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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THOMAS METCALF, a Minor, etc., Plaintiff and Appellant, v. COUNTY OF SAN JOAQUIN, Defendant and Respondent.	C047734 (Super. Ct. No. CV018106)

APPEAL from a judgment of the Superior Court of San Joaquin County, Elizabeth Humphreys, Judge. Affirmed.

Law Offices of Tony J. Tanke and Tony J. Tanke; Tabak Law Firm and Stewart M. Tabak; Law Offices of Lawrence Knapp and Lawrence M. Knapp, for Plaintiffs and Appellants.

Law Offices of Brunn & Flynn, Charles K. Brunn and Andrew N. Eshoo, for Defendant and Respondent.

This case was brought under the Tort Claims Act (Gov. Code,[1] § 810 et seq.) for injuries suffered by plaintiff Thomas Metcalf[2]

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[1] All further statutory references are to the Government Code unless otherwise indicated.

in an automobile collision that took place in an intersection controlled by defendant County of San Joaquin (the County).

We hold that to establish liability of a public entity for injury caused by a dangerous condition of its property, a plaintiff must prove that the public entity acted negligently or wrongfully even though the public entity created the dangerous condition. Because there was substantial evidence to support the jury's findings that there was no negligent or wrongful conduct on the part of the public entity and that the public entity did not have notice of the dangerous condition for a long enough time to have protected against it, we will affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

On the evening of October 6, 2001, plaintiff Thomas Metcalf was dropping off his classmate, Raquel Rodriguez, at her home in French Camp in his parents' Toyota Corolla. Rodriguez directed Metcalf to take the Arch Road exit off State Route 99 and drive westbound on Sperry Road.

Sperry Road ends at McKinley Avenue, forming a T-intersection that requires westbound motorists on Sperry Road to turn right or left. There are railroad tracks that run parallel to McKinley Avenue. Before the intersection, Sperry Road rises in elevation to the railroad tracks. The road then descends from the railroad tracks into the intersection with McKinley

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[2] Metcalf was a minor when the accident occurred. The lawsuit was filed by his guardian ad litem -- his mother.

Avenue. 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.

As Metcalf approached the T-intersection, Rodriguez told him to stop before the railroad tracks and then make a left turn onto McKinley Avenue. Metcalf brought the Corolla to a complete stop before the two lines near the railroad tracks. As Metcalf attempted to make a left turn onto McKinley Avenue, the Corolla collided with a truck proceeding northbound on McKinley Avenue. The Corolla hit the truck's refrigeration unit fuel tank and one of the truck's axles. Rodriguez did not remember whether Metcalf stopped at the intersection or whether she had told him he needed to stop.[3]

The County controls the intersection. Sukhminder Chahal was the County's senior civil engineer in charge of the traffic

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[3] Metcalf did not testify at trial and is unable to recall how the accident occurred because of injuries sustained from the collision.

division for 20 years. After his retirement in 2002, Chahal became a temporary employee assisting in the traffic division. According to Chahal, in 1941, the railroad gave the County the right to extend Sperry Road approximately 50 feet across the railroad tracks to connect with McKinley Avenue. The County was responsible for constructing the connector and the stop controls. There were various conditions imposed upon the County by the railroad, the state Public Utilities Commission, and the federal railroad safety branch. One of the conditions was that the connector would not exceed a 4 percent grade. The grade as built has a 9 percent slope to the stop legend and 6 percent slope to the stop limit line. The railroad or the Public Utilities Commission inspected the connector and "[s]omebody signed off on it as complying with the order at the time it was built."

In 1984, "the roadway was annexed to the city." The area became urban, the traffic pattern "changed," and the city paved the road. The County retained control of the intersection and the signage.

Chahal evaluated the placement of the stop sign after he took over the traffic division. In Chahal's opinion, the existing location was the "best place" for the stop sign because a motorist traveling on Sperry Road toward the intersection could see the sign very clearly. If the stop sign was moved to the right, it would be behind a PG&E pole and the motorist could not see the sign "as good." If the stop sign was moved to the left, it would obstruct the "railroad sign cross bucks and

flashing light." If the sign was moved to the west side of the tracks, it would be obstructed by the railroad sign. A stop sign could not be placed on an island in the middle of the road on the west side of the tracks because there was not enough space and it would be knocked down by trucks that were turning.

The County has an inspection system in place to check the roadways "in a systematic manner." A County employee drives to all areas in the county, including "the city portions," and "checks that all signs and legends and markings are there." The County makes a decision to change a preexisting intersection based on a number of factors: problems discovered by County employees, complaints from citizens, and the number and type of traffic accidents. According to Chahal, the County's records did not contain any complaints about the intersection. Moreover, he was unaware of anything about the "volume and type of traffic collisions" in the intersection that required the County to "consider a change in the design of the intersection or the placement of the signs."

Arnold Johnson is a civil engineer who has served as the traffic engineer for the Cities of Santa Monica and Oakland. He has taught traffic engineer courses at the University of California at Berkeley and Laney College in Oakland. He was retained by the County as its expert witness on traffic safety issues.

In Johnson's opinion, "because of the railroad crossing and because of the fact that the roadway drops down slightly as you approach McKinley, . . . the optimum or the best location for

the stop sign [wa]s in advance of the railroad crossing." If the approach to the intersection was completely flat and there were no railroad tracks, Johnson would have located the stop sign closer to the intersection. It was not feasible to put the stop sign on an island because the island would be hit by trucks.

In addition to examining the intersection, Johnson reviewed police reports to determine the accident history of the intersection. There was nothing in the accident reports that should have alerted the County of the need to change the location of the stop sign or take other measures to control the possibility of an accident: "The accident history [wa]s favorable" and there was nothing in those accident reports attributing the cause of the accidents to the stop sign.

William Neuman is a civil engineer and retired professor of engineering from California State University at Sacramento. As part of his work for Metcalf in this case, Neuman observed motorists' behavior at the intersection. He saw many motorists stop at the stop bar before the railroad tracks, as they were supposed to, but fail to stop again as they approached the intersection. The 6 and 9 percent grades prevented motorists in cars from seeing the stop limit line and the stop legend. Drivers of "cab-over truck[s]" and some minivans could see these markings.

According to Neuman's calculation, the stop sign is 89 feet from McKinley Avenue. The federal manual on traffic control devices mandates that a stop sign "shall" be located no more

than 50 feet from the required stop. "Shall means you're really supposed to do that. . . . If it's impossible, you have to be smart and for good reasons do something different." He testified it was possible to move the stop sign closer to McKinley Avenue by creating an island in the road and positioning the stop sign on the island. He did not think a truck would "take out . . . [the] island stop sign if it was making [a] turn."

In Neuman's opinion, the intersection constituted a dangerous condition because "people [we]re stopping in the wrong place." Motorists in cars did not know where to stop because they could not see the stop limit line and the stop legend. He based his opinion, in part, on two accidents at the intersection: one in 1993 and another in 1995. In the 1993 accident, a motorist "made a right turn in front of an oncoming car, and the car swerved to avoid the person who failed to stop and had a head-on collision with somebody going south." In the 1995 accident, a motorist "stopped at the railroad tracks and then . . . stopped again at the bottom, but the car behind them didn't expect them to do so and there was a rear-end accident."

Within one year of the accident, Metcalf filed a complaint for damages against the County under the Tort Claims Act. He alleged the County owned and controlled the intersection; the intersection constituted a dangerous condition in the way it was "designed, constructed and maintained"; the dangerous condition created a substantial risk of injury to people using the roadway; the County knew or should have known the dangerous

condition existed; the County "negligently and carelessly" failed to "remove, repair, construct or correct the dangerous conditions . . . and negligently failed to take reasonable precautions to prevent injuries"; and, as a result of the dangerous condition, he suffered "injuries and damages."

At trial, the parties agreed that the property at issue was the intersection and that the County controlled the intersection, "signage and the marking." The dispute was over whether "this situation" was a dangerous condition, whether the County employee who was responsible for sign placement acted improperly or made a "wrong" decision, and whether the County had "notice that they had a problem."

With the parties' consent, the court instructed the jury that to establish his claim, "Metcalf must prove all of the following: [¶] 1. That County of San Joaquin owned or controlled the property; [¶] 2. That the property was in a dangerous condition at the time of the incident; [¶] 3. That the dangerous condition created a reasonably foreseeable risk of the kind of incident that occurred; [¶] 4. That negligent or wrongful conduct of County of San Joaquin's employee acting within the scope of his or her employment created the dangerous condition or that County of San Joaquin had notice of the dangerous condition for a long enough time to have protected against it; and [¶] 5. That the dangerous condition was a substantial factor in causing the incident."

Metcalf proffered a special verdict form[4]. The first question on the form asked, "Did the County of San Joaquin own or control the property?" The jury answered, "Yes."

The second question asked, "Was the property in a dangerous condition at the time of the incident?" The jury answered, "Yes."

The third question asked, "Did the dangerous condition create a reasonably foreseeable risk that this kind of incident would occur?" The jury answered, "Yes."

The fourth question asked, "Did the negligent or wrongful conduct of an employee of the County of San Joaquin acting within the scope of his or her employment create the dangerous condition?" The jury answered, "No." The form directed the jury to answer question No. 5.

The fifth question asked, "Did the County of San Joaquin have notice of the dangerous condition for a long enough time to have protected against it?" The jury answered, "No."

Because the jury's response was "No" to both question No. 4 and question No. 5, the verdict form instructed the jury to proceed no further and have the presiding juror sign and date the verdict form.[5]

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[4] The entire form is appendix A.

[5] If the jury had answered "Yes" to either question No. 4 or question No. 5, or to both questions, then the verdict form directed the jury to answer question No. 6, which asked, "Was the County of San Joaquin acting reasonably in failing to take sufficient steps to protect against the risk of this incident?"

After the jury verdict for County, Metcalf filed a "motion for new trial and/or to vacate and enter new judgment." He argued that given the jury's finding that the intersection constituted a dangerous condition, "the jury rendered an inconsistent finding on the question of whether the negligent or wrongful conduct of an employee of the County acting within the scope of the employment created the dangerous condition."

The court denied the motion because it was "not convinced" the "jury should have reached a different verdict or decision."

Metcalf filed a timely appeal from the judgment and the order denying his motion.

In this appeal, Metcalf contends that the jury's two last findings were not supported by substantial evidence. As he did in the trial court, Metcalf argues that the County cannot "escape liability" based on the jury's findings that the dangerous condition was not created by the negligent or wrongful conduct of the County's employee and that the County did not have notice of the dangerous condition because the County conceded that its employee created the intersection and related signage and the jury found the property to be in a dangerous condition.

DISCUSSION

I

The Plain Language Of The Tort Claims Act Requires A Plaintiff To Prove That A Public Entity Acted Negligently Or Wrongfully When It Created The Dangerous Condition

Metcalf contends that conduct by the County's "senior-level public employee . . . that creates a set of conditions on public property that are dangerous to others is negligent or wrongful per se under Government Code section 835(a)." We disagree.

Section 835 reads in full: "Except as provided by statute, a public entity is liable for injury caused by a dangerous condition[6] of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and 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

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6 "'Dangerous condition' means a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used." (§ 830, subd. (a).)

"(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."

Given these elements of a cause of action under section 835, the Legislature could not have intended that *any* act by a public entity's employee that creates a dangerous condition is negligent or wrongful per se. In construing the statute, we must give meaning to every word and avoid an interpretation that renders a word or phrase surplusage. (*Estate of MacDonald* (1990) 51 Cal.3d 262, 269-270; *Trinkle v. California State Lottery* (2003) 105 Cal.App.4th 1401, 1410.) To construe the statute as Metcalf proposes would render surplusage the phrase "negligent or wrongful." Indeed, the California Law Revision Commission emphasized that it is not the creation of a dangerous condition that imposes liability; rather "[a] public entity may be held liable for a 'dangerous condition' of public property only if it has acted unreasonably in creating or failing to remedy or warn against the condition under the circumstances described in subsequent sections." (Cal. Law Revision Com. com., reprinted at 32 West's Ann. Gov. Code (1995 ed.) foll. § 830, p. 298.)

Metcalf's position, however, finds support in a treatise entitled California Government Tort Liability Practice. In relevant part, 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 or negligent or wrongful conduct sufficient to support liability." (2 Coates et al., Cal. Government Tort Liability Practice (Cont.Ed.Bar 4th ed. 2006) Dangerous Condition of Public Property, § 12.42, p. 846.) In support of this statement, the treatise cites three cases: *Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707 (*Ducey*); *Hill v. People ex rel. Dept. of Transportation* (1979) 91 Cal.App.3d 426 (*Hill*); and *Pritchard v. Sully-Miller Contracting Co.* (1960) 178 Cal.App.2d 246 (*Pritchard*). (Cal. Government Tort Liability Practice, *supra*, at pp. 846-847.) As we will explain, these cases do not lead to the broad-reaching proposition asserted in the treatise.

Ducey involved an accident in which the plaintiffs were seriously injured when another motorist crossed the median of a heavily traveled freeway and collided head-on with their automobile. (*Ducey*, *supra*, 25 Cal.3d at pp. 711-712.) The plaintiffs sued the state based on the state's failure to erect a median barrier on the freeway. (*Id.* at p. 712.) The evidence at trial revealed the following facts: according to Department of Transportation guidelines, the construction of a barrier was justified when the average daily traffic exceeded 40,000 vehicles and, three years before the Duceys' collision, daily traffic on the freeway exceeded 40,000; five years before the Duceys' collision, the regional headquarters of the Department

of Transportation concluded that the rate of cross-median injuries on the freeway was "'unusually high,'" and a cable-type median barrier along the freeway was recommended; four years before the Duceys' collision, the highway commission authorized appropriation of funds to erect the proposed barrier; three years before the Duceys' collision, the appropriation was canceled because of an anticipated widening of the freeway in the coming three to four years that would necessitate a metal beam guardrail instead of a cable-type barrier; and the state chose to leave the freeway "without a needed barrier for more than three years," during which time the Duceys' collision occurred. (*Id.* at pp. 713-714.) The jury found the state liable for the substantial damages sustained by the Duceys in the collision. (*Id.* at p. 714.)

On appeal, the state argued that the trial court erred in submitting the issue of its liability to the jury because there was "no substantial evidence from which the jury could have concluded that the absence of a median barrier constituted a 'dangerous condition.'" (*Ducey*, *supra*, 25 Cal.3d at p. 718.) In making this argument, the state contended "that cross-median freeway accidents usually result from the negligence of either the victim or a third party, and therefore that the jury could not properly conclude that the absence of a median barrier created a substantial risk of injury when the freeway was used with due care." (*Id.* at p. 719.)

The *Ducey* court disagreed. It acknowledged that while many or most of such accidents "result from the negligence of one or

more drivers, the evidence in the instant case was clearly sufficient for the jury to conclude that the lack of a median barrier created a substantial risk of injury even in the absence of negligent conduct." (*Ducey*, *supra*, 25 Cal.3d at p. 719.) The court went on to explain that "numerous expert witnesses identified various situations in which cross-median accidents might occur in the absence of negligence, as when accidents result, for example, from mechanical failure, sudden illness, or animals in the road." (*Ibid.*) "[T]he jurors were free to draw upon their own common driving experiences which might well have suggested to them that many traffic accidents, including cross-median accidents, occur without the negligence of any party." (*Id.* at p. 720.)

From this language, the treatise concludes that the *Ducey* court "found that the lack of a median barrier created a dangerous condition; evidence of negligence by any party, *including the public employee*, was not required." (Cal. Government Tort Liability Practice, *supra*, § 12.42, pp. 846-846.1, italics added.)

We find two flaws with the treatise's conclusion. One, read in context, the *Ducey* court's reference to the lack of negligence of "any party" was not to parties such as the state. We draw this conclusion from the fact that the discussion preceding the *Ducey* court's pronouncement regarding the lack of negligence of "any party" referred to the parties or entities on the freeway. (*Ducey*, *supra*, 25 Cal.3d at p. 719.) Two, the *Ducey* court was not concerned with the state's negligence under

subdivision (a) of section 835 because the case proceeded on the alternate theory of liability under subdivision (b) regarding a public entity's notice of the dangerous condition. (*Ducey*, at p. 716.) In light of these factors, we do not read *Ducey* as supporting the treatise's proposition that the creation of a dangerous condition by a public entity's employee, by itself, satisfies the plaintiff's burden of proving negligent or wrongful conduct under subdivision (a) of section 835.

Hill involved a lawsuit against the state for its alleged negligence in issuing a special permit that allowed the codefendants to transport an oversized load measuring 15 feet 7 inches in height on the pubic highways and attaching to the permit a route that the codefendants were to use that included an overpass with a height of only 15 feet 3 inches. (*Hill*, *supra*, 91 Cal.App.3d at p. 428.) When the codefendants' tractor trailer came to the overpass, the load struck the overpass, fell to the highway, and struck the plaintiff's vehicle, causing personal injuries and property damage. (*Ibid.*) The plaintiff's complaint alleged that the defendant or defendants "negligently measured or recorded the height of the overpass, negligently passed incorrect information to codefendants or negligently issued the permit. The dangerous condition was thus created by the negligent act or omission of a Caltrans employee." (*Id.* at p. 430, fn. 4.) The trial court sustained the state's demurrer on the theory that the state was immune from liability for negligent issuance of a permit (§ 818.4) and that the plaintiff

had not adequately stated a cause of action for governmental liability for a dangerous condition (§ 835). (*Hill*, at p. 429.)

On appeal, the state proffered two arguments why the ruling was correct: one, there was no dangerous condition because a 15-foot 3-inch overpass was not dangerous for normal sized vehicles; and two, if the issuance of a permit created the dangerous condition, then the state was immune under section 818.4. (*Hill*, *supra*, 91 Cal.App.3d at pp. 429-431.) The *Hill* court rejected both arguments. As to the first argument, the court concluded that while the overpass was not dangerous for use by normal vehicles, the state's conduct in permitting its use by a vehicle that was too high created a dangerous condition. (*Id.* at p. 430.) As to the second argument, the court reasoned that given "the unusual circumstances of this case, the Legislature could not have intended that the permit immunity of section 818.4 should defeat the governmental liability under section 835." (*Hill*, at pp. 431-432.) There was "no theory which could justify an exercise of discretion to send a 15-foot 7-inch trailer along a route with a 15-foot 3-inch overpass." (*Id.* at p. 432.) The *Hill* court, therefore, concluded that the plaintiff's "complaint adequately state[d] a theory of liability for a dangerous condition of public property to which section 818.4 [wa]s no defense." (*Ibid*.)

Hill does not support the broad-reaching proposition stated in the treatise because the negligence of the state employee who issued the permit in *Hill* was not disputed: the state's demurrer was sustained on the theory that the state was "immune

from liability for *negligent* issuance of a permit" (*Hill*, *supra*, 91 Cal.App.3d at p. 429, italics added), and the state did not claim on appeal that it was not negligent in issuing the permit. While the "unusual circumstances" of *Hill* could justify a finding of negligence in the very fact of the state's creation of the dangerous condition, there is nothing in *Hill* that stands for the broad-reaching proposition that a public entity's creation of a dangerous condition is per se negligent or wrongful.

Pritchard involved a lawsuit brought under the Public Liability Act of 1923[7] against the City of Long Beach for a collision that occurred when the automobile in which the plaintiff was riding collided with another automobile in an intersection controlled by the city. (*Pritchard*, *supra*, 178 Cal.App.2d at p. 248.) The city had changed the timing on the traffic lights so that drivers in opposite directions simultaneously appeared to have the right of way. (*Ibid.*) The jury found the city liable, and the city appealed. (*Id.* at p. 249.)

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[7] "[T]he Public Liability Act of 1923, [formerly] codified in Government Code, section 53051 [reads]: 'A local agency is liable for injuries to persons and property resulting from the dangerous or defective condition of public property if the legislative body, board, or person authorized to remedy the condition: (a) Had knowledge or notice of the defective or dangerous condition. (b) For a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition.'" (*Pritchard*, *supra*, 178 Cal.App.2d at p. 249.)

In affirming the judgment, the appellate court reasoned that a voluntary act of the city done on its own behalf that created a dangerous condition dispensed with the necessity of notice. (*Pritchard*, *supra*, 178 Cal.App.2d at pp. 254, 257.) The court also noted that where the city "itself created the dangerous condition it is *per se* culpable and notice, knowledge and time for correction have become false quantities in the problem of liability." (*Id.* at p. 256.)

This statement seems to support the treatise's conclusion that if a public entity's employee creates a dangerous condition, "[t]he plaintiff need not prove that the employee's conduct was unreasonable (*i.e.*, negligent or wrongful) in any other respect . . . ." (Cal. Government Tort Liability Practice, *supra*, § 12.42, p. 846.) The *Pritchard* court's statement of per se culpability, however, cannot be applied to a construction of section 835, subdivision (a) because there is no provision similar to subdivision (a) in the Public Liability Act of 1923. (See Sen. committee com. to § 835, reprinted at 32 West's Ann. Gov. Code, § 835, p. 350.) Indeed, when our Supreme Court has cited *Pritchard* approvingly, it has done so specifically noting that a negligent or wrongful act is a prerequisite for liability even when the condition is created by the public entity: "'Although there is no provision similar to [section 835,] subdivision (a) in the Public Liability Act of 1923, the courts have held that entities are liable under that act for dangerous conditions created by the *negligent or wrongful acts* of their employees. *Pritchard v. Sully-Miller*

Contracting Co., [*supra*] . . ..’ (Sen. committee com. to § 835, *supra*, reprinted at 32 West’s Ann. Gov. Code, § 835, p. 301.)” (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 834, italics added.) If we were to accept the treatise’s conclusion as true, there would be no need for the phrase “negligent or wrongful acts.”

In sum, given our analysis of these cases and the plain language of section 835, we reject Metcalf’s argument that a public entity’s conduct that creates a dangerous condition is negligent or wrongful per se under section 835, subdivision (a). Instead, we hold that to establish liability under section 835, subdivision (a) for injury caused by a dangerous condition, a plaintiff must prove that the public entity acted negligently or wrongfully even when the public entity created the dangerous condition.

II

There Was Substantial Evidence To Support The Jury’s Finding That There Was No Negligent Or Wrongful Conduct

Metcalf contends there was insufficient evidence to support the jury’s finding that the County’s employee did not act negligently or wrongfully in creating the dangerous condition. We disagree.

The substantial evidence standard of review “is very well settled.” (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571.) When a finding is attacked as unsupported, we determine whether there is any substantial

evidence, contradicted or uncontradicted, that will support the finding. (*Ibid.*) We resolve all conflicts in favor of the prevailing party and indulge all legitimate and reasonable inferences to uphold the finding if possible. (*Ibid.*)

In this case, there was substantial evidence to support the jury's finding that a "negligent or wrongful conduct of an employee of the County of San Joaquin acting within the scope of his or her employment [did not] create the dangerous condition." The former senior engineer in charge of the traffic division for the County, Sukhminder Chahal, testified that the stop sign was in the best place because a motorist traveling on Sperry Road toward the intersection could see the sign very clearly. If the sign was moved to the right, it would be blocked by the PG&E pole. If the sign was moved to the left, it would obstruct the railroad sign cross bucks and flashing lights. If the sign was moved to the west side of the tracks, it would be obstructed by the railroad sign. The stop sign could not be placed on an island in the middle of the road on the west side of the tracks because there was not enough space and it would be knocked down by trucks.

The County's expert witness, Arnold Johnson, drew the same conclusions as Chahal: 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.

In sum, this testimony provided substantial evidence from which the jury could determine that there was no negligent or

wrongful conduct on the part of the County's employee that created the dangerous condition.

III

A Public Entity's Reasonableness In Creating The Dangerous Condition Negates The Alleged Negligent Or Wrongful Conduct

Metcalf contends that any evidence of County's reasonableness in creating the dangerous condition went not to the jury's finding of lack of negligence but, rather, to the unanswered question on the verdict form that asked whether the County acted reasonably in failing to take sufficient steps to protect against the risk of this incident. We disagree.

It has long been established that negligence is the absence of reasonableness. (*Richardson v. Kier* (1867) 34 Cal. 63, 75, citing Broom's Legal Maxims, 329.) A public entity is relieved of liability under section 835, subdivision (a) if "the public entity establishes that the act or omission that created the condition was reasonable." (§ 835.4, subd. (a).)[8] Given the relationship between negligence and reasonableness, it follows that evidence establishing a public entity's reasonableness in creating the condition negates the element of negligence or

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[8] Section 835.4, subdivision (a) further states that "[t]he reasonableness of the act or omission that created the condition shall be determined 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 taking alternative action that would not create the risk of injury or of protecting against the risk of injury."

wrongfulness required for a finding of liability under section 835, subdivision (a). The jury's verdict in this case reflects that it found the County's employee acted without negligence, i.e., reasonably.

We, therefore, agree with a leading treatise on defenses that states, "Proof of . . . negligence is part of the plaintiff's burden, and lack of . . . negligence is not an affirmative defense to be proved by the defendant." (Schwing, Cal. Affirmative Defenses (2006) Immunity, § 38.111, p. 736.) 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.)

A final point on this issue bears mentioning. The verdict form used in this case was based on VF-1101 contained in the Judicial Council of California Civil Jury Instructions (CACI). CACI VF-1101 (Jan 2006 ed.) is problematic. It asks the jury 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 asks whether the act or omission that created the dangerous condition was reasonable. This latter question has the potential to create an inconsistent verdict: it 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 creation of the dangerous condition. This is inconsistent because, as we have explained, the existence of negligence

necessarily means the absence of reasonableness. In this case, however, the jury never encountered this problem because it found that the County's employee did not act negligently or wrongfully and never answered the further question phrased in terms of reasonableness.

IV

There Was Substantial Evidence To Support The Jury's Finding That The Public Entity Did Not Have Notice Of The Dangerous Condition

Metcalf contends, notwithstanding the jury's finding of a lack of negligent or wrongful conduct, there was insufficient evidence to support the jury's finding that the County did not "have notice of the dangerous condition for a long enough time to have protected against it." We disagree.

It was undisputed that the County created the intersection and related signage. When a public entity creates the dangerous condition, the notice requirements of subdivision (b) do not apply. (*Brown v. Poway Unified School Dist.*, *supra*, 4 Cal.4th at p. 835.) This is because knowledge is presumed. (*Id.* at 833.) In such circumstances, therefore, liability has to be premised not on notice of the condition but, rather, on negligent or wrongful conduct creating the condition.

In this case, however, the theory of liability outlined in the complaint was premised on both negligent creation and notice. And there was evidence from which the jury could have found that the intersection and related signage were not

dangerous when completed but, rather, became dangerous later in time. Indeed, the parties presented evidence that, in 1984, the roadway was annexed to the city, the area became urban, the traffic pattern changed, and thereafter, at least two accidents occurred at the intersection. From these circumstances, then, it was arguable that even though the County created the intersection and related signage and was aware of the physical condition that it had created, it needed notice of the property's dangerous condition.[9]

Here, there was substantial evidence from which the jury could have found a lack of notice. Chahal testified that the County has an inspection system to check on the roadways in a systematic manner,[10] there were no complaints about the intersection, and he was unaware of anything about the "volume and type of traffic collisions" that occurred in the intersection that required the County to "consider a change in the design of the intersection or the placement of the signs."

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[9] We are aware that Metcalf's closing argument claimed the County had notice of the dangerous condition for 60 years, which is the approximate time the intersection had been in existence. However, if that was the only theory on which the jury could have found notice, the County's liability should have been premised only on a negligent or wrongful act creating the condition and the notice issue should not have gone to the jury.

[10] Consistent with this evidence, the jury was instructed that "[i]n deciding whether County of San Joaquin should have discovered the dangerous condition, you may consider whether County of San Joaquin had a reasonable inspection system and whether a reasonable system would have revealed the dangerous condition."

Johnson similarly testified there was nothing in the accident history of the intersection that should have alerted the County of the need to change the location of the stop sign or take other measures to control the possibility of an accident.

Given our conclusion that there was substantial evidence to support the jury's findings, we need not address Metcalf's final contention on appeal that "following reversal of the judgment, this court should direct a new trial limited to the liability issues that were not resolved by the jury."

DISPOSITION

The judgment is affirmed. The County shall recover its costs on appeal. (Cal. Rules of Court, rule 27(a)(1).)

ROBIE, J.

We concur:

MORRISON, Acting P.J.

CANTIL-SAKAUYE, J.

APPENDIX A

SPECIAL VERDICT

"We answer the questions submitted to us as follows:

"1. Did the County of San Joaquin own or control the property?

__X__ Yes _____ No

"If your answer to Question 1 is yes, then answer Question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

"2. Was the property in a dangerous condition at the time of the incident?

__X__ Yes _____ No

"If your answer to Question 2 is yes, then answer Question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

"3. Did the dangerous condition create a reasonably foreseeable risk that this kind of incident would occur?

__X__ Yes _____ No

"If your answer to Question 3 is yes, then answer Question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

"4. Did the negligent or wrongful conduct of an employee of the County of San Joaquin acting within the scope of his or her employment create the dangerous condition?

_____ Yes __X__ No

"Answer question 5.

"5. Did the County of San Joaquin have notice of the dangerous condition for a long enough time to have protected against it?

_____ Yes __X__ No

"If your answer to either Question 4 or Question 5 (or to both of them) is yes, then answer Question 6. If you answered no to both Question 4 and Question 5, stop here, answer no further questions, and have the presiding juror sign and date this form.

"6. Was the County of San Joaquin acting reasonably in failing to take sufficient steps to protect against the risk of this incident?

_____ Yes _____ No

"If your answer to Question 6 is no, then answer Question 7. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

"7. Was the dangerous condition a substantial factor in causing the incident?

_____ Yes _____ No

"If your answer to Question 7 is yes, then answer Question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

"8. Was Thomas Metcalf negligent?

_____ Yes _____ No

"If your answer to Question 8 is yes, then answer Question 9. If you answered no, answer Question 10.

"9. Was Thomas Metcalf's negligence a substantial factor in causing the incident?

_____ Yes _____ No

"If your answer to Question 9 is yes, then answer Question 10. If you answered no, insert the number zero (0) next to Thomas Metcalf's name in Question 10.

"10. What percentage of responsibility for the incident do you assign to the following? Insert a percentage for each:

County of San Joaquin: ___%

Thomas Metcalf: ___%

TOTAL: 100%

Signed: [Signature]
PRESIDING JUROR

"Dated: 6-10-04"