SUPREME COURT NO. S267453

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

BETTY TANSAVATDI
Plaintiff and Appellant,

v.

CITY OF RANCHO PALOS VERDES
Defendant and Respondent,

PETITIONER'S REPLY BRIEF ON THE MERITS

After a Decision by the Court of Appeal
Second Appellate District, Division Four Case No. B293670
(Los Angeles Superior Court Nos. BC633651/BC652435)

***** Daniel P. Barer [SBN 150812]
Anna L. Birenbaum [SNB 217588]
Pollak, Vida & Barer
11500 West Olympic Blvd.
Ste 400
Los Angeles, CA 90064
Tel: (310) 551-3400
Fax: (424) 535-1225
daniel@PollakVida.com
Anna@PollakVida.com

David Ferrante-Alan
[SBN 158877]
Wesierski & Zurek
100 Corson St, Ste 300
Pasadena, CA 91103-3871
Tel: (213) 627-2300
Fax: (213) 629-2725
dferrante-alan@wzllp.com

Attorneys for Defendant and Respondent
CITY OF RANCHO PALOS VERDES

TABLE OF CONTENTS

TABLE OF AUTHORTIES

Page(s)

Cases

Statutes

Rules

Other Authorities

1.0. Introduction

The sole question before this court is: "Can a public entity be held liable under Government Code section 830.8[1] for failure to warn of an allegedly dangerous design of public property that is subject to Government Code section 830.6 design immunity?" (April 28, 2021 Amended Order.) At page 25 of her Answer Brief on the Merits, plaintiff Betty Tansavatdi appears to *concede* that the answer to that question is "no":

> "The language of section 830.6 (design immunity) limits its immunity to injuries caused by a plan or design. A failure to warn claim is based on a concealed dangerous condition *independent of an approved design*, that necessitates warning. The trap exception (section 830.8) is *not* an exception to design immunity. Rather, it is an exception to the immunity in section 830.8 for failure to post traditional warning signs, which is a defense to a claim for failure to warn." (AB:25 [emphases added].)

Which is precisely what the City is arguing: A public entity *cannot* be held liable under section 830.8 for a design that is immunized under section 830.6. The entity

---

[1] Unless otherwise specified, further citations to code sections are to the Government Code.

can be held liable under the "failure to warn" exception to section 830.8 only for a concealed dangerous condition *independent of* an immunized design.

Not only does the Answer Brief concede the sole issue, but it fails to address multiple arguments the City raised in its Opening Brief. Further, Tansavatdi bases her Answer Brief arguments on incorrect premises. In particular, she warns that accepting the City's position will result in "eternal" immunization "forever"—yet ignores the law that provides design immunity may be lost over time due to changed circumstances.

It appears that Tansavatdi copied her argument, in substantial part, from the dissent in *Cabell v. State* (1967) 67 Cal.2d 150. She thus urges this Court to adopt a position that was not only rejected by the Court's majority over 50 years ago, but that subsequent developments in the law have rendered the dissent's propositions (and Tansavatdi's arguments) obsolete.

Further, Tansavatdi begins her opening brief with a summary of the facts that not only eschews citations to the record, but makes representations of fact that find no support in that record.

The Answer Brief does not assist this Court in resolving the issue before it. The brief only supports the City's position that design immunity bars any liability for failure to warn of the alleged danger from an immunized design.

2.0. Discussion

2.1. Tansavatdi's Summary of the Facts Violates the Rules of Court and Sets Forth Representations of Facts Unsupported by the Record

A brief on the merits filed in this Court must comply with the relevant provisions of rule 8.204 of the California Rules of Court. (Cal. Rules of Court, rule 8.520(b)(1).) One such provision requires the brief to support any reference to a matter in the record by a citation to the portion of the record where the matter appears. (Cal. Rules of Court, rule 8.204(a)(1)(C).)

The summary of facts at pages 6-7 of the Answer Brief violates those rules. Tansavatdi sets forth multiple sentences without any citation to the record, and others with scant citation.

The harm in this approach becomes apparent where Tansavatdi sets forth facts the record does not support.

For instance, at AB:6-7, Tansavatdi represents that:

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

The brief does not set forth any citation to evidence that, seconds before his fatal accident, decedent Jonathan Tansavatdi was contemplating entering the bike lane on the other side of the intersection.

True, an eyewitness had the impression, based on her observation of Jonathan's movements, that Jonathan intended to continue straight through the intersection of Vallon and keep going southbound on Hawthorne. (1AA:246 [Cynthia Oliver depo]). And a police detective determined, through witnesses, that Jonathan was planning on going straight (because at the speed he was going he would not have been able to safely make a right turn). (1AA:296 [Det. David Johnson depo].)

But the conclusion that Jonathan intended to enter the bicycle lane on the other side of the intersection is pure speculation.

Further, it is speculation rebutted by the eyewitness evidence that as Jonathan rode along portions of Hawthorne that had a bike lane, he did not use that lane. (1AA:235-237, 239-242, 253, 263-264.)

Tansavatdi also complains that, "the City had not provided any warnings to motorists or bicyclists that trucks also frequent the area . . . ." (AB:7.) Tansavatdi's theory that the City had a duty to post some kind of warnings that trucks use the area appears to be raised for the first time in this brief; it does not appear in her expert Edward Ruzak's declaration (2AA:784-790).

The brief also includes record citations that do not support the facts cited. For instance, AB:7 represents Jonathan was "a young and successful software designer in his 20s" and cites 5AA:1537 for this fact. 5AA:1537 is a page of the trial court's ruling. It says nothing about the decedent's age, occupation, or success.

Inaccuracies also extend to the Answer Brief's discussion of the procedural history. Tansavatdi writes that "[t]he City did not raise any factual issue . . . that its plan or design included warnings or signs for the dangerous condition created by the termination of the bike lane." (AB:10.) The City agrees that it did not raise any factual

issues below—since the City was moving for summary judgment. (1AA:27.) But Tansavatdi's implication that the City provided no *evidence* of warnings or signs considering the bike lane is incorrect. As the Court of Appeal acknowledged, the City presented 2009 street resurfacing plans that reflected both striping and signage for bike lanes for the portions of Hawthorne where bike lanes were placed. (*Tansavatdi v. City of Rancho Palos Verdes* (2021) 60 Cal.App.5th 423, 429-430.)

Tansavatdi also makes much of the City's summary judgment motion addressing Tansavatdi's failure-to-warn theory in a footnote. (AB:7-8, 10, citing 1AA:44.) She does not mention that her complaint alluded to failure to warn in a single paragraph, and did not even cite Government Code section 830.8. (1AA:211, para. 15.)

These incorrect statements of fact matter. This Court's focus is on the broad development of California law. But its analysis is grounded in the facts of the case before it. Tansavatdi's inaccurate description of those facts does not assist the Court.

2.2. Tansavatdi Concedes That Section 830.8's "Concealed Trap" Exception Applies only to Section 830.8's Immunity, and Does Not Apply to Designs Immunized by Section 830.6

As quoted in the Introduction above, at AB:25 Tansavatdi concedes that "[t]he trap exception (section 830.8) is not an exception to design immunity. Rather, it is an exception to the immunity in section 830.8 for failure to post traditional warning signs."

That is a concession of the sole issue before this Court. If, as here, the sole dangerous condition at issue is a design, and design immunity applies to that design, design immunity bars any liability based on failure to warn of the purported danger from that design.

The concession is reflected elsewhere in Tansavatdi's brief. At AB:16, she writes, "There are certain hazardous conditions *independent of a design*, which create a concealed trap for reasonable roadway users, thus requiring a warning." (Emphasis added.) At AB:21, she argues that "the legislature must have contemplated that there could be liability for *failure to maintain planned streets and highways free from defect* under section 835,

and that the immunity conferred by section 830.6 . . . would not forever preclude such liability." (Emphasis added.)

By definition, design immunity does not extend to hazardous conditions independent of a design. (Gov. Code, § 830.6; *Mozzetti v. City of Brisbane* (1977) 67 Cal.App.3d 565, 570, 575.) In particular, it does not apply to injury caused by failure to properly maintain public improvements. (*Mozetti*, *supra*, at p. 575.)

Accepting the City's position therefore would not preclude liability for failure to warn of traps caused by failure to maintain a roadway, or by any other defect independent of design.

Further, design immunity does not even apply to an injury caused by a plan or design if the other elements of Government Code section 830.6 are not met. (E.g., *Martinez v. County of Ventura* (2014) 225 Cal.App.4th 364, 373.) To the extent that such plans or designs create hidden traps, section 830.8 would apply to them.

This is why Tansavatdi's argument that the City's position would abrogate roadway trap liability completely (AB:24-25) fails. Where defects other than immunized designs or plans create hidden traps that require warning signs, Government Code section 830.8 permits plaintiffs to

sue public entities for failure to warn of those defects. Nothing in the City's argument affects that.

To the extent Tansavatdi argues that section 830.8's trap exception applies only to defects independent of immunized plans or designs, the City agrees. To the extent she argues that section 830.8's trap exception is not an exception to design immunity, she and the City are making the same argument.

2.3. Tansavatdi Ignores Several of the City's Arguments

In addition to conceding the City's major point, Tansavatdi fails to respond to multiple arguments in the City's Opening Brief on the Merits.

Tansavatdi does not address the City's contentions that Government Code immunities prevail over statutory liability (OB:23-25); that the language of section 830.6 shows the immunity's broad application (OB:28-30); that interpreting section 830.8's "trap" exception as an exception to section 830.6 conflicts with the warning provisions in the 1979 amendment to section 830.6 (OB:40-42); or that liability for failure to warn conflicts with the legislative intent that design immunity be an issue of law for the court if the first two elements are undisputed (OB:43-45).

Tansavatdi had room in her brief to address these points. Her brief is a mere 5,927 words. Her decision not to address the City's arguments may be taken as tacit concession of those arguments.

2.4. Tansavatdi's Arguments in Favor of the Lower Court's Decision Are Based on Incorrect Premises

On the points she does not concede (expressly or tacitly), Tansavatdi makes arguments based on premises that are demonstrably incorrect, and that often amount to strawman arguments.

For instance, throughout her brief Tansavatdi repeatedly warns that accepting the City's position would mean that section 830.6 would confer immunity "forever." (See AB:12, 13, 21, 24.) The City never made such an argument. Nor could it. This Court has established that "[d]esign immunity does not necessarily continue in perpetuity." (*Cornette v. Department of Transp.* (2001) 26 Cal.4th 63, 66, citing *Baldwin v. State of California* (1972) 6 Cal.3d 424, 434.)

In *Baldwin*, *supra* this Court ruled that where an immunized plan, in actual operation and under changed physical circumstances, produces a dangerous condition of

property and causes injury, design immunity is lost. (*Id.*, 6 Cal.3d at p. 438; see *Cornette*, *supra*, 26 Cal.4th at p. 71 [recounting history of design immunity].) In 1979, the Legislature responded to *Baldwin* by passing Assembly Bill No. 893, amending Government Code section 830.6 to specify the circumstances under which a public entity retains design immunity despite notice the plan has become dangerous due to changed conditions. (*Cornette*, *supra*, at p. 71.) In *Cornette*, *supra*, 26 Cal.4th at pp. 70-80, this Court analyzed and interpreted this amendment, and explained the circumstances under which design immunity can be lost.

Tansavatdi's brief alludes briefly to *Baldwin*'s holding, and the 1979 amendment of section 830.6 in response. (AB:5, 18, 20.) Yet the rest of the brief ignores the law governing loss of design immunity.

Another incorrect premise (and a similar one) is Tansavatdi's contention that the City advocates that "section 830.6 confers immunity for plan and design forever *and without regard to actual interaction of the public with the roadway design* . . . ." (AB:12 [emphasis added]; see also AB:24 ["without regard to the actual operation of the improvement . . . ."].)

The City makes no such contention. Nor could it. As explained above, design immunity can be lost if the actual operation of the improvement (combined with changed physical circumstances) renders the design one that could no longer be reasonably approved. (Gov. Code, §830.6; see *Cornette*, *supra*, 26 Cal.4th at pp. 79-80.)

A third incorrect premise in Tansavatdi's brief is that a failure to warn of a dangerous condition is itself a dangerous condition of property. (See AB:16-17 [failure to post sign as to safe speed is an "independent caus[e] of the incidents"].) As the Opening Brief explained, failure to warn of a concealed trap is not an "independent" dangerous condition. Instead, the "trap" exception to section 830.8 does not create liability unless the plaintiff shows that there is a dangerous condition of public property—one that meets Government Code section 835's requirements for liability—that creates a "trap." (*Pfeiffer v. County of San Joaquin* (1967) 67 Cal.2d 177, 184.)

Finally, according to Tansavatdi, the City contends that design immunity and Government Code section 830.8's "trap" exception are "incompatible or illogical." (AB:17.) This is another strawman argument.

Design immunity and section 830.8's exception are perfectly compatible when interpreted according to the plain language of both statutes: The "trap" exception is an exception only to section 830.8's sign immunity; and is not an exception to section 830.6 design immunity. An entity can be immune from liability for the design of a roadway, yet liable under section 830.8 for failure to warn of a non-design defect in the roadway that creates a hidden trap. The City has not argued otherwise.

What the City did argue was that it is illogical to immunize a public entity under section 830.6 from liability for injury caused by a design or plan, but then hold the entity liable under section 830.8 for the same injury caused by the same plan or design. (OB:34-39.) Tansavatdi fails to show otherwise.

///

///

///

2.5. Tansavatdi's Arguments in Support of the Lower Court's Decision on Section 830.8 Fail

2.5.1. Tansavatdi Fails to Identify Any Language in Either Section 830.6 or Section 830.8 That Provides That Section 830.8 Creates an Exception to Design Immunity

In direct contradiction to Tansavatdi's concession at AB:25 that "[t]he trap exception (section 830.8) is not an exception to design immunity[,]" she argues at AB:12 that "[s]ection 830.8, the trap exception, . . . provides an exception to the defense of design immunity."

Setting aside this contradiction, Tansavatdi fails to identify any language in either section 830.6 or section 830.8 that supports the proposition that section 830.8's trap exception is an exception to design immunity. As explained in the City's Opening Brief at OB:28-30, there is no such language.

Tansavatdi does not show otherwise. She does not identify anything in the statutes' plain language that indicates section 830.8 is an exception to section 830.6. She does not identify anything in the statutes' language that

creates an ambiguity. Instead, she appears to *presume* that the statutes are ambiguous on this point; and submits extrinsic evidence she contends relevant to legislative intent. (See AB:18-21.)

That is not the correct approach. "[T]he statutory language is typically the best indication of the Legislature's purpose." (*Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 155.) Only "[w]hen the language of a statutory provision remains opaque after we consider its text" should the Court take account of extrinsic sources, such as legislative history. (*Id.* at p. 156.)

The plain language of sections 830.6 and 830.8 show that the "trap" exception to the latter is not an exception to the former. The analysis should end there. Tansavatdi fails to show otherwise.

2.5.2. Tansavatdi Fails to Rebut the City's Contention That *Cameron*'s Distinction between Active and Passive Negligence Is Not Based on Statute and Is Undermined by Later Case Law

The City's Opening Brief explained that *Cameron v. State of California* (1972) 7 Cal.3d 318, 328 appeared to

base its holding on common law concepts of active negligence versus passive negligence that are not reflected in the Government Claims Act. (OB:50.) The City further explained that this Court's post-*Cameron* decisions established that public entity liability for property conditions must be based on Government Code section 835, rather than common law negligence. (OB:50-52, 55-56.)

Tansavatdi responds by arguing that *Cameron* based its active versus passive negligence on the difference between subdivisions (a) and (b) of Government Code section 835. (AB:14-15.) This contention fails for multiple reasons.

First, *Cameron* did not itself link the dichotomy between active and passive negligence to subdivisions (a) and (b) of section 835. (See *Cameron*, *supra*, 7 Cal.3d at pp. 327-329.)

Rather, *Cameron* adopted the active versus passive negligence analysis set forth in *Flournoy v. State of California* (1969) 275 Cal.App.2d 806, 811.) (*Cameron*, *supra*, at pp. 327-328.) *Flournoy*, in turn, noted that the active negligence of creating a dangerous condition would fall under subdivision (a) of section 835 ("A negligent or wrongful act or omission of an employee of the public entity

. . . created the dangerous condition"); and that the passive negligence of failing to warn of that condition would be one of the theories of liability actionable under subdivision (b) (the entity has notice of a dangerous condition a sufficient time before the injury to have taken measures to protect against it). (*Flournoy*, *supra*, at pp. 810-811.) The *Flournoy* court then held that section 830.6 applies only to a design (the bridge at issue) and not to a danger created by the design (the ice that the design caused the bridge to form). (*Id.* at pp. 812-813.)

Second, as explained in the OB, the attempt to base the dichotomy between active and passive negligence on the difference between subdivisions (a) and (b) fails because section 835 does not set forth separate causes of action for active negligence and passive negligence. Section 835 sets forth a single cause of action for injury caused by a dangerous condition of public property. (OB:50.) And Government Code section 830.6, by its terms, applies to any liability under that cause of action for injury caused by design or plan.

Third, as also explained in the OB, even subdivisions (a) and (b) do not break down neatly into active versus passive negligence. Instead, the primary difference between the two subdivisions "is who created the

dangerous condition." (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 836.) If the entity or the entity's employee created the condition, subdivision (a) applies. If they did not, subdivision (b) applies. (*Id.*)

That is not a distinction between active and passive negligence. Instead, each subdivision embraces both active negligence and passive negligence.

For instance, subdivision (a) liability can arise from failure to warn of a concealed trap. (E.g., *Hill v. People ex rel. Dept. of Transportation* (1979) 91 Cal.App.3d 426, 431 [state created hidden trap by issuing permit to haul high load under overpass that was not high enough to accommodate the load].) By the statute's express terms, subdivision (a) liability can arise not only from acts, but also from omissions.

Subdivision (b) liability can arise out of failure to take active measures to remedy dangerous conditions of which the entity had notice. (E.g., *Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 814.) Subdivision (b) also creates liability for active attempts to warn of or remedy known dangerous conditions that prove inadequate. (See Gov. Code, §§ 830, subd. (b) [defining "protect against"] & 835.4, subd. (b) [standards for

reasonableness of protective measures]; *Warden v. City of Los Angeles* (1975) 13 Cal.3d 297, 301 [affirming judgment against city because steps city took to warn of pipe inadequate]; *De La Rosa v. City of San Bernardino* (1971) 16 Cal.App.3d 739, 748-749 [upholding jury verdict that "Stop Ahead" signs city provided to protect against impaired visibility of stop sign were inadequate].)

Finally, the text of Government Code section 830.6 neither distinguishes between active and passive negligence, nor between liability under subdivision (a) subdivision (b) of section 835.

Instead, 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 . . . ." Liability under "this chapter" of the Government Code includes liability for both active negligence and passive negligence. It includes liability under section 835, subdivision (a) and liability under section 835, subdivision (b). It includes failure to warn under Government Code section 830.8.

Nothing in the Government Code supports limiting section 830.6's immunity to "active negligence" and

excluding from that immunity liability for "passive negligence."

2.5.3. Tansavatdi Fails to Rebut That *Cameron*'s Distinction between Active and Passive Negligence Is Undermined by Later Decisions from This Court

In its Opening Brief, the City explained that post-*Cameron* decisions from this Court emphasized that public entity liability for property conditions must be based upon Government Code section 835 rather than common law principles; and that this case law undermined *Cameron*, *supra*, 7 Cal.3d at pp. 328-329's holding that design immunity applies only to "active negligence" and not "passive negligence." (OB:51-2, 55-56.)

Apart from attempting to premise the distinction between active negligence and passive negligence on statute (AB:11-12) and arguing that the Legislature has declined attempts to expressly disapprove *Cameron* (OB:18-22), Tansavatdi does not address this argument. The first argument is rebutted above under Heading 2.5.1. The second is rebutted below under Heading 2.5.4. Tansavatdi therefore fails to show that *Cameron*'s active versus passive negligence distinction is outdated.

2.5.4. The Legislature's Rejection of the Underdeveloped Recommendations to Legislatively Overrule *Cameron* Do Not Establish Legislative Endorsement of *Cameron*

Tansavatdi points to two recommendations to the Legislature in the late 1970s (in the wake of Proposition 13) for various changes to the Government Claims Act, both of which asked the Legislature to expressly disapprove *Cameron*'s holding on Government Code section 830.8. (Staff Report of the Joint Committee on Tort Liability to the Governor and Legislature, January 1979, Ex. 1 to Plaintiff's Motion for Judicial Notice, p. 26 [recommending Gov. Code, § 830.6 be reenacted with a statement that the purpose is to "obviat[e] the holding in Cameron" [underlining in original]; September 12, 1978 letter from the Office of the Attorney General of the State of California with "draft for the Design Immunity portion of the report submitted by [the Deputy Attorney for Cal-Trans and the Assistant Attorney General]," Ex. 2 to Motion for Judicial Notice, pp. 68-69 [recommending amending § 830.6 to expressly apply to liability for failure to warn].) (AB:18-20.)

Tansavatdi further points to the 1979 amendment of section 830.6, "only amending section 830.6 in ways that did not affect the holding of *Cameron*, or the trap exception of section 830.8." (AB:20.) She argues that this limited amendment demonstrates the Legislature's refusal to eliminate *Cameron*'s holding. (AB:18.)

The argument that the Legislature's rejection of amendments proposed in staff reports establishes the Legislature's intent is questionable. This Court has agreed with the U.S. Supreme Court in viewing such arguments with caution:

> "The high court has cautioned that '[e]xtrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms,' and that 'judicial reliance on legislative materials like committee reports . . . may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.' (*Exxon Mobil Corp. v. Allapattah Services, Inc.* (2005) 545 U.S. 546, 568, 125 S.Ct. 2611, 162 L.Ed.2d 502.)"

(*Martinez v. Regents of University of California* (2010) 50 Cal.4th 1277, 1293.)

Since staff reports and similar documents may be used to explain ambiguities in statutory language, courts have considered them in interpreting amendments that *were* made after staffers or lobbyists recommended they be made. For instance, in *Cornette*, *supra*, 26 Cal.4th at pp. 70, 72, this Court considered staff and commission reports about loss of design immunity under changed conditions when examining the 1979 amendment to section 830.6 dealing with that subject.

But Tansavatdi appears to argue that the fact the Legislature does *not* amend a statute, after recommendation to do so, is proof that the Legislature's intent was contrary to the proposed amendments. That is a much further reach. More statutes are proposed than passed. More amendments are recommended than implemented. That a particular recommended amendment never becomes law may be due to many factors independent of legislative intent.

Even assuming, for sake of argument, that the recommendations have some relevance to legislative intent,

the recommendations themselves fail to present legislators with a compelling case for changing the law.

The Joint Committee on Tort Liability's recommendation does not explain why *Cameron*'s carve-out from design immunity is an undesirable result, or spell out the negative consequences of the holding. It merely describes the holding, and recommends the Legislature provide a statement legislatively overruling *Cameron*. (MJN:26.)

Similarly, the Office of the Attorney General's recommendation comments that *Cameron*'s and *Flournoy*'s exception of failure to warn from design immunity "seems contrary to the legislative history of the dangerous condition sections and the design immunity." (MJN:68-69.) The recommendation deems *Cameron* an "erosion" of design immunity, and recommends that the Legislature "restor[e]" the immunity "to conform to the original Legislative intent" to apply the immunity without regard for changed conditions. (MJN:69; see *id.* at p. 66 [discussing original legislative intent"].)

Neither of these are compelling arguments for changing or reenacting Government Code section 830.6.

Instead, viewed in context, these recommendations are secondary to the recommending bodies' main focus: a legislative response to *Baldwin*, *supra*, 6 Cal.3d 424, in which the Court ruled that design immunity may be lost over time due to changed circumstances. (See MJN:25-27, 66-69.) In *Cornette*, *supra*, 26 Cal.4th at pp. 71-72, the Court recounted the Legislature's recognition that Proposition 13 imposed practical limitations on the ability of governments to address designs that had become dangerous due to changed circumstances.

Appropriately, the Legislature's 1979 amendment of section 830.6 addressed that concern by amending section 830.6 to keep immunity in place while the entity obtained funds and carried out necessary remedial work; or while the entity provided adequate warnings of the dangerous condition. (*Cornette*, *supra*, 26 Cal.4th at pp. 71-72.)

That the 1979 amendment did not also address *Cameron* should not be deemed a tacit legislative endorsement of *Cameron*'s holding. The Legislature merely addressed the most pressing and most discussed legislative adjustment of design immunity.

2.5.5. Tansavatdi's Arguments Regarding Government Code Sections 831 and 831.8 Fail

Tansavatdi argues that Government Code sections 831[2] and 831.8[3] set forth exceptions to design immunity.

---

[2] "Neither a public entity nor a public employee is liable for an injury caused by the effect on the use of streets and highways of weather conditions as such. Nothing in this section exonerates a public entity or public employee from liability for injury proximately caused by such effect if it would not be reasonably apparent to, and would not be anticipated by, a person exercising due care. For the purpose of this section, the effect on the use of streets and highways of weather conditions includes the effect of fog, wind, rain, flood, ice or snow but does not include physical damage to or deterioration of streets and highways resulting from weather conditions." (Gov. Code, §831.)

[3] "(a) Subject to subdivisions (d) and (e), neither a public entity nor a public employee is liable under this chapter for an injury caused by the condition of a reservoir if at the time of the injury the person injured was using the property for any purpose other than that for which the public entity intended or permitted the property to be used.
(b) Subject to subdivisions (d) and (e), neither an irrigation district nor an employee thereof nor the state nor a state employee is liable under this chapter for an injury caused by the condition of canals, conduits, or drains used for the distribution of water if at the time of the injury the person injured was using the property for any purpose other than that for which the district or state intended it to be used.
(c) Subject to subdivisions (d) and (e), neither a public agency operating flood control and water conservation facilities nor its employees are liable under this chapter for an injury caused by

the condition or use of unlined flood control channels or adjacent groundwater recharge spreading grounds if, at the time of the injury, the person injured was using the property for any purpose other than that for which the public entity intended it to be used, and, if all of the following conditions are met:
(1) The public agency operates and maintains dams, pipes, channels, and appurtenant facilities to provide flood control protection and water conservation for a county whose population exceeds nine million residents.
(2) The public agency operates facilities to recharge a groundwater basin system which is the primary water supply for more than one million residents.
(3) The groundwater supply is dependent on imported water recharge which must be conducted in accordance with court-imposed basin management restrictions.
(4) The basin recharge activities allow the conservation and storage of both local and imported water supplies when these waters are available.
(5) The public agency posts conspicuous signs warning of any increase in waterflow levels of an unlined flood control channel or any spreading ground receiving water.
(d) Nothing in this section exonerates a public entity or a public employee from liability for injury proximately caused by a dangerous condition of property if all of the following occur:
(1) The injured person was not guilty of a criminal offense under Article 1 (commencing with Section 552) of Chapter 12 of Title 13 of Part 1 of the Penal Code in entering on or using the property.
(2) The condition created a substantial and unreasonable risk of death or serious bodily harm when the property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used.
(3) The dangerous character of the condition was not reasonably apparent to, and would not have been anticipated by, a mature, reasonable person using the property with due care.

(4) The public entity or the public employee had actual knowledge of the condition and knew or should have known of its dangerous character a sufficient time prior to the injury to have taken measures to protect against the condition.
(e) Nothing in this section exonerates a public entity or a public employee from liability for injury proximately caused by a dangerous condition of property if all of the following occur:
(1) The person injured was less than 12 years of age.
(2) The dangerous condition created a substantial and unreasonable risk of death or serious bodily harm to children under 12 years of age using the property or adjacent property with due care in a manner in which it was reasonably foreseeable that it would be used.
(3) The person injured, because of his or her immaturity, did not discover the condition or did not appreciate its dangerous character.
(4) The public entity or the public employee had actual knowledge of the condition and knew or should have known of its dangerous character a sufficient time prior to the injury to have taken measures to protect against the condition.
(f) Nothing in subdivision (c) exonerates a public agency or public employee subject to that subdivision from liability for injury proximately caused by a dangerous condition of public property if all of the following occur:
(1) The person injured was 16 years of age or younger.
(2) The dangerous condition created a substantial and unreasonable risk of death or serious bodily harm to children 16 years of age or younger using the property or adjacent property with due care in a manner in which it was reasonably foreseeable that it would be used." (Gov. Code, §831.8.)
(3) The person injured did not discover the condition or did not appreciate its dangerous character because of his or her immaturity.
(4) The public entity or public employee had actual knowledge of the condition and knew or should have known of its dangerous

(AB:13 & fn. 2.) She then argues that adopting the City's position in this case would "negate" those exceptions. (AB:18, 20-21.) Both arguments are incorrect.

2.5.5.1. Neither Section 831 Nor Section 831.8 Creates an Exception to Design Immunity; Tansavatdi's Argument Otherwise Appears Based on a Dissent to an Overruled Case

Regarding the first argument, nothing in sections 831 and 831.8 provides that either statute is an exception to design immunity; and no case law identifies either as such an exception. Instead, sections 831 and 831.8 set forth immunities to dangerous-condition liability that are independent of design immunity. Each of those statutes also sets forth exceptions to *that statute's* immunity. Tansavatdi's argument otherwise appears based on the *dissent* to this Court's decision in *Cabell v. State* (1967) 67

---

character a sufficient time prior to the injury to have taken measures to protect against the condition."

Cal.2d 150, overruled by *Baldwin*, *supra*, 6 Cal.3d at pp. 438-439.

2.5.5.1.1. Section 831

Section 831 provides public entities and employees immunity from liability for an injury caused by the effect on the use of streets and highways of weather conditions, including the effects of fog, wind, rain, flood, ice, or snow. (Gov. Code, § 831.) It contains an exception for liability caused by the effect of such a weather condition "if it would not be reasonably apparent to, and would not be anticipated by, a person exercising due care." (*Ibid*.)

The statute's purpose is to immunize against the effect of weather conditions that no amount of human care or foresight can protect against. (*Erfurt v. State of California* (1983) 141 Cal.App.3d 837, 845–846.) For instance, if a highway is slippery simply because it is covered by snow, the entity is immune, because that condition would be reasonably apparent to a person exercising due care. (*Allyson v. Dep't of Transportation* (1997) 53 Cal.App.4th 1304, 1318.) But the sudden glare of the rising sun over the crest of an incline in a highway falls into the exception. (*Erfurt*, *supra*, at p. 845 [affirming jury verdict].)

Further, section 831 does not immunize the entity from liability when other aspects of the roadway combine with weather to create a dangerous condition. (E.g., *Erfurt*, *supra*, at pp. 845-846 [sudden sun glare plus a pillar in the middle of a freeway, improper channelization, and lack of warning signs].)

Section 831 does not mention design immunity. Section 830.6 does not mention weather immunity. Tansavatdi does not cite any authority that section 831's exception to section 831's immunity is also an exception to design immunity. The City's research has not found any published case in which the court (or a majority of the court) so held.

To the contrary, *Flournoy*, *supra*, 275 Cal.App.2d at p. 814 illustrates that section 831's immunity operates independently of section 830.6. The *Flournoy* court concluded that section 830.6 did not apply, because the plaintiff's theory that the State failed to warn of the hidden danger of ice on the roadbed. (*Id.* at p. 812.) Yet, the court concluded, "The state's inability to invoke the design immunity does not assure plaintiffs a tenable claim on the theory that the state 'created' a dangerous condition by constructing an ice-prone bridge." (*Id.* at p. 814.) The court concluded that section 831's immunity might still apply,

although there was an issue of fact on whether section 831's concealed danger exception applied. (*Ibid.*)

Section 831 therefore does not create an exception to design immunity.

2.5.5.1.2. Section 831.8

Section 831.8 sets forth a qualified immunity for artificial conditions arising from man-made water improvement and distribution facilities, including reservoirs, canals, conduits, and drains. (*Keyes v. Santa Clara Valley Water Dist.* (1982) 128 Cal.App.3d 882, 887.)

Section 831.8's immunities apply to liability for injuries arising out of use of the property for purposes other than those the public entity intended or permitted. (*Id.*, subds. (a)-(c).)

Section 831.8 includes a variety of exceptions to the immunities provided in that statute. (*Id.*, subds. (d)-(f).) For instance, section 831.8 includes an "attractive nuisance" exception for children under 12. (Gov. Code, § 831.8, subd. (e); *Cardenas v. Turlock Irr. Dist.* (1968) 267 Cal.App.2d 352, 356–357.) It sets forth a more limited "attractive nuisance" exception for those 16 and younger. (Gov. Code, §831.8, subd. (f).)

Section 831.8 also sets forth a "trap" exception: Section 813.8's immunity does not apply if the injured person was not trespassing or loitering on posted industrial property; the property was dangerous; the public entity or employee had actual knowledge of the condition, and knew or should have known of its dangerous character, long enough before the injury to have taken protective measures; and "The dangerous character of the condition was not reasonably apparent to, and would not have been anticipated by, a mature, reasonable person using the property with due care." (Gov. Code, § 831.8, subd. (d).)

As with section 831, Tansavatdi provides no authority holding that any of these exceptions to section 831.8's immunity is also an exception to section 830.6's design immunity. The City has been unable to find any published authority in which a court (or a court's majority) has so held.

2.5.5.1.3. The *Cabell* Dissent

Although the Answer Brief does not cite *Cabell v. State of California*, *supra*, 67 Cal.2d 150, the brief's argument that sections 831 and 831.8 create exceptions to design immunity appears to originate in Justice Peters's

dissent (concurred in by Justice Tobriner) in that decision. The dissent is not persuasive authority for that point.

The *Cabell* majority ruled that if a plan or design for a public improvement (in *Cabell*, a glass door) met all of the requirements for section 830.6 design immunity at the time it was adopted or approved, the immunity remained in place even if subsequent use showed the plan or design to be dangerous. (*Id*., 67 Cal.2d at pp. 154-155.) Justice Peters disagreed with this conclusion. In his dissent, he opined that the Legislature did not intend design immunity "to apply to negligent maintenance after the agency has notice that the improvement has created a dangerous situation." (*Id.* at p. 156.)

Justice Peters attempted to support his conclusion by analyzing the statutory scheme of which section 830.6 was a part. (*Id.*, 67 Cal.2d at pp. 159-160.) He specifically discussed the exceptions to immunities set forth in sections 830.8, 831, and 831.8. (*Id.* at pp. 160-161.) Since all of these statutes deal with improved property, Justice Peters reasoned, "if section 830.6 confers immunity for plan and design forever and without regard to the actual operation of the improvement," the other statutes' limitations on immunities "would be pointless and misleading." (*Ibid*.)

While the Answer Brief does not identify this dissent as the source of Tansavatdi's argument concerning sections 831 and 831.8, a comparison of Justice Peters's language with that used in the Answer Brief supports a conclusion that Tansavatdi has borrowed the dissent's argument and now urges this Court to adopt it.

The Court should not do so. There are multiple reasons why.

First, as explained above, no case law that has precedential value supports Justice Peters's position. The *Cabell* dissent itself has no such value. (*Berg v. Davi* (2005) 130 Cal.App.4th 223, 232.) At most, it may have persuasive value, much like dicta. (9 Witkin, Cal. Proc. (5th ed. 2020) Appeal, § 538.)

Second, the dissent has little persuasive value, because Justice Peters's analysis is based on an incorrect premise: That design immunity applies to every dangerous condition of public property claim arising out of constructed or improved public property. Nearly sixty years of experience with the Government Claims Act has established otherwise. Not every dangerous condition of improved property arises out of the property's design. Not every design meets the elements of design immunity.

Where design immunity does not apply, one of the other immunities may. (E.g., *Flournoy*, *supra*, 275 Cal.App.2d at p. 814.) And one of the exceptions to those immunities might apply. (*Ibid.*) The exceptions to sections 831 and 831.8 may therefore coexist with design immunity without being rendered pointless.

Third, the dissent is outdated. In *Baldwin*, *supra*, 6 Cal.3d at 438-439, the Court overruled the majority's decision in *Cabell* and adopted the central point Justice Peters urged: That design immunity may be lost. The Court also adopted a portion of Justice Peters's reasoning. (Compare *Baldwin*, *supra*, at pp. 433-434 with dissent in *Cabell*, *supra*, 67 Cal.2d at p. 155-157.) But the Court did *not* adopt the portion of the *Cabell* dissent that Tansavatdi apparently borrows. And Justice Peters joined the *Baldwin* majority decision, without a separate concurring opinion.

Justice Peters's discussion of sections 831 and 831.8 in relation to design immunity therefore addresses an issue that no longer exists. That discussion, made in the early days of the Government Claims Act, never became part of the jurisprudence interpreting that Act. And because of its incorrect premise, it should not become part of that jurisprudence.

2.5.5.2. Adopting the City's Position Will Not Negate the Exceptions to Sections 831 and 831.8

Tansavatdi's argument that adopting the City's position that design immunity applies to failure to warn (AB:20-21, 24) appears to be based on the same premises on which Justice Peters based his dissent in *Cabell*: that the design immunity defense applies to every alleged defect in constructed or improved public property; and that when it applies, it always succeeds. As discussed below, both premises are incorrect. Tansavatdi's argument therefore fails.

2.5.6. Tansavatdi Fails to Show That either *Weinstein* or *Compton* Was Incorrectly Decided

Tansavatdi calls *Weinstein v. Department of Transportation* (2006) 139 Cal.App.4th 52 and *Compton v. City of Santee* (1993) 12 Cal.App.4th 591 "outlier cases" and argues that they are not persuasive. (AB:22.) But she never explains why she believes the cases were incorrectly decided.

Tansavatdi's analysis of *Weinstein*, *supra*, 139 Cal.App.4th at p. 61 simply ignores *Weinstein*'s holding

that design immunity bars section 830.8 failure-to-warn liability for conditions that are part of the design, as well as *Weinstein*'s holding that *Cameron* applies only to conditions that are not part of the approved design. (See AB:22-23.) Instead, Tansavatdi argues that *Weinstein* agreed with *Cameron*; and that the City's reliance on it is "mistaken." (AB:23.)

Likewise, Tansavatdi ignores *Compton*, *supra*, 12 Cal.App.4th at p. 600's holding that section 830.8 "in no way purports to create an exception to design immunity under section 830.6." Instead, Tansavatdi dismisses *Compton*'s analysis of section 830.8 as "brief" and directs the Court to *Compton*'s *additional* holding that the plaintiff in that case failed to establish the elements of dangerous condition liability. (AB:23-24.) Tansavatdi argues that the *Compton* court therefore held that "an analysis under 830.8 was not necessary in the first place." (AB:24.) But that is incorrect. *Compton* did analyze section 830.6's interaction with section 830.8. (*Compton*, at p. 600.) Tansavatdi cannot persuade this Court that *Compton*'s analysis was mistaken by ignoring it.

Finally, Tansavatdi argues that *Weinstein* and *Compton* are the only post-*Cameron* cases that the City uses to support its position. (AB:24.) That is incorrect; the

City also relies on the post-*Cameron* cases from this Court and lower courts establishing the changes in both dangerous condition liability and design immunity after *Cameron*. (See, e.g., OB:51-2, 55-56.) The City does focus on *Weinstein* and *Compton*, because the lower court's decision rejecting *Weinstein*'s holding created the conflict facing this Court now. (*Tansavatdi*, *supra*, 60 Cal.App.5th at p. 442.)

Tansavatdi fails to explain why the Court should resolve that conflict in her favor.

2.5.7. Adopting the City's Position Would Not Preclude Liability for Failure to Warn of Hidden Traps That Are Not Covered by Design Immunity

Finally, the discussion above disposes of Tansavatdi's argument at AB:26 that, "If this Court were to adopt the City's view of the world, then a public entity would never again have to provide a warning about the danger in any roadway . . . ."

Design immunity immunizes public entities from dangerous condition liability covered by the immunity. It does not apply to dangerous conditions for which the elements of design immunity cannot be satisfied. It does

not apply to dangerous conditions for which design immunity has been lost due to changed conditions. It does not apply to dangerous conditions that are not plans or designs. If any of those dangerous conditions not covered by design immunity amount to a "trap," and the entity fails to warn about them, the entity may be held liable under section 830.8. Adopting the City's position would not change that.

///

///

///

3.0. Conclusion

Tansavatdi has failed to explain why the plain language of section 830.6—that design immunity applies to all liability "under this chapter" for which design immunity's elements are established—does not apply to liability under section 830.8. Instead, she concedes that "[t]he trap exception (section 830.8) is not an exception to design immunity." (AB:25.)

The City respectfully requests that the Court reverse the Court of Appeal's decision on Tansavatdi's Failure to Warn claim, and direct that court to affirm summary judgment for the City in full.

DATED: September 15, 2021

POLLAK, VIDA & BARER

/S/ Daniel P. Barer

By: _____

Daniel P. Barer
Co-counsel for the City of
Rancho Palos Verdes

4.0. Certificate of Compliance

In accordance with rule 8.520(c)(1) of the California Rules of Court, the undersigned certifies that the attached Opening Brief on the Merits contains 7,530 words, which is less than the total number of words permitted by Rule 8.520(c)(1). The undersigned relies on the word count of the computer program used to prepare the brief.

DATED: September 15, 2021

POLLAK, VIDA & BARER

/S/ Daniel P. Barer

By: _____
Daniel P. Barer
Co-counsel for the City of
Rancho Palos Verdes

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 11500 West Olympic Boulevard, Suite 400, Los Angeles, California 90064.

On September 16, 2021, I served the foregoing document described as PETITIONER'S REPLY BRIEF ON THE MERITS on the interested parties in this action as follows:

See attached service list.

[X] (BY EMAIL) I hereby certify that I electronically filed the foregoing with the California Supreme Court by using their electronic system on September 16, 2021 and service will be accomplished by the Court's electronic service system upon all participants in the case who are registered users.

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

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

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

Executed on September 16, 2021 at Los Angeles, California.

s/ Jennifer Sturwold
Jennifer Sturwold

Adan Feit
Armen Akaragian
Garo Mardirossian
Mardirossian & Associates, Inc.
6311 Wilshire Boulevard
Los Angeles, CA 90048
Tel.: (323) 653-6311
Fax: (323) 651-5511
afeit@garolaw.com
aakaragian@garolaw.com
gmardirossian@garolaw.com

Counsel for Plaintiff and Appellant
Betty Tansavatdi

Douglas A. Linde
Erica A. Gonzales
The Linde Law Firm
6701 Center Dr. W.. Ste 610
Los Angeles, CA 90045-1597
Tel.: (310) 203-9333
Fax: (310) 203-9233
dal@lindelaw.net
eag@lindelaw.net

Co-Counsel for Plaintiff and Appellant
Betty Tansavatdi

Holly N. Boyer
Esner, Chang & Boyer
234 East Colorado Boulevard, Suite 975
Pasadena, CA 91101
Tel: (626) 535-9860
hboyer@ecbappeal.com
mmaynez@ecbappeal.com

Co-Counsel for Plaintiff and Appellant
Betty Tansavatdi

Alexander M. Giannetto Johnpaul N. Salem Bremer Whyte Brown & O'Meara, LLP 501 West Broadway, Suite 1750 San Diego, CA 92101 Tel.: (619) 236-0048 Fax: (619) 236-0047 agiannetto@bremerwhyte.com jsalem@bremerwhyte.com	Counsel for Defendants and Respondents Daryl Flood Warehouse and Movers, Inc.; and, Kevin Troy Box
Frank J. D'Oro David Ferrante-Alan Wesierski & Zurek, LLP 100 Corson Street, Suite 300 Pasadena, CA 91103 Tel.: (213) 627-2300 Fax.: (213) 629-2725 fdoro@wzllp.com dferrante-alan@wzllp.com	Co-Counsel for Defendant and Respondent City of Rancho Palos Verdes
Clerk's Office Court of Appeal Second Appellate District Division 4 300 S. Spring Street 2nd Floor, North Tower Los Angeles, CA 90013	Served via TrueFiling

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **TANSAVATDI v. CITY OF RANCHO PALOS VERDES**
Case Number: **S267453**
Lower Court Case Number: **B293670**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **daniel@pollakvida.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	Reply Brief on the Merits-dpb-091521

Service Recipients:

Person Served	Email Address	Type	Date / Time
David Ferrante-Alan Wesierski & Zurek LLP	dferrante@wzllp.com	e-Serve	9/16/2021 1:35:17 PM
Douglas Linde The Linde Law Firm	dal@lindelaw.net	e-Serve	9/16/2021 1:35:17 PM
Johnpaul Salem Bremer Whyte Brown & O'Meara LLP 286518	jsalem@bremerwhyte.com	e-Serve	9/16/2021 1:35:17 PM
Jennifer Sturwold Pollak, Vida & Barer	jennifer@pollakvida.com	e-Serve	9/16/2021 1:35:17 PM
Marina Maynez Esner, Chang & Boyer	mmaynez@ecbappeal.com	e-Serve	9/16/2021 1:35:17 PM
Sheeny Bang Esner, Chang & Boyer	sbang@ecbappeal.com	e-Serve	9/16/2021 1:35:17 PM
Anna Birenbaum Pollak, Vida & Barer 217588	anna@pollakvida.com	e-Serve	9/16/2021 1:35:17 PM
Alexandra Atencio Hanson Bridgett LLP	apercy@hansonbridgett.com	e-Serve	9/16/2021 1:35:17 PM
Kelsey Wong Esner, Chang & Boyer	kwong@ecbappeal.com	e-Serve	9/16/2021 1:35:17 PM
Daniel Barer Pollak Vida & Barer 150812	daniel@pollakvida.com	e-Serve	9/16/2021 1:35:17 PM
Holly Boyer Esner Chang & Boyer 221788	hboyer@ecbappeal.com	e-Serve	9/16/2021 1:35:17 PM
Shea Murphy Esner Chang & Boyer 255554	smurphy@ecbappeal.com	e-Serve	9/16/2021 1:35:17 PM

Alexandra Atencio Hanson Bridgett LLP 227251	aatencio@hansonbridgett.com	e-Serve	9/16/2021 1:35:17 PM
Armen Akaragian Mardirossian & Associates, Inc. 242303	aakaragian@garolaw.com	e-Serve	9/16/2021 1:35:17 PM
Lourdes Malam Mardirossian & Associates, Inc.	LMalam@garolaw.com	e-Serve	9/16/2021 1:35:17 PM
Garo Mardirossian Mardirossian & Associates	gmardirossian@garolaw.com	e-Serve	9/16/2021 1:35:17 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

9/16/2021

Date

/s/Daniel P. Barer

Signature

Barer, Daniel P. (150812)

Last Name, First Name (PNum)

Pollak, Vida & Barer

Law Firm