Office of the Los Angeles City Attorney
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May 25, 2023

BY ELECTRONIC FILING

The Honorable Chief Justice Patricia Guerrero
Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-4783

Re: Amicus Curiae Letter in Support of the City of Oakland's Petition for Review in *Lynne McDonald, et al., v. City of Oakland*
Supreme Court Case No. S279468

To the Honorable Chief Justice and Associate Justices of the California Supreme Court:

Amicus curiae the League of California Cities ("Cal Cities") respectfully submits this letter under California Rules of Court, rule 8.500(g) in support of the Petition for Review by the City of Oakland ("Oakland") in *Lynne McDonald, et al., v. City of Oakland*, Supreme Court Case No. S279468.

Oakland's Petition seeks review of an unpublished decision by the Court of Appeal, First Appellate District, Division Two ("the Decision"). The Decision held that if a future, unknown dangerous condition was the "natural and probable consequence" of a different but known harmless condition, then sufficient notice of the future dangerous condition existed to support public entity liability under Government Code sections 835 and 835.2.[1] The Decision significantly distorts and expands the potential scope of liability

[1] All statutory references are to the Government Code.

under section 835 by greatly expanding the concept of "notice" of an alleged dangerous condition to include circumstances before it even exists. The Decision relies heavily on a misreading of *Fackrell v. City of San Diego* (1945) 26 Cal.2d 196, which fundamentally relied on the public entity's creation of the subject dangerous condition as the basis for constructive notice. (The governing statute at that time only allowed liability for notice of the dangerous condition.) Here no evidence exists that Oakland created the subject pothole, but the Court of Appeal still reversed summary judgment. Because of the potential adverse and misguided impact of the Decision on the multitude of dangerous condition lawsuits, Cal Cities urges the Court to grant Oakland's Petition for Review.

I. Statement of Interest

Cal Cities is an association of 477 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. Cal Cities is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

II. Why the Court Should Grant Review.

The Decision significantly expands the potential liability for dangerous conditions beyond the statutory language of section 835, which will also result in greatly expanded litigation against public entities.

A. The Decision misinterprets section 835 by requiring public entities to predict if a condition that is not dangerous on its own will cause some other dangerous condition.

Under the Government Claims Act of 1963, the potential liability of public entities for injuries is strictly limited to just the "rigidly delineated circumstances" expressly authorized by statute. (*Williams v. Horvath* (1976) 16 Cal.3d 834, 838; Gov. Code, §§ 810, 815, subd. (a).) Thus, the applicable statutory language is both the beginning and end of determining potential liability. (See Gov. Code § 815 Legis. Comm. Comments – Senate [Except as may be constitutionally required, § 815 "abolishes all common law or judicially declared forms of liability for public entities"].)

Subject to the various immunities set forth in the Government Claims Act, section 835 establishes the limits of how "a public entity is liable for injury caused by a dangerous condition of its property…" Based on a line of cases exemplified by *Fackrell*, the Legislature expressly adopted section 835, subdivision (a), adding *the creation* of the dangerous condition as another basis for public entity liability, a provision not found in the predecessor statute. (See *Brown v. Poway Unified Sch. Dist.* (1993) 4 Cal.4th 820, 833-34.)

Under section 835, the plaintiff must establish: (1) "that the property was in a dangerous condition at the time of the injury," (2) "that the injury was proximately caused by the dangerous condition," (3) "that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred," and (4) that either:

> "(a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
>
> (b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition." (Gov. Code, § 835.)

By its terms, section 835 limits potential liability to cases in which the public entity either created the dangerous condition that caused the injury, or had actual or constructive notice of the dangerous condition that caused the injury. To establish constructive notice, a plaintiff must show that the dangerous condition that caused the injury "had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character." (Gov. Code, § 835.2, subd. (b); and see § 830, subd. (a) [defining a "Dangerous Condition" as a current "condition of property," not a potential or future condition].)

Importantly, sections 835 and 835.2, subdivision (b), focus unwaveringly on the dangerous condition that actually caused the injury – how long was it there and how obvious was it, or alternatively, did the public entity create it? The trial court here properly granted summary judgment for Oakland by enforcing this statutory language. As the trial court concluded, there was no evidence to indicate that Oakland created the pothole, had actual notice of the pothole, or that the pothole existed long enough to establish constructive notice.

Contrary to the statutory language, the Decision proposes a new basis for liability under section 835: whether the public entity should have predicted that a dangerous condition would later develop from previously harmless conditions that did not cause the plaintiff's injury. Neither the statutory language nor the case law supports the Court of Appeal's interpretation of section 835.

B. Prior cases do not support the Decision because they each addressed the actual condition that caused the injury, not a prior harmless condition.

The Court of Appeal mistakenly cites *Fackrell* among other cases to support its new theory of liability. In fact, the cases cited by the Court of Appeal base their liability discussions either on the public entity creating the dangerous condition or being on notice of the existing injury-producing dangerous condition. Thus, unlike the Decision, they are all based on section 835's statutory language. None of those cases invoked a notice theory that the public entity should have predicted the later possible development of a dangerous condition based on an observation before the dangerous condition actually existed.

In *Fackrell*, the city negligently built a sidewalk on a dirt slope by spraying oil on the dirt, which formed a hardened shell. Predictably, the rain eroded away the dirt, resulting in a two-foot gap under a seemingly solid but unsupported shell of oil-hardened dirt. (*Fackrell*, *supra*, 26 Cal.2d at pp. 199-200, 201.) This concealed hole was the dangerous condition that plaintiff fell into when she walked on the apparent sidewalk and the shell broke. This Court held that the city had constructive notice of the concealed hole *because the city created it*. This reasoning was necessary because in 1945, the existing statutory language established public entity liability for a dangerous condition based only on notice of the condition, and contained no provision for the creation of dangerous conditions. (See *Brown*, *supra*, 4 Cal.4th at pp. 833-34.) Under the previous statute, a judicial rule separately evolved imposing liability when the public entity had created the dangerous condition – on the theory that a public entity had a duty to be aware of the natural consequences of its own creations. This provided the basis for constructive notice of a dangerous condition resulting from that creation. *Fackrell* held that this creation liability extended to an improvement that "naturally will become[ ] unsafe for [ordinary] use because of its planned design…." (*Fackrell*, *supra*, at pp. 203 and 204.)

Fackrell based its subsequent discussion of constructive notice on the grounds that the city designed and constructed the dangerous condition. (See

Fackrell, *supra*, at 26 Cal.2d at pp. 205-07.) "The question [in *Fackrell*] was whether evidence supported the finding that a dangerous condition had been created by the city." (*Wood v. Santa Cruz Cnty*. (1955) 133 Cal.App.2d 713, 717; and see *Pritchard v. Sully-Miller Contracting Co*. (1960) 178 Cal.App.2d 246, 254 ["Under the decisions the fact that the city itself deliberately created the dangerous condition dispensed with the necessity of the notice…"], citing *Fackrell*.) When the Legislature adopted section 835 in 1963, it included subdivision (a), which incorporated the holdings of *Fackrell* and *Pritchard* by expressly imposing liability if the public entity created the dangerous condition. (See *Brown*, *supra*, 4 Cal.4th at pp. 833-34; and see comment to Gov. Code § 835.) As a result, the legal analysis in *Fackrell* effectively became moot, or at least redundant, under the Government Claims Act because the basis of the court's thesis – that the public entity had created the dangerous condition – was wholly assumed by section 835, subdivision (a).

Similarly, the other cases cited by the Court of Appeal fit into the existing statutory scheme and do not support the attempt to expand liability. For example, in *Briggs v. State of California* (1971) 14 Cal.App.3d 489, the dangerous condition at issue was the instability of the adjacent soil that later moved in a landslide, causing damage. (*Id*., at p. 496.) The dangerous condition existed when the soil became unstable, and the court based notice on when the State knew or should have known the soil was unstable. The actual landslide was not the dangerous condition, but rather, it was when the injuries or damages were sustained. Similarly, a dangerous pothole may exist for a significant time before it injures someone, but even before the pothole injures anyone it was still a dangerous condition that existed. In contrast, the failed street base-layer here was not in itself a dangerous condition and no dangerous condition existed before the pothole existed.

The Decision's other supporting cases also address either a dangerous condition which existed before the subject injury, followed by an inquiry of whether the public entity knew or should have known about the existing dangerous condition, or a condition that the public entity created. (E.g., *Smith v. San Mateo Cnty*. (1943) 62 Cal.App.2d 122, 124 [trees that were "dead and partly rotted and were in constant danger of falling to the ground" "had existed for many months prior to" the accident]; *Hawk v. City of Newport Beach* (1956) 46 Cal.2d 213, 217 [cited *Smith* that a natural condition could constitute a dangerous condition under § 835 when the public entity fails to warn of a known but concealed risk]; *Ducey v. Argo Sales Co*. (1979) 25 Cal.3d 707, 717 [liability "may be predicated upon a failure of the entity to provide adequate safeguards against a dangerous condition of which the entity had actual or constructive notice].)

Plaintiffs' Answer to Petition for Review provides another example of a public entity both creating the dangerous condition and having notice of it. In *Mulder v. City of Los Angeles* (1930) 110 Cal.App. 663, the City hired contractors to execute City plans to raise a public highway "and thereby had interfered with the natural flow of storm waters" so that the city project created a flood risk by diverted drainage to the plaintiff's property, while taking no steps to prevent damage to plaintiff. (*Id*., at pp. 665-666.) The drainage from a later rainstorm made plaintiff's property uninhabitable. The court held that the City's knowledge of its own plans, which were executed at its request and which included the knowledge that there was no provision addressing the change in drainage that would result, constituted notice of the dangerous condition that the City created with its public works project. (*Id*., at pp. 668-69.)

In all of the cases cited, the courts based notice on when the dangerous condition actually existed (or was created by the public entity) and not on circumstances occurring before the dangerous condition existed.

C. The Decision threatens to significantly expand public entity liability and litigation.

In addition to significantly expanding the liability of public entities, the Decision also threatens to greatly expand their litigation burden. That the Decision is unpublished should not deter review. Unpublished opinions "are easily obtained by interested lawyers and judges, the unpublished opinions may influence the strategy of counsel and the decisions of trial and perhaps even appellate courts." (*People v. Moret* (2010) 180 Cal.App.4th 839, 884; and see 9 Witkin, *Cal. Proc*. 6th Appeal, § 850 (2023) ["Unpublished opinions are readily available, and they were occasionally cited or otherwise used in Supreme Court and Court of Appeal opinions."].) Moreover, this case is not unique – Cal Cities' membership reports increasing attempts by plaintiffs to invoke similar theories that a public entity should have known that a dangerous condition would later develop, and that this predictive power should count as notice for a dangerous condition that does not yet exist.

The Decision will further encourage a new cottage industry for experts to opine about how past harmless conditions were actually warning signs that a dangerous condition would later develop, thus supposedly putting public entities on notice before any dangerous condition existed. Every tree next to a sidewalk, for example, could now become the basis for notice of a future dangerous condition on the sidewalk long before any dangerous condition develops.

In addition to significantly increasing the scope of liability beyond the statutory language, this will also create a new category of factual disputes with experts battling over what previously harmless conditions actually indicated a potential future dangerous condition. Thus, the visceral harm of the Decision is not limited to expanding liability beyond the statutory language, but will also burden public entities with greatly expanded litigation as newly created questions of fact will bar summary judgments that were previously supported by section 835.

III. Conclusion

The Court should grant review because Oakland's Petition for Review provides this Court with an excellent opportunity to clarify the scope of Government Code section 835 and the potential liability of public entities for dangerous conditions of public property.

Sincerely,

/s Michael M. Walsh

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