S213132

IN THE

SUPREME COURT OF CALIFORNIA

RANDALL KEITH HAMPTON, ET AL.,

Plaintiffs and Petitioners,

v.

COUNTY OF SAN DIEGO,

Defendant and Respondent.

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

REPLY BRIEF ON THE MERITS

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INTRODUCTION

At issue in this appeal is whether the County established "discretionary approval" of an intersection that had substandard sight distance as the direct result of an embankment on the intersection's southeast corner.

The parties agree that in order establish discretionary approval, a public entity must show that the design *either* conformed to the entity's previously adopted standards *or*, if nonconforming, was nonetheless approved in an exercise of "engineering judgment." (ABOM, p. 11.)[1]

Viewing the facts in a light most favorable to the Hamptons gives rise to the following two conclusions:

First, because the embankment deprives the intersection of the minimum amount of sight distance under the County's written guidelines, the intersection does not conform to the County's previously adopted standards.

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[1] References to County's Answer Brief on the Merits are abbreviated as **ABOM, p. [page]**. References to the Hamptons' Opening Brief on the Merits are abbreviated as **OBOM, p. [page]**. References to the County's Respondent's Brief in the Court of Appeal are abbreviated as **CoA RB at p. [page]**. References to the County's Answer to the Petition for Review are abbreviated as **Ansr. to Pet., p. [page]**. References to the Court of Appeal's opinion are abbreviated as **Slip opn. at p. [page]**. References to the Appellants' Appendix are abbreviated as **[vol.] AA [page]:[line]**. Finally, references to the Reporter's Transcript are abbreviated as **RT [page]:[line]**.

Second, because the embankment is absent from the design plans used for the approval process, there is no basis to infer that the senior engineer who approved the plans made a conscious decision to approve a nonconforming design.

The County attempts a number of counterarguments in its answer brief, only a few of which, in the Hamptons' estimation, actually warrant a response.[2]

But *none* of the County's arguments change the salient fact that, on this record, the County (1) implemented an apparently substandard design, (2) showed up to court with plans that omit the very terrain feature that caused the design to be substandard, and (3) altogether failed to avail itself of the numerous ways to establish that the substandard plans were approved in an exercise of engineering judgment by an authorized engineer.

As a result, the County failed to establish discretionary approval of this apparently substandard intersection and the summary judgment in its favor must be reversed.

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[2] Among the arguments that do *not* warrant much discussion is the County's baseless allegation that Keith Hampton entered the intersection "without stopping to look for on-coming traffic." (ABOM, p. 1.) That is pure conjecture on the part of the County and the Hamptons' suspect the County's sole purpose for making this unfounded assertion is to prejudice this Court against the Hamptons.

DISCUSSION

A. The County is not entitled to summary judgment on the discretionary-approval element of its design-immunity affirmative defense.

The parties agree that, with respect to discretionary approval, section 830.6 distinguishes between plans that *do* and plans that *do not* conform to governing standards. Thus, the parties agree that a public entity establishes "discretionary approval" under section 830.6 either by showing the plans conform to the entity's previously approved standards *or*, if nonconforming, by showing the plans were nonetheless approved in the exercise of engineering judgment.

As discussed below, there is conflicting evidence whether the intersection conformed to County sight-distance standards, and a *complete lack of evidence* the apparently nonconforming design was approved in the exercise of engineering judgment.

1. There is conflicting evidence regarding whether the intersection conformed to the County's sight-distance standards.

The Hamptons presented evidence—in the form of County documents—that the County's "corner sight distance" standards required at least 550 feet of sight distance when measured from a point 10 feet back from Cole Grade Road's pavement edge. (OBOM, p. 10.)

The County does not deny "that sight distance is generally measured from a point 10 feet back from the edge of pavement."

(ABOM, p. 4.) Nor does the County deny that the intersection falls short of that standard. (2 AA 363:17–364:4; see also OBOM, p. 31; 1 AA 152:14–15.)

Instead, the County argues that "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." (ABOM, p. 4.)

As a threshold matter, it seems odd for a public entity to adopt a "standard" that applies only so long as the project meets it. A "standard" is no standard at all if it categorically does not apply to anything that falls short of it.

Even casting that logical fallacy aside, one could be excused for doubting the veracity of the County's assertion that "practices and guidelines allow sight distance to be measured 8 feet back from the edge of the traffic lane." Indeed, although the County insists these alleged guidelines are "written," it is telling that there is no copy of any such guideline in this record. Instead, the only evidence the County offers in this regard is equivocal testimony from biased witnesses—a current County engineer and the County's paid expert. (E.g., 1 AA 87–88 ["*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 . . . ," emphasis added]; 2 AA 359, 364.)

It is also telling that the written standards on which the Hamptons rely were provided *by the County* in response to discovery requests. (1 AA 171–173.) If the County believed that other written standards took precedence here, it should have produced copies of *those* standards instead of the documents that were made part of this record. (Cf. *Mozzetti v. City of Brisbane* (1977) 67 Cal.App.3d 565, 573 (*Mozzetti*) ["It is equally axiomatic that the parties must abide by the consequences of their own acts, and cannot seek reversal upon appeal for errors which they have committed."].)

But even giving the County the benefit of the doubt, the County's "evidence" that its "practices and guidelines allow sight distance to be measured 8 feet back from the edge of the traffic lane" *still* does not entitle the County to an inference that the intersection conformed to governing standards.

Contrary to the County's belief, it was not sufficient for the County to merely "present[] evidence" that its plan "met sight distance standards when measured according to County practices and guidelines." (ABOM, p. 26; *id.* ["The County presented evidence that it followed its road standards."].) Rather, as the party moving for summary judgment, the County had the obligation to demonstrate the nonexistence of any contrary evidence. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*) [moving party on summary judgment has burden to show "there is no triable issue of material fact"].)

But the County's claim that a more lenient, "operational" standard categorically applies every time "there are existing topographical features creating a visual obstruction," is contradicted by evidence indicating that "corner sight distance" is the default standard applicable to all intersections. (1 AA 162–163 ["Sight distance requirements at **all** intersections **shall** conform to the intersectional sight distance criteria as provided below," emphasis added]; see also 2 AA 311:17–20 [County engineer defining "corner sight distance" as "the ideal sight distance that is intended to be achieved when an [existing] intersection is being improved on"].)[3]

Moreover, even if a court *could* draw the inference that "corner sight distance" categorically did not apply to this intersection, it *still* would not entitle the County to the inference that its intersection conformed to applicable standards. This is because the County documents in this record specify that 388 feet of "operational" sight distance must be achieved when measuring

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[3] The County argues the Hamptons conceded the applicability of "corner sight distance" standards (also known as "design sight distance") at the hearing on the County's motion for summary judgment. (ABOM, p. 28, fn. 11.) But the County takes counsel's words out of context. Lest there be any doubt, moments after the passage the County quotes, counsel remarked: "So it's very clear that they didn't meet their own design sight distance. And one of the arguments we have made is was this a substantial enough project to require them to meet that sight distance standard? And I would submit to you that it was." (RT 7:24–28.)

eight feet back from the *pavement edge* (1 AA 164), not eight feet back from the *edge of the lane* as the County argues.

This distinction is material because the County admits the intersection lacks the required 388 feet of operational sight distance when measured eight feet back from the pavement edge. (E.g., CoA RB, p. 6 ["Measuring from the edge of the shoulder pavement, sight distance is limited by the embankment and falls short of the required 388 feet."].)

To summarize, the evidence in this record reveals at least two disputed issues of material fact regarding the threshold question of whether the intersection conformed to County standards:

The first dispute is whether the County's "corner sight distance" standard applies, or whether it was sufficient for the County to only meet an "operational" standard. (Compare 1 AA 162–163 with 1 AA 87–88.) If the former, then the intersection is substandard. (1 AA 152:14–15; 2 AA 363:17–364:4.)

But even if the County only had to satisfy an "operational" standard, the next dispute is whether that standard required 388 feet of sight distance from a point eight feet back from the *pavement edge* or the *lane line* on Cole Grade Road. (Compare 1 AA 164 with 1 AA 87–88.) If the former, then the intersection is, once again, substandard. (E.g., CoA RB, p. 6.)

Since "[t]he actual weighing of conflicting evidence by the fact-finder is a process which can never take place in the context of a

summary judgment motion" (*Kerns v. CSE Ins. Group* (2003) 106 Cal.App.4th 368, 396), *neither* of these evidentiary disputes can be resolved at this stage. Accordingly, the County is not entitled to the inference that its design conformed to its own previously adopted standards. (See *Hernandez v. Department of Transportation* (2003) 114 Cal.App.4th 376, 388 (*Hernandez*).)

2. There is no evidence the engineer who approved the embankment-less plans exercised his engineering judgment to approve a substandard design.

As noted above, the parties agree that a public entity establishes "discretionary approval" under section 830.6 *either* by showing the plans conform to governing standards *or*, if nonconforming, by showing the plans were nonetheless approved in the exercise of discretionary authority.

In light of the factual dispute regarding the correct minimum standard for sight distance at the intersection, the County is not entitled to the inference that the intersection conformed to the County's sight-distance standards. Thus, to establish the second element of its design-immunity defense, the County must demonstrate the plans were approved by an authorized official exercising engineering judgment. It is here that the County exhibits schizophrenic confusion about its own legal position.

At one point, the County, echoing the Fourth District, takes the position that section 830.6's reference to designs approved by an "employee exercising discretionary authority" means simply that

there must be evidence that the employee who approved the plans "was authorized to do so." (ABOM, p. 8.)

But that argument was foreclosed in *Johnson v. State of California* (1968) 69 Cal.2d 768 (*Johnson*), in which this Court held that references to "discretionary authority" in California's governmental tort immunity statutes require evidence that discretion was exercised *in the particular case*, not merely that the employee generally engages in discretionary activity as a general matter. (*Id.* at p. 794, fn. 8 ["The fact that an employee normally engages is 'discretionary activity' is irrelevant if, in a given case, the employee did not render a considered decision."].)

No doubt with *Johnson* in mind, the County reversed course and acknowledged that "discretionary authority" inherently "requires a showing that the employee balanced risks and benefits in making the policy decision." (ABOM, p. 9.) Thus, the County eventually conceded that "section 830.6 clearly requires an exercise of judgment or choice" and that, in the context of a design that does not conform to standards, "engineers . . . must decide, among other things, whether in the exercise of sound engineering judgment the circumstances warrant or necessitate any exceptions to design standards." (ABOM, p. 11.)

And yet, despite acknowledging that in the context of a nonconforming design a public entity must show that the official who approved the design consciously "weigh[ed] and balanc[ed] the

risks of [the] particular design" (Ansr. to Pet., p. 13), to determine whether "the circumstances warrant or necessitate any exceptions to design standards" (ABOM, p. 11), the County clings to the seemingly inconsistent belief that "[t]he second element of design immunity does not require a showing that the approval was 'informed.'" (ABOM, p. 1.)

How does one explain such hypocrisy? The Hamptons are not sure, but suspect it has much to do with the County's exaggerated definition of the word "informed."

The County—perhaps in a strategic effort to create a strawman out of the Hamptons' arguments—assumes that by "informed," the Hamptons mean that engineers must be "fully informed," engage in an "elaborate, fully informed deliberation," and conduct a "strictly careful, thorough, formal, or correct evaluation." (ABOM, pp. 9–10.)

But somewhere between the engineer who signs plans without reviewing them (essentially the Fourth District's position), and the engineer who retires to Walden Pond to contemplate every possible permutation of a design (the position the County ascribes to the Hamptons), lies the level of discretionary decisionmaking contemplated by section 830.6.

Wherever that line might someday be drawn, it is not sensational to suggest that an engineer who approves a nonconforming design must, at a minimum, have the threshold

understanding that the design does not conform to applicable standards. If not, then the engineer never even had the *opportunity* to consider whether, in the County's words, "the circumstances warrant or necessitate any exceptions to design standards." (ABOM, p. 11.)

The County concedes that the embankment deprived the intersection of the requisite amount of sight distance under those standards. (1 AA 152:14–15; 2 AA 363:17–364:4; CoA RB, p. 6; see also OBOM, p. 31.) And yet, the record is devoid of *any* evidence David Solomon—the engineer who approved the plans—knew about the embankment.

Indeed, the only "evidence" the County offers in this regard is the County's assertion that the design was intended to address "sight distance" a sufficient basis to charge Solomon with knowledge of the embankment.

As a factual matter, there is no evidence the 1995 project actually improved sight distance. While the reduction in the roadbed of Cole Grade Road might have improved sight distance, the other aspect of the project—the addition of the turn pockets on Cole Grade Road—made it worse. This is because, in order to accommodate the turn pockets, the County had to shift the pavement edge of northbound Cole Grade Road further east by several feet, thereby exacerbating the embankment's impact on sight distance for the same reason there is "more" sight distance when a

motorists rolls forward from the pavement edge to the edge of the traveled lane. (1 AA 152:27–28.)

Because the plans do not contain any figures for sight distance under the proposed project (1 AA 99–104), it us unclear whether the tradeoffs inherent in the project resulted in a net gain, no change, or even a net *loss* of sight distance. Obviously, if sight distance was *X* before the project and something less than X after, it cannot be said that the "purpose" of the project was to improve sight distance.

But even assuming the "purpose" of the 1995 project was to improve sight distance, this does not mean Solomon knew about the embankment. While the fact that the plans were designed to address sight distance might have cued Solomon to consider the effect of *known* impediments to sight distance, it does not convert previously *unknown* impediments into known ones. Thus, the bare fact that the plans called for Cole Grade Road to be re-graded would not have alerted Solomon to the presence of an embankment on the southeast corner of the intersection about which he was previously unaware.[4]

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[4] Nor does it matter that other, more junior engineers who worked on the project might have been aware of the embankment. Only Solomon had been clothed with the discretionary authority to approve plans. (1 AA 087:1–3.) Thus, unless that information was conveyed to Solomon—and there is no evidence it was—the fact that others might have been aware of the embankment is irrelevant in establishing whether Solomon made a conscious engineering judgment to approve the intersection despite the embankment. (E.g., *Levin v. State of California* (1983) 146 Cal.App.3d 410, 418 (*Levin*).)

The absence of any evidence Solomon knew about the embankment is fatal to discretionary approval in light of the fact the embankment is absent from the design plans. And while the County attempts a number of excuses regarding why the embankment is absent from the plans, they only hurt the County's case.

The first excuse is the County's circular argument that "there would be no reason to include the shoulder embankment on the plans because it was simply not a factor." (ABOM, p. 11.) This statement might seem odd in light of the County's concession that the embankment limits sight distance when measured according to the written standards in this record. (1 AA 152:14–15; 2 AA 363:17–364:4; CoA RB, p. 6; see also OBOM, p. 31.) Thus, what the County is presumably referring to is its belief that the intersection is safe so long as motorists roll up to the edge of the cross-street before entering the intersection. (E.g., ABOM, pp. 2, 4.)

But as discussed in more detail below (see Part II.B.1, *post*), the fact that a nonconforming design might nonetheless be reasonable is an issue reserved for the *third* element of design immunity ("reasonableness of the design"). Such evidence has no bearing on the factual question regarding whether the nonconforming design was the product of a conscious exercise of engineering judgment. *That* question depends on the engineer's threshold understanding

that the design does not conform to applicable standards in the first place.

This is not to mention that in arguing the embankment did not need to be on the plans because the intersection is safe regardless, the County effectively suggests that the high-ranking engineers who provide approval for County projects are on a "need-to-know basis" and need not be aware that a design is substandard if the project might nonetheless deemed "safe" in the after-the-fact opinion of a junior County engineer.

But to so hold would effectively render the approval process a ministerial, token gesture and would therefore be directly inconsistent with the very definition of "discretion." (E.g., *Morgan v. Yuba County* (1964) 230 Cal.App.2d 938, 942 ["A discretionary act is one which requires 'personal deliberation, decision and judgment' while an act is said to be ministerial when it amounts 'only to an obedience to orders, or *the performance of a duty in which the officer is left no choice of his own,*'" emphasis added, quoting Prosser, *Torts* (3d ed.) p. 1015].)

The County's *other* excuse for why the embankment is absent from the plans can only be described as bizarre. At footnote 12 on page 31 of its answer brief, the County argues that the Hamptons

> misapprehend[] 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 a project, not to show the

> thought process which led to the project, the problem, the solution, what was considered but not selected, etc.

But the six pages of embankment-less plans at pages 99 through 104 of the Appellants' Appendix were offered *by the County.* And it was *the County* that emphasized the plans

> [i]nclude a profile that enables a *traffic engineer* to draw a line of sight between a driver who is about to reach the intersection on westbound Miller Road and a vehicle northbound on Cole Grade Road to determine the . . . sight distance at the intersection.

(Ansr. to Pet., pp. 2–3, emphasis added.)

If the County's argument at footnote 12 is meant to suggest that the County's custom and practice is to provide its high-ranking engineers with plans that are equipped with everything needed to verify sight distance at an intersection *except for impediments to sight distance,* then perhaps the County needs to re-examine that policy if it ever wants to legitimately receive design immunity in a road-design case.

Alternatively, if there *are* "hundreds of pages" worth of detailed plans (ABOM, p. 11, fn. 6), that *do* "show the thought process which led to the project, the problem, the solution, what was considered but not selected, etc." (ABOM, p. 31, fn. 12), then the County would have been wise to include *those* documents in this record instead of the six pages of embankment-less plans that it did.

Either way, the County only has itself to blame if this Court infers that David Solomon, the lone engineer vested with authority to approve plans, was unaware an embankment on the southeast corner of the intersection deprived the westbound Miller Road motorist of the minimum sight distance under the County's written standards.

B. The County's criticisms of the Hamptons' interpretation of section 830.6 reflect a fundamental misunderstanding of design immunity.

Early in its brief, the County acknowledges that, in the context of a nonconforming design, section 830.6 requires evidence the approving engineer considered "whether in the exercise of sound engineering judgment the circumstances warrant or necessitate any exceptions to design standards." (ABOM, p. 11)

Nevertheless, the County stubbornly maintains that the discretionary-approval element of design immunity does *not* require a "showing that the official who approved the plans considered applicable standards and the consequences of [deviating from them]." (ABOM, p. 22.)

How does one explain these seemingly inconsistent arguments? As set forth below, the County's obvious confusion arises out of a fundamental misunderstanding of design immunity.

1. The Hamptons' interpretation of discretionary approval does not "conflate" the second and third elements of design immunity.

Chief among the County's criticisms of the Hamptons' interpretation of section 830.6 is the County's unfounded belief that requiring a "showing that the official who approved the plans considered applicable standards and the consequences of [deviating from them]" in order to establish discretionary approval would "conflate[] the second (discretionary approval) element of design immunity with the third (reasonableness of the approval) element." (ABOM, p. 22.)

The Hamptons are at a loss to understand how evidence that "the official who approved the plans considered applicable standards and the consequences of [deviating from them]" speaks to the third element of design immunity. The best the Hamptons can surmise is that the County interprets the third element as focusing on the reasonableness of the *approval process*.

But contrary to the County's attempt to re-define the third element, it is well established that the third element assesses the reasonableness of the *resulting design*, not the *design process that gave rise to it*. (E.g., *Mozzetti*, 67 Cal.App.3d at p. 574 [describing the second element as "a court['s] finding of substantial evidence of *the design's* reasonableness," emphasis added]; *Uyeno v. State of California* (1991) 234 Cal.App.3d 1371, 1383 ["Considered against this backdrop, we conclude there is substantial evidence in support of

the *reasonableness of the timing of the signal system here at issue,"* emphasis added]; *Ramirez v. City of Redondo Beach* (1987) 192 Cal.App.3d 515, 525 ["[Section 830.6] does not require that *property* be perfectly designed, only that it be given a design which is reasonable under the circumstances," emphasis added].)

The County acknowledged as much when it supported its motion for summary judgment with expert testimony the intersection was "safe." (E.g., 1 AA 088 ["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."].)

In fact, it is the *second* element of design immunity—discretionary approval—that asks, as a factual matter, the official who approved the design actually exercised professional judgment. (*Hernandez, supra,* 114 Cal.App.4th at p. 383 ["[S]econd element of the design immunity defense is a question of fact for the jury."].) By contrast, the third element is a question of law, and asks whether resulting design was reasonable as an abstract matter. (*Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 73.)

With a proper understanding of the third element in mind, it becomes immediately apparent that a court does not "conflate" the second and third elements of design immunity when, in the case of a design that deviates from applicable standards, it expects the public entity to show "that the official who approved the plans considered

applicable standards and the consequences of [deviating from them]." (ABOM, p. 22.)

It is possible that an engineer might, in the exercise of his subjective judgment, select a design that was unreasonable. Similarly, it is possible that a conservative engineer might—perhaps due to misleading design plans—inadvertently approve a design that another, more liberal (but still reasonable) engineer would have chosen with little hesitation.

In fact, it is actually *the County* that "conflates" the second and third elements of design immunity when, in arguing that the design received the requisite discretionary approval, it falls back on the claim that the design was reasonable. (E.g., ABOM, p. 30–31.)

But again, the bare fact that a substandard design might be deemed "reasonable" does not establish discretionary approval of the substandard design absent some evidence the particular official who approved the design knew it was substandard and approved it anyway.

If the fact that a design is "reasonable" could, in and of itself, constitute evidence of discretionary approval, then, at least in the case of a substandard design, design immunity would effectively become a two-factor test. In such cases, a public entity would only need to establish a causal nexus between the design and the accident (first element), and substantial evidence the design was reasonable (second and third elements). Thus, nothing could more directly

"conflate" the second and third elements of design immunity than the County's attempt to prove discretionary approval by arguing the design was reasonable.

2. There is no merit to the County's belief that the embankment's absence from the plans speaks to causation, but not discretionary approval.

Citing *Cameron v. State of California* (1972) 7 Cal.2d 318 (*Cameron*), the County argues that "evidence that the injury[-] producing element was omitted from the plan may rebut causation (element one of the design immunity), but it does not rebut discretionary approval (element two of design immunity)." (ABOM, p. 20.)

In their opening brief, the Hamptons expressed doubt that such evidence relates to the causation element *at all*, let alone *exclusively*. The Hamptons' skepticism was based on the observation that the causation element has traditionally been understood to ask whether "the accident was caused by a design defect." (*Alvis v. County of Ventura* (2009) 178 Cal.App.4th 536, 551 (*Alvis*).) Since designs are often deemed "defective" precisely *because* they failed to take a potential injury-producing element into account, and since a plaintiff risks demurrer by not alleging a causal nexus between the design and the injury, public entities routinely establish the causal element simply by pointing to "the allegations of the [plaintiff's own] complaint." (*Ibid.*)

In response, the County accuses the Hamptons of "confusing the evidence necessary to establish a dangerous condition ***cause of action*** with the showing necessary to establish the ***affirmative defense*** of design immunity." (ABOM, p. 21, emphasis in original.) In particular, the County argues that "[w]hile a ***plaintiff*** must show that a dangerous condition is a 'cause' of her injury to state a claim [*citation*], the defendant ***entity*** must show that the dangerous condition was part of its plan to show a 'causal connection' between the plan and the accident [*citation*]." (ABOM, p. 21, emphasis in original.)

But it is telling that this distinction was nowhere to be found in the County's motion for summary judgment. The County's *entire* discussion of the causation element in *that* document consists of the observation that the Hamptons had alleged that a dangerous condition caused Keith Hampton's accident:

> Plaintiffs' theory is that the County is liable because of the accident intersection constituted a dangerous condition of public property. There is no allegation by Plaintiffs that the accident was caused by the County in some other manner. (Ex. I, Complaint.).

(1 AA 014; see also 1 AA 018 ["The County of San Diego has established element one of the [d]esign [i]mmunity defense: Plaintiffs' theory against the County is that the design of the intersection of Miller Road and Cole Grade Road caused the accident."].)

Moreover, the County's fresh take on the causation element in its answer brief is one that is not supported by the weight of appellate authority. Consistent with the County's approach to causation in its motion for summary judgment, courts focus on a causal nexus between the accident and the *resulting design, not* a causal nexus between the *design process* and the accident. (E.g., *Alvis, supra,* 178 Cal.App.4th at p. 550 ["Here the complaint alleges that the County negligently 'planned, placed, constructed and maintained' a wall and that the wall created an increased risk of injury or death . . . ."]; *Levin, supra,* 146 Cal.App.3d at p. 415 ["The design feature at issue is the 1974 reconstruction of the portion of Route 37 at issue, and more specifically, the absence of a median barrier and guard rails."].)

In any event, it is largely academic whether *Cameron* specifically had the causation element in mind when it discussed the absence of the injury-producing feature from the plans. Even if *Cameron does* stand for the proposition that the absence of the injury-producing feature from the design plans is fatal to the causation element, it does not follow that such evidence has *no bearing* on discretionary approval.

Everyone—including the Fourth District and the County—agrees that a single fact can have implications for more than one element of design immunity.

For example, the Fourth District held that the existence of plans signed by authorized official can satisfy *both* the second and third elements of design immunity. (Slip opn., pp. 26, 30.)

Meanwhile, the County believes that the embankment's absence from the plans is relevant to both the causation element *and* the third element of design immunity:

> 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).

(ABOM, p. 31.)

Of course, the County is wrong about that as a technical matter. As discussed in the preceding section, the third element of design immunity assesses the reasonableness of the *resulting design,* not the *design process* that led to it.

But the County's imperfect understanding of the third element aside, the important point *here* is that the County believes the embankment's absence from the plans has implications for multiple elements of design immunity.

Notably, the County provides no basis for its all-too-convenient belief that the absence of the embankment from the design plans speaks to everything *but* the one element at issue in this case (and, indeed, the one element to which it bares the most intuitive relation).

Nor does *Cameron* endorse that belief. *Cameron* is devoid of any express or implied statement that "evidence that the injury producing element was omitted from the plan may rebut causation (element one of the design immunity), but it does not rebut discretionary approval (element two of design immunity)." (ABOM, p. 20.) It is axiomatic that "[a]n opinion is not authority for propositions not considered." (*See Kinsmand v. Unocal Corp.* (2005) 37 Cal.4th 659, 680.)

The folly of the County's refusal to accept that the embankment's absence from the plans has implications for discretionary approval becomes obvious when one considers the following hypothetical:

> Assume that at his deposition, David Solomon, the engineer who reviewed and signed the plans, testified that he was unaware of the embankment on the southeast corner of the intersection, and would not have approved the plans had he known.[5]

Whatever other elements of design immunity such testimony might impact, does the County really believe that it should have *no bearing* on discretionary approval?

The Hamptons invite the County to spend the time between now and oral argument thinking of a way around that hypothetical.

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[5] This is not such an unrealistic scenario. (*See Johnston v. County of Yolo* (1969) 274 Cal.App.3d 46, 54 [engineer admitted he approved plans against his own professional judgment based on pressure from "a member of the county board of supervisors"].)

As it does, the Hamptons advise the County to do better than the simplistic, knee-jerk observation that the difference between that hypothetical and this case is that the Hamptons do not have such direct evidence of Solomon's state of mind.

If *that* is the County's response, it might once again be reminded that *it* is the moving party on summary judgment. As such, it is not the Hamptons' burden to offer affirmative proof that Solomon did *not* know about the embankment. Rather, it was the County's burden to establish as a matter of law that he *did*. (E.g., *Aguilar, supra,* 25 Cal.4th at p. 850 [moving party on summary judgment has burden to show "there is no triable issue of material fact"].)

And while the Hamptons may not have a gasp-inducing admission from Solomon, they are not exactly empty-handed either. After all, the design plans Solomon reviewed and signed omit the very terrain feature that deprived the intersection of the requisite amount of sight distance. As such, one can easily draw the inference that Solomon was misled into thinking the intersection had ample sight distance when measured according to mandatory sight-distance standards reflected in this record. If so, then Solomon was categorically deprived of the opportunity to, in the County's words, decide "whether in the exercise of sound engineering judgment the circumstances warrant or necessitate any exceptions to design standards." (ABOM, p. 11.)

The County might also be advised to come armed with something better than the argument that "[i]n 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." (ABOM, p. 13, citing Evid. Code, § 664.)

As might already be clear from the preceding discussion, the Hamptons' argument does *not* depend on a finding that Solomon failed to carry out any of his professional duties. To the contrary, the Hamptons' argument *assumes* Solomon *did* carry out his professional duties, and therefore attempted to verify sight distance from the plans during the approval process, no doubt using the profile included on the plans. (E.g., Ansr. to Pet., pp. 2–3 [noting the plans "include a profile that enables a traffic engineer to draw a line of sight between a driver who is about to reach the intersection on westbound Miller Road and a vehicle northbound on Cole Grade Road to determine the . . . sight distance at the intersection"].)

Again, the problem is that in doing so, the embankment-less plans would have mislead Solomon into thinking the design met both the County's "corner sight distance" *and* "operational stopping sight distance" as defined in this appellate record. If so, then, once again, he never would have had reason to consider deviating from those standards.

Ultimately, the County might be right that, under *Cameron*, "the defendant ***entity*** must show that the dangerous condition was

part of its plan to show a 'causal connection' between the plan and the accident." (ABOM, p. 21, emphasis in original.) But this should not disturb the intuitive conclusion that, in the case of a design that deviates from previously adopted standards, the absence of the injury-producing feature from the plans cuts against a finding of discretionary approval, at least where, as here, the absent feature is the reason for the deviation in the first place.

3. The Hamptons' interpretation of section 830.6 does *not* require direct testimony from the approving engineer.

The County criticizes the Hamptons' interpretation of section 830.6 on the mistaken belief it would "effectively require[] declarations from the individuals who developed and approved the project" and would require those individuals to "specifically recall details of plans for a particular project." (ABOM, p. 13.) But nothing could be further from the truth.

As the hypothetical in the preceding section suggests, direct testimony from David Solomon—the engineer who approved the plans and who is alive and residing in San Diego County—would obviously be helpful in establishing whether or not the embankment was taken into account.

Yet, even without Solomon's direct testimony, there are other alternative means by which the County could have fostered an inference he knew he was approving a substandard design.

Perhaps the most obvious example is the plans themselves. Had the embankment been depicted on the design plans (or even

what the sight distance would be under the proposed project), it would have supported the inference that Solomon was aware of and considered the embankment's effect on sight distance.

Similarly, memos or correspondence to and from Solomon discussing the embankment or the substandard sight distance might have established that Solomon knew the intersection deviated from governing standards.

For example, Caltrans requires its engineers to seek permission in writing before approving a design that deviates from its standards and calls for the resulting permission to be recorded "in a 'project approval document.'" (*Hernandez, supra,* 114 Cal.App.4th at p. 381.) If the County had maintained a similar practice, this Court would not have been bothered with this case.

Indeed, even custom-and-practice evidence regarding the approval process might have sufficed. For example, had the County presented evidence that senior engineers always visit the actual site of a future project as part of the approval process, it might have supported the inference that Solomon was aware of the embankment when he approved the plans.

This was, after all, the *exact* sort of evidence Caltrans used to establish discretionary approval in *Alvarez v. State of California* (1999) 79 Cal.App.4th 720 (*Alvarez*). There, Caltrans provided testimony from several engineers who described in detail "the State's custom and practice in providing discretionary approval of roadway

designs during the 1960's when the Project was designed and constructed." (*Id.* at p. 729.)

Although the County claims it provided such evidence here, its effort fell woefully short. Rather than discuss how the approval process works, what information is taken into account, and what steps are taken to verify whether the design conforms to applicable standards (see *Alvarez, supra,* 79 Cal.App.4th at pp. 728–729), the *only* evidence the County offered was testimony that, "[Solomon] had been delegated by the County Board of Supervisors, through the Director of the Department of Public Works, discretion and authority to approve plans such as Exhibit K." (1 AA 087.)

Thus, whereas the court in *Alvarez* had some basis for drawing inferences about what the engineer who approved the plans likely knew in light of the custom and practice in place at the time, the County failed to provide any equivalent evidence here.

In light of the disfavored nature of tort immunities (e.g., *Baldwin v. State of California* (1972) 6 Cal.3d 424, 435–436; OBOM, p. 24), there is little to regret about denying design immunity to a public entity that (1) implemented an apparently substandard design, (2) shows up to court with plans that omit the very terrain feature that caused the design to be substandard, and (3) altogether failed to avail itself of numerous ways to establish that the substandard plans were approved in an exercise of engineering judgment by an authorized engineer (if that was, in fact, the case).

CONCLUSION

Ultimately, there is no truth to the County's claim that the Hamptons believe "design exemptions are undesirable and that that [*sic*] design standards must be applied regardless of the configuration of the existing road." (ABOM, p. 21, fn. 13.) To the contrary, the Hamptons openly acknowledge that situations arise in which engineers will encounter "a compelling need for a deviation from the public entity's own standards." (OBOM, p. 12.)

The Hamptons merely emphasize that an engineer cannot "weigh and balance" the risks of deviating from his agency's previously adopted standards without the threshold recognition "the circumstances warrant or necessitate any exceptions to design standards" in the first place. (ABOM, p. 11.) It therefore follows that in a case involving a design that deviates from a public entity's own standards, the public entity must show that the official who approved the design at least had the threshold understanding that the design was nonconforming.

Here, the County is not entitled to the inference the intersection conformed to its standards in light of conflicting evidence regarding the standard applicable to this intersection.

Nor is there proof the nonconforming design was nonetheless approved in a conscious exercise of engineering judgment. Here, it is notable that the embankment that deprives the intersection of the required sight distance was not on the plans, and the County failed

to offer any other evidence from which a court could infer that the lone engineer authorized to approve these plans knew "the circumstances warrant or necessitate any exceptions to design standards." (ABOM, p. 11.)

Accordingly, the County has failed to establish discretionary approval of the intersection under either of the alternative avenues contemplated by section 830.6. For that reason, the Hamptons pray this Court will reverse summary judgment and remand this case for trial.

Dated: April 12, 2014

By: _____

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CERTIFICATE OF COMPLIANCE

As required by California Rules of Court, rule 8.520(c)(1), I certify that, according to the word-count feature in Microsoft Word 2011, this "Reply Brief on the Merits" contains **6,965** words, including footnotes, but excluding any content identified in rule 8.520(c)(3).

Dated: April 12, 2014

By: _____

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PROOF OF SERVICE

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

On April 12, 2014, I served the attached:

Reply Brief on the Merits

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

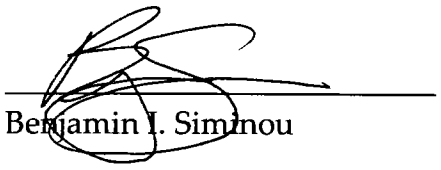
Thomas E. Montgomery
Christopher J. Welsh
Office of County Counsel
1600 Pacific Highway, Ste. 355
San Diego, CA 92101-2469

California Court of Appeal
Fourth Appellate District, Division One
750 B Street, Suite 300
San Diego, CA 92101

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

Each envelope was then sealed, and with the postage thereon fully prepaid, deposited in the U.S. Mail by me in San Diego, California, on April 12, 2014.

I declare under penalty of perjury that the foregoing is true and correct, and this declaration was executed at San Diego, California, on **April 12, 2014**.



Benjamin I. Siminou