LIU, J.

S213132

IN THE

SUPREME COURT OF CALIFORNIA

RANDALL KEITH HAMPTON, et al.,	)	
	)	SUPREME COURT
Plaintiffs and Appellants,	)	FILED
	)	
v.	)	SEP 24 2013
	)	
COUNTY OF SAN DIEGO	)	Frank A. McGuire Clerk
	)	
Defendant and Respondent.	)	Deputy
	)	

After Decision by Court of Appeal
Fourth Appellate District
4th Civil No. D061509
Honorable Timothy R. Taylor, Judge

Superior Court of San Diego County
Case No. 37-2010-00101299-CU-PA-CTL

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

In 1998, the County of San Diego ("County") approved plans for the redesign of a rural intersection at the crest of a hill with an existing embankment and utilities. The plans, which were developed in response to concerns about how to provide more sight distance for motorists, required drivers to stop at a limit line and roll forward past the embankment for an unobstructed view of approaching traffic. More than ten years later, petitioner Randall Hampton, who lived in the area and was on his way to work, entered the intersection and was hit by an oncoming truck. As Hampton's own expert concedes, Hampton would have been able to see the oncoming traffic had he stopped at the limit line and rolled forward on the available pavement before entering the travel lane.

The appellate court affirmed summary judgment in favor of the County on the Hamptons' claim that the design created a dangerous condition of public property, finding that the County established the three elements of "design immunity": (1) a causal relationship between the plan or design and the accident; (2) compliance with design standards or discretionary approval of the plan or design prior to construction; and (3) substantial evidence supporting the reasonableness of the plan or design. The Hamptons seek review as to the second element, but fail to show review is warranted because the appellate court's opinion follows a long line of cases in holding that where the first element (a causal link

between the design and the injury) is shown, the second element (approval of the design), is met by evidence that an employee with discretionary authority approved the design plans. Here, the Hamptons agreed the County's plans improved sight distance at the intersection; the Hamptons conceded a causal link exists between the design and the injury; and the County provided a declaration establishing that the plans were approved by a Traffic Engineer with appropriate discretionary authority.

BACKGROUND

A. The Design Plans.

The Hamptons' "Statement of Facts" incorrectly depicts the County's improvement project as one designed solely to address the need for left turn pockets at the accident intersection, and incorrectly states that the design made sight distance worse. In fact, one purpose of the approved design was to improve sight distance by lowering the crest of Cole Grade Road, which was limiting the ability of drivers on the intersecting westbound road, Miller Road, to see oncoming northbound vehicles. (Vol. 1 Appellants' Appendix ["1 AA"] 91-97; 1 AA 86-87, ¶¶ 4, 5 and 6; 1 AA 92, 99-104.)

The approved design plans accomplish this purpose and 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 "operational"

sight distance at the intersection. (1 AA 87-88, ¶¶ 6, 7, and 8; 1 AA 99-104; Appellant's Appendix, Vol. 2 ["2 AA"], pp. 361:1- 362:6.) As The Hamptons' expert conceded, when drivers stop at the limit line on Miller Road and roll forward on the available pavement prior to entering the traffic lane for Cole Grade Road, the design provides unobstructed sight distance of oncoming traffic. (2 AA 367:5-23 ["I know there is a point at which, as you come closer to the edge of the travel course of the road, *you can see all the way down* [Cole Grade Road]. I know that."], emphasis added.)

The Hamptons acknowledged sight distance improvement was a purpose of the Design plans in the trial court, where they argued the County: "attempted to address a 'sight distance' problem at the intersection of Cole Grade Road and Miller Road, . . that was the suspected cause of unusually high accident rates at the Intersection. A crest in Cole Grade Road as it approached the intersection with Miller Road limited visibility, so the County re-graded the road to remove the crest." (1 AA 118:5-10.) The Hamptons' expert also admitted the improvements improved sight distance at the intersection. (2 AA 368-369.) However, their expert opined that the design was unreasonable because it required drivers on Miller Raod to roll forward to achieve adequate sight distance. (1AA 153-154, ¶¶ 13-14.)

B. The Elements of Design Immunity.

A public entity is not liable for an alleged dangerous condition of its property if it establishes the three elements of design immunity set forth in Government Code section 830.6 ("section 830.6"). The issue may be resolved by a motion for summary judgment where the entity establishes: "(1) a causal relationship between the plan or design and the accident; (2) compliance with design standards or discretionary approval of the plan or design prior to construction; and (3) substantial evidence supporting the reasonableness of the plan or design." (*Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 69 ["*Cornette*"]; *Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931, 939-40 ["*Grenier*"].) The first two elements may be resolved as issues of law when the facts are undisputed. (*Flournoy v. State of California* (1969) 275 Cal.App.2d 806, 813.) The third element is a legal issue for the court to decide and is established by substantial evidence of reasonableness, even if contradicted. (*Higgins v. State of California* (1997) 54 Cal.App.4th 177, 186.)

C. The Court of Appeal's Decision.

Division One of the Fourth District Court of Appeal affirmed the San Diego Superior Court's order granting summary judgment in favor of the County, agreeing that the County had established each of the elements of design immunity. ("Fourth District's decision"). (See Exhibit "A" to Petition for Review ["Slip Opn."], p. 13.) In finding that the County had

established the second element of design immunity (discretionary approval), the Fourth District stated:

> The County presented undisputed evidence that a licensed civil and traffic engineer working for the County, David Solomon, approved the Plans prior to the construction of the improvements. The Plans consist of construction documents that include various drawings, including details of the intersection at which the accident occurred. The Plans themselves indicate that they have been "approved by" Solomon. The County also presented undisputed evidence both that Solomon had the discretionary authority to approve the Plans and that a licensed engineer working for the County approved and signed "as built" plans after construction of the improvements. This evidence demonstrates the discretionary approval element as a matter of law.

(Slip Opn., p. 17, citations omitted.)

The Fourth District's decision acknowledges that two cases cited by the Hamptons, *Levin v. State of California* (1983) 146 Cal.App.3d 410 ("*Levin*") and *Hernandez v. Department of Transportation* (2003) 114 Cal.App.4th 376 ("*Hernandez*"), support their argument that where there is evidence the design at issue violated the public entity's own standards, the public entity cannot establish the second element of design immunity—discretionary approval—unless it shows that the engineer who approved the plans (1) knew it was substandard, (2) elected to disregard the standard, and (3) had the authority to do so. (Slip Opn., p.18.) But the Fourth District declined to follow *Levin* or *Hernandez* "with respect to the nature of the evidence that the governmental entity must present to establish the discretionary approval element." (Slip Opn., p. 18.)

ARGUMENT

I

THE HAMPTONS FAIL TO SHOW THAT REVIEW IS NECESSARY

The Hamptons urge this Court to grant review to clarify the nature of the evidence necessary to establish the second element of design immunity, arguing that "there is tremendous value in resolving a split of authority at the earliest opportunity. If allowed to linger, this split of authority will result in inconsistent judgments and inevitable appeals." (Petition for Review ["Petn"], p. 7.) Yet in the 30 years since *Levin* was decided, the only published opinion to follow it on the relevant point is *Hernandez.* The Hamptons argue that *Hernandez* has since been followed (Petn., p. 7, fn. 2), but the two cases they cite do not support their argument. Although one of the opinions cites *Hernandez,* it does not address whether the discretionary approval element of design immunity requires a showing of compliance with the entity's own standards. (*Lian Ying Shen v. City of San Ramon,* 2012 Cal.App. Unpub. LEXIS 6334 at * 28.) The other opinion also does not address this point directly and instead distinguishes *Hernandez*. (*Curtis v. County of Los Angeles* (2013) 218 Cal.App.4th 366, 380-381.) The Hamptons thus fail to establish a split of authority on an important issue of law necessitating review by this Court.

The second ground for review is that, in light of the Fourth District's decision to "reject rather than distinguish published authority from its sister districts, the fate of the Hampton's appeal hinges solely on the legal questions in this petition." (Petn., p. 7.) This is not a ground for review, and even if it were, the Hamptons fail to show that if the Fourth District's decision had distinguished (rather than declined to follow) *Levin* and *Hernandez*, it would have reached a different result. Rather, it would have reached the *same* result. Although the Fourth District declined to follow the legal reasoning of *Levin* and *Hernandez,* both cases are also factually distinguishable from this case.

Levin analogized the situation before it to the one before this Court in *Cameron v. State* (1972) 7 Cal.3d 318, where the feature that allegedly caused the injury was not part of the approved design plan. (*Levin, supra*, 146 Cal.App.3d at p. 418, citing *Cameron, supra,* 7 Cal.3d at 326 ["Here, as in *Cameron, supra*, the design plan contained no mention of the steep slope of the embankment."].) By contrast, it is undisputed that the feature allegedly causing the injury in this case *was* part of the design plan. (See Slip Opn., p. 29-30 ["The Hamptons did not dispute in the trial court or in this court that the County established a causal relationship....Thus, while 'section 830.6 does not immunize for liability caused independent of design' we have no occasion to consider the potential application of this principle in the case"].)

Hernandez is likewise distinguishable. *Hernandez* turned on evidence that Caltrans had its own specific written procedure requiring that "[a]ny deviation from the applicable guidelines required the designer to obtain formal approval, which would be recorded in a 'project approval document'" and Caltrans conceded there was no evidence it followed its own approval process. (*Hernandez, supra,* 114 Cal.App.4th at 380-381.) Here, there is no evidence that the County failed to follow its own approval process. To the contrary, the County provided the declaration of its Traffic Engineer Robert Goralka to show that the County followed its customary process for approval of sight distance improvements at an existing intersection. Consequently, the Hamptons' second ground for review is unpersuasive.

II

THE FOURTH DISTRICT'S DECISION FOLLOWS A LONG LINE OF CASES, WHICH FIND THAT THE SECOND ELEMENT OF DESIGN IMMUNITY IS ESTABLISHED BY EVIDENCE THAT A PERSON OR BODY WITH DISCRETIONARY AUTHORITY APPROVED THE PLANS

The issues as framed by the Hamptons do not accurately reflect the context in which the Fourth District decided this case. The issue properly framed is as follows: Where plaintiffs agree that the design plans addressed the feature that allegedly created a dangerous condition and that there is a causal relationship between the feature and their injury, does a public entity establish the second element of design immunity (discretionary approval of

the plan or design prior to construction) by showing that the plans were approved in advance of construction by an employee/engineer with discretionary authority?

The Fourth District's holding -- that the second element of design immunity is established by evidence that an employee with discretionary authority approved the plans or design -- is supported by a long line of cases from this Court and other courts of appeal. (See *Becker v. Johnston* (1967) 67 Cal.2d 163, 172–173 [element established by design plans that were signed by the engineers who approved the plans and by evidence the work was completed in accordance with the plans]; *Baldwin v. State* (1972) 6 Cal.3d 424, 430-431[element established by Division of Highways employee declarations stating that an intersection was constructed in accordance with plans, where plans were approved in advance by the state highway engineer of the Division of Highways, "who certainly qualifies as an 'employee exercising discretionary authority to give such approval.'"]; *Cameron, supra*, 7 Cal.3d at 325 [element established by design plans and declaration that the plans in question had been prepared by employee at the direction of the county board, which approved the plans, and parties agreed the board was the proper body to exercise the discretionary authority referred to in section 830.6]; *Ramirez v. City of Redondo Beach* (1987) 192 Cal.App.3d 515, 525 [element demonstrated where "the City's engineer, along with the engineers and other officials of the county who were

recognized as being competent in the design of highways, approved the design before it was adopted by the City"]; *Grenier, supra*, 57 Cal.App.4th at 941 [element established where "plans were prepared by Saguchi, a civil engineer, and approved by Alvarado, the city engineer, after review"]; *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1263 ("*Laabs*") [element established by evidence that an engineer employed by a public entity "reviewed and approved" construction plans].)

The Hamptons suggest that the Fourth District's decision "overlooked" opinions that "support the reasoning" of *Levin* and *Hernandez*, including *Mozzetti v. City of Brisbane* (1967) 67 Cal.App.3d 566, 570-571, 574 ("*Mozzetti*"); *Anderson v. City of Thousand Oaks* (1976) 65 Cal.App.3d 82, 89-90 ("*City of Thousand Oaks*") and *Bane v. State of California* (1989) 208 Cal.App.3d 860, 866-867. (Petn., p.17.) But the Hamptons do not elaborate on how these cases are relevant here.

The Hamptons further suggest that the Fourth District "misread" *Grenier*, *supra*, 57 Cal.App.4th at 941, which in a footnote purportedly "mused whether the omission of the injury- producing feature from the plans 'relates to the element of causation or discretionary approval.'" (Petn., p. 15, citing *Grenier*, *supra*, 57 Cal.App.4th at 941, fn. 7.) This point is irrelevant because the Hamptons conceded that the "injury-producing feature" in this case was sight distance and they conceded sight distance was addressed and improved by the design plans. Moreover, the

footnote in *Grenier* is dicta, which is not supported by the cited cases, *Mozzetti* and *City of Thousand Oaks,* neither of which holds that the omission of the injury-producing feature relates to the element of discretionary approval.

On the contrary, *Mozzetti* found "overwhelming evidence negating the requisite *causal* relationship between the design defect and the flooding in question" and concluded "[i]t is a longstanding proposition articulated in numerous cases that by force of its very terms design immunity is limited to a design-*caused* accident." (*Mozzetti, supra,* at 575, emphasis added.) *City of Thousand Oaks,* without addressing the distinction between the "causation" and "discretionary approval" elements of design immunity, simply rejected appellants' claim that the feature allegedly causing the injury was "one which was not comprehended within the plan or design." (*City of Thousand Oaks, supra,* at 89-90.) Accordingly, the Hamptons fail to show that the Fourth District's decision "overlooked" or "misread" relevant case law. Rather, the decision merely follows well-settled authority.

A. The Fourth District's Decision Is Consistent With The Rationale Underlying Design Immunity And The Language of the Governing Statute.

Contrary to the Hampton's arguments (Petn., pp. 11-12), the Fourth District's decision is consistent with the rationale underlying design immunity. In *Cameron*, this Court held that where the feature causing the

injury was not part of the approved plan in that case, the rationale for the design immunity defense, which is to prevent a jury from simply reweighing the same factors considered by the governmental entity that approved the design, did not apply. (*Cameron, supra*, 7 Cal.3d at 326.) Logically, if a feature is not part of the approved plan, design immunity would not apply to immunize a decision that had not been made. (*Ibid.*)

However, as the Fourth District's decision points out, *Cameron's* reasoning does not apply where the feature allegedly causing the accident ***is*** part of the approved design plan. (Slip Opn., pp. 22-23.) While the rationale underlying design immunity is not served by providing immunity for a feature that is unrelated to the accident, permitting a jury to reweigh the reasonableness of a project feature that ***is related*** to the accident, as in this case, ***would*** permit a jury to simply reweigh the same factors already considered by the governmental entity, in contravention of the rationale for design immunity.

Also contrary to the Hamptons' arguments (Petn., p. 12), the Fourth District's decision is consistent with the language of the statute that provides design immunity, section 830.6. Where the injury-causing feature is part of an approved plan or design, the statutory language from which the second element of design immunity is derived does ***not*** require evidence of compliance with the entity's own standards. On the contrary, section 830.6 requires ***either*** discretionary approval or conformance with approved

standards, stating: "Neither a public entity nor a public employee is liable under this chapter for an injury caused by the plan or design … where such plan or design has been approved … by some … employee exercising discretionary authority to give such approval ***or*** where such plan or design is prepared in conformity with standards previously so approved … ." (§ 830.6, emphasis added.)

Thus, section 830.6 provides immunity based on ***either*** the employee's exercise of discretion in weighing and balancing the risks of a particular design ***or*** the entity's exercise of discretion in adopting standards as a matter of policy. Contrary to the Hamptons' argument (Petn., pp. 9-10), this interpretation of section 830.6 is consistent with *Johnson v. State of California* (1968) 69 Cal.2d 782, 794, fn. 8, which notes that the discretionary immunity under a different provision of the Government Code, section 820.2, applies to policy level decisions made after a conscious balancing of risks and advantages.

While the Hamptons argue that *Johnson* requires a showing that the employee's exercise of discretion was "conscious" or "informed" (Petn., pp. 8-9), section 830.6 contains no such requirement. (See *Alvis v. County of Ventura* (2009) 178 Cal.App.4th 536, 552 (*Alvis*) ["[S]ection 830.6 does not state the approval must be knowing or informed. A court may not rewrite a statute to make it conform to a presumed intent that is not expressed."].) The immunity provided by section 830.6 would be

eviscerated if the "discretionary approval" element required a ***showing*** that the employees who approved the design plans were "informed" or "conscious" of every aspect of those plans. In many cases, the designs have been in place for many years and the employees who approved them may be deceased, unavailable, or unable to recall the particular details.

Courts have repeatedly rejected the argument that the "discretionary approval" element requires a showing that the employee approving a plan was "conscious" or "informed" of specific factors. (See *Laabs, supra,* 163 Cal.App.4th at 1263 [declining to require a showing that the engineers who approved the plans took into consideration the added distance and involved time for a westbound motorist to clear the northbound lanes.]; *Alvis, supra,* at 553 [declining to require a showing that comments by consultants or experts were known and considered]; *Alvarez v. State* (2000) 79 Cal.App.4th 720, 735, disapproved on another point in *Cornette, supra*, 26 Cal.4th at pp. 73–74 [declining to require evidence that state engineers weighed various factors in deciding whether to install a median barrier or which factors they relied on in making their decision].)

Here, the Hamptons similarly contend that there must be a showing as to whether applicable standards were considered. According to the Hamptons, such a showing is necessary to prove that the engineers actually reviewed the plans, and were not under the "mistaken impression" that plans conformed to applicable standards. (Petn., p. 9.) But it is presumed

that an official regularly performs his or her duties (Evid. Code § 664), absent evidence to the contrary. (See *Johnston v. County of Yolo* (1969) 274 Cal App 2d 46, 79 [finding no discretionary approval where a County Road Commissioner testified he changed the design plans, contrary to his professional judgment as an engineer, at the request of a county supervisor].)

B. Requiring A Showing Of A Knowing or Informed Approval Conflates the Second And Third Elements Of Design Immunity.

As the Fourth District's decision points out, requiring a showing as to what factors were considered during the discretionary approval process would conflate the second element—discretionary approval of the plans – with the third element of design immunity—the reasonableness of the design. (Slip Opn., p. 23, citing *Levin, supra*, 146 Cal.App.3d at p. 418.) It is the third element, not the second, which addresses whether the approved design--including any deviation from applicable standards--was reasonable. This distinction is important because under section 830.6, the third element is established by substantial evidence regardless of whether conflicting evidence is presented. (*Grenier, supra*, 57 Cal.App.4th at p. 940.) In other words, preventing conflation of the second and third elements is ***critical*** to design immunity because it protects the discretionary decision from being second-guessed – which is the very reason design immunity exists. (*Cameron, supra*, 7 Cal.3d at 326.)

CONCLUSION

Because the Hamptons fail to establish a significant conflict on an important issue of law necessitating review, the County respectfully submits that the Hamptons' Petition for Review should be denied.

DATED: 9/23/13

Respectfully submitted,

THOMAS E. MONTGOMERY, County Counsel

By

CHRISTOPHER J. WELSH, Senior Deputy
Attorneys for Respondent County of San Diego

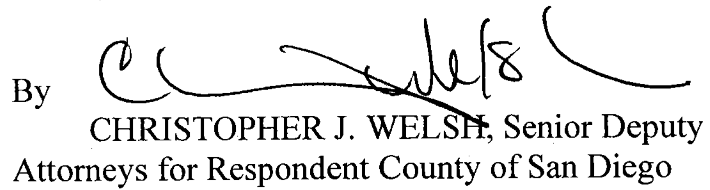
CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.201(c)(1), I certify that the text of this brief consists of 3,578 words as counted by the Microsoft Word 2010 word-processing program used to generate the brief.

DATED: 9/23/13

Respectfully submitted,

THOMAS E. MONTGOMERY, County Counsel

By 

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PROOF OF SERVICE BY MAIL

(C.C.P. 1013a and 2015.5(b))

I, LEE WOLFE, declare:

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

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

I caused to be served the following document(s): **ANSWER TO PETITION FOR REVIEW** by placing a true copy of each document in a separate envelope addressed to each addressee, respectively, as follows:

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Honorable Timothy R. Taylor Judge of the Superior Court 330 West Broadway San Diego, CA 92101 *Trial Court*	California Court of Appeal Fourth Appellate District 750 B Street, Third Floor San Diego, CA 92101 *Appellate Court*

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

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

Executed on September 23, 2013, at San Diego, California.

LEE WOLFE