S213132

IN THE
SUPREME COURT OF CALIFORNIA

RANDALL KEITH HAMPTON, et al.,

Plaintiffs and Petitioners,

v.

COUNTY OF SAN DIEGO,

Defendant and Respondent.

After Decision by the California Court of Appeal
Fourth Appellate District, Division One
Case No. D061509

ANSWER BRIEF ON THE MERITS

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INTRODUCTION

Randall Keith Hampton was hit by a truck after he entered an intersection near his home without stopping to look for oncoming traffic. He and his wife sued the County of San Diego, alleging the intersection's design provided inadequate sight distance. While the Hamptons' expert found the design to be unreasonable because it requires drivers to stop and roll forward to look for cross-traffic, he agrees that drivers who do so have unobstructed sight distance. Indeed, the expert concedes Hampton would have seen the oncoming truck had he stopped and then rolled forward. The Fourth District Court of Appeal affirmed that the County is immune from liability under Government Code section 830.6 because the evidence establishes each of its three distinct elements: (1) a causal connection between the design plan and the accident; (2) "discretionary approval" of the plan; and (3) reasonableness of the design.

The question here is whether the second element of design immunity -- "discretionary approval" -- is shown by undisputed evidence that the authorized official exercised his discretion to approve the plan in advance of construction. The judgment should be affirmed because the Fourth District correctly followed a long line of cases holding that such evidence is sufficient as a matter of law. The court properly declined to follow *Levin v. State of California* (1983) 146 Cal.App.3d 410 ("*Levin*") and *Hernandez v. Department of Transportation* (2003) 114 Cal.App.4th 376 ("*Hernandez*"), to the extent these decisions require a showing of "informed" approval where there is evidence the design does not meet an entity's road standards. The second element of design immunity does not require a showing that the approval was "informed." Instead, the third element requires a separate showing that the approved plan was reasonable. This distinction is critical because once reasonableness is established by any substantial

evidence, courts and juries are prevented from second-guessing the choice of a particular design, which is the very purpose of design immunity. Additionally, the County presented evidence that it followed its road standards, rendering *Levin* and *Hernandez* inapplicable.

STATEMENT OF THE CASE

Twenty-five years ago the County's Department of Public Works determined through its "Road Review" process that the sight distance provided at a rural intersection in Valley Center, California was inadequate. (1 AA 86, ¶¶ 4 and 6; 1 AA 91-97.)[1] The 1989 Road Review recommended lowering the crest of Cole Grade Road, which was blocking the line of sight between drivers on Miller Road and oncoming vehicles. (1 AA 86-87, ¶¶ 4 and 6; 1 AA 92, 99-104.) County civil engineers decided upon a design solution and drafted "Plans for Construction of Cole Grade Road/Miller Road Interim Intersectional Improvements" by 1995. (1 AA 86-87, ¶¶ 4, 5 and 6; 1 AA 92, 99-104.) The plans lowered the crest of Cole Grade Road and required drivers on westbound Miller Road to stop at a stop sign limit-line and roll forward within the available pavement to gain an unobstructed view of approaching traffic before entering the intersection. (1 AA 87-88, ¶¶ 6-8.) The plans were approved by David Solomon, a licensed civil engineer and traffic engineer who was then in charge of the County's Design Engineering Section and who had discretion and authority to approve the plans on behalf of the County Board of Supervisors. (1 AA 86 – 87, 99-104.) The project was completed in accordance with the plans in 1998. (1 AA 86-87, ¶ 5.)

In November 2009, Randall Hampton was driving to work early in the morning and pulled out into the intersection from westbound Miller Road without

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[1] References to the Appellants' Appendix are abbreviated as [Vol.] AA [page]. References to the Court of Appeal's opinion are abbreviated as "Slip Opn." References to the Opening Brief on the Merits are abbreviated as "OB."

stopping. (1 AA 63.) He was hit by a pick-up truck traveling northbound on Cole Grade Road, driven by Robert Cullen. (1 AA 34-39, 62-63.)[2] The Hamptons assert the intersection where the accident occurred constitutes a dangerous condition of public property under Government Code section 835 (1 AA 83) because sight distance is limited by a nearby embankment. (1 AA 128.) However, the County's roadway design expert, Arnold Johnson, explained that the embankment has no effect on sight distance when a driver stops at the limit line and then rolls forward on the pavement between the limit line and the travel lane. (2 AA 359-363.)

The Hamptons' expert, Edward Stevens, agrees that a driver who pulls forward and checks for traffic before entering the intersection has an unobstructed view down Cole Grade Road. Mr. Stevens testified: "I know there is a point at which, as you come closer to the edge of the travel course of the road, you can see all the way down [Cole Grade Road]. I know that." (2 AA 367:5-23.) Mr. Stevens also agrees that Hampton could have seen the truck coming had he stopped or even slowed at the stop sign and then rolled forward from the limit-line to check for cross-traffic before entering the intersection. At his deposition, Mr. Stevens was asked: "if Mr. Hampton had pulled forward and just before

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[2] The CHP's diagram of the accident provides a helpful layout the intersection. (AA048.) A left turn pocket, one through lane and the paved shoulder/bike lane are depicted on the northbound side of Cole Grade Road approaching the intersection. The arrow on northbound Cole Grade Road represents the pick-up truck driven by Mr. Cullen. The arrow on Miller Road represents the car driven by Mr. Hampton. A "Stop" sign, the painted word "Stop" and a limit-line are depicted on westbound Miller Road just before it reaches Cole Grade Road. The paved shoulder/bike lane is between the limit line and the continuation of the painted lane line for the edge of northbound Cole Grade Road. This paved area was available for drivers to use to creep forward from the limit line to check for oncoming traffic before crossing into the intersection.

entering—the front of his vehicle would enter and cross into that through lane, if he had looked left, Mr. Cullen's vehicle would be within his view if it was within 550 feet of the intersection, correct?" Mrs. Stevens responded, "That's true." (2 AA 367:16-23.) But in Mr. Stevens' opinion, it was unreasonable to require drivers to roll forward past the limit line to achieve adequate sight distance (1 AA 152, ¶¶ 7-9), and the intersection design did not meet either "design" or "operational" sight distance standards when measured 10 feet back from the edge of the pavement.[3]

The County's Traffic Engineer Robert Goralka and roadway design expert Arnold Johnson opined that the plans for improving sight distance at Miller Road and Cole Grade Road were reasonable for an existing intersection with a nearby shoulder embankment. (1 AA 87-88, ¶¶ 6-8; 2 AA 359.) They explained that sight distance is generally measured from a point 10 feet back from the edge of the pavement but County practices and guidelines allow sight distance to be measured 8 feet back from the edge of the traffic lane where there are existing topographical features creating a visual obstruction. (1 AA 87-88; 2 AA 359, 364.) Mr. Stevens admitted that his sight distance measurements did not take into account County practices or the written guidelines allowing sight distance at an existing intersection to be measured in this manner. (1 AA 87-88, ¶ 7; 2 AA 359:1-23.)

PROCEDURAL HISTORY

The trial court granted the County's motion for summary judgment on the affirmative defense of design immunity under Government Code section 830.6, finding that the County established the three required elements: causation,

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[3] "Sight distance standards" refers to the number of feet of sight distance required at a specified type of intersection, based on factors such as the posted speed limit and the slope of the road. (See 1 AA 164.) "Design" (or "corner") sight distance standards apply to new construction (1 AA 162-163; 1 AA 87, ¶ 7; 1 AA 88:11-13) whereas "operational" standards apply to existing intersections with obstructions. (1 AA 164; 1 AA 87-88, ¶¶ 7-8.)

discretionary approval, and reasonableness. (2 AA 382-388.) On appeal, the Hamptons focused on the nature of the evidence necessary to establish the second element, "discretionary approval." The Hamptons argued that the County had to (1) show that the civil engineer who approved the plans knew the intersection did not meet County's sight distance standards when measured from the edge of the pavement and (2) had authority to approve an exception to the County standards. (See Slip Opn., p. 18.) The Fourth District found that the Hamptons' argument was supported by the decisions in *Levin, supra,* 146 Cal.App.3d 410 and *Hernandez, supra,* 114 Cal.App.4th 376, but declined to follow these decisions to the extent they require such a showing to establish the discretionary approval element of design immunity. (Slip Opn., p. 20.) This Court granted review to resolve the split of authority as to the correct interpretation of Government Code section 830.6.

ARGUMENT

I

THE SECOND ELEMENT OF DESIGN IMMUNITY REQUIRES A SHOWING THAT THE "PLAN" WAS APPROVED IN ADVANCE BY THE "EMPLOYEE EXERCISING DISCRETIONARY AUTHORITY TO GIVE SUCH APPROVAL"

"When questions as to the . . . interpretation of statutes are presented to this court, numerous cases have recognized that the controlling issue is the intent of the Legislature." (*Milligan v. City of Laguna Beach* (1983) 34 Cal.3d 829, 831-832, citing cases.) As this Court explained in *Baldwin* v. *State of California* (1972) 6 Cal.3d 424, the Legislature's intent in enacting section 830.6 is found in the comments of the California Law Revision Commission, which drafted the section in 1963 as part of its comprehensive study of governmental tort liability and

sovereign immunity. (*Id.* at 433.)[4] The official comment declares that "The immunity provided by Section 830.6 is similar to an immunity that has been granted by judicial decision to public entities in New York. See *Weiss* v. *Fote*, 7 N.Y.2d 579, 200 N.Y.S.2d 409, 167 N.E.2d 63 (1960)." (*Baldwin, supra,* 6 Cal.3d at 433, citing 2 Sen. J. (1963) p. 1885; 3 Assem. J. (1963) p. 5439.)

In *Weiss,* the plaintiff contended she was struck by an automobile because the clearance interval between traffic lights at an intersection was too short, but the evidence showed that the lights had been designed by a city agency. *Weiss* held that under these circumstances, allowing a jury to pass on the reasonableness and safety of improvements planned and approved by a governmental body would obstruct governmental operations and "place in inexpert hands what the Legislature has seen fit to entrust to experts." (*Weiss, supra,* 7 N.Y.2d at 586.) *Weiss* explained that immunity for plans or designs did not rest on the outdated rationale of "sovereign immunity," but instead relied on the "distinctive rationale" "of maintaining the administration of municipal affairs in the hands of state or municipal executive officers as against the incursion of courts and juries[.]" (*Id.,* at 585.)

This longstanding rule of immunity reflects both "a regard for sound principles of government administration" and "a respect for the expert judgment of agencies authorized by law to exercise such judgment." (*Id.* at 588.) *Weiss* cautions that for these reasons courts and juries "should not be permitted to review

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[4] The purpose of the study was to restore to public entities in California certain protections after this Court abolished the doctrine of sovereign immunity in *Muskopf v. Corning Hospital Dist.* (1961) 55 Cal.2d 211, and *Lipman v. Brisbane Elementary Sch. Dist.* (1961) 55 Cal.2d 224. Immediately following these decisions, the Law Revision Commission, working at the behest of the Legislature, spent nearly two years analyzing the problem, making recommendations and formulating a new statutory scheme. (4 Cal. Law Revision Com. Rep. (1963) 803, 804, 807.) The result was the Government Claims Act (Gov. Code § 800 et seq.), of which the design immunity statute is a part.

determinations of governmental planning bodies" (*Ibid.*), a sentiment echoed by this Court in discussing the rationale underlying California's design immunity statute, section 830.6. (*Cameron v. State of California* (1972) 7 Cal.3d 318, 326 (*Cameron*).)

As the *Cameron* Court stated: "The rationale behind design immunity 'is to prevent a jury from simply reweighing the same factors considered by the governmental entity which approved the design.'" (*Ibid.*, citing *Baldwin, supra,* 6 Cal.3d at 424, 432, fn. 7.) The underlying reasoning is that "permit[ing] reexamination in tort litigation of particular discretionary decisions where reasonable men may differ as to how the discretion should be exercised would create too great a danger of impolitic interference with the freedom of decision-making by those public officials in whom the function of making such decisions has been vested." (*Ibid.*, citing 4 Cal. Law Revision Com. Rep. (1963), p. 823.) To achieve this legislative goal, section 830.6 provides:

> 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. (Gov't Code § 830.6.)

This Court has held that an entity is entitled to immunity under this provision where it shows: "(1) a causal relationship between the plan or design and the accident; (2) discretionary approval of the plan or design prior to construction; and (3) substantial evidence supporting the reasonableness of the plan or design." (*Cornette v. Department of Transportation* (2001) 26 Cal.4th 63,

69 ("*Cornette*").) In determining the sufficiency of the proof necessary to satisfy each of these elements, "courts 'must bear in mind the rationale underlying the theory of design immunity." (*Higgins v. California* (1997) 54 Cal.App.4th 177, 185 (*Higgins*) citation omitted.)

To establish the second element of design immunity, an entity may show that its design plan was "'***in conformity with' the entity's approved standards*** even when those plans have not been specifically approved." (*Weinstein v. Department of Transportation* (2006) 139 Cal.App.4th 52, 59 (*Weinstein*) citation omitted.) ***Alternatively***, an entity may show ***approval of the plan***. (*Ibid.*) This alternative is established by evidence that the "plan . . . has been approved in advance of construction . . . by some . . . body or employee exercising discretionary authority to give such approval. . . ." (§ 830.6.) In other words, there must be evidence that the employee who exercised discretion to approve the plan was authorized to do so. This interpretation of the "discretionary approval" element is consistent with the type of "discretionary" approvals discussed in *Weiss*, after which section 830.6 was modeled. *Weiss* explained:

> The rule is well settled that ***where power is conferred on public officers or a municipal corporation to make improvements***, such as streets, sewers, etc., and keep them in repair, ***the duty to make them is quasi judicial or discretionary,*** involving a determination as to their necessity, requisite capacity, location, etc., and for a failure to exercise this power or an erroneous estimate of the public needs, no civil action can be maintained. (*Weiss, supra,* 7 N.Y.2d at 584; citation omitted; emphasis added in part.)

While *Weiss* acknowledged a public entity's duty to keep streets in a reasonably safe condition for travel, the court observed that "in measuring that duty, we have long and consistently held that the courts would not go behind the ordinary performance of planning functions by the officials to whom those functions were entrusted." (*Id.* at 584.) The "discretionary approval" element of section 830.6 reflects the rule discussed in *Weiss*; it does not address the reasoning

behind the design but instead requires a showing that the entity itself was involved in ***approving the plan*** for the particular public improvement.

A. The Reasoning of *Johnson* Does Not Require Evidence Of "Informed" Approval.

Contrary to the Hamptons argument, this Court's opinion in *Johnson v. State of California* (1968) 69 Cal. 2d 782, 794, fn. 8 (*Johnson*) does not require a showing that the approval was "informed." (OB at 15-16.) *Johnson* did not address the elements of design immunity under section 830.6 but rather addressed the elements of discretionary immunity under Government Code section 820.2, which provides that "a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." (*Id.,* at 787, citing Gov. Code § 820.2.) After it found that this immunity applies only to policy or planning level decisions, the *Johnson* Court considered 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." (*Id.* at 794 and fn. 8.) In answering this question, the Court noted that the immunity serves "no purpose except to assure that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government." (*Ibid.*) Given the statutory language and purpose aimed at protecting policy decisions, the *Johnson* Court concluded that to establish immunity under section 820.2 an entity "must make a showing that such a policy decision, consciously balancing risks and advantages, took place." (*Ibid.*)

While section 820.2 requires a showing that the employee balanced risks and benefits in making the policy decision, this Court has clarified that it does ***not*** require a showing that the deliberations leading up to the policy decision were "fully informed." (See *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 984 and fn. 6 (*Caldwell*), [disapproving *Mouchette v. Board of Education* (1990) 217

Cal.App.3d 303 "to the extent that case holds that only elaborate, fully informed deliberation can qualify for discretionary act immunity."].) In *Caldwell*, members of a school district's governing board decided not to renew the employment contract for the district superintendent, who alleged that their decision was based on standards that "were wrong and impermissible." (*Caldwell, supra,* 10 Cal.4th at 984 fn. 6.) Although the appellate court found that this allegation precluded a showing on demurrer of a "conscious balancing of risks and benefits," this Court disagreed, explaining that *Johnson* requires a showing of an "*actual* exercise of discretion," but "does not require *a strictly careful, thorough, formal, or correct* evaluation." (*Id.* at 983; emphasis in original.) As the Court pointed out, section 820.2 immunizes an exercise of discretion whether or not the discretion is abused, and thus "claims of *improper* evaluation cannot divest a discretionary policy decision of its immunity." (*Caldwell, supra,* 10 Cal.4th at 984, emphasis in original.)

Applying this reasoning to the language of section 830.6, the discretionary approval element requires a showing that the authorized official exercised discretion to approve the plan, but does not require a showing that the approval was informed or correct. Just as section 820.2 immunizes the exercise of discretion in making a policy decision, even if the discretion is abused, section 830.6 immunizes the exercise of discretion to approve a design plan, even if the plan contains design flaws. While section 830.6 requires an additional showing -- that the plan or design as approved was ***reasonable*** -- this is the ***third element*** of design immunity, which is a ***separate element*** that is satisfied as a matter of law by "any substantial evidence upon the basis of which . . . a reasonable legislative body or other body or employee could have approved the plan . . . ." (§ 830.6.)

B. Section 830.6 Does Not Require A Showing Of Informed Approval.

Nothing in the language of section 830.6 requires that the approval be "informed." On the contrary, section 830.6 requires a showing of approval by "the legislative body of the public entity" unless that authority is delegated to another body or employee. (§ 830.6.) An entity's legislative body does not develop the design plans or make the myriad of decisions necessary to develop the often complex and detailed plans for public improvements.[5] Those decisions are left to the engineers who must decide, among many other things, whether in the exercise of sound engineering judgment the circumstances warrant or necessitate any exceptions to design standards. Section 830.6 does not require a showing that the approving body was "informed" of these underlying decisions. Imposing a requirement of "informed approval" would mean that a city council, county board of supervisors or other legislative body of a local public entity would have to demonstrate an understanding of often voluminous plans, all applicable standards, and the relevant engineering concepts to make their approval of the plans valid.[6]

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[5]For example, the engineers who developed the plans here exercised engineering judgment to improve sight distance at the intersection by lowering the crest of the hill on Cole Grade Road and placing a stop sign at a point on Miller Road where drivers necessarily pull forward past the shoulder embankment for unobstructed sight distance, rather than install traffic signals.

[6] Depending on the size and complexity of the project, construction plans may consist of a simple drawing or a full set of engineering designs. Design plans may incorporate a set of standard plans (currently over 500 pages on state projects), a set of standard specifications (currently over 1000 pages on state projects) and sometimes a set of special provisions for configurations unique to the project. See Caltrans Standard Specifications

http://www.dot.ca.gov/hq/esc/oe/construction_contract_standards/std_specs/2010_StdSpecs/2010_StdSpecs.pdf

Caltrans Standard Plans

http://www.dot.ca.gov/hq/esc/oe/project_plans/highway_plans/stdplans_US-customary-units_10/viewable_pdf/2010-Std-Plns-for-Web.pdf

Yet in approving a project, public entities are entitled to rely on the exercise of judgment by engineers and other professionals competent in the design of public improvements. (See *Ramirez v. City of Redondo Beach* (1987) 192 Cal.App.3d at 515, 525 (*Ramirez).*) Evidence that the judgment was flawed does not relate to whether the plan was ***approved***, but to whether the design or plan as approved was ***reasonable***. (*Ibid.*)

The Hamptons acknowledge that section 830.6 does not expressly require a showing of informed approval but argue that such a requirement is implicit because "discretion" means "an exercise of judgment or choice." (OB p. 17.) Section 830.6 clearly requires an exercise of judgment or choice -- as to whether to "give approval" to the particular project or improvement. "But section 830.6 does ***not*** state the approval must be knowing or informed." (*Alvis v. County of Ventura* (2009) 178 Cal.App.4th 536, 552 (*Alvis*); emphasis added.) In *Alvis,* the appellate court declined to rewrite section 830.6 to include such a requirement, and rejected the assertion that the discretionary approval element of section 830.6 requires evidence that an expert's concerns were considered by the approving official. (*Ibid.*) In doing so, the court cited *Cornette, supra,* 26 Cal.4th at 73-74, for the fundamental rule of statutory construction that "[a] court may not rewrite a statute, either by inserting or omitting language, to make it conform to a presumed intent that is not expressed."

Section 830.6 thus does not require a showing of informed approval, even where the legislative body delegates its authority to an engineer. (*Ibid.*; see also *Alvarez v. State* (2000) 79 Cal.App.4th 720 (disapproved on other grounds in *Cornette, supra*, 26 Cal.4th at 73–74) (*Alvarez*).) For instance, the omission of a median barrier allegedly caused the accident in *Alvarez* and the court rejected the appellant's "claim that the State's evidence must show what factors the State weighed in deciding to install a median barrier and what factors ultimately persuaded the engineers that a median barrier would not be appropriate." (*Id.* at 735.) The court stated: "Nothing in section 830.6 or subsequent case law requires

such a detailed showing to establish the discretionary approval element of design immunity." (*Ibid.*) Similarly, the court in *Laabs v. City of Victorville* (2008)163 Cal.App.4th 1242 (*Laabs*) declined to require evidence regarding what engineers considered in approving plans that allegedly resulted in inadequate sight distance. (*Id.* at 1263, citing *Alvarez*, *supra*, at 734.)

The Hamptons claim that *Laabs* is distinguishable because the plaintiffs in that case did not present any evidence to support their allegation that city engineers who approved the plans "failed to consider the alleged dangerous aspect of the design." (OB, p. 23.) However, the Hamptons likewise did not present any evidence supporting their allegation that County engineers "failed to consider" sight distance standards. The Hamptons instead argue that the ***County*** must present affirmative evidence showing that the engineer who approved the plan knew it "deviated" from applicable sight distance standards and had the authority to approve the "deviation." (OB, p. 29.) This argument lacks merit. In the absence of evidence to the contrary, a public official is presumed to have carried out his professional duties in reviewing and approving the plan. (Evid. Code § 664.) And since the County has authority to approve design exceptions in its own design plans and the County's authority for plan review and approval was delegated to a professional engineer, the engineer had authority to approve design exceptions.

C. Section 830.6 Does Not Require Evidence From Those Involved In Developing And Approving The Project: Discretionary Approval May Be Established By Expert Testimony And Interpretation Of The Plans

The Hamptons' argument is meritless for another reason: it effectively requires declarations from the individuals who developed and approved the project, and requires that they specifically recall the details of plans for the particular project. Yet case law holds that the element of "discretionary approval" need not be established by percipient witnesses but instead may be established

through expert testimony and the plans themselves. (*Alvarez, supra,* 79 Cal.App.4th at 730-732.)

In *Alvarez,* the appellant similarly argued that the element of discretionary approval required "declarations from the individuals who were actually involved in the design and approval of the Project." (*Id.* at 730.) *Alvarez* rejected this argument, finding "a number of cases where such testimony was supplied by persons who were not personally involved in the design and/or approval process for the subject project." (*Id.* at 731, citing *Baldwin, supra,* 6 Cal.3d at 430 [declarations of two engineers, who had worked on the planning and construction of the project, that project was approved by the then district engineer and the then state highway engineer]; *Cameron, supra,* 7 Cal.3d at 325 [county surveyor testified that plans were prepared in the 1920's by the then county surveyor, and copies of the board of supervisor's minutes demonstrated the plans were approved by the board]; *Higgins, supra,* 54 Cal.App.4th at 181-182 [declaration by long-term Caltrans employee that plans were approved by the district engineer, engineer of design, deputy district engineer and assistant state highway engineer]; *Bay Area Rapid Transit Dist. v. Superior Court* (1996) 46 Cal.App.4th 476, 479 [declaration by BART engineer that design was approved by independent consulting firm of engineers].) As *Alvarez* concluded, such a "premise--that discretionary approval can only be established by a percipient witness--is not supported inferentially by case law." (*Alvarez, supra,* 79 Cal.App.4th at 731.)

Because "the discretionary approval of project plans . . . is beyond the common experience of the trier of fact" *Alvarez* held that this element could be established by an expert who "could competently testify to the State's custom and practice of discretionary design review and approval during the relevant time period. He could competently interpret and explain the Project plans, identify the officials involved in the review and approval process at the district and state level, and explain their role in the discretionary approval process even though he was not personally involved in the Project's approval." (*Id.* at 732, citing Evid. Code, §

801, subd. (a).) This is exactly the type of evidence provided in this case. The County submitted a declaration by an expert Traffic Engineer, who attested that the engineer who approved the plans was authorized to do so and that the plans provided the requisite sight distance when measured according to the County guidelines and practices applicable to an intersection with a nearby embankment. (AA 87-88; 2 AA 359, 361-364.)

In arguing that more was required to show discretionary approval, the Hamptons ignore the context in which design immunity arises. By the time a design immunity defense is raised, those involved in developing and approving the plans for construction of a road, a courthouse or some other public project may be elderly, deceased or otherwise unavailable. Even if available, such individuals should not be expected to recall details of complex design plans developed and approved months, years or even decades earlier. Section 830.6 thus does not require a detailed showing of these individuals' thought processes to establish the discretionary approval of a design plan. Rather, discretionary approval of the plan may be established through expert testimony. (*Alvarez, supra,* 79 Cal.App.4th at 730-732.)

II

EVIDENCE RELATING TO THE CAUSAL RELATIONSHIP BETWEEN THE PLAN AND THE ACCIDENT DOES NOT "REBUT" EVIDENCE THAT THE PLAN WAS APPROVED

According to the Hamptons, evidence that otherwise establishes discretionary approval may be "rebutted" by evidence that the approved plan "did not contain the alleged dangerous condition." (OB 18-19.) However, such evidence contradicts the ***first*** element of design immunity, the ***causal relationship*** between the plan and the accident. If the alleged dangerous condition is not contained within the approved plan, the plan or design cannot be a cause of the accident. This point is illustrated by several of the cases on which the Hamptons

rely, including this Court's opinion in *Cameron.* (OB, p. 18, citing *Cameron, supra*, 7 Cal.3d 381.)

A. *Cameron* Found That The Causal Element Of Design Immunity Was Negated By Evidence That The Injury-Producing Feature Was Not Part Of The Approved Design.

In *Cameron,* the State argued that the superelevation of an "S" curve on a state highway "was part of a duly approved design or plan" but the plaintiffs countered that "even if plans for Highway 9 were approved" the immunity did not apply because "such plans did not contain any design for or mention of superelevation ...." (*Cameron, supra,* 7 Cal.3d at 324.) The *Cameron* Court agreed with the plaintiffs, explaining: "The state merely showed that the Santa Cruz Board of Supervisors approved a design . . . . The design plan contained no mention of the superelevation . . . . Therefore such superelevation . . . did ***not result from the design or plan introduced into evidence*** and there was no basis for concluding that any liability for injuries ***caused*** by this uneven superelevation was immunized . . . ." (*Id.* at 326; emphasis added.) In other words, the Court found that the approved design was not a cause of the accident because it did not contain the injury-producing feature.

The Hamptons misread *Cameron,* claiming the Court was addressing the element of discretionary approval and was simply "saying that the accident was not caused by a design *worthy of design immunity*. . . ." (OB, p. 27; emphasis in original.) But whether a design is "worthy of design immunity" relates to whether the design was reasonable (the third element of design immunity) rather than to whether it was approved (the second element of design immunity). To show that *Cameron* addressed discretionary approval rather than causation, the Hamptons further suggest that the element of causation is only defeated by evidence of negligence unrelated to the design (OB, p. 29) yet causation is likewise defeated if the plan does not contain the condition that allegedly caused the injury. (*Cameron, supra,* 7 Cal.3d at 327.) Finally, the Hamptons observe that an

omission may constitute a design defect in the context of products-liability cases, and conclude that it thus would be "odd to suggest that the design is not the legal 'cause' of injuries because it failed to account for an injury producing feature." (*Ibid.*) An omission may also constitute a design defect in the context of design immunity, but it must be part of the entity's overall design for it to be a cause of the injury. (See e.g., *Higgins, supra,* 54 Cal.App.4th at 186.)

Higgins applied the reasoning of *Cameron* in analyzing whether the State established a causal relationship between its approved plan and an accident allegedly caused by the omission of a median barrier. (*Id.* at 185.) *Higgins* explained that a"[c]ausal relationship is proved by evidence the injury-producing feature ***was actually a part of the plan approved*** by the governmental entity: Design immunity is intended to immunize only those design choices which have been made." (*Higgin, supra,* 54 Cal.App.4th at 185; emphasis added.) *Higgins* further explained that in *Cameron,* "there was no evidence 'the superelevation which was actually constructed on the curve . . . was the result of or conformed to a design approved by the public entity vested with discretionary authority.' The state thus failed to prove the ***causation element***-- that a discretionary decision was actually made regarding the dangerous condition which caused plaintiffs' accident." (*Id.* at 186, citing *Cameron, supra,* 7 Cal.3d at 326; parallel citations omitted; emphasis added.)

Higgins found that the omission of the median barrier in the case before it ***was*** a part of the State's design plans, based on the plans themselves, an engineer's declaration interpreting the plans, and the State's own standards, which did not require a median barrier under the circumstances. (*Ibid.*) *Higgins* concluded: "***the absence of a median barrier 'was the result of or conformed to a design approved by the public entity vested with discretionary authority***.' No more was needed to establish a ***causative*** relationship between the plan and the accident."

(*Ibid*, citing *Cameron, supra,* 7 Cal.3d at 326; emphasis added.)[7] The reasoning of *Higgins* is sound: *Cameron* was addressing the issue of causation, not discretionary approval. (*Ibid.*; see also *Wyckoff v. California* (2001) 90 Cal.App.4th 45, 54 ["in *Cameron*, what caused the accident--uneven superelevation--was not in the plans. In the instant case, in contrast, what caused the accident--the absence of a median barrier--was part of the design."].)

B. Greiner And *Anderson* Addressed The Element Of Causation.

The Hamptons also cite *Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931 ("*Grenier*") for the proposition that evidence of discretionary approval is "'destroyed if' the 'injury-producing feature' was not 'part of the plan approved by the governmental entity.'" (OB, 19-20; citing *Grenier* at 941, fn. 7.) Yet in *Grenier,* the court found that the injury-producing features (slopes and runoff inlets that caused flooding) were contained in the city's plan and concluded that because the plan was prepared by a civil engineer and approved by a city engineer, the evidence was sufficient to "establish both causation and discretionary approval." (*Ibid.*) *Grenier* then cited *Higgins* for the proposition that "the injury-producing feature must have been a part of the plan approved by the governmental entity." (*Ibid,* citing *Higgins, supra,* 54 Cal.App.4th at 185.)

In a footnote, *Grenier* observed that two cases seemingly related this requirement to the element of discretionary approval -- *Mozzetti v. City of Brisbane,* (1977) 67 Cal.App.3d 565, 574 (*Mozzetti*) and *Anderson v. City of Thousand Oaks* (1976) 65 Cal.App.3d 82, 89-90 (*Anderson*) -- then concluded: "The distinction is academic. If the injury-producing element was not a part of the discretionarily approved design, immunity is defeated." (*Ibid.*) While the end result may be the same if both causation and discretionary approval are disputed,

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[7] The first element of causation addresses whether the injury-producing omission was part of the design plan approved by the entity; the wisdom of the entity's exercise of discretion in deciding to omit the feature is relevant to the third element of design immunity, reasonableness of the design.

these elements are nonetheless distinct and require different showings. Moreover, contrary to *Grenier's* observation, neither *Mozzetti* nor *Anderson* found that the element of discretionary approval was rebutted by evidence that the injury-producing feature was omitted from the plan.

Mozzetti separately discussed the evidence supporting each of the elements of design immunity. *Mozzetti* found the evidence of discretionary approval fell "short of showing that the plan or design of the Project was approved in advance of construction" because "the one-page surface drawing so approved did not show the requisite details of the road design" and there was no evidence subsequent changes "were approved by either the city council or a public employee possessing discretionary authority." (*Mozzetti, supra,* 67 Cal.App.3d at 574.) *Mozzetti* then turned to the element of causation, finding "overwhelming evidence negating the requisite causal relationship," specifically, evidence that the injury was caused by poor maintenance rather than the design alone. (*Ibid.*)

Anderson did not expressly distinguish between the elements of discretionary approval and causation, but its reasoning implicitly addresses causation. The appellants in *Anderson* analogized the omission of signage in an approved plan to the omission of the superelevation of the road from the approved plan in *Cameron.* (*Anderson, supra,* 65 Cal.App.3d at 90.) The *Anderson* court rejected appellants' "attempt to take this case outside the reach of design immunity . . . by characterizing the dangerous condition of the roadway as one which was not ***comprehended within*** the plan or design." (*Ibid.*; emphasis added.) *Anderson* explained that the comprehensive nature of the design plans and other evidence before it indicated that a conscious choice was made to omit the signage. (*Ibid.*) Consequently, the *Anderson* court declined "to conclude that the absence of warning signs . . . was not ***an element of the design.***" (*Ibid.,* emphasis added.) While the Hamptons assert that *Anderson* was addressing the element of discretionary approval (OB, p. 20), the court's findings -- that the omission was a "conscious design choice" and was "an element of the design" -- relate to whether

the omission was part of the design plan rather than whether the plan was approved. (See *Higgins, supra,* 54 Cal.App.4th at 186; See also *Alvarez, supra,* 79 Cal.App.4th at 734-735 [finding that the omission of a median barrier was part of the state's design plan].)

Contrary to the Hamptons' argument, evidence that the injury producing element was omitted from the plan may rebut causation (element one of design immunity), but it does not rebut discretionary approval (element two of design immunity).[8]

III

LEVIN SHOULD BE DISAPPROVED TO THE EXTENT IT REQUIRES A SHOWING OF INFORMED APPROVAL TO ESTABLISH THE ELEMENT OF DISCRETIONARY APPROVAL

Although the decision in *Levin* lends support to the Hamptons' position that the element of discretionary approval requires a showing of "informed" approval, *Levin*'s discussion of design immunity is fundamentally flawed. *Levin* begins by acknowledging that the ***public entity*** must present evidence supporting each of the three elements, including the ***causal relationship*** between the design plans and the accident. Yet *Levin* addresses the first element as follows:

> The ***state*** maintains that there was ***no causal relationship*** between Dr. Levin's fatal accident and the absence of the eight feet shoulder and guardrails. The state argues that the accident was caused only by the unlawful driving of Townsend. The state's argument ignores the obvious fact that the absence of guardrails mandated by its own standards, the high embankment and the ditch with four feet of water in it, could have been contributing causes after Dr. Levin attempted to avoid a head-on collision. Thus the record indicates a causal relationship between the accident and the state's 1974 modification of Highway 37. (*Levin, supra,* 146 Cal.App.3d at 417; emphasis added.)

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[8] The Hamptons also cite *Johnston v. County of Yolo* (1969) 274 Cal.App.2d 46, but that case is inapposite. It involved an official who testified he "felt constrained" to approve the design plans and only did so "out of deference to the wishes of a member of the county board of supervisors." (*Id.* at 54.)

Levin thus apparently confuses the evidence necessary to establish a dangerous condition ***cause of action*** with the showing necessary to establish the ***affirmative defense*** of design immunity. While a ***plaintiff*** must show that a dangerous condition is a "cause" of her injury to state a claim (Gov. Code § 835), the defendant ***entity*** must show that the dangerous condition was part of its design plan to show a "causal connection" between the plan and the accident. (§ 830.6; see also *Higgins, supra,* 54 Cal.App.4th at 186.) *Levin* found a dangerous condition (the absence of guardrails and shoulder at an embankment with a steep slope) and related it to the State's modification of the roadway. (*Levin, supra*, 146 Cal.App.3d at 417.) But *Levin* did not make the finding necessary to establish the causal connection between the State's ***plan*** and the accident, i.e., that the plan contained the allegedly dangerous condition.

Rather, *Levin* appeared to make a contrary finding in its discussion of the second element of design immunity, discretionary approval of the plan. (*Levin, supra*, 146 Cal.App.3d at 417-418.) *Levin* observed that the State's standards required a guardrail at a steep slope, but the State's evidence did not address the standards or the degree of the slope. (*Id.* at 418.) Relying on this Court's decision in *Cameron*, the *Levin* court then concluded:

> An actual informed exercise of discretion is required. The defense does not exist to immunize decisions that have not been made. Here, as in *Cameron, supra*, the design plan contained no mention of the steep slope of the embankment. The state made no showing that [the official] who alone had the discretionary authority, decided to ignore the standards or considered the consequences of the elimination of the eight feet shoulder. It follows that the state also failed to establish the second element of the defense. (*Ibid.*, citing *Cameron, supra,* 7 Cal.3d at 326.)

The cited evidence -- that state standards required a guardrail, that the design plan "contained no mention" of the steep slope, that the State offered no evidence indicating that the omission of the guardrails and shoulder were considered in designing plan -- might be relevant to show that the dangerous condition (the omission of the guardrail) was not part of the approved plan (and

thus the approved plan was not a cause of the accident.) Numerous cases have considered compliance with standards to determine whether an omission was a part of the approved design. (See *Higgins, supra,* 54 Cal.App. 4th at 18; see also *Weinstein, supra,* 139 Cal.App.4th at 59 [applicable standards supported finding that omission of signage was part of the design plan]; *Hefner v. County of Sacramento* (1988) 197 Cal.App.3d 1007, 1011 [standards supported finding that a limit line was part of the design plan].) But the fact that a plan deviates from an entity's own standards neither establishes nor disproves approval of the plan.[9]

By requiring a showing that the official who approved the plans considered applicable standards and the consequences of eliminating the shoulder near the embankment, *Levin's* reasoning conflates the second (discretionary approval) element of design immunity with the third (reasonableness of the approval) element. As the Fourth District pointed out, the distinction between the second and third elements is important given the statutory language and purpose of section 830.6. While the first and second elements of design immunity are questions of fact that may preclude summary judgment, the third element is established as a matter of law by any substantial evidence of reasonableness. (See *Grenier, supra*, 57 Cal.App.4th at 940.) Conflating these elements thus results in absurd consequences because plaintiffs like the Hamptons may avoid summary judgment despite (1) an undisputed causal connection between the plans and the accident; (2) undisputed evidence that the plans were approved in advance by an authorized official and (3) any substantial evidence that the design itself, as approved, was reasonable.

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[9] In fact, the Hamptons agree that the State's "deviation" from its own standards was not fatal to design immunity but instead "**what proved fatal in *Levin* was the deviation combined with the fact that the *'design plan contained no mention of' the dangerous aspect*** of the surrounding area." (OB, p. 21, emphasis omitted and added.)

Such a construction of section 830.6 is directly contrary to the legislative intent that the exercise of engineering discretion in developing plans for public projects be addressed under the third element of design immunity. This element ensures that if "reasonable minds can differ concerning whether a design should have been approved, then the governmental entity must be granted immunity." (*Ramirez, supra,* 192 Cal.App.3d at 525.) By contrast, requiring "informed" approval defeats the very purpose of design immunity, which is predicated upon the concepts of separation of powers and judicial economy, by allowing the design decision to be second-guessed by a court or a jury. (See *Cameron, supra*, 7 Cal.3d at 326; *Higgins, supra,* 54 Cal.App.4th at 184; *Ramirez, supra,* 192 Cal.App.3d at 524-525.) *Levin's* reasoning thus should be disapproved to the extent it requires a showing of "informed" approval.

IV

HERNANDEZ SHOULD BE DISAPPROVED TO THE EXTENT IT CONSTRUES SECTION 830.6 AS REQUIRING AN "INFORMED APPROVAL"

For the same reasons, the reasoning of *Hernandez, supra,* 114 Cal.App.4th 410, should be disapproved to the extent it requires informed approval under section 830.6 as opposed to documenting approval under the Caltrans procedures at issue in that case. In *Hernandez,* the evidence showed that Caltrans' procedures governing design exceptions provided: "[a]ny deviation from the applicable guidelines required the designer to obtain formal approval, which would be recorded in a 'project approval document'." (*Hernandez, supra,* 114 Cal.App.4th at 380-381.) Caltrans conceded there was no evidence it followed its own procedures. (*Ibid.*) While an entity may adopt a procedure requiring that design exceptions be approved and documented in a specific manner, as Caltrans did in *Hernandez,* no such requirement exists under section 830.6. Reading such a requirement into section 830.6, and applying it to entities that do not have such a

policy, would make it difficult if not impossible for those entities to enjoy the protection the Legislature afforded to them when it enacted design immunity.

V

BY ENACTING SECTION 830.6, THE LEGLISATURE MADE A POLICY DECISION TO IMMUNIZE THE DISCRETIONARY APPROVAL OF REASONABLE PUBLIC PROJECTS

The Hamptons argue that it is simply "bad policy" to follow the plain language of section 830.6 and require "mere approval by an authorized official" to establish the second element of design immunity. (OB, p. 24.) According to the Hamptons, this interpretation of the discretionary approval element "would all but guarantee design immunity by rendering toothless the [only] element . . . that had any real bite." (OB, p. 24.) They argue that the first element of design immunity, the causal connection between the plan and the accident, "will effectively be established the moment the complaint is filed in a road-design case." (OB, p 25.) This is, of course, incorrect. A plaintiff may allege that the injury-producing condition was not a part of the approved design plan (see *Cameron, supra,* 7 Cal.3d at 326–327) or allege that the injury was caused by negligence independent of design. (See *Mozzetti , supra,* 67 Cal.App.3d at 575; *Flournoy* v. *State of California* (1969) 275 Cal.App.2d 806, 811.)

Similarly, the Hamptons assert that the third element, reasonableness of the plans, is easily shown where the plans were prepared and approved by competent officials. (OB, p. 26.) But this element requires substantial evidence of reasonableness, meaning evidence that "'reasonably inspires confidence' and is of 'solid value.'" (*Laabs, supra,* 163 Cal.App.4th at 1264, citation omitted.) Although the opinion of a civil engineer ordinarily constitutes substantial evidence of reasonableness, "appellate courts have rejected expert testimony ostensibly supporting design immunity where the testimony has been flawed sufficiently to destroy its substantiality." (*Hefner, supra*, 197 Cal.App.3d at 1015, citing *Davis v. Cordova Recreation & Park Dist.* (1972) 24 Cal.App.3d 789 [court rejected the

testimony of an expert supporting the reasonableness of the design of a pond in a public park.].) Thus, the Hamptons' fear -- that design immunity will be "casually decreed" – is unfounded. Immunity is ***statutorily*** decreed where an entity shows (1) a causal connection between its design plan and the accident, (2) discretionary approval of the plans, and (3) reasonableness of the approved design.

VI

SUMMARY JUDGMENT SHOULD BE AFFIRMED BECAUSE THE EVIDENCE ESTABLISHES A CAUSAL CONNECTION, DISCRETIONARY APPROVAL AND REASONABLENESS OF THE DESIGN

The elements of design immunity are established in this case. The Hamptons conceded the first element of design immunity, a causal connection between the plan and the accident. (See Appellants' Opening Brief on Appeal at 14 ["To obtain design immunity, a public entity must establish . . . three elements, the first of which is not in dispute here . . . ."].) The Hamptons also do not challenge the lower courts' determination that the evidence of advance approval by an authorized official is undisputed. (OB, 18, 23.) Thus, the second element of "discretionary approval" is established unless a further showing is required under the reasoning of *Levin* and *Hernandez*. (See *Laabs, supra,* 163 Cal.App.4th 1242, 1263; *Grenier, supra,* 57 Cal.App.4th at 941 [concluding that city established discretionary approval element as a matter of law where "plans were prepared by Saguchi, a civil engineer, and approved by Alvarado, the city engineer, after review"]; *Ramirez, supra,* 192 Cal.App.3d at 525 [concluding discretionary approval element demonstrated as a matter of law where "the City's engineer, along with the engineers and other officials of the county who were recognized as being competent in the design of highways, approved the design before it was adopted by the City"].)

No further showing is required here because the reasoning of *Levin* and *Hernandez* is flawed, as discussed above. Additionally, these cases are

distinguishable. Unlike the situation in *Levin* and *Hernandez*, where there was no evidence the entities considered the injury-producing feature or applicable standards, here the County presented evidence that its plan addressed sight distance and met sight distance standards when measured according to County practices and written guidelines. (1 AA 87-88; 2 AA 359, 363.) Sight distance is only "substandard" if the County is required to measure sight distance from the point of an unreasonable driver who remains behind the limit line, allowing the nearby shoulder embankment to be an obstruction. While the Hamptons argue that County standards always require that sight distance be measured from a point 10 feet back from the edge of the pavement regardless of the configuration of the intersection, the evidence is to the contrary.

County guidelines for measuring sight distance at intersections with topographical features expressly provide that: "Sight distance is measured 8 feet back . . . from the edge line." (2 AA 359: 13-20.) The edge line is the edge of the travel lane. (1 AA 152, ¶ 7.) Consequently, the County properly measured sight distance in this case, because it measured 8 feet back from the travel lane. The Hamptons' expert, Mr. Stevens, admittedly did not consider or apply County guidelines. (2 AA 368:11-16.) He explained that he was provided with information on County guidelines after he had completed his work, and that he would have to "redo" his sight distance measurements to take County guidelines into account. (2 AA 368:2-11.) Thus, Mr. Stevens' calculations do not create a dispute of fact as to whether sight distance at the intersection meets County standards.[10]

The Hamptons concede that whether sight distance standards are met turns on how sight distance is measured. (OB, p. 30.) They also concede that

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[10] The Hamptons raised no objection in the trial court to the County's evidence regarding these guidelines. Likewise, the Hamptons did not request time for Mr. Stevens to reconsider his sight distance measurements after he learned of the applicable County practices and guidelines.

operational sight distance standards take topography into account. (OB, p. 31-32.) Here, there is a wide paved shoulder/bike lane between the edge of the closest lane on Cole Grade Road and the edge of the pavement. Measuring 10 feet back from the edge of the pavement determines the sight distance for a driver who has not pulled forward past the embankment; when measured in this manner, sight distance falls short of the requirements. (1 AA 152, ¶¶ 7-9; 2 AA 368:12-16; 1 AA 87-88, ¶ 7; 2 AA 359:1-23.) By contrast, measuring 8 feet back from the edge of the travel lane determines the sight distance for a driver who has pulled forward to the point where the embankment is not a factor. Measured in this manner, the parties ***agree*** sight distance at the intersection meets or exceeds sight distance standards. (2 AA 359-363; 2 AA 367:16-23 [Stevens' testimony that drivers can see 550 feet]; see also 2 AA 361:1-24; AA 152, ¶¶ 7 and 8 [operational sight distance standard is 388 feet]; 1 AA 162-163 [design sight distance standard is 550 feet].)

Thus, the real dispute here is whether the design was reasonable. This is exactly the type of dispute that falls squarely under the third element of design immunity, which "does not require that property be perfectly designed, only that it be given a design which is reasonable under the circumstances." (*Ramirez, supra*, 192 Cal.App.3d at 525.) In this case, the County did not completely rebuild the intersection to new construction design standards, which would include traffic signals, overhead lights, left turn arrows and clear, flat viewing space in every direction. As the plans themselves indicate, these were interim improvements rather than improvements bringing the whole intersection up to an ideal design configuration. (1 AA 92, 99-104.) The County's engineers exercised their discretion to improve sight distance at the intersection by lowering the crest that was impeding the view of oncoming traffic and placing a stop sign and limit line several feet before the travel lane so that drivers could roll safely forward past the shoulder embankment to gain adequate sight distance. (1 AA 86-87, ¶¶ 4, 5 and 6; 1 AA 99-104.)

Robert Goralka, the County's Traffic Engineer, confirmed that the approval was reasonable because it provided adequate sight distance when drivers roll forward. Mr. Goralka attested that he has performed civil engineering work for the County for over 25 years and was familiar with the sight distance practices followed by the County on its many miles of roadways dating back to the years when this project was developed. (1AA 85-86, ¶ 1.) Mr. Goralka explained that for the Miller Road/Cole Grade Road intersection, where the existing roads had topographical features such as a shoulder embankment, it was the County's practice to provide "operational" sight distance rather than the ideal "design standard" sight distance for new intersections. (1 AA 88, ¶ 8.)[11] Mr. Goralka stated:

> My usual manner of gauging operational sight distance from a side street at an intersection such as this, and the manner I have usually seen used by those working for the County, is to measure back from the prolongation of the painted edge of lane line, not the limit line. In this instance, the edge of the lane line is several feet in front of the limit line. As a practical matter, a driver on westbound Miller Road who creeps forward from the limit line but has not yet crossed into the oncoming travel lane is able to gain more sight distance to the left, looking for traffic on northbound Cole Grade Road. This results in "operational" sight distance. (1 AA 87-88, ¶ 7.)

Mr. Goralka further explained that since there was a wide paved shoulder outside the travel lanes at the Miller Road/Cole Grade Road intersection, the County's custom and practice was to gauge sight distance from a point eight feet

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[11] The applicability of "operational" sight distance rather than "design" sight distance **was not in dispute** in the summary judgment motion. (RT 5:15 – 7:1.) The Hamptons conceded that the County could use operational sight distance requirements when evaluating existing roads and did not have to meet the more stringent design sight distance standards, generally used for new roadway projects. Their counsel admitted to the court: "And I'll submit to you that we will not be able to establish that this was a new project or that they should have met that design standard." (RT 5:15-17.) The Hamptons' expert later conceded that he

back from the edge of the closest oncoming lane to approximate where a driver would be situated before the front of their car crossed into the travel lane. (1 AA 85, ¶ 1; 1 AA 87-88, ¶¶ 7-8.) Mr. Goralka personally visited the Miller Road/Cole Grade Road intersection to confirm that sight distance was adequate and exceeded the applicable standards when measured in this manner. (1 AA 86 - 87, ¶¶ 4, 5 and 6.) He declared:

> The configuration of the intersection shown in the plans provides adequate operational sight distance for a driver who creeps forward from the limit line. Having viewed the site in person, I can say that the operational sight distance provided between westbound Miller Road and northbound Cole Grade Road is adequate. The plans did not achieve a more desirable amount of sight distance sought when a new intersection is being designed from scratch in an open area. But the project did achieve operational sight distance, which is a reasonable improvement when, as here, there are design constraints including roadways already in place that are near the crest of a hill and an embankment with existing utilities. (1 AA 88, ¶8.)

The County's retained traffic engineering expert, Arnold Johnson, testified that providing operational sight distance by measuring back from the edge of the lane (his term is "edge line") was reasonable under the circumstances, was an accepted exercise of engineering judgment he himself used during his many years as a traffic engineer, and was expressly authorized by written County guidelines. (2 AA 359:3-23; 2 AA 364:5-9.) He further testified that Mr. Goralka's declaration regarding the practice for measuring sight distance at the intersection of Miller Road and Cole Grade Road is consistent with the County's written guidelines, which provide that operational sight distance at such intersections is to be measured eight feet back from the edge of the travel lane or edge line. (2 AA 359:3-3; 2 AA 363:11-25.) Measuring sight distance in this manner, Mr. Johnson determined that a driver westbound on Miller Road who rolled forward from the

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had not considered County guidelines as to how to measure operational sight distance at existing intersections with nearby obstructions. (2 AA 368.)

limit line and looked left for traffic approaching northbound on Cole Grade Road would be able to see vehicles more than 550 feet away. (2 AA 361- 364; AA 152, ¶¶ 7-8.) As noted, the Hamptons' traffic engineering expert Mr. Stevens ***agreed*** that if Mr. Hampton had pulled forward, he would have been able to see a vehicle within 550 feet of the intersection. (2 AA 367:20-23.)

Although the Hamptons argue that the County's plans do not on their face require that drivers roll forward, the design itself requires that drivers roll forward to see oncoming traffic. Applicable case law confirms that it is reasonable to require drivers to roll forward from a limit line to gain an unobstructed view of oncoming lanes. In such circumstances, traffic engineers can expect that reasonable drivers will creep forward to gain sight distance before deciding to pull into the intersection.

> The practice of stopping at a limit line and then "creeping" forward to a point of visibility has long been recognized as "practical" under California law. (See *Smith v. Pellissier* (1955) 134 Cal.App.2d 562.) There are many reasons why a limit line would be placed where visibility of oncoming traffic might be impaired. Trolley or railroad tracks could require the limit line to be set back from the intersection. Or (as anyone who has driven in San Francisco would understand), many times the limit line is placed below the crest of a steep hill to avoid a pedestrian crosswalk, requiring the driver to cross the limit line before he or she can tell whether it is safe to proceed further. (*Hefner, supra,* 197 Cal.App.3d at 1016.)

The need to drive reasonably by rolling forward from a stop sign limit-line is not academic or theoretical. Rather, it is consistent with the common experience of drivers and modern driving. Drivers know that at some stop signs they will have to roll forward to see around a row of cars parked along the cross-street or to see past trees and utility poles placed along the road. At other stop signs they will have to inch forward to see oncoming traffic when the limit line is behind a bike lane, trolley or railroad track or a crosswalk. Drivers stopping at intersections cannot accelerate into cross-traffic without first rolling forward to a

point where oncoming traffic is visible. This is what the County design plans reasonably require.

The Hamptons' argument that the plans should have been more detailed -- specifically, that the plans should have shown the shoulder embankment to indicate that the engineer who approved them knew there was an impediment to sight distance -- is likewise related to the reasonableness of the design (element three).[12] If a motorist on westbound Miller Road is reasonably required to creep forward from the limit line to a point eight feet from the closest lane to check for oncoming vehicles, then the experts on both sides agree ***there is no sight distance obstruction.*** (2 AA 359-363, 367.) Thus, there would be no reason to include the shoulder embankment on the plans because it simply was not a factor.

In short, the only dispute here is whether the County's design plan was reasonable in requiring that motorists pull forward to check for oncoming traffic. That a paid expert witness disagrees with the design does not mean that the design was unreasonable. (*Ramirez, supra,* 192 Cal.App.3d at 525.) "A mere conflict in the testimony of expert witnesses provides no justification for the matter to go to a lay jury who will then second-guess the judgment of skilled public officials." (*Id.*, at 525-526.) [13] Because substantial evidence supports the reasonableness of the

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[12]The Hamptons' argument also misapprehends the nature of design plans, which include only information necessary to bid and build a project because the purpose of the plans is to enable a contractor to construct the project, not to show the thought process which led to the project, the problem, the solution, what was considered but not selected, etc.

[13] The Hamptons' position -- that design exceptions are undesirable and that that design standards must be applied regardless of the configuration of the existing road -- is against public policy. If, for example, a public intersection was designed and built in the 1930s, it might not be economically possible for the intersection to be brought up to current, ideal design standards. Public policy favors immunizing the decision to improve safety, even where the intersection cannot be improved to ideal standards.

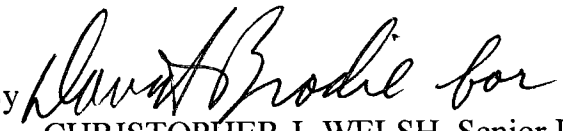
design here, summary judgment is appropriate in this case. (*Ibid.*) To conclude otherwise would defeat the very purpose of design immunity, by "permit[ting] "reexamination in tort litigation of particular discretionary decisions where reasonable men may differ as to how the discretion should be exercised . . . ." (*Cameron, supra,* 7 Cal.3d at 326; citation omitted.)

CONCLUSION

Where statutory language "is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend." (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1131; citation omitted.) Here, following section 830.6's plain language results in the intended consequences by immunizing decisions to give discretionary approval to reasonable design plans. By contrast, reading a requirement of "informed" approval into section 830.6 results in an absurd consequence because it conflates the second and third elements of design immunity, when the legislature clearly separated these elements and required different showings for each. For these reasons, the Hamptons' construction of section 830.6 should be rejected and the reasoning of the decisions in *Levin* and *Hernandez* should be disapproved to the extent they require "informed" approval to establish the second element of design immunity.

DATED: March 20, 2014

THOMAS E. MONTGOMERY, County Counsel

By 

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.520(c)(1)

Pursuant to California Rules of Court, rule 8.520(c)(1), I certify that the text of this brief consists of 10,775 words as counted by the Microsoft Office Word 2010 word-processing program used to generate the brief

DATED: March 21, 2014

CHRISTOPHER J. WELSH, Senior Deputy

RANDALL KEITH HAMPTON, et al. v. COUNTY OF SAN DIEGO
Supreme Court of California Case No. S213132 - 4th Civil No. D061509

PROOF OF SERVICE BY MAIL
(C.C.P. 1013a and 2015.5(b))

I, SARA FRANCO, declare:

I am over the age of eighteen years and not a party to the case; I am employed in, or am a resident of, the County of San Diego, California where the mailing occurs; and my business address is: 1600 Pacific Highway, Room 355, San Diego, California.

I further declare that I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business.

I served the following document: **ANSWER BRIEF ON THE MERITS** by placing a true copy of each document in a separate envelope addressed to each addressee, respectively, as follows:

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Fourth Appellate District, Division One
750 "B" Street, Suite 300
San Diego, California 92101

(4th Civil No. D061509)

Clerk of the Superior Court
300 West Broadway
San Diego, California 92101

(Superior Court No. 37-2010-00101299-CU-PA-CTL)

I then sealed each envelope and, with the postage thereon fully prepaid, I placed each for deposit in the United States Postal Service, this same day, at my business address shown above, following ordinary business practices.

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

Executed on March 21, 2014, at San Diego, California.

/s/

SARA FRANCO