S267453

IN THE SUPREME COURT OF CALIFORNIA

BETTY TANSAVATDI,
Plaintiff and Respondent,

v.

CITY OF RANCHO PALOS VERDES,
Defendant and Petitioner.

Review of a Decision by the Court of Appeal,
Second Appellate District, Division Four, Case No. B293670
Los Angeles Superior Court Case No. BC633651 c/w BC652435

ANSWER BRIEF ON THE MERITS

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I. ISSUE PRESENTED

Can a public entity 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?

II. INTRODUCTION

When enacting Government Code sections 830.6 and 830.8, the legislature never intended for a public entity to be completely immune from suit merely because an improvement is constructed in accordance with an approved plan or design. Section 830.6 (design immunity) and the immediately succeeding section, section 830.8 (trap exception), are both part of comprehensive legislation adopted in 1963 establishing governmental tort liability and immunity. Although section 830.8 provides that neither a public entity nor a public employee can be liable for its/his or her failure to provide traffic or warning signals, section 830.8 clearly states that a public entity must still install warning signs or signals when necessary to warn of a dangerous condition, which would not be reasonably apparent and would not have been anticipated by a person exercising due care. (Gov. Code, § 830.8.)

In 1972, this Court, through *Cameron v. State of California* (1972) 7 Cal.3d 318, brought into harmony sections 830.6 and 830.8 and resolved the issue presented here in favor of Plaintiff. The Court held that the mere existence of design immunity under section 830.6 for a dangerous condition does not automatically

bar liability for a failure to warn of that dangerous condition. Rather, section 830.6 provides immunity only to harms caused by a plan or design. Even where design immunity applies, a public entity may still have an obligation to warn of unsafe conditions that are an independent concurring cause of the accident. Negligence that is independent of the design, even if only a concurring, proximate cause, is not subject to design immunity.

Following the *Cameron* decision, the legislature in 1978 sought input from various sources about modifying section 830.6 in light of this Court's decisions in *Cameron* and *Baldwin v. State of California* (1972) 6 Cal.3d 424 (held design immunity does not apply if the design has become inadequate due to passage of time). At that time, numerous bodies, including the California Attorney General and the Joint Committee on Tort Liability, urged the legislature to add language to section 830.6, obviating the holding in *Cameron*. The legislature refused and reaffirmed this Court's correct interpretation and application of sections 830.6 and 830.8 in *Cameron*.

The law in the State of California, since at least 1963, has been that a public entity has an obligation to warn of a concealed dangerous condition even if it enjoys design immunity under section 830.6.

Nevertheless, Defendant asks this Court to overrule *Cameron* and implement a change in the law that the legislature never wanted. This Court should reaffirm *Cameron* and continue to follow the legislative intent when it adopted sections 830.6 and 830.8.

III. STATEMENT OF FACTS

The bicycle lane stretching four miles on Hawthorne Boulevard, between Highridge Park and Rancho Palos Verdes Drive, meanders up and down the picturesque hills of Rancho Palos Verdes with a view of the ocean, making it a popular spot for cyclists. As highlighted by an engineer hired by the City of Rancho Palos Verdes ("City"), this four-mile stretch of Hawthorne Boulevard is "heavily used by bicyclists," with "significant numbers of bicyclists using the roadway." (2 AA 636.) At some point prior to 2016, the City erased the bicycle lane between Vallon Drive and Dupre Drive, a distance of approximately a quarter-mile where this incident occurred. (2 AA 599, 787 [¶ 12].)[1]

On a sunny afternoon in March 2016, Jonathan Tansavatdi ("Jonathan"), while cycling on Hawthorne Boulevard, entered this stretch of roadway which did not have a bike lane. Jonathan made it through most of this stretch of the roadway and approached the only intersection on Hawthorne Boulevard in this four-mile stretch that did not provide any guidance to a bicyclist on how to properly approach and navigate the intersection.

As Jonathan approached the intersection at Hawthorne and Vallon Drive, he intended to travel straight through the intersection to enter the bike lane, which restarted on the other

[1] In the trial court, the City claimed a bike lane never existed in this quarter-mile stretch of roadway and, thus, submitted no evidence establishing any deliberative process by the City in the installation or removal of the bike lane. Plaintiff provided photographic evidence establishing the presence of a bike lane in this stretch of roadway.

side of the intersection. Jonathan approached the intersection riding his bike as close to the curb as he could. At the same time, a very large semi-truck (Hawthorne is also a dedicated truck route, but the City had not provided any warnings to motorists or bicyclists that trucks also frequent the area) that was also traveling down Hawthorne made a right-hand turn directly in front of Jonathan, while attempting to turn onto Vallon Drive. Jonathan grabbed the brakes in an attempt to slow down but could not. He crashed into the side of the truck. (2 AA 732-733.) Jonathan, a young and successful software designer in his 20s, died from the impact. (5 AA 1537.)

Jonathan's mother, Betty Tansavatdi ("Plaintiff"), filed this lawsuit in September 2016 against the City and the owners/operators of the truck. (1 AA 10.) As against the City, Plaintiff alleged that the intersection of Hawthorne Boulevard and Vallon Drive was a dangerous condition of public property. (1 AA 12.)

Defendant filed a Motion for Summary Judgment, arguing the dangerous condition created by the ending of the bike lane was part of the 2009 plan and summary judgment could be entered because of design immunity under Government Code section 830.6. (1 AA 27-54.)

However, in making its motion, the City did not argue that the 2009 plan considered the placement of a warning for the dangerous condition, or that a warning was included in the plan, or even that a decision was made not to provide a warning. Rather, the City exclusively argued in a footnote that because

"the City has met the requisites of design immunity, no such warning was required." (1 AA 44, fn. 2.)

Plaintiff opposed the motion. (2 AA 412-438.) With respect to the issue of design immunity, Plaintiff argued that the City failed to demonstrate each of the three elements necessary to prove application of the affirmative defense as a matter of law. (2 AA 424-432.) Plaintiff noted that even if the defense applied, it did not preclude liability as the evidence revealed that in addition to creating the dangerous condition, the City was negligent in failing to warn users of the abrupt end to the bike lane on Hawthorne Boulevard, thereby creating a concealed trap. (2 AA 424-425.) The trial court granted summary judgment in favor of the City, finding that design immunity applied because the applicable plans showed bicycle lane markings in multiple segments of Hawthorne Boulevard. However, for the segment between Dupre and Vallon where the fatal accident occurred, the plans omitted a bicycle lane and, thus, there could be no liability based on the lack of bicycle lane in the approach to the intersection. (5 AA 1536.)

In granting summary judgment, the trial court did not address Plaintiff's failure to warn claim, although Plaintiff's pleadings and papers in opposition to the motion for summary judgment raised the issue of the City's passive negligence for its failure to warn and presented competent evidence of a concealed dangerous trap independent of the plans and the bicycle lane omission. (2 AA 425-426.) Among other things, because the slope of Hawthorne (with a steep 8% downgrade) causes bicyclists to

ride their bicycles at relatively high speeds and straight through the right turn at Vallon Drive, the likelihood of conflict and collision with a vehicle is increased. Moreover, this area is a designated route for semi-trucks. Given the curve, the slope, and the right turn only lane, under professional engineering standards, bicyclists traveling on Hawthorne between Dupre and Vallon need more advanced warning and positive guidance for the safe and intended operation of the roadway, especially considering the high volume of bicycle use, and the City's designation of this roadway as a designated truck route. The roadway, without warnings or guidance to the foreseeable class of bicyclists traveling at high speed, is a trap under established engineering principles. (See 2 AA 554, 561, 785-786 [Ruzak, ¶ 9], 787 [Ruzak, ¶ 13].)

The Court of Appeal agreed with this analysis, holding that even if design immunity protects the City from liability for the omission of the bicycle lane, the City may still be liable for failing to warn of a dangerous condition that exists independent of the plans. Following *Cameron, supra,* 7 Cal.3d 318, the Court of Appeal concluded that design immunity does not, as a matter of law, preclude liability under a theory of failure to warn of a dangerous condition.

The City disagrees, and the matter is now before this Court.

IV. LEGAL ARGUMENT

A. This Is A Pure Legal Issue.

The issue presented in this appeal is purely a legal issue. The City did not raise any factual issue regarding the adequacy of any signage, or that its plan or design included warnings or signs for the dangerous condition created by the termination of the bike lane. In fact, the City only raised the issue of design immunity as it applies to a failure to warn in a footnote. (See 1 AA 44, fn. 2.) The City did not independently move for summary adjudication on the claim for failure to warn, nor did the court's order granting summary judgment extend beyond the design immunity analysis. (See 5 AA 1539-1547.)

In light of this sparse factual record, the Court of Appeal specifically held, "under *Cameron*, 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. Because it appears the trial court did not consider appellant's failure to warn theory, we deem it advisable to allow the trial court to consider the failure to warn theory in the first instance." (*Tansavatdi v. City of Rancho Palos Verdes* (2021) 60 Cal.App.5th 423.)

The City's argument that this decision should be reversed because the "appellate court admitted it could not tell what kind of warning plaintiff claimed the City should have provided" is inaccurate. As noted by the Court of Appeal, these issues were

not fully addressed or considered below and the record thereon is incomplete.

The issue before this Court is exclusively whether the existence of a failure to warn claim is barred as a matter of law if design immunity applies to the underlying concealed dangerous condition. As set forth herein, it is not.

B. <u>This Court Already Resolved This Issue In *Cameron*</u>.

This Court already resolved the issue presented in this appeal through *Cameron, supra,* 7 Cal.3d 318. That decision should not be overruled.

Section 835 provides that a public entity may be liable under certain circumstances for injuries caused by a dangerous condition of its property. Specifically, "[s]ection 835 provides that a public entity may be held liable for such injuries '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 dangerous condition, [and] that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred.' In addition, the plaintiff must establish 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) '[t]he public entity had . . . notice of the dangerous condition . . . a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.' [Citation.]" (*Cordova v. City of Los Angeles* (2015) 61 Cal.4th 1099, 1105.)

Thus, as can be seen from this language, section 835 establishes two distinct alternate duties and grounds for liability. Under subdivision (a), the public entity owes what amounts to a general duty of care for dangerous conditions, becoming liable where the entity wrongfully or negligently creates a dangerous condition, i.e., engages in "active negligence." Under subdivision (b), the public entity owes an affirmative duty of care, becoming liable where it has notice of a dangerous condition but fails to take measure to "protect against" it, i.e., "passive negligence."

Section 830.6, design immunity, provides a defense to liability under section 835. Section 830.8, the trap exception, in turn provides an exception to the defense of design immunity. Sections 830.6 (design immunity) and 830.8 (trap exception) are part of the comprehensive legislation adopted in 1963, the Government Claims Act, which provides for direct liability on the part of the public entities for injuries caused by dangerous conditions. It is clear that section 830.6 (design immunity) limits liability for an injury caused by an improvement constructed according to an approved plan or design. But when adopting section 830.6, the legislature never intended for the public entity to be forever immune when the improvement, as used by the public, is dangerous, defective, or a trap for the unwary.

The legislature – in enacting both sections 830.6 and 830.8 simultaneously (and in subsequent amendment discussed further herein) – went out of its way to point out that design immunity is

not absolute.[2] The determination of whether to place warning signs is ordinarily part of any plan for highway improvement, and if section 830.6 confers immunity for plan and design forever and without regard to actual interaction of the public with the roadway design, the limitation on the immunity granted by section 830.8 for traps for the unwary would be pointless and misleading.

Through section 830.8 (trap exception), the legislature recognized that there can be liability for failure to place warning signs. The Court's decision in *Cameron, supra,* 7 Cal.3d 318, properly reconciled sections 830.6 and 830.8. The plaintiffs in *Cameron* sustained injury when they lost control of their car on a highway. Their complaint alleged that the injuries were caused by a dangerous condition on the highway, namely uneven banking, also referred to as "superelevation," on a curve in the road. (*Id.* at p. 323.) The state countered that the uneven banking "was part of a duly approved design or plan of the highway." (*Id.* at p. 324.) This Court reversed the trial court's entry of a judgment of nonsuit in favor of the state, finding that the state had failed to meet its burden of establishing all the elements of design immunity as a matter of law, given evidence that the superelevation did not appear in the plan. (*Id.* at p. 326.)

This Court then considered a second issue raised in the plaintiff's petition: "2. The settlement of the important question of law revolving about the scope and application of Government

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[2] See, e.g., section 831 (weather conditions) and 831.8 (reservoirs, canals, conduits and drains). Both provide exceptions to immunity in limited circumstances.

Code Section 830.6 in light of the 'trap exception' of Government Code Section 830.8." (Plaintiff's Motion for Judicial Notice ["MJN"], Exhibit 3, Appellant's Petition in *Cameron*, at p. 2.) This is the very the same issue before this Court.

This Court then resolved that issue raised by Cameron in Cameron's favor and held that the state's failure to warn of a dangerous condition was an independent, separate concurring cause of the accident. (*Cameron, supra,* 7 Cal.3d at p. 329.) Such was because the driver entering the curve in question at a lawful speed and exercising due care was unable to perceive the uneven superelevation; that the superelevation would trap the driver into thinking the curve would continue to the left, while in fact it continues to the right; that the driver, too late to remedy the situation, would discover himself going too fast; and that warning signs, indicating the proper speed to negotiate the curve, if obeyed by the driver, would eliminate the dangerousness from the condition of uneven superelevation. (*Id.* at p. 327.)

The affirmative duty of care under section 835's subdivision (b) that gives rise to the duty to warn is wholly distinct from the standard duty of care under subdivision (a). (*Cameron, supra,* 7 Cal. 3d at p. 327.) Active and passive forms of negligence identified in section 835 are two independent theories of liability. Although "'[t]here may be two concurring, proximate causes of an accident . . . these separate, concurring causes may be produced by a single defendant, who is guilty of an affirmatively negligent act and of a passively negligent omission . . . .'" (*Cameron, supra,* 7 Cal.3d at p. 328.)

Cameron then explained that the affirmative duty for passive negligence identified in subdivision (b) is always present whether or not the dangerous condition was a product of active negligence under subdivision (a). *Cameron, supra,* 7 Cal.3d at p. 328, held that "[r]egardless of the availability of (an) active negligence theory (creating a danger), plaintiffs (are) entitled to go before a jury on (a) passive negligence theory, i.e., an accident caused by the (entity's) failure to warn the public against (the) danger known to it but not apparent to a reasonably careful . . . user." (*Cameron, supra,* 7 Cal.3d at p. 328.)

When finding for Cameron, the Court distinguished design immunity (superelevation of the roadway) from negligence in failing to warn of a dangerous curve and posting of the safe speed. (*Cameron, supra,* 7 Cal. 3d 318.) The Court concluded that "if there had been proper warning of a dangerous curve and posting of the safe speed, the dangerous condition of the highway would have been effectually neutralized. The state's failure to so warn was an independent, separate concurring cause of the accident." (*Ibid.*)

Within the *Cameron* decision, the Court approvingly cited *Flournoy v. State of California* (1969) 275 Cal.App.2d 806. In *Flournoy*, the state constructed a bridge in such a way that water from an under passing stream caused moisture to condense on the bridge. (*Id.* at p. 808.) On cold days, the moisture would freeze on the bridge surface prior to formation of frost or ice on the approaching highway, thereby creating a dangerous icy condition. (*Ibid.*) The state, despite having notice thereof, failed

to post any signs warning of the icy condition or indicating the need for reduced speed. The plaintiff's decedent, unaware of the icy condition, was driving at a normal rate of speed when she lost control of her car and was killed. (*Ibid.*) There were two concurring proximate causes of the accident: (1) the state's active negligence in building a bridge that was ice-prone and (2) the state's passive negligence in failing to post a warning about known icy danger and safe speed. (*Ibid.*)

The Court found that the court of appeal in *Flournoy* had properly harmonized design immunity (830.6) for the active negligence in the bridge design on the one hand, and the passive negligence (830.8) for failure to warn the public against a danger know to the entity but not apparent to a reasonably careful highway user, on the other hand.

Here, the City repeatedly dismisses *Cameron* as "illogical." However, *Cameron* and *Flournoy* are intellectually sound. The granting of design immunity means that the design was reasonable in light of the circumstances, but it does not mean that the roadway is safe per se. Where design immunity is granted, but the roadway is not safe, there may be a duty to warn of the dangerous condition in the roadway. There are certain hazardous conditions independent of a design, which create a concealed trap for reasonable roadway users, thus requiring a warning. The state in *Flournoy* did not purposely design the bridge to become icy and was properly immune for a design susceptible to icing, but nonetheless remained liable for failing to warn roadway users of the invisible danger and the safe speed to

navigate such. Similarly, the state in *Cameron* could be simultaneously immune for a curve that caused cars to escape the roadway, and liable for the failure to post a sign as to a safe speed to navigate the curve. These are independent causes of the incidents. Sections 830.6 (design immunity) and 830.8 (trap exception) are not incompatible or illogical. The legislature clearly contemplated that there could be liability for a trap in the roadway, notwithstanding immunity for the design of the roadway.

This makes sense because, notwithstanding competent design pursuant to approved plans, roadway dangers may persist independent of the design. For example, it may be reasonable that a public entity does not need to install guardrails throughout hundreds of miles of unpredictably winding mountain roads, but that does not mean that the unpredictably winding mountain roadway is safe or that there is no obligation to warn motorists of the conditions they are about to encounter. Further examples include blind curves (i.e., a curve on a roadway in which drivers cannot see approaching traffic), or ice forming on bridges. The design may be reasonable, but without a warning, the roadway user may not visibly appreciate the risk and slow down. Without the trap exception of section 830.8, the public entity has insufficient incentive to warn the public about a concealed danger and would have no obligation to place signs on the roadway warning motorists of the impending, but unapparent, danger.

The language of section 830.6 (design immunity) limits its immunity to injuries caused by a plan or design only. To extend

the section to grant a general immunity for an injury caused by all conditions of the actual improvement would require going beyond the scope of design immunity intended by the legislature. It would also result in less warnings, less safe roadways, and a gross unfairness to those individuals injured by the condition of the property. The City's position, if adopted by this Court, would also negate the exceptions to immunity for the effects of weather in section 831 and the exceptions to immunity for children in canals in section 831.8. (Discussed below).

C. Post-*Cameron* Legislative History Validates *Cameron* And Establishes Plaintiff's Position.

In response to *Cameron*, the Joint Committee on Tort Liability and the California Attorney General urged the legislature to revise the design immunity statute (section 830.6) to legislatively eliminate the holding in *Cameron*. The legislature refused. Accordingly, this Court should not do so either.

Section 830.6 was originally enacted in 1963. In 1978, approximately six years after *Cameron* was decided, the legislature considered making changes to section 830.6 in light of this Court's holdings in *Cameron* and *Baldwin*. As a result, the Attorney General urged the legislature to add language to the statute to overrule this Court's holding in *Cameron*. (See MJN, Exhibit 2, DOJ Letter, September 12, 1978.)

In support of its position, the Attorney General argued "A further inroad to design immunity is contained in the concept of liability for failing to warn of a dangerous condition . . . While an entity may be immune for the existence of a dangerous condition

of property, a court may still hold the entity liable for failure to post warning signs regarding that condition. This result seems contrary to the legislative history of the dangerous condition sections and the design immunity. It is recommended that the 'design immunity' of governmental entities be restored . . . [to] overcome the erosion of Baldwin and Cameron. This might be accomplished by adding the following language to existing statutes: 'The immunity created by Government Code section 830.6 shall not be made inapplicable by the passage of time, changed physical conditions, or other changed circumstances. If it is established that the public entity is immune from liability for a dangerous condition, there shall be no liability imposed on a public entity for the failure to warn of that dangerous condition.'" (See MJN, Exhibit 2, DOJ Letter, September 12, 1978.) Despite the urging of the State Attorney General, the legislature rejected the invitation to overturn *Cameron*. (See Historical and Statutory Notes, Gov. Code, § 830.6.)

Similarly, through a 1978 Staff Report prepared by the Joint Committee on Tort Liability, the Joint Committee urged the legislature to abrogate *Cameron* when making its revisions to section 830.6. As did the Attorney General, the Joint Committee complained that subsequent to the enactment of section 830.6, case law including *Baldwin* and *Cameron* had "carved out several exceptions" to design immunity. (MJN, Exhibit 1, 1978 Staff Report.) The Committee also recognized that since *Cameron* "a public entity may be liable for failure to provide warning signs if such were necessary to warn of a dangerous condition not

reasonably apparent nor anticipated by a person using the highway with due care . . . even though design immunity may have been applicable, since the failure to warn was an independent basis for recovery." The Committee then strongly recommended "that Government Code Section 830.6 be reenacted, affirming the Legislative intent to provide immunity for design. A statement in the Legislation should provide that its purpose is to reenact section 830.6, obviating the holding in Cameron." (MJN, Exhibit 1, 1978 Staff Report.)

Despite the urging of the Joint Committee on Tort Liability, the legislature again refused to obviate *Cameron*, only amending section 830.6 in ways that did not affect the holding of *Cameron*, or the trap exception of section 830.8.

In addition to the legislature's refusal to obviate or contradict *Cameron*, the statutory language of section 831 also demonstrates that the legislature contemplated that section 830.6 (design immunity) would not eternally immunize public entities for dangerous conditions under section 830.8. Section 831 provides that a public entity shall not be liable for injury caused by the "effect on the use of streets and highways of weather conditions as such." (Gov. Code, § 831.) However, the section also states that "Nothing in this section exonerates a public entity or public employee from liability for injury proximately caused by such effect if it would not be reasonably apparent to, and would not be anticipated by, a person exercising due care. For purposes of this section, the effect on the use of streets and highways of weather conditions includes the effect of fog, wind, rain, flood, ice

or snow but does not include physical damage to or deterioration of streets and highways resulting from weather conditions." (Gov. Code, § 831.)

Streets and highways are ordinarily planned and approved by public entities, and the plans ordinarily specify the materials to be used in the improvements. In enacting section 831 simultaneously with the design immunity section in 1963, the legislature must have contemplated that there could be liability for failure to maintain planned streets and highways free from defects under section 835 and that the immunity conferred by section 830.6 for planned improvements would not forever preclude such liability.

Similarly, section 831.8 (granting immunity with respect to reservoirs, canals, conduits, and drains) contains an exception to the immunity for persons under the age of 12 where certain conditions are met. (Gov. Code, § 831.8.) Unplanned, undesigned and unapproved reservoirs, canals, conduits, and drains are so rare, if not entirely nonexistent, that it would be unreasonable to assume that the exception to immunity in section 831.8 is only applicable to such improvements, and the legislature must have contemplated that liability for dangerous conditions under section 835 could extend to planned improvements of the kind named in section 831.8 and that section 830.6 did not forever preclude such liability.

Design immunity is just one part of an integrated plan for allocating risks and costs caused by a condition of public property. To alter one element of that plan would cause

disruption of the entire plan. Reading the immunity statutes as a whole, the trap exception of section 830.8 is not somehow cancelled by the design immunity of section 830.6. The City's reading of the statutes is unreasonable, and inconsistent with the legislative history. *Cameron* and the Court of Appeal in this case, correctly interpreted the law and is consistent with what the legislature intended when it enacted sections 830.6 and 830.8 in 1963.

D. ***Weinstein* And *Compton* Are Not Persuasive.**

The City relies on two outlier cases: *Weinstein v. Department of Transportation* (2006) 139 Cal.App.4th 52, and *Compton v. City of Santee* (1993) 12 Cal.App.4th 591.

In *Weinstein*, the plaintiffs were injured when another car crossed the median and struck their vehicle head on. (*Weinstein, supra,* 139 Cal.App.4th at p. 54.) The plaintiffs contended that the design of the roadway was inadequate to prevent cross-over accidents. (*Id.* at p. 55.) Design immunity applied because the state's independent traffic engineering expert, Edward Ruzak, submitted a declaration confirming that the absence of a median barrier, shoulder width, and horizontal alignment of the roadway were all aspects of the design as planned and built. (*Id.* at p. 58.) (Mr. Ruzak submitted a declaration in this action in opposition to the City's motion for summary judgment.) The plaintiffs in *Weinstein* contended that failure to post a warning about an upcoming lane drop was an independent basis for liability. (*Id.* at p. 61.) The *Weinstein* court distinguished *Cameron* as "involv[ing] the failure to warn of a *hidden dangerous condition* that was not

part of the approved design of the highway" since the danger in *Weinstein* was not hidden and was quite obvious. (*Ibid.*, emphasis added.)

The City gives *Weinstein* greater credence than warranted. It does not negate section 830.8 (trap exception) and, further, it recognizes the importance of *Cameron* that liability remains, notwithstanding design immunity, for failure to warn of a "hidden dangerous condition." (*Weinstein*, *supra,* 139 Cal.App.4th at 61.) The Court of Appeal in the instant matter described the City's reliance on *Weinstein* as "mistaken," and correctly applied *Cameron's* logic 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."

In *Compton*, the plaintiffs claimed that a "trap" was created by a bridge's "cresting" and a horizontal curve which purportedly created a sight restriction. The City of Santee moved for summary judgment arguing the bridge was not a dangerous condition of public property as a matter of law, the City of Santee did not have notice of the allegedly dangerous condition of the bridge, and it was immune from liability pursuant to the provisions of section 830.6.

The trial court granted the motion on the immunity ground, concluding the City was protected by the design immunity provision of section 830.6. (*Compton, supra,* 12 Cal.App.4th at p. 595.) Compton appealed contending the trial court erred in granting the motion, arguing a genuine issue of material fact existed as to whether the design immunity was lost

based on the City's "notice of changed circumstances." While the appellate court did briefly analyze section 830.8, it believed that since the plaintiff had not shown that the City had notice of a dangerous condition, an analysis under 830.8 was not necessary in the first place. (*Id.* at p. 600.)

Weinstein and *Compton* appear to be the only published authorities, in the nearly 50 years since *Cameron* was decided, that the City uses to support its position that this Court should now overrule *Cameron* and reinterpret a legislative scheme that has existed since the 1960s. This Court should decline to do so.

E. The City's Position Here Would Preclude All Liability Under Chapter 830 *et seq.*

The City's position, if adopted by this Court, would affect the reading of numerous statutes, including sections 830.6, 830.8, 831, 831.8 and others. The determination of whether to place warning signs is ordinarily part of any plan for a highway improvement, and if section 830.6 confers immunity for plan and design forever and without regard to the actual operation of the improvement, the limitation on the immunity granted by section 830.8 for traps for the unwary would be pointless and misleading, as would too the exceptions for weather immunity, and the exception for children injured in canals. These limitations on immunity can only be viewed reasonably as a legislative recognition that, under section 835 providing for liability for dangerous conditions, there can be liability for failure to place the necessary warning signs.

The language of section 830.6 (design immunity) limits its immunity to injuries caused by a plan or design. A failure to warn claim is based on a concealed dangerous condition independent of an approved design, that necessitates warning. The trap exception (section 830.8) is not an exception to design immunity. Rather, it is an exception to the immunity in section 830.8 for failure to post traditional warning signs, which is a defense to a claim for failure to warn.

The City's position would abrogate section 830.8 and the duty by any governmental entity to provide any warning signs. Presumably all public roadways are designed by a public entity. If this Court were to adopt the City's position, the public entity would merely have to show that the plan or design was approved in advance by the proper legislative body or by a person with the proper authority and that there is substantial evidence demonstrating reasonableness. Once that occurred, the entity would be immune from all liability, regardless of it having created a dangerous condition.

Some roadways cannot be designed safely because of the earth's natural topography. Such roadways include curves on mountains, roadways which traverse over a steep hill with a blind intersection on the other side of the hill, and roadways which have reduced visibility due to line-of-sight issues. Despite such roadways being inherently dangerous, the public entity still erects the roadway because of the utility and need for the roadway. Citizens use these roadways thousands of times daily to access various mountain communities, such as Lake Tahoe,

Yosemite, and Lake Arrowhead. However, motorists who use these roadways may not realize the hidden danger in the roadway until it is too late. As a result, entities, under section 830.8, must provide adequate warning to motorists of the hidden dangers so that they can properly navigate the danger or avoid it all together. If this Court were to adopt the City's view of the world, then a public entity would never again have to provide a warning about the danger in any roadway, including any signs which warn motorists to slow down due to the upcoming curve, because the entity would be immune from all liability. This should not be and cannot be the standards that public entities have to abide by when they erect roadways which all of us depend upon greatly on a daily basis.

V. CONCLUSION

Cameron and *Flournoy* have established important precedent in this State for close to 50 years. Notwithstanding design immunity, an entity may nevertheless be liable for failure to warn of a dangerous condition when the failure to warn is itself negligent, and is an independent, separate, concurring cause of the accident. (*Cameron, supra,* 7 Cal.3d at p. 329.) That has been and should remain to be the law in this state, especially since the legislature agrees.

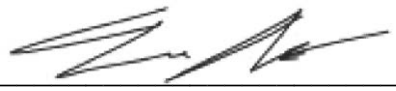
The Court of Appeal correctly remanded the matter to the trial court to consider Plaintiff's failure to warn claim, which was pled in the complaint, but not considered by the trial court in granting summary judgment in favor of the City. Under section

830.8, the City must remain liable for its negligence in failing to warn of a dangerous condition independent of its design immunity. This Court should affirm the Court of Appeal decision in *Tansavatdi, supra,* 60 Cal.App.5th 423, and send the matter back to the trial court.

Dated: August 10, 2021

Respectfully submitted,

MARDIROSSIAN AKARAGIAN LLP



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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 5,927 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Dated: August 10, 2021

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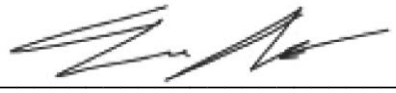

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Ma. Lourdes V. Malam

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Supreme Court Case No. S267453
Court of Appeal Case No. B293670
Los Angeles Superior Court Case No. BC633651 c/w BC652435

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Supreme Court of California

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Supreme Court of California

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Case Number: **S267453**
Lower Court Case Number: **B293670**

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

8/10/2021

Date

/s/Armen Akaragian

Signature

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