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Appellate Reports

SUPREME COURT RULES GOVERNMENTAL DESIGN IMMUNITY FOR DANGEROUS ROADS DOES NOT CATEGORICALLY PRECLUDE FAILURE-TO-WARN CLAIMS; ALSO, PUBLIC LIABILITY FOR DANGEROUS SIDEWALKS

Tansavatdi v. City of Rancho Palos Verdes

(2023) __ Cal.5th __, 307 Cal.Rptr.3d 346 (Cal. Supreme Court.)

Who needs to know about this case: Lawyers litigating cases subject to design immunity if a failure-to-warn claim can also be made.

Why it's important: Reaffirms *Cameron v. State of California* (1972) 7 Cal.3d 318 (*Cameron*), which held that design immunity under the Government Claims Act does not categorically preclude failure-to-warn claims that involve a discretionarily approved element of a roadway; disapproves *Weinstein v. Department of Transportation* (2006) 139 Cal.App.4th 52, and *Compton v. City of Santee* (1993) 12 Cal.App.4th 591.

Synopsis: Jonathan Tansavatdi was killed while riding his bicycle through the intersection of Hawthorne Boulevard and Vallon Drive in the City of Rancho Palos Verdes, when an 80-foot tractor-trailer turned right across his path. His mother, Betty, filed a wrongful-death action against the City, pleading that the intersection was a dangerous condition that the City had created or allowed to be created under Gov't Code section 835, and that the City had failed to provide adequate warnings of the dangerous condition to motorists or bicyclists.

The trial court granted the City's motion for summary judgment based on the defense of design immunity under Gov't Code section 830.6. The trial court did not rule on the failure-to-warn issue. The Court of Appeal affirmed the summary judgment on the design-immunity issue, but reversed with respect to the failure-to-warn claim, based on the Supreme Court's ruling in *Cameron*. In reaching this conclusion, the court expressly declined to follow the decisions in *Weinstein* and *Compton*, which appear to hold that design-immunity will preclude a failure-to-warn claim.

The City sought review, which the Supreme Court granted, on the issue of whether design immunity is limited to claims alleging that a public entity *created* a dangerous roadway condition through a defective design, or whether the statutory immunity also extends to claims alleging that a public entity *failed to warn* of a design element that resulted in a dangerous roadway condition.

Cameron held, "[W]here the state is immune from liability for injuries caused by a dangerous condition of its property because the dangerous condition was created as a result of a plan or design which conferred immunity under [Government Code] section 830.6, the state may nevertheless be liable for failure to warn of this dangerous condition." (*Id.* at p. 329.) The effect of *Cameron* is that, while section 830.6 shields public entities from liability for injuries resulting from the design of the physical features of a roadway, they nonetheless retain a duty to warn of known dangers that the roadway presents to the public.

The City argued that *Cameron* was "poorly reasoned" and "illogical" and should be overruled. It contended that *Cameron* gravely undermines the design-immunity defense: asking rhetorically, "If the improvements at issue would be covered by design immunity, and the [public] entity is therefore not liable for injuries caused by them, how could it make sense to hold the entity liable for the defendant's failure to warn of the same improvements?" The Supreme Court's response was: "Contrary to the City's assertions, however, we find nothing illogical in *Cameron's* conclusion that section 830.6 was not intended to allow government entities to remain silent when they have notice that a reasonably approved design presents a danger to the public."

The Court further noted that the City failed to identify any subsequent development in the law or other special justification that warrants departure from the doctrine of stare decisis. In particular, it held that the 1979 amendments to the design-immunity defense in section 830.6, which describe the circumstances under which government entities can retain design immunity when changed circumstances have rendered the original design no longer safe, did not undermine *Cameron*. The Court explained that the legislative history of the amendments were intended to mitigate the financial effects of the Court's decision in *Baldwin v. State of California* (1972) 6 Cal.3d 424, which held that section 830.6's statutory immunity is lost when "the actual operation of the plan or design over a period of time and under changed circumstances discloses that the design has created a dangerous condition of which the entity has notice." (*Id.*, at p. 431.)

The Court explained that *Baldwin* and the amendments deal with a loss of design immunity caused by changed physical conditions. By contrast, *Cameron* addresses whether design immunity applies to failure-to-warn claims *irrespective* of changed circumstances.

In footnote 7 of its opinion, the Court also clarified that its decision in *Cornette v. Dept. of Transportation* (2001) 26 Cal.4th 63, 66, which includes an isolated passage that is arguably in tension with some of the discussion in *Cameron* about whether the design-immunity defense applies to failure-to-warn claims, was intended to modify or limit the holding in *Cameron* that the defense of design immunity did not preclude liability for failure to warn of risks created by a design that is subject to design immunity.

Short(er) takes:

Public entity liability for defects in sidewalk; trivial-defect doctrine; effect of plaintiff's familiarity with the area:

Stack v. City of Lemoore (2023) __ Cal.App.5th __ (Fifth District)

On March 12, 2019, Mark Stack was jogging his usual route around his neighborhood in the City of Lemoore and

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tripped over a raised portion of public sidewalk. The photographs of the sidewalk admitted at trial show a panel of concrete sidewalk, the edge of which is elevated about one and three-quarter inches above its neighboring panel (hereafter, the first defect). As shown in the photographs and described by plaintiff and his expert witness, the lifted panel slopes slightly downward away from the first defect, as viewed from plaintiff's perspective as he jogged south; and it runs into the next sidewalk panel, which in turn slopes upward and creates a second elevated ridge where it meets with the following downward-sloping, raised panel (hereafter, the second defect). Each defect aligns with a trunk of one of the bordering trees, whose roots have grown beneath the sidewalk, pushing it up in places. A layer of pine needles appears all along the base of the first defect, except at its outermost edges.

Stack was familiar with both defects from having jogged over this stretch of sidewalk some 300 times in the previous two years. On the day he fell, he saw the first defect as he approached; but as he was striding over it, he was focused up ahead on the second defect, and he caught his toe on the lip of the first defect and stumbled. Unable to catch himself, he fell and broke his left wrist. He went to the emergency room and later had two surgeries to repair the wrist. At trial, the jury found that the sidewalk was in a dangerous condition, and it awarded him nearly $90,000 in damages and attributed no comparative fault to him.

The City appealed, arguing that the sidewalk condition where plaintiff tripped was too trivial, as a matter of law, to constitute a dangerous condition. Affirmed.

There is no hard-and-fast rule for what constitutes a dangerous condition, which must be decided on the unique facts of each case. California Courts of Appeal typically follow a two-step analysis for determining whether a sidewalk defect is trivial, i.e., not dangerous, as a matter of law. "First, the court reviews evidence regarding the type and size of the defect. If that preliminary analysis reveals a trivial defect, the court considers evidence of any additional factors such as the weather, lighting and visibility conditions at the time of the accident, the existence of debris or obstructions, and plaintiff's knowledge of the area. If these additional factors do not indicate the defect was sufficiently dangerous to a reasonably careful person, the court should deem the defect trivial as a matter of law ...." The Court agreed with the premise that the size of the defect is the primary determinant of triviality, but it modified the prevailing two-step framework "into a holistic, multi-factor analysis."

The photos of the defect appear to show, at minimum, a height differential of one and three-quarter inches. "This size defect hovers at the very upper limit of sidewalk height differentials any court has deemed trivial as a matter of law. None of the cases cited in the briefs involved a differential of one and three-quarter inches or greater, and our independent search reveals just one case in which an equal or greater sidewalk height differential was deemed trivial."

In response to the City's quotation of one court's generalization that "[s]idewalk elevations ranging from three-quarters of an inch to one and one-half inches have generally been held trivial as a matter of law," the Court observed, "This dictum . . . exaggerates the generally accepted size range of defects deemed trivial. The more accurate encapsulation is that when the size of the depression begins to stretch *beyond one inch* the courts have been reluctant to find that the defect is not dangerous as a matter of law, i.e., that it is minor or trivial."

Instead of focusing solely on the size of the defect, the court should "determine whether there existed any circumstances surrounding the accident which might have rendered the defect more dangerous than its mere abstract depth would indicate."

The commonly recited two-step framework suggests that defect size alone can preclude a legal conclusion of triviality when the size is great enough. But these formulations do not comport with section 830.2's express requirement to assess the triviality of "the risk created by the condition ... *in view of the surrounding circumstances*," regardless of size. In light of this directive, the Court adopted a "holistic multi-factor framework, the size of the defect is but one of the many circumstances to be considered; however, size remains the most important of the dangerous condition factors.

In this case, the minimum one-and three-quarter-inch height differential of the first defect weighs heavily against finding the sidewalk condition trivial as a matter of law. The height is nearly double the one-inch threshold where courts grow reluctant to take the issue from the jury.

Beyond size, additional factors courts typically consider in assessing a sidewalk condition's triviality as a matter of law are: the nature and quality of the defect (including whether it has jagged breaks or cracks); whether anything was obstructing or concealing the defect (for instance, an object, debris, or other substance); the lighting and weather conditions at the time of the incident; whether the defect has caused other accidents; and plaintiff's familiarity with the area.

The Court "respectfully part[s] ways with the Court of Appeal precedent weighing a particular plaintiff's familiarity with the defect as part of the dangerous condition analysis. In our view, individual familiarity is not a proper factor for consideration within the trivial defect doctrine." Disposition: "On balance, the above factors do not combine to create a risk so trivial, minor, or insignificant that the sidewalk condition must be held not dangerous as a matter of law. Although the condition was visible on approach on an inferably clear, dry day and had not harmed others or plaintiff in his many prior jogs, reasonable minds could still differ as to its dangerousness based on the evidence of the first defect's relatively large height and rough edge, the presence of back-to-back defects, and the partial obstruction of the pine needles

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and debris. The determination of the condition's dangerousness was properly left for the jury, whose verdict we will not overturn."

Cost-shifting under Code Civ. Proc. § 998 – does it apply when, before trial, the plaintiff settles for an amount that is lower than a prior § 998 offer?

Madrigal v. Hyundai Motor America (2023) 90 Cal.App.5th 385 (Third District)

Oscar J. and Audrey M. Madrigal (plaintiffs) sued defendant Hyundai Motor America (Hyundai) under California's automobile lemon law. Early in the case, Hyundai made two offers to compromise under Code of Civil Procedure section 998, both of which were rejected. Litigation continued. After a jury was sworn in, plaintiffs settled with Hyundai for a principal amount that was less than Hyundai's second section 998 offer. The parties elected to leave the issue of costs and attorney fees for the trial court to decide upon motion. Under the settlement agreement, once the issue of costs and attorney fees was resolved and payment was made by Hyundai, plaintiffs would dismiss their complaint with prejudice.

This case presents the novel question of whether section 998's cost-shifting penalty provisions apply when an offer to compromise is rejected and the case ends in settlement. Under the facts of this case, the Court held in a 2-1 decision that it does, and the court therefore reversed the order of the trial court denying section 998 costs because the statute did not apply to a resolution of the case by settlement before trial.

Negligent infliction of emotional distress (NEID); is it sufficient for the plaintiff to have heard the car accident in which a relative was injured over the phone as it occurred?

Downey v. City of Riverside (2023) __ Cal.App.5th __ (Fourth Dist., Div. 1.)

Vance Downey, the daughter of plaintiff Jayde Downey (Downey) was on the phone with her mother when she was involved in an auto accident in Riverside. Downey sued the City and a property owner (Sevacherian), for NEID, asserting that the collision occurred "because [City] created or permitted to exist, a dangerous condition of public property" and because Sevacherian maintained vegetation and trees on their property so as to cause an unsafe obstruction to the view of vehicular traffic. She alleged that because she was on the phone with Vance and heard the sounds of the crash and its aftermath, she was "present, or virtually present" at the scene when the collision happened and had "contemporaneous, sensory awareness of the connection between the injury-causing traffic collision and the grievous injury suffered by [Vance] as a result ..., thereby causing ... Downey ... serious emotional injuries and damages ...."

The trial court sustained a demurrer to the complaint without leave to amend, finding that Downey's allegations were insufficient to show that she had a contemporaneous awareness of the injury-producing event – not just the harm Vance suffered, but also the causal connection between defendants' tortious conduct and the injuries Vance suffered. Reversed and remanded.

In a 2-1 decision, the majority held that, under *Bird v. Saenz* (2002) 28 Cal.4th 910, 921, Downey's allegations, without more, would compel the court to conclude that Downey, who was not present at the scene, could not know at the time of the collision of the connection between defendants' alleged negligent conduct and the collision or her daughter's injuries. Under *Bird*, liability for negligent infliction of emotional distress cannot be imposed for the *consequences* of City and Sevacherian's assertedly harmful conduct. *Bird* held that it is not enough for a plaintiff to observe "'*the results* of the defendant's infliction of harm,' however 'direct and contemporaneous'" as "[s]uch a rule would eviscerate the requirement ... that the plaintiff must be contemporaneously aware of the connection between the injury-producing event and the victim's injuries."

The court reversed and remanded, however, because at oral argument Downey's counsel argued that Downey could allege additional facts to cure the defect, namely, her familiarity with and knowledge and awareness of the intersection and the dangerous conditions created by City and Sevacherian. Under these circumstances, Downey should be given an opportunity to allege facts establishing she had the requisite contemporaneous sensory awareness of the causal connection between the negligent conduct and the resulting injury.

In dissent, Justice Dato argued that there was no need for Downey to further amend her complaint, and that the majority's reading of *Bird* was erroneous. In his view, the immediate injury-producing event is the car crash. Downey contemporaneously perceived that event when she listened over the phone to the horrific sounds of the crash, understanding that her daughter's vehicle had been hit and her daughter seriously injured. Those allegations are sufficient to state a cause of action. Nothing requires that Downey be aware of each and every separate act of negligence that may have contributed to the accident.

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