretionary approval had been established in light of evidence the signs "had been considered and rejected" and therefore that the omission was "a conscious design choice." (*Id.* at p. 90.)

Also illustrative is *Johnston v. County of Yolo* (1969) 274 Cal.App.3d 46 (*Johnston*), in which a County road commissioner ordered construction of a section of roadway involved in an accident. The court noted the "Yolo County's road commissioner . . . was the public agent exercising discretionary authority to approve the design of the double-curve alteration project in 1951 or 1952." (*Id.* at p. 53.) But that evidence was overcome by the official's admission the design was "contrary to his professional judgment as an engineer [and] he felt constrained to order its construction out of

deference to the wishes of the county board of supervisors." (*Id.* at p. 54.)

And, of course, this list of examples would not be complete without *Levin, supra,* 146 Cal.App.3d 410, and *Hernandez, supra,* 114 Cal.App.4th 376.

In *Levin,* a woman was killed when her car careened off a state highway in a section where no guardrails were present. Her heirs sued Caltrans for a dangerous condition. Caltrans moved for design immunity, emphasizing that a senior Caltrans official approved the plans. (*Levin, supra,* 146 Cal.App.3d at p. 417.) The plaintiffs responded with evidence the plans violated Caltrans's own guardrail standards. (*Id.* at pp. 417–418.)

But Caltrans's deviation from its own standards was not, in and of itself, fatal to design immunity in *Levin.* Rather, what proved fatal to the discretionary-approval element in *Levin* was the deviation *combined* with the fact that "the design plan contained no mention of" the dangerous aspect of the surrounding area. (*Levin, supra,* 146 Cal.App.3d at p. 418.)

Because "[t]he state made no showing that [the engineer who approved the design] . . . decided to ignore the standards," the *Levin* court concluded that the state failed to prove the roadway design was actually the result of a discretionary decision. (*Ibid.*)

In *Hernandez,* several persons were injured when their car slid off a freeway off-ramp that, under Caltrans' own guidelines, should

have been equipped with guardrails. As in *Levin,* Caltrans argued it was entitled to design immunity and produced "the certified 'as-built' plans signed by officials with authority to approve them." (*Hernandez, supra,* 114 Cal.App.4th at p. 380.)

The plaintiff responded by "present[ing] evidence that the off-ramp as designed violated Caltrans's then applicable guardrail-installation guidelines." (*Ibid.*) The plaintiffs also pointed out that Caltrans's expert "did not know whether any of the three engineers who signed the as-built plans actually considered the guardrail installation guidelines and approved the purported deviation from the guidelines' requirements." (*Id.* at p. 381.) Ultimately, the court disagreed that discretionary approval had been established as a matter of law, citing "[c]onflicting evidence [that] was presented in the trial court as to whether the off-ramp design at issue in this case deviated from the applicable guardrail standards and, if so, whether that deviation was knowingly approved by the responsible Caltrans authorities." (*Id.* at p. 388.)

Contrary to the Fourth District's belief, the cases cited in its opinion—*Grenier, supra,* 57 Cal.App.4th 931; *Becker, supra,* 67 Cal.2d 163; *Laabs,* 163 Cal.App.4th 1242, 1263; *Ramirez, supra,* 192 Cal.App.3d 515—are consistent with these authorities.

As discussed above, *Grenier* held that evidence plans were signed by an authorized official is "persuasive"—but not *conclusive*—evidence of discretionary approval, then went on to note

that such evidence would be rebutted if "the injury-producing feature" was not "part of the plan approved by the governmental entity." (*Grenier, supra,* 57 Cal.App.4th at p. 941 & fn. 7.)

And neither *Becker* nor *Ramirez* even involved *allegations,* much less *evidence,* the plans deviated from governing standards or that the injury-producing feature was omitted from the plans. Thus, there was no reason for either court to doubt that the apparently unremarkable plans had received discretionary approval.

Although the plaintiff in *Laabs did* allege the engineers failed to consider the alleged dangerous aspect of the design, the allegation did not disturb the court's belief the city had met its initial "evidentiary burden for the [discretionary-approval] prong" because the "record [was] void of any evidence" to support the plaintiff's allegation. (*Laabs, supra,* 164 Cal.App.4th at p. 1263.)

In fact, *none* of the cases cited by the Fourth District support its overarching conclusion that mere approval by an official who possesses discretionary authority establishes the discretionary-approval element as a matter of law. Rather, those cases—along with *Anderson, Johnston, Levin, Hernandez,* and this Court's opinion in *Cameron*—are consistent with the proposition that such evidence is "persuasive" evidence the plans were approved in the exercise of discretionary authority that, at least for purposes of summary judgment, conclusively establishes discretionary authority only in the absence of contrary evidence.

3. The Fourth District's approach to discretionary approval is bad policy.

Aside from conflicting with the plain text of Government Code section 830.6 and the great weight of authority interpreting that section, the Fourth District's holding that mere approval by an authorized official establishes discretionary authority as a matter of law is simply bad policy.

This Court has long recognized the "important societal goal of compensating injured parties for damage caused by willful or negligent acts." (*Ramos v. County of Madera* (1971) 4 Cal.3d 685, 692.) Accordingly, it is the strong public policy of this state that "when there is negligence, the rule is liability, immunity is the exception." (*Muskopf v. Corning Hospital Dist.* (1961) 55 Cal.2d 211, 219.)

The exceptional, disfavored nature of tort immunities would lead one to believe that such immunities should not easily be awarded. And, indeed, this Court has encouraged lower courts to show restraint in awarding governmental tort immunities, including design immunity. (*Baldwin v. State of California* (1972) 6 Cal.3d 424, 435–436 ["Thus, we have pointed out that 'courts should not causally decree governmental immunity . . . .'" quoting *Johnson, supra*, 69 Cal.2d at p. 798].)

And yet, the Fourth District's opinion would all but guarantee design immunity in virtually every road-design case by rendering toothless the one element in the three-element test for design immunity that had any real bite.

To refresh, design immunity is a function of the following three-element test:

1. A causal relationship between the plan or design and the accident;

2. Approval of the design in advance of construction by a legislative body or officer exercising discretionary authority; and

3. Substantial evidence of the design's reasonableness.

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

Regarding the first element, courts have roundly held that it is established when the plaintiff alleges "the accident was caused by a design defect." (E.g., *Alvis, supra,* 178 Cal.App.4th at p. 551.) Not coincidentally, these are precisely the cases in which a public entity will assert a design-immunity defense. Thus, the first element of the will effectively be established the moment the complaint is filed in a road-design case. (*Ibid.* ["The County may rely on the allegations of the complaint to establish causation."].)

As has already been discussed at length, the Fourth District would find the second element—discretionary approval—established *as a matter of law* in every case in which a public entity produces plans signed by an allegedly authorized official. (Slip opn. at p. 30.)

This leaves only the third element, which requires "substantial evidence" the design was reasonable. But as the Fourth District

noted on page 26 of its opinion, more than one court has held that "[t]he fact of approval by competent professionals can, in and of itself, establish the reasonable element." (*Laabs, supra,* 163 Cal.App.4th at pp. 1263–1264.)

In other words, in every case in which a public entity finds it necessary to assert a design-immunity defense (i.e., every road-design case), the public entity will be awarded design immunity merely by presenting plans signed by a presumably authorized and competent official, regardless of whether the plans conform to the public entity's own standards or omit critical details. This would obviously be inconsistent with this Court's admonition that lower courts "should not causally decree governmental immunity." (*Johnson, supra,* 69 Cal.2d at p. 798.)

The Fourth District tried to quell these fears when it indicated that although it is irrelevant to discretionary approval, the Hamptons' evidence *might* have presented an obstacle for the causal element of the design-immunity defense, but that the court had "no occasion" to consider that possibility because the Hamptons did not dispute "a causal relationship between the Plans and the accident" in the trial court. (Slip opn. at p. 29.)

As a threshold matter, one wonders how a plaintiff could ever succeed by filing a design-defect lawsuit, only to then turn around and dispute "a causal relationship between the [design] and the

accident." Doing so might be the charter example of "winning the battle, but losing the war."

This is not to mention that the Fourth District's belief that the Hamptons' evidence speaks *only* to the causation element is based on an overly literal reading of this Court's opinion in *Cameron*. As is evident at page 22 of its opinion, the Fourth District placed heavy emphasis on *Cameron*'s use of 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.)

But that passage was simply another way of saying that the accident was not caused by a design *worthy of design immunity*, not that the accident was unrelated to a design defect. Indeed, *Cameron* never expressly held that such evidence speaks exclusively to causation, and there are two good reasons to doubt that interpretation of *Cameron*.

First, it would be odd to suggest that a design is not the legal "cause" of injuries because it failed to account for an injury-producing feature of the surrounding landscape. In the products-liability context, it is well accepted that the defectiveness of a design is defined not only by what it included, but also by what it overlooked. (E.g., G. Schwartz, *Foreward: Understanding Products Liability* (1979) 67 Cal.L.Rev. 435, 468 ["The heart of the problem is this: one simply cannot talk meaningfully about a risk-benefit defect

in a 'product design until and unless one has identified some design alternative (*including any design omission*) that can serve as the basis for a risk-benefit analysis.'" Emphasis added.].) Why should this intuitive concept not carry over when the design at hand is an intersection instead of a table saw?

Not coincidentally, rather than draw a distinction between injuries that arise from affirmative design *decisions* and those that arise out of design *omissions*, cases interpreting the "caused by" language in section 830.6 have instead drawn a distinction between injuries arising out of the initial *design* of public property and those that arise out of subsequent negligence in, for example, *maintaining* the property. (E.g., *Mozzetti, supra*, 67 Cal.App.3d at p. 565; see also *Alvis, supra*, 178 Cal.App.4th at p. 551 ["The first question is whether there is undisputed evidence that *the accident was caused by a design defect, and not some other cause.*"].)

Of course, the second reason to reject the Fourth District's interpretation of *Cameron* is because, as discussed above, there is no doubt Government Code section 830.6 views a deviation from previously adopted standards as a discretionary-approval issue. In such a case, the second element would require proof the nonconforming plans were nonetheless approved in a *conscious* exercise of discretion.

Indeed, it is notable that, unlike this case, the plans in *Cameron* conformed to governing standards. (*Cameron, supra*, 7 Cal.3d at p.

325 ["[T]he plans were in accordance with [then-governing] standards of design."].) Thus, whatever might be said about an injury-producing feature that is absent from plans that *conform* to governing standards, there is no doubt that the absence of the very feature which causes the design to *deviate* from governing standards is directly relevant to discretionary approval under section 830.6.

B. Summary judgment should be reversed.

In the prior section, the Hamptons demonstrated that in the context of a design that deviates from governing standards, Government Code section 830.6 requires proof the deviation was knowingly approved by someone with authority to ignore those standards. In this section, the Hamptons explain why that rule is fatal to the County's design-immunity defense.

1. The design deviated from County standards, yet there is no evidence the official who approved the design was aware of that fact.

Among the many elements engineers must consider in designing intersections is sight distance, of which there are two main categories.

Using the Cole Grade/Miller Road intersection as an example, the first category of sight distance considers the perspective of a motorist who approaches Cole Grade Road from Miller Road. Such a motorist must be able to see far enough down Cole Grade Road in both directions to know when it is safe to enter the intersection. This is known as "corner sight distance." (1 AA 162–163.)

The other category considers the perspective of a motorist on Cole Grade Road who is approaching the Miller Road intersection. Such a motorist must be able to see far enough ahead to react to and stop before hitting any cars that prematurely enter the intersection from Miller Road. This is known as "operational stopping sight distance." (1 AA 164.)

The County's written standards for corner sight distance require 10 feet of sight distance from Miller Road for every mile-per-hour in the posted speed limit on Cole Grade Road. (1 AA 162–163.) Thus, because Cole Grade Road has a posted speed limit of 55 miles per hour (1 AA 088), Miller Road must have *at least* **550 feet** of corner sight distance looking south down Cole Grade Road. (1 AA 162–163.)[3]

But the amount of sight distance available to a motorist varies depending on the location from which it is measured. (E.g., 2 AA 363:19–22.) So although it is clear County standards require 550 feet of corner sight distance, the next question is, "From where?"

As it turns out, the County's written standards are remarkably specific on this point and require the measurement to be taken from a point on Miller Road exactly 10 feet back from the "edge of

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[3] The County's sight-distance standards refer to sight distance from a "minor" road looking down a "major" one. (1 AA 162–164.) The parties agree Cole Grade Road is the "major" road and Miller Road the "minor" one in this case. (2 AA 364:6–11.)

pavement" on Cole Grade Road, and two feet to the right of the centerline on Miller Road. (1 AA 162–163.)

Thus, an engineer lining up to take a measurement might, much like an NFL kicker lining up for a field goal, begin with his toes on Cole Grade Road's pavement edge, walk backwards 10 feet, then shuffle two feet to the right. Once there, he would crouch to a point 3.5 feet above the asphalt, and look south down Cole Grade Road. (*Ibid.*) To meet the County's minimum standards, the engineer must be able to see a marker placed at least 550 feet away.

The County concedes that as a result of the embankment on the southeast corner of the intersection, there is significantly less than 550 feet of corner sight distance. (2 AA 363:17– 364:4.) In fact, there is just **214 feet** of corner sight distance. (1 AA 152:14–15.)

The County will inevitably respond by arguing that the only relevant standard when improving an existing intersection is operational stopping sight distance. As discussed later, that assertion is factually questionable. But this dispute is largely academic because the intersection does not have the required amount of operational stopping sight distance anyway.

Unlike corner sight distance, operational stopping sight distance is not merely a function of the posted speed limit. As an "operational" standard designed to provide adequate stopping distance, the standard takes the topography of the intersection into

account. This is because a car traveling up a hill can stop more quickly than that same car traveling downhill or on a flat surface.

The parties agree that given the roughly 3% grade leading up to Miller Road, the operational stopping sight distance for a motorist heading northbound on Cole Grade Road towards Miller Road was 388 feet. (1 AA 164; CoA RB, p. 6.) As with corner sight distance, the measurement is taken from Miller Road looking down the Cole Grade Road. But instead of walking backwards 10 feet from the edge of pavement on Cole Grade Road, an engineer measuring operational stopping sight distance would walk back **eight feet** from the edge of pavement on Cole Grade Road. (1 AA 164.)

Once again, the County concedes that as a result of the embankment, the intersection lacks the requisite 388 feet of operational stopping sight distance when measured according to County guidelines. (CoA RB at p. 6 ["Measuring from the edge of the shoulder pavement, sight distance is limited by the embankment and falls short of the required 388 feet."].)

Thus, the County concedes that the embankment on the southeast corner of the intersection deprives the intersection of the minimum sight distance required by the County's written standards. And yet, unlike other vertical impediments to sight distance such as signposts and utility poles, the embankment is absent from the plans. (1 AA 099–104, 151:21–26.)

The omission is critical. As the County confirmed when it emphasized that the plans "include[d] a profile that enables 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." (Ansr. at pp. 2–3.) In other words, but for the omission of the embankment, the plans would have given the reviewing engineer everything he needed to ascertain the actual sight distance at the intersection under the proposed design.

But because the embankment was *not* on the plans, the engineer who reviewed the plans was unaware the intersection lacked the minimum amount of sight distance under the County's standards. Since, Government Code section 830.6 requires proof a nonconforming design was nonetheless approved in the exercise of of discretionary authority, the absence of the embankment is, on this record, fatal to the County's design-immunity defense.

Nor did the County establish that the engineer who signed the plans had the authority to ignore County standards. Instead, the County offered the declaration of a current County engineer, Robert Goralka, who testified that the engineer who signed the County plans had authority to approve plans "such as" these. (1 AA 087:2–3.) But that statement must be taken in context of Goralka's underlying belief the plans conformed to County standards. (1 AA 088:9–11.) Thus, Goralka's declaration does not address the question

of whether the engineer who signed the plans had the unilateral authority to deviate from County standards.

2. None of the County's inevitable counter-arguments justify summary judgment.

The County will inevitably raise a number of counterarguments, none of which justify a summary judgment on its design-immunity defense.

a. The County's belief that the Hamptons rely on the wrong standards is a factual dispute that cannot be resolved on summary judgment.

If history is any indication, the County will respond to the above by arguing, first, that the standard for "corner sight distance" does not apply when engineers improve an existing intersection, and second, that the Hamptons misstate the guidelines for measuring "operational stopping sight distance." But there is conflicting evidence on both issues.

For example, the County's argument that corner sight distance does not apply when improving an existing intersection is rebutted by language appearing at the top of the County document that sets the standard for corner sight distance, which reads: "Sight distance standards at *all* intersections *shall* conform to the sight distance criteria as provided below." (1 AA 162, emphasis added.)

And a County engineer testified at deposition that the County's corner sight distance standard reflects "the ideal sight distance that *is intended to be achieved when an intersection is being*

improved upon." (2 AA 311:17–20, emphasis added; see also 2 AA 312:3–17 ["Where [] the project is being designed for any future improvements, then the corner sight distance is strived to be achieved."].)

The County's second assertion—that the Hamptons misstate the guidelines for measuring operational stopping sight distance—arises out of its belief that operational stopping sight distance is measured relative to the *lane line* on Cole Grade Road, not the *pavement edge*. Not coincidentally, the lane line is several feet further into the intersection than the pavement edge and greatly reduces the embankment's impact on sight distance. The County insists there is at least 388 feet of operational stopping sight distance when measured relative to the lane line.[4]

But again, the County standards for operational stopping sight distance unequivocally state that it must be measured "from a point on the minor road 8 feet from the *edge of pavement.*" (1 AA 164, emphasis added.)

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[4] The difference between the "**edge of pavement**" (or "pavement edge") and the "**lane line**" (or "edge line") is perhaps best understood by viewing the photographs at page 300 of the Appellants' Appendix. The photo is taken from Cole Grade Road looking north. Westbound Miller Road is the street that approaches Cole Grade Road from the right side of the photograph. The "lane line" is the right-most white stripe in each photo. The "edge of pavement" is the curb-like division between the dirt shoulder and the asphalt.

In light of this evidence, no amount of County conjecture about the "correct" standard can justify a summary judgment. (E.g., *Kerns v. CSE Ins. Group* (2003) 106 Cal.App.4th 368, 396 ["The actual weighing of conflicting evidence by the fact-finder is a process which can never take place in the context of a summary judgment motion."].)

b. There is no evidence the design was approved on the assumption motorists would "creep" past the embankment for an unobstructed view.

The County will inevitably argue that the substandard sight distance is a nonissue because a motorist could obtain ample sight distance by rolling forward from the pavement edge up to the lane line before entering the intersection. Citing *Hefner v. County of Sacramento* (1988) 197 Cal.App.3d 1007, the County will emphasize that since reasonable motorists roll forward to peer around obstructions, it would have been reasonable for engineers to assume motorists would have done so at this intersection.

But design immunity was intended to prevent courts from second-guessing the actual decisions made by public officials in the exercise of their discretionary authority. It does not exist to immunize decisions that *might* have been made. (*Levin, supra,* 146 Cal.App.3d at p. 418.) And yet, the County has *absolutely no evidence* the engineer who approved the design of *this* intersection did so based on the assumption adequate sight distance would be achieved if a motorist rolled past the embankment and up to the lane line. As

a purely factual matter, he could not have drawn any such conclusion because, at least on this record, the engineer was unaware of the embankment in the first place.

Nor is the assumption motorists will roll past any sight-distance obstructions they encounter the sole, implicit basis for approval of *every* intersection. If it were, this would render superfluous the exacting sight-distance standards County officials chose in the exercise of their quasi-legislative discretionary authority.

Ultimately, absent proof that this otherwise substandard intersection was nonetheless approved on the rationale that it would be safe for motorists who rolled past the embankment to obtain an unobstructed view of northbound Cole Grade Road, the fact that a "reasonable" motorist might have done so is, at best, a response to the charge that the intersection is a dangerous condition, *not* a basis for establishing discretionary authority. (See CACI 1102; Gov. Code, § 830, subd. (a).)

c. The County's "objections" do not justify summary judgment in the County's favor.

History has also taught that the County will point out the trial court sustained most of its objections to the declaration submitted by the Hamptons' expert engineer, Edward Stevens. And the County will argue the Hamptons failed to specifically address those objections in the trial court and the Fourth District. Two responses are in order.

First, the County's "objections"—which can be found on pages 345 to 354 of the Appellants' Appendix—are not true evidentiary objections so much as substantive arguments regarding the case as a whole. In effect, the County's "objections" boil down to the circular claim that Stevens's conclusions are irrelevant and lack foundation because they cite evidentiary facts that are moot only if one accepts the County's view of the case.

At the risk of giving this issue far more attention than it deserves, the Hamptons will avoid a blow-by-blow account of why each "objection" fails to state a valid evidentiary challenge that warranted discussion beyond the Hamptons' substantive arguments. Instead, to the extent this Court has *any* interest in parsing this issue, the Hamptons would respectfully direct this Court's attention to *Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 763–767 (*Cole*). In *Cole*, the Sixth District chastised the Town of Los Gatos for making virtually identical "objections" in another road-design case. The court's ultimate conclusion that the objections "consist almost entirely of arguments about the merits of the controversy not the admissibility of evidence," could not more accurately describe the County's "objections" in this case. (*Cole, supra*, 205 Cal.App.4th at p. 767.)

Second, and more importantly, the admissibility of Stevens's declaration is a nonissue for the simple fact that it is not necessary to raise a triable issue of fact. The County's own personnel and

documents confirm that the intersection had to have at least 550 feet of corner sight distance when measured from a point 10 feet from the edge of pavement on Cole Grade Road. (1 AA 162; 2 AA 311:17–20, 312:3–17.) And the County's personnel admit it does not meet that standard because of the embankment. (1 AA 088:11–13; 2 AA 363:17–21.)

Similarly, the County's own papers confirm that the intersection needed at least 388 feet of operational stopping sight distance measured from a point eight feet from the edge of pavement on Cole Grade Road. (1 AA 164.) And the County concedes the intersection lacks that amount of sight distance due to the embankment, never more succinctly than in the brief it filed with the Fourth District. (CoA RB at p. 6 ["Measuring from the edge of the shoulder pavement, sight distance is limited by the embankment and falls short of the required 388 feet."].)

And, of course, the embankment that deprives the intersection of the requisite minimum amounts of corner sight distance *and* operational stopping sight distance is absent from the plans used for the approval process. (1 AA 099–104.)

In short, there is ample evidence negating the discretionary-approval element in this record even *without* Edward Stevens's declaration.

CONCLUSION

The Fourth District held that evidence design plans were approved by an official who merely possessed discretionary authority is sufficient to establish the discretionary-approval element of design immunity as a matter of law.

But the text of Government Code section 830.6 requires proof that a design which deviates from governing standards was approved in a conscious exercise of discretion by an official with authority to deviate from governing standards.

Here, the plans not only fall below the County's written sight distance standards, but actually conceal that fact by omitting the embankment which caused sight distance to fall below County minimums. The County failed to respond with proof the engineer who approved the design was aware of the embankment and had the authority to disregard the County's minimum standards.

Accordingly, the Hamptons pray this Court will reverse the Fourth District's decision and remand this case for trial.

Dated: December 19, 2013

By: _____
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CERTIFICATE OF COMPLIANCE

As required by California Rules of Court, rule 8.520(c)(1), I certify that, according to the word-count feature in Microsoft Word 2011, this "Opening Brief on the Merits" contains **8,622** words, including footnotes, but excluding any content identified in rule 8.520(c)(3).

Dated: December 19, 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 December 19, 2013, I served the attached:

Opening Brief on the Merits

of which a true and correct copy of the document filed in the case 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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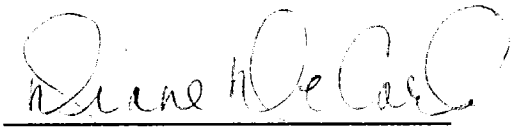
California Court of Appeal
Fourth Appellate District, Division One
750 B Street, Suite 300
San Diego, CA 92101

Hon. Timothy Taylor
San Diego County Superior Court
330 West Broadway
San Diego, CA 92101

Each envelope was then sealed, and with the postage thereon fully prepaid, deposited in the U.S. Mail by me in San Diego, California, on December 19, 2013.

I declare under penalty of perjury that the foregoing is true and correct, and this declaration was executed at San Diego, California, on **December 19, 2013**.



Diane DeCarlo