

No. S144831

Third District Court of Appeal No. C047734

**IN THE SUPREME COURT OF THE STATE OF
CALIFORNIA**

THOMAS METCALF, a minor, etc., et al.,
Plaintiff and Appellant,

vs.

COUNTY OF SAN JOAQUIN, et al.,
Defendants and Respondents,

PETITION FOR REVIEW

On Appeal from the Superior Court of San Joaquin County
Case No. CV018106
Honorable Elizabeth Humphreys

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INTRODUCTION

Californian contains hundreds of square miles of public property, including tens of thousands of miles of highways that transect our state. The safe and prudent operation of this publicly-owned property is a matter of vital community concern, and is inevitably the subject of hundreds of tort lawsuits brought against government entities. *This case will affect all of them.*

It is axiomatic that the law holding public entities liable in tort is statutory and not based on the common law. (*Thomas v. City of Richmond* (1995) 9 Cal.4th 1154, 1157.) The collection of governing statutes interacts with negligence principles to produce a complex series of 12 special jury instructions and a verdict form requiring six explicit statutory findings. (CACI 1100-VF-1101, pp. 457-488.)

The Third District Court of Appeal's *published decision* in Tom Metcalf's suit against San Joaquin County would alter those instructions, and form, making radical changes in governing law. The decision effectively disregards this Court's holding in *Brown v. Poway Unified School District* (1993) 4 Cal.4th 820 ("*Brown*"), and disapproves two prior Court of Appeal decisions – one implicitly on the issue of public employee creation of dangerous conditions (*Pritchard v. Sully-Miller Contracting Co.*

(1960) 178 Cal.App.2d 246 [cited and approved in *Brown* at pp. 834-835]) – and another explicitly on the question of burden of proof to show reasonable conduct in the face of known danger (*Hibbs v. Los Angeles County Flood Control Dist.* (1967) 252 Cal.App.2d 166, 172). The opinion also criticizes the leading treatise (Van Alstyne, *California Government Tort Liability Practice* (CEB 4th ed. 2004)) – a legal “Bible” followed by lawyers and judges as to the correct procedure to be followed in trying government tort cases. And it calls the CACI model Judicial Council special verdict form confusing and wrong. (Slip Opinion, p. 23.) It cries out for review.

ISSUES PRESENTED FOR REVIEW

The decision presents two issues:

1. *When a public entity knowingly designs, constructs, and maintains a dangerous intersection for more than 60 years, can it escape government tort liability by arguing both that its senior-level employees were not negligent when they created the condition and that the entity had no notice of the danger?*

Appellant respectfully submits the answer must be *No*. The jury in this case found that the County of San Joaquin created and maintained a dangerous “T” intersection of two highways that was preceded by a series

of misleading stop signs and signals, leading motorists to believe they needed to stop only once when two stops were essential. The jury also found that it was foreseeable that the dangerous condition would give rise to injury.

The County's own senior traffic engineer admitted that the intersection was intentionally maintained in that dangerous condition for more than 60 years, and that he himself had examined the intersection and found it to be optimal. (RT 256-257; 274:19-27; 275:4-5; see Statement of Facts below or Opinion, pp. 4-5, 21, 25 & fn. 9.)

In the face of the uncontroverted findings and evidence just described, the jury nonetheless remarkably concluded that the County's engineers had not been "negligent" in creating the dangerous condition, and also the County had absolutely no "notice" of it. The jury's findings were directly contrary to this Court's decision in *Brown*, 4 Cal.4th 820, in which it held that a public entity's knowing creation of a dangerous condition carried a *presumption of notice* on its part.

In upholding the jury's findings, the Court of Appeal transgressed the rule of *Brown* and, under the guise of a non-existent distinction, effectively overruled *Pritchard v. Sully-Miller Contracting Co.* (1960) 178 Cal.App.2d 246, a case cited and adopted by the Legislature in its

Comment to Government Code section 835 *and* expressly approved by this Court. As *Brown* observed: “[A] public agency was presumed to have notice of a dangerous condition of property that was the ‘natural and probable consequence’ of the entity’s own work.” (4 Cal.4th at p. 834.) As a result, notice in such instances is established and need not be proven. (*Id.* at pp. 834-835.)

Without so admitting, the Court of Appeal’s holding has discarded *Brown*’s approval of *Pritchard* and thrown this often-litigated area of law into a state of confusion.

2. *When a public entity wishes to present a defense under Government Code section 835.4(a) or (b), claiming its employees acted reasonably notwithstanding its creation of a dangerous condition on its property, must it bear the burden of proof on that defense or can it simply argue that it was “not negligent?”*

Appellant respectfully submits the answer to this question must also be *No*.

Section 835.4(a) and (b)¹ provide an escape from dangerous-condition-on-property liability for public entities, but only if they can

¹ All statutory references are to the Government Code unless otherwise stated.

affirmatively “*establish*” the reasonableness of their conduct under all the circumstances. CACI 1110 and 1111 acknowledge the entity’s burden of proof as expressed in the statute by characterizing these subsections as “*affirmative defenses*,” and they are so treated in Special Verdict Form VF-1101. (*Id.* at pp. 470-473; 485-486.)

The Court of Appeal disapproves the CACI jury instructions (although it does not say so), the special verdict form, and a prior appellate decision. As the decision states: “We respectfully disagree with case law stating that section 835.4 lays out an affirmative defense. (See, e.g., *Hibbs v. Los Angeles County Flood Control Dist.* (1967) 252 Cal.App.2d 166, 172.)” (Opinion, p. 23.) This express conflict in appellate authority is in and of itself sufficient to justify review under Rule 28(b)(1) [review “necessary to secure uniformity of decision”].

The clash of appellate decisions and its impact on the CACI instruction and verdict forms – which are now regarded as the authoritative guide to the trial of tort and other actions in California – will disrupt the orderly application of California law and cause numerous appeals in a garden-variety area of tort and trial practice. It is up to this Court to restore order from the result of chaos.

STATEMENT OF FACTS

As required by this Court's established policy, appellant brought to the Court of Appeal's attention in his Petition for Rehearing certain misstatements and omissions in the court's opinion. (Cal. Rules of Court, rule 28(c)(2).) Appellant's petition for rehearing was denied on June 8, 2006, without modification in the opinion. Therefore, appellant will provide a more complete and accurate statement of the facts as adduced by the evidence and the record on appeal.

Tom Metcalf was driving a fellow classmate, Raquel Rodriguez, home from a highschool football game when he took the Arch Road exit off southbound Highway 99 and drove westbound on Sperry Avenue toward McKinley Avenue. (Opinion, p. 2; RT 139:16-140:6; 140:19-143:11.) Sperry Avenue eventually ends at McKinley, forming a T-intersection that requires westbound drivers on Sperry to turn either right or left on McKinley. (RT 143:6-15.) Just before the intersection, Sperry rises in elevation to a stop sign and railroad crossing. It then immediately descends from the crossing into McKinley at a right angle without a stop, yield, or other warning sign. (RT 144-145; 164-165.)

On the east side of Sperry Road prior to the railroad tracks, there is a stop ahead sign, a railroad crossing sign, cross bucks (a post with X's), a

stop sign, and a stop bar (two white lines on the pavement where motorists are required to stop for the train). On the west side of the tracks before McKinley Avenue, there is a stop legend (the word STOP on the pavement) and a stop limit line (a white line on the pavement where motorists are required to stop). Also facing westbound motorists is a yellow sign at the end of the T-intersection with a black directional arrow informing motorists they must turn right or left onto McKinley Avenue. (Opinion, p. 3.) The speed limits on Sperry and McKinley at the point of the intersection were both 55 miles per hour. (RT 107:17-108:14.)

As they were approaching the T-intersection, Tom made a complete stop at the stop sign *before* the railroad crossing. As he proceeded an additional 89 feet toward the intersection and began to make a left turn *after* the crossing, the Toyota Corolla collided with the side of a semi-trailer, heading northbound on McKinley Avenue, that had traveled about seven feet into the intersection. (RT 122:7-18; 146:23-147:13; 194:3-22.) Tom suffered closed head injuries in the accident, had no memory of it, and was unable to testify at trial. (RT 87:21-24.)

Tom filed suit against the County in the San Joaquin County Superior Court. (Opinion, p. 7; CT 1-5.) Trial was bifurcated with liability preceding damages. Trial proceeded over seven court days and included the

testimony of six witnesses. Descriptions of portions of the testimony relevant to the issues presented for review, i.e., liability of a public entity in the creation and maintenance of a dangerous condition on its property, is briefly summarized below:

Raquel Rodriguez. Raquel testified that Tom stopped at the stop sign *before* the tracks and *before* the double stop lines on the road. (RT 140-143; 145:11-28.) She was not aware of a second stop legend on the pavement on the other side of the railroad tracks. (RT 148:24-28.)

William Neuman. Professor Neuman is a civil engineer and retired professor of engineering from California State University- Sacramento where he had taught for 35 years. (RT 153-155.) He testified as plaintiff's expert, presenting plaintiff's only theory of liability – that the T-intersection at Sperry and McKinley was dangerous because: (1) the sole stop sign controlling westbound traffic and a double-bar pavement marking were located on the east side of the railroad tracks some 89 feet from the place where motorists were required to stop; and (2) the stop legend on the pavement for that stop sign was located at the bottom of a hill, such that it was not possible for drivers of passenger cars crossing the railroad tracks to

see the legend before they encountered McKinley Avenue. (Opinion, pp. 6-7.)²

The 89-foot distance from stop sign to the required stopping place at McKinley violated an established federal traffic MUTD (Manual Traffic Control Devices) standard requiring stop signs to be located no more than 50 feet from the required stopping place. (Opinion, pp. 6-7; RT 170-171.)

The 9% grade of the hill running from the railroad tracks to the intersection also violated a California Public Utilities Commission permit requiring no more than a 6% grade. (RT 165:9-16.) The steepness of the grade prevented automobile drivers from seeing the stop legend and line on the pavement at the intersection as they were crossing the grade. (Opinion, p. 6; RT 168:13-24.) Only a big-rig cab was high enough to see the stop legend and line from the grade crossing. (*Id.*)

As a result of the condition of the intersection, drivers had a tendency to stop once at the stop sign *before* the railroad tracks, and then to continue rather than stop a second time at the T-intersection. Motorists were left to figure out for themselves that a second stop would be required

² A stop sign is the familiar post on which is mounted a red octagonal plate. A stop legend or legend is the word STOP painted in large white letters on the pavement just before a stop is required. (RT 167:4-6; 250:5-251:21.) A stop limit line is a broad white line on the pavement at the place a motorist is required to come to a complete stop. (RT 168: 9.)

immediately after their back wheels left the railroad tracks and before they merged onto McKinley. (Opinion, pp. 6-7; RT 180:5-17; 181.)

At least two prior accidents were attributable to the dangerous condition. In one accident in 1995, one vehicle rear-ended another when the second vehicle stopped suddenly at McKinley Avenue. In another case in 1993, one vehicle swerved to avoid a rear-end impact with another that was turning right onto McKinley. (RT 180-182.) There were skid marks on the road made by persons who apparently did not see the stop legend, and had to stop at the last minute before Sperry entered McKinley. (RT 183:1-3.) Skid marks were also made by large trucks who, although they perceived the stop legend at the top of the grade, nonetheless had to apply their brakes quickly and skid from the railroad crossing to the stop legend and line at the McKinley intersection. (Opinion, p. 7; RT 216:21-217:1; 222:1-11.)

Plaintiff's engineering expert William Neuman was asked why he had concluded that the County's signs and legends constituted a dangerous condition of public property at the Sperry-McKinley intersection. As he testified:

“[P]eople are stopping in the wrong place. They make up their mind[s] to go. And they do go. . . [T]hen two things

happen. If there's a conflicting vehicle, they have to undo a decision. By the time you get your back wheels on the tracks, it's too late to undo a decision, you're [not] going to stop in the intersection even if you figure out to do it.

And so consequently people who use this in an ordinary way are exposed to the risk of grievous injury. They just don't know where to stop, and you can't see the stop limit line in plain old cars, and you can't see the stop legend. That information of where further to stop is lost."

Q. Do you believe that played role in this crash?

A. Yes.

Q. Why?

A. Well, because it's my understanding the testimony about the witness is Mr. Metcalf did in fact stop at the limit line for the railroad, and that he proceeded from there and that's the problem. Once you do that, and if you haven't figured it out by the time that your back wheels are on those tracks, you're not going to be able to stop short of in the traveled way for northbound McKinley." (RT 180:5-26.)

Mr. Neuman emphasized that stop signs should be as close as possible to the place a motorist is required to stop. It should convey the message: “We want you to stop and this line tells you where to stop.” (Opinion, p. 7; RT 199:20-28.)

Jason Bartlett. CHP Officer Jason Bartlett was the officer who investigated the accident. (RT 103-105.) He observed the posted speed limits on both highways were 55 miles per hour (RT 107:17-108:14.) Although he had regularly driven the route through the intersection of Sperry and McKinley as the back route to the County Jail from Highway 99, Officer Bartlett was not aware that there were two bars on the pavement on the eastern side of the tracks as opposed to a single stop bar on the western side at the intersection. (RT 111:6-13; 116:9-117:11.) There were no fresh skid marks on the pavement revealing pre-impact attempts to stop by either Tom’s Toyota Corolla or Mr. Dovie’s (the truck driver’s) big-rig. (RT 125:14-21.) Officer Bartlett confirmed that motorists in ordinary passenger vehicles – like Tom’s Toyota – would not be able to see the stop legend painted on the pavement at the intersection of Sperry and McKinley when they were stopped at the stop sign. (RT 131:3-132:5.)

Arnold Johnson. Arnold Johnson, a consulting traffic engineer who had given his deposition more than 200 times, was the County’s

expert witness. (Opinion, p. 5; RT 301:13-19; 318:15-20.) Mr. Johnson testified that, in his view, the intersection was perfectly safe because the only feasible place to locate the stop sign was before the railroad crossing. (Opinion, pp. 5-6; RT 310:2-25.) He acknowledged that the stop limit line was invisible to westbound traffic until 7-8 feet from Sperry/McKinley intersection. (RT 326.) He reviewed both of the accident reports that were reviewed by Mr. Neuman and came to an opposing conclusion: “‘The accident history [wa]s favorable’ and there was nothing in those accident reports attributing the cause of the accidents to the stop sign [or lack thereof.]” (Opinion, p. 6.)

Sukminder Chahal. Mr. Chahal retired in 2002 from San Joaquin County service after 25 years as the Senior Civil Engineer in charge of its Traffic Division. (RT 248:6-28.) He then resumed employment for the County as a temporary employee to assist in the Traffic Division. (Opinion, pp. 3-4; RT 247-248.)

According to Mr. Chahal, stop signs are the highest priority for safety in all types of signs, signals, and markings. (RT 249:1-18.) There are four ingredients in a traffic control system: (1) a stop sign; (2) a stop ahead sign warning of the upcoming stop sign; (3) a stop ahead legend painted on the pavement warning of the upcoming stop sign; and (4) a

painted stop legend with a limit bar telling the motorist precisely where to stop. (RT 250:17-251:1.) The ingredients tell the driver he must stop *somewhere* in the area of the stop sign. (RT 251:22-25.)

According to Mr. Chahal, it is San Joaquin County policy to have fully controlled intersections with all four of the above ingredients. (RT 252:13-27.) However, notwithstanding its policy, the County has many places that do not even have stop signs. (*Id.*) The goal of a stop sign is to tell a motorist to stop and where he must stop. (RT 254:16-255:2.) The sign's message should be comprehensible to average drivers of average passenger vehicles, including Tom Metcalf. (RT 255:15-256:12.) The County's own safety guidelines demanded that the stop sign *and* the limit bar painted on the roadway be located in the vicinity of the intersection. (RT 268:12-20.)

The railroad gave permission for the County to cross its tracks at Sperry and to intersect with McKinley in 1941, as shown by the California Public Utilities Commission's permit to build and maintain the crossing. (RT 257:2-13; Def.'s Ex. 115.) The County or a County contractor built the roadway between McKinley and the railroad tracks as authorized by the 1941 permit. (Opinion, p. 4; RT 258:12-25.) At the time of the accident,

San Joaquin County had controlled the intersection of Sperry and McKinley for 60 years. (Opinion, p. 25, fn. 9; RT 256-257.)

One of the PUC's requirements of San Joaquin County was that it build the section of the roadway from the railroad tracks to McKinley at a grade not exceeding 4%. (Def's Ex. 115, p. 3, ¶3.) Mr. Chahal did not know whether the grade approaching the railroad tracks satisfied the 4% requirement. (Opinion, p. 4; RT 259:3-6.) Mr. Neuman's undisputed testimony established that the grade was 9% to the limit line and 6% thereafter, in violation of the PUC's requirements. (Opinion, p. 4; RT 165:9-16.) This prevented drivers from seeing the stop line when stopped at the stop sign on the eastern side of the tracks. (RT 168:13-24.)

In Mr. Chahal's 25 years working for the County, he does not ever remember a stop sign on the western side of the railroad tracks. The sign has always been on the eastern side requiring westbound traffic to encounter the stop sign before reaching the tracks and 89 feet before the stop limit line where motorists were supposed to stop. (RT 268:21-269:9.)

Mr. Chahal testified repeatedly that the County controlled all the signs, legends, and markings at the Sperry and McKinley intersection despite a partial annexation by the City in 1984. (Opinion, p. 3, 4; RT 270:2-26; 271:22-26; 274:1-27; 275:4-5; 281:2-6; 282:1-283:28; 285:7-

13.) Though consistently admitting the County's creation of all signs, legends, and markings at the intersection and its complete control over the intersection at all times, Mr. Chahal staunchly maintained that County's work was impeccably safe and sound and not in a dangerous condition. (RT 274:19-27; 275:4-5.) Mr. Chahal disagreed with plaintiff's expert William Neuman on the feasibility of placing a stop sign on the west side of the railroad tracks at the intersection, maintaining that such a stop sign would be knocked down by trucks. (Opinion, pp. 4-5; compare RT 290:23-291:5 with RT 178-180.)

Jury Instructions. Tom Metcalf's case was submitted to the jury based on jury instructions and special verdict questions largely borrowed from the new Judicial Council of California Civil Jury Instructions (2003), CACI 1100-1104; 1120-1121. (CT 627-635.) The Special Verdict Form used by the court is attached to the Court of Appeal's opinion. It is the Judicial Council Form with the addition of two questions dealing with Tom Metcalf's negligence and causation. (Compare CACI VF-1100 with CT 567-569.) A copy of the portion of the instructions dealing with statutory liability for dangerous conditions of public property is included in the record at CT 627-635.

Special Verdict. After listening to the Court’s jury instructions and the final arguments given by the parties, the jury deliberated and returned a verdict. (CT 567-569; RT 425:21-430:2.) The special verdict included these findings:

- San Joaquin County owned or controlled the intersection of Sperry and McKinley. (CT 567:16-17.) This finding was unanimous. (RT 427:13-16.)
- The intersection was in a dangerous condition at the time of Tom Metcalf’s accident. (CT 567:20-21.) The jury reached this conclusion by a 10-2 vote. (RT 427:17-20.)
- The dangerous condition of the intersection created a reasonably foreseeable risk that the kind of accident that happened would occur. (CT 567:24-26.) The jury’s vote on this issue was 9-3. (RT 427:21-24.)
- The dangerous condition of the intersection was *not* created by the “negligent or wrongful conduct of an employee of the County of San Joaquin acting within the scope of his or her employment.” (CT 568:3-5.) The vote on this issue was 11-1. (RT 427:28-428:5.)

- The County of San Joaquin did *not* have notice of the dangerous condition for a long enough time to have protected against it. (CT 568:7-9.) The vote here was 9-3.

Because the jury voted “no” on both the issue of negligent or wrongful employee conduct creating the dangerous condition and the issue of public entity notice of the dangerous condition, the jury never even got to the question of whether the Court acted “reasonably,” which appeared on the Special Verdict Form as question No. 6. (Opinion, Appendix, p. 2.)

The court entered a judgment for defendant because plaintiff had failed to prove either of the alternative pathways to dangerous condition liability set forth in Government Code section 835. (Opinion, p. 9; CT 657.)

Plaintiff made a motion for new trial and a motion to vacate the judgment under Code of Civil Procedure Section 663, arguing in part that the County’s traffic engineer had testified that the County had created and controlled an intersection found by the jury to be a dangerous condition of public property, citing Van Alstyne, *California Government Tort Liability Practice* (4th ed. 2004), section 12.42, including three cases cited by Van Alstyne, together with the Supreme Court’s decision in *Brown v. Poway*

Unified Sch. Dist. (1993) 4 Cal.4th 820, 828-837 [interpreting Govt. Code, §835]. (Opinion, p. 10.)

In opposition to plaintiff's motions, the County maintained that Mr. Chahal's testimony merely established that the County "constructed the roadway and was responsible for signage." (CT 708:18-20.) Contending this was not enough to establish liability, the County argued that its only conduct "was the decision by an unknown and unnamed traffic engineer 60 plus years ago to place a stop sign on the east side of the tracks" and that: "No subsequent evidence to establish that such placement was incorrect or that such placement created a dangerous condition was presented at trial." Thus, according to the County (and upheld by the Court of Appeal), plaintiff apparently had to prove the County *knew* the intersection was dangerous, and was entitled to judgment because Mr. Chahal and Mr. Johnson said it was not. (Opinion, pp. 25-26; CT 708:21-709:2.) The County's argument took no account of the jury's finding of a dangerous condition or the Supreme Court's interpretation of section 835(a) in *Brown*.

The Court of Appeal upheld the judgment and the trial court's denial of appellant's motion for new trial. Appellant's petition for review contends this Court in *Brown* and Professor Van Alstyne were correct in interpreting section 835(a) to import a *presumption of notice* that renders a

public entity's conduct to be "negligent or wrongful" whenever its employees deliberately create a dangerous condition on its own public property. The presumption was applicable here and there was no evidence rebutting it. Alternatively, the County indisputably had notice of the condition it created. Either way, the jury's verdict lacks support in the evidence, and the Court of Appeal's opinion replicates the error.

Appellant's petition also maintains that any argument the County's expert could muster that the County had acted reasonably despite its knowledge of the dangerous condition was, at most, a basis for the County's affirmative defense under section 835.4 – an issue that was never reached by the jury. This is consistent with the CACI instructions and verdict form. It, however, contravenes the holding of the Court of Appeal, resulting in further conflict and confusion in California public liability law.

DISCUSSION

I. A PUBLIC ENTITY CANNOT ESCAPE LIABILITY FOR ITS OWN CREATION OF A DANGEROUS CONDITION BY CLAIMING THAT NO EMPLOYEES WERE NEGLIGENT AND THAT IT SIMPLY HAD NO NOTICE OF THE VERY CONDITION IT CREATED.

A. The Opinion Purports to Distinguish – But Effectively Disapproves – Two Court of Appeal Decisions.

The opinion holds that a public entity cannot be held liable, even if it undisputably creates a dangerous condition on its own property unless “a plaintiff . . . prove[s] that the public entity acted negligently or wrongfully.” (Opinion, p. 2.) It thereby refused to acknowledge the jury’s dangerous condition and foreseeability findings as amounting to negligence and wrongful conduct. The court purported to distinguish two controlling appellate decisions: (1) *Pritchard v. Sully-Miller Contracting Co.* (1960) 178 Cal.App.2d 246, the holding of which was expressly approved by this Court in *Brown* (4 Cal.4th 820, 834-835) (“*Pritchard*”); and (2) *Hill v. People ex rel. Dept. of Transportation* (1979) 91 Cal.App.3d 426 (“*Hill*”).

Pritchard held that, where a city “itself created the dangerous condition it is *per se* culpable and notice” and “knowledge and time for

correction [] become false quantities in the problem of liability.” (Opinion, p. 19; *Pritchard, supra*, 178 Cal.App.2d at p. 256.) The Court of Appeal expressly disagreed, and found *Pritchard* to be inapplicable under section 835(a) “because there is no provision similar to subdivision (a) in the Public Liability Act of 1923.” (Opinion, p. 19.)

The court’s view of *Pritchard* disregards the fact that the Legislature was well aware of the decision and expressed its intent to adopt its holding in the “negligent or wrongful act or omission” language. (Opinion, p. 19.) Before the Public Liability Act of 1923, “local agencies were not liable for negligent acts or omissions of their officers or employees, and it was solely by reason of that statute and the amendments following it that they were liable for their officers and employees’ tortious acts or omissions.” (*Jones v. City of Alhambra* (1953) 117 Cal.App.2d 728, 729.) “[T]he reason for abolishing the requirement [of knowledge by ‘the governing board or person “authorized to remedy the condition”] was not to hold public entities liable for unknown dangers but to apply the rules that govern the imputation of knowledge from employees to employers in ordinary civil cases.” (*Brown, supra*, 4 Cal.4th at p. 835.) Thus, Government Code section 835, subdivision (a) simply recodified the rule under the prior act,

including *Pritchard*, but with an added component making it possible for public entities to be held liable for acts of its employees.

As this Court recognized in *Brown*, the Legislature’s own explanatory comment reveals its desire to codify *Pritchard*. The Senate Committee Comment accompanying section 835 that the statute was “‘similar to the [former] Public Liability Act of 1923, under which cities, counties and school districts [were] liable for injuries proximately caused by the dangerous conditions of their property.’” The Comment further observed that: “*Although there is no provision similar to subdivision (a) in [the former act], the courts have held that entities are liable under that act for dangerous conditions created by the negligence or wrongful acts of their employees. Pritchard v. Sully-Miller Contracting Co. (1960) 178 Cal.App.2d 246 . . .*” (*Brown, supra*, 4 Cal.4th at p. 833; emphasis in original.)

Brown twice stated that the Legislature intended to adopt the rule of *Pritchard* in section 835(a).

“The Legislature’s reference to *Pritchard, supra*, 178 Cal.App.2d 246, can only mean that it intended to adopt the rule of that case, i.e., that a public entity is liable for a dangerous condition created by an employee under

circumstances in which the employee's involvement makes it fair to presume that the entity had notice of the condition . . . [T]here is . . . ample evidence that section 835, subdivision (a), was intended to incorporate the *Pritchard* rule.” (*Brown, supra*, 4 Cal.4th at pp. 834-835.)

Explaining the Senate Committee’s reference to caselaw in its comment, this Court noted that *Pritchard v. Sully-Miller Contracting Co.* (1960) 178 Cal.App.2d 246, had dispensed with the requirement of notice to a public entity under the former statute because “the fact that the city itself deliberately created the dangerous condition [i.e., the timing sequence of traffic signals] dispensed with the necessity of the notice contemplated by [the former act] . . .” (*Pritchard, supra*, 178 Cal.App.2d at p. 254.) *Pritchard* had followed *Fackrell v. City of San Diego* (1945) 26 Cal.2d 196 (“*Fackrell*”), in which the Supreme Court had held that “a city was presumed to know of the dangerous condition presented by a poorly designed sidewalk improvement” because the improvement was “planned by city officers and constructed in accordance with such plan” which, when carried out, gave rise to a “dangerous and defective condition.” As a result,

no further proof was needed to charge the city with notice. (*Id.* at p. 203; *Brown, supra*, 4 Cal.4th at p. 834.)

As this Court noted in *Brown*, the prior decisions in *Fackrell* and *Pritchard* had merely applied the well-established rule that “a public agency was presumed to have notice of a dangerous condition of property that was the ‘natural and probable consequence’ of the entity’s own work.” (*Brown, supra*, 4 Cal.4th at p. 834.)³

In addition to dismissing *Pritchard*, the Court of Appeal also distinguishes *Hill v. People ex rel. Dept. of Transportation* (1979) 91 Cal.App.3d 426, concluding that because “the state’s demurrer was sustained on the theory that the state was ‘immune from liability for negligent issuance of a permit’ . . . and the state did not claim on appeal that

³ As further illustrations of the application of this principle, this Court cited four additional cases under the prior Act: *Watson v. City of Alameda* (1933) 219 Cal. 331, 334 [city employees marked a crosswalk with slippery paint]; *Bigelow v. City of Ontario* (1940) 37 Cal.App.2d 198, 204 [city employees created a dangerous roadway]; *Sandstoe v. Atchison, T. & S.F. Ry. Co.* (1938) 28 Cal.App.2d 215, 219 [city employees painted a misleading centerline on a road]; and *Wise v. City of Los Angeles* (1935) 9 Cal.App.2d 364, 367 [city employee dug and left a hole in the street]. (*Brown, supra*, 4 Cal.4th at p. 834, fn. 6.).

As this Court noted, none of these cases under the prior Act had required a plaintiff to prove any kind of knowledge or notice on the part of a public entity when he or she had shown that a dangerous condition was “created by an employee under circumstances in which the employee’s involvement makes it fair to presume that the entity had notice of the condition.” (*Brown, supra*, 4 Cal.4th at p. 834.)

it was not negligent in issuing the permit . . . [it] could not justify a finding of negligence in the very fact of the state’s creation of the dangerous condition.” (Opinion, p. 18; *Hill, supra*, 91 Cal.App.3d at p. 429.)

The Court of Appeal’s view of *Hill* is wrong. In *Hill*, an oversized truck hit an overpass that was too low, causing injuries to a woman when her car hit the back of the truck. The defendant argued that plaintiff failed to establish actual or constructive notice of a dangerous condition under section 835(b). The court held plaintiff could argue liability under the alternative subdivision (a) because the complaint alleged that “unknown Doe defendants were agents or employees of the named defendants acting within their scope of employment” when the dangerous condition was created. (*Id.* at p. 430, fn. 4.) Although the individual employees were unidentifiable, state employees had measured or recorded the height of the overpass, passed on incorrect information to codefendants, and issued the permit for the oversized truck load.

As the court concluded in *Hill*, there was no doubt “[t]he dangerous condition was thus created by the negligent act or omission of a Caltrans employee.” (*Id.*) The issue of employee negligence was at the very heart of the *Hill* case – there was a dangerous condition; there was no question that an employee’s negligence created it; liability followed. Van Alstyne’s

reliance was correct. The opinion's purported distinction of *Hill* effectively disapproves its holding and furnishes further grounds for review.

B. The Opinion Criticizes Van Alstyne's Treatise on Government Tort Liability, Which Was Also Cited With Approval in this Court, Concluding that A Dangerous Condition Created By A Public Entity is Negligent or Wrongful Per Se Under Government Code Section 835(a).

The Court of Appeal's opinion discounts Professor Van Alstyne's leading treatise on government tort law based on its own purported distinction of the *Pritchard* and *Hill* cases. It states: "[T]hese cases do not lead to the broad-reaching proposition asserted in the treatise." (Opinion, p. 13.) The treatise states:

"The negligence or wrongful quality of the responsible employee's act appears to be inherent in the very fact that the condition created is, at least prima facie, dangerous. The plaintiff need not prove that the employee's conduct was unreasonable (i.e., negligent or wrongful) in any other respect; proof of the creation of a 'dangerous condition,' as defined in Govt C §830(a), is itself evidence of negligent or

wrongful conduct sufficient to support liability.” (Opinion, p. 13; Van Alstyne, *California Government Tort Liability Practice* (4th Ed. 2004), § 12.42, p. 846.)

The Court of Appeal ignores this Court’s express reliance in *Brown* on Professor Arvo Van Alstyne’s analysis of section 835(a). That reliance was well placed. The late professor Van Alstyne was the Law Revision Commission’s research consultant on the subject of sovereign immunity. (*Brown, supra*, 4 Cal.4th at p. 832, fn. 5.) As a result of his work for the Commission, he became the principal draftsman of the California Tort Claims Act. (See Van Alstyne, *California Government Tort Liability Practice* (CEB 4th ed. 2004), Preface and In Memoriam [explaining how Professor Van Alstyne personally supervised the drafting of the California Tort Claims Act of 1963].)

As a result of his unique role in preparing and presenting the Tort Claims Act to the Legislature, this Court and the Court of Appeal have traditionally accorded great weight to Professor Van Alstyne’s views as expressed in the CEB text in construing the various provisions of the Act. (See, e.g., *Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710, 721-722 [calling Professor Van Alstyne “the principal architect of the California Tort Claims Act”]; see also *Mary M. v. City of Los Angeles*

(1991) 54 Cal.3d 202, 209; *Golden West Baseball Co. v. Talley* (1991) 232 Cal.App.3d 1294, 1304.)

Professor Van Alstyne’s comments, which this Court found crucial in *Brown* in interpreting section 835(a), were as follows:

“The creation by the public entity of a physical facility or condition that is ‘dangerous’ dispenses with the necessity of notice, for the entity presumably knows already that it has affirmatively created the condition, and thus has notice that it is dangerous.” (*Brown, supra*, 4 Cal.4th at p. 835, citing Van Alstyne; emphasis in original and emphasis added.)

Relying on Professor Van Alstyne’s analysis, this Court pointed out that subdivisions (a) and (b) of section 835 “obviously address two different types of cases,” which were distinguished in practice based on who had created the dangerous condition.

“Because an entity must act through its employees, virtually all suits brought on account of dangerous conditions created by the entity will be brought under subdivision (a). In contrast, subdivision (b) can *also* support suits based on

dangerous conditions not created by the entity or its employees.” (*Id.* at p. 836; emphasis added.)

The Court explained in *Brown* that liability under the former Public Liability Act depended upon whether the “governing board” of a public entity or a person “authorized to remedy the condition” had “knowledge or notice.” (*Id.* at p. 835.) The Law Revision Commission recommended abolition of this requirement and its replacement with the “ordinary rules” which imputed knowledge of an employee to his or her employer “if under all the circumstances it would have been unreasonable for the employee not to have informed his employer.” (*Id.*) In adopting the Commission’s recommendation, the Legislature enacted section 835(b) which imposes liability when a public entity has actual or constructive notice of a dangerous condition “a sufficient time prior to the injury to have taken measures to protect against [it].” (*Id.* at p. 836.) *However, when the public entity creates the physical facility or condition that is dangerous it “presumably knows already that it has affirmatively created the condition and thus has notice that it is dangerous.”* (*Id.* at p. 835, quoting Van Alstyne, §3.176, p. 208; emphasis added.)

This Court emphasized that public entity liability under section 835(a) was not legal liability without notice, but responsibility only where

“a public employee’s involvement in creating the dangerous condition provides a basis for presuming that the public entity has notice of the condition. This is because a public entity is presumed to have knowledge of a dangerous condition that is the ‘natural and probable consequence’ of its work.” (*Id.* at p. 837.)

To illustrate the latter point, the Court cited with approval several appellate cases “in which public employees actively created dangerous conditions under circumstances that would clearly justify a presumption of notice on the part of a public employer.” (*Id.*) One of the cases cited involved “county employees [who] constructed a dangerous highway intersection by grading the intersecting roadways at differing elevations, by planting trees that obstructed vision, and by placing misleading signs and center lines.” (*Id.*, citing *Hilts v. County of Solano* (1968) 265 Cal.App.2d 161, 164-166.)⁴

In its refusal to acknowledge this Court’s reliance on Van Alstyne’s text, the Court of Appeal effectively overrides *Brown* as well as the treatise.

⁴ See also *Warden v. City of Los Angeles* (1975) 13 Cal.3d 297, 300 [municipal employees placed a sewer pipe just below the surface of a navigable watercourse without adequate warnings]; *Teall v. City of Cudahy* (1963) 60 Cal.2d 431, 434 [seven-year-old child was hit by a car because the city “invited reliance on [misleading] signals”]; *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298, 303-304 [city employees neglected to repair a large pothole].

This, of course, is impermissible. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; see also Opinion, p. 13.) If not clarified or corrected by this Court, the result will be confusion in the lower courts as to whether this Court's decision in *Brown* or the Court of Appeal's decision here governs. Appellant's petition should therefore be granted.

C. The Opinion Acknowledges the Potential Confusion and Inconsistency of the Model CACI Judicial Council Special Verdict Form.

The opinion states that the jury found no negligence because it concluded that County employees acted reasonably. (Opinion, pp. 22-23) But the jury made no such findings. Nor was it given definitions of a "negligent or wrongful" act.⁵ Instead, it was given a special verdict form in which the question of the County's reasonableness in the face of known danger was not to be addressed until later in the special verdict form as question No. 6, which asks: "Was the County of San Joaquin acting reasonably in failing to take sufficient steps to protect against the risk of this accident?" (Opinion, Appendix, p. 2.)

⁵ The sufficiency of the evidence must be measured by the instructions given, not by principles of law in appellate opinions the jury was never told about. (*Bullock v. Phillip Morris USA, Inc.* (2006) 138 Cal.App.4th 1029, 1049, fn. 9; *Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1535.)

The Court of Appeal found the model CACI Judicial Council form to be “problematic” because it invited the jury first to answer whether “the negligent or wrongful conduct of a public entity’s employee created the dangerous condition and, if the answer to the question is yes, then ask[ed] whether the act or omission that created the dangerous condition was reasonable.” (Opinion, p. 23.) The Court of Appeal’s view of these questions make it possible for the jury to arrive at an inconsistent verdict:

“[I]t allows the jury to find that the act or omission that created the condition was reasonable even if the jury has already found that there was negligent or wrongful conduct in the creation of the dangerous condition.” (*Id.*)

Although the Court of Appeal has correctly identified a potential problem in the verdict form, it has failed to perceive its source – a statutory scheme that splits various elements of common law negligence into *four pieces* for separate jury consideration: (1) presence of a dangerous condition on public property; (2) foreseeability that the dangerous condition will result in injury; (3) knowledge or notice on the public entity’s part; and (4) overall reasonableness of the entity’s conduct in the face of a known dangerous condition. Refusing to acknowledge the complexity of the scheme, the Court of Appeal ruled that the jury could

collapse all the elements into one and simply find that the County had not been “negligent” in the common law sense. This defeats the Legislature’s design and runs roughshod over *Brown*, Van Alstyne, the CACI, and prior appellate authority.

From the special verdict and instructions given, the jury could only have concluded that the County’s reasonableness in creating the dangerous condition was to be considered *after* – and independent of – the questions of negligent creation (which existed per se) and notice (which was presumed). To the extent the verdict form misled the jury, a new trial, not affirmance of a judgment based on a verdict by a profoundly confused jury, was warranted. The Court of Appeal erred in concluding to the contrary. Review is warranted.

II. A PUBLIC ENTITY CANNOT ESTABLISH THAT ITS CONDUCT IN CREATING A DANGEROUS CONDITION WAS REASONABLE WITHOUT BEARING THE BURDEN OF PROOF ON THAT DEFENSE.

Construing the jury’s findings to be a vindication of the reasonableness of the County’s conduct in the face of a known dangerous condition on its property, the Court of Appeal held that reasonableness was simply part of plaintiff’s burden of showing negligence, and was not an

affirmative defense. In so holding, it expressly “disagree[d] with case law stating that section 835.4 lays out an affirmative defense. (See, e.g., *Hibbs v. Los Angeles County Flood Control Dist.* (1967) 252 Cal.App.2d 166, 172.)” (Opinion, p. 23.) The Court of Appeal’s express disapproval of a prior appellate decision is sufficient to justify this Court’s intervention to resolve the conflict.

The Court of Appeal’s disapproval of the *Hibbs* case is premised on a common law view of negligence that is fundamentally at odds with the statutory scheme. If adopted, it would render section 835.4’s defense superfluous and excise that entire provision in defiance of the established rule that every part of a statute must be given meaning and accorded significance. (*Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 611 [“[C]ourts may not excise words from statutes . . . [E]ach term has meaning and appears for a reason.”]; *City and County of San Francisco v. County of San Mateo* (1995) 10 Cal.4th 554, 563; *Fields v. Eu* (1976) 18 Cal.3d 322, 328.)

The defensive character of an overall reasonableness in-the-face-of-known-danger showing by a public entity is plain on the face of the statute which clearly assigns to public entities the burden of establishing the

defense. In both instances, the defense must be “*established*” by the public entity, not refuted by the plaintiff. Section 835.4, subdivision (a) provides:

“A public entity is not liable under subdivision (a) of Section 835 for injury caused by a condition of its property if the public entity *establishes* that the act or omission that created the condition was reasonable.” (Emphasis added.)

Subdivision (b) states:

“A public entity is not liable under subdivision (b) of Section 835 for injury caused by a dangerous condition of its property if the public entity *establishes* that the action it took to protect against the risk of injury created by the condition or its failure to take such action was reasonable.” (Emphasis added.)

In each case, overall reasonableness of the entity’s conduct “shall be determined by taking into consideration the time and opportunity it had to take action and by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of protecting against the risk of such injury.”

In addition to conflicting with the plain language of the statute and the *Hibbs* case, the Court of Appeal’s novel and radical approach to public

entity liability defies the manifest intent of the Legislature and the CACI instructions, as appellant will now show.

First, the court's conclusion defies section 835's incorporated Law Revision Comment, which expressly states how the section 835.4 defense comes into play regarding "reasonableness:"

"Even if the elements stated in the statute are established, a public entity may avoid liability if it shows that it acted reasonably in the light of the practicability and cost of pursuing alternative courses of action available to it. *In addition to the defenses available to public entities under Section 835.4*, a public entity also may use any other defense--such as contributory negligence or assumption of the risk--that is available under subdivision (b) of Section 815 to avoid liability under this section." (Emphasis added.)

The comment thus characterizes the section 835.4 defense as an affirmative defense akin to contributory negligence or assumption of the risk, as to which the defendant clearly bears the burden of proof. (CACI 405; *Drust v. Drust* (1980) 113 Cal.App.3d 1, 6.)

Second, the CACI jury instructions under subdivision (a) of section 835.4 expressly state "Affirmative Defense--Condition Created By

Reasonable Act Or Omission (Gov. Code, § 835.4(a)),” and goes on to list the required elements under the defense. This fact, alone, negates the opinion’s opposite holding that section 835.4 is not an affirmative defense.

The Court of Appeal’s error in regarding the section 835.4 defense as part of plaintiff’s burden caused it to misconstrue the expert testimony of Arnold Johnson that “the best location for the stop sign was before the railroad crossing and it was not feasible to place the stop sign on an island.” (Opinion, p. 21.) That testimony was not pertinent to the jury’s determination of knowledge or notice in question Nos. 4 and 5, but to the overall reasonableness issue in question No. 6. (Opinion, Appendix, p. 2.) The jury never considered that question affirmatively, and thus made no factual finding that the defense had been established.⁶

In summary, whether or not a public entity acted “reasonably” in knowingly maintaining a dangerous condition on its property is a separate and affirmative defense. By refusing to so acknowledge, the Court of Appeal misconstrues and entangles the “wrongful or negligent” conduct element (special verdict question No. 4) with the “reasonableness” element

⁶ Yet, this is what it had to do to sustain its verdict under the statutory scheme; CACI 1111-1112; *Swaner v. City of Santa Monica* (1984) 150 Cal.App.3d 789, 810-811; *De La Rosa v. City of San Bernardino* (1971) 16 Cal.App.3d 739, 748-749 [overall reasonableness presents discretionary factual questions].

(special verdict question No. 6). The resulting confusion and overt conflict in appellate authority urgently requires this Court's intervention.

CONCLUSION

For the reasons stated above, the Court of Appeal's opinion is at odds with established California law, including one Supreme Court case, two appellate decisions, the plain language of the California Tort Claims Act, the leading government tort liability treatise in the state, and the approved Judicial Council Jury Instructions and Special Verdict Forms. Such a far-reaching and radical change in California law requires examination by this Court, not a wholesale alteration of the law by a single appellate panel. Appellant's petition for review should be granted.

Dated: June 30, 2006

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 14(c)(1))

The text of this brief consists of 8,066 words as counted by the Corel WordPerfect version 10 word-processing program used to generate the brief. The entire brief is double spaced. The font is 13 point Times New Roman.

Dated: June 30, 2006

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**PROOF OF SERVICE
STATE OF CALIFORNIA - COUNTY OF YOLO**

I am employed in the City of Davis, County of San Diego, State of California. I am over the age of 18 and not a party to this action; my business address is: 2050 Lyndell Terrace, Suite 240, Davis, California 95616.

On July 3, 2006 I served the document(s) described as: **PETITION FOR REVIEW** in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

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- (STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

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