



Investigating and conducting written discovery in roadway-design cases

GETTING PAST THE ROADBLOCK OF THE COMMONLY ASSERTED DEFENSE OF DESIGN IMMUNITY

Too often, we find ourselves with a client who is injured in an auto accident involving a driver who is grossly underinsured. In these cases, the only remaining avenue for potential recovery may be a roadway design-defect claim against the public entity that owned or controlled the road. Roadway-design cases against public entities are challenging for several reasons, but particularly because of the commonly asserted defense of statutory design immunity.

It is almost inevitable that the plaintiff will face a motion for summary judgment raising the immunity issue, which will become a roadblock that the plaintiff must overcome to obtain a recovery in the case. Therefore, you need to prepare the case by anticipating this motion from

day one. The earlier you can gather the relevant information, the better position you will be in to succeed on the claim.

Dangerous condition of public property

It is important to have a good understanding of the essential elements of a roadway-design claim, the components of the design-immunity defense, and the circumstances for loss of immunity to guide your investigation. To establish a claim of a dangerous condition of public property, the plaintiff must show that: (1) defendant owned or controlled the property; (2) the property was in a dangerous condition; (3) the condition created a reasonably foreseeable risk of the kind of incident that occurred;

(4) defendant had notice of the condition in time to protect against it or the negligent conduct of defendant's employee acting within scope of employment created the dangerous condition; and (5) the condition was a substantial factor in causing the plaintiff's harm. (Gov. Code, § 835.)

A dangerous condition is something that creates a substantial risk of injury to the public when the property is used with reasonable care in a reasonably foreseeable manner. (Gov. Code, § 830(a).) The mere failure to provide a traffic-control signal or device is not a dangerous condition. However, the absence of a device along with other circumstances in evidence may be considered in determining

See Wong, Next Page

whether the property was dangerous. (Gov. Code, § 830.4.) In other words, a combination of factors can combine to create a dangerous condition, so think broadly during your investigation. You will want to examine things such as, road width, lighting, signage, traffic signal, pavement markers, absence of a barrier, length of crossing, volume of vehicle and pedestrian traffic, and high traffic speed.

A public entity is not responsible for the lack of a warning device unless a reasonably careful person would not notice or anticipate the dangerous condition of property without the device. (Gov. Code, § 830.8.) Courts have described this situation as a “concealed trap.” (*Washington v. City and County of San Francisco* (1990) 219 Cal.App.3d 1531, 1537.) There may be a concealed trap if the entity fails to post signs warning of a sharp banked curve ahead on a road, there is a hidden intersection behind a promontory, or the entity knows of a non-obvious defect in the roadway that causes moisture to freeze and creates an icy surface.

(*Chowdhury v. City of Los Angeles* (1995) 38 Cal.App.4th 1187, 1196-97.) Even if a sign was provided, that could become a trap for an unwary motorist if the sign is an inadequate warning, poorly maintained, obscured, in an unanticipated position or is deceptive. (*Id.* at 1194-95.)

The plaintiff must show that the defendant had notice of the condition and that the condition was dangerous. Notice can be actual or constructive. (Gov. Code, § 834.2) The absence of prior similar accidents is not dispositive on the notice issue, but a factor considered. (*Lane v. City of Sacramento* (2010) 183 Cal.App.4th 1337, 1346.) “A particular type of accident may be reasonably anticipated even if such an accident had not occurred before.” (*Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 780.)

Design immunity

Once the plaintiff has met the burden to show a dangerous condition of the roadway, the burden then shifts to the public entity to establish design immunity. Immunity applies when the following three conditions are met:

(1) there is a causal relationship between the design and the incident; (2) there was discretionary approval of the design before construction or design was prepared in conformity with standards previously approved; and (3) there is substantial evidence supporting the reasonableness of the design. (Gov. Code, § 830.6.)

At this point, it becomes the plaintiff’s job to poke holes to create triable issues regarding one or more of the necessary components for immunity. If unsuccessful, the burden will shift back to the plaintiff to establish a loss of immunity.

Investigate whether there was actually a design or plan. If the as-builts do not conform with the specifications in the design drawings, you should be able to eliminate the causal relationship element. Immunity also fails where the condition at issue is not included in the design or is a substantial divergence from design

parameters. (See, *Martinez v. County of Ventura* (2014) 225 Cal.App.4th 364.)

When examining the discretionary-approval element, figure out who approved the design, under what authority, and the basis for the approval. You want to verify that the person who made the decision was vested with the authority to approve the design. Implied discretionary approval is not sufficient. Additionally, the decisionmaker’s approval must fall within the scope of their designated authority. (See, *Castro v. City of Thousand Oaks* (2015) 239 Cal.App.4th 1451.)

Attacking the reasonableness of the design is often difficult because you must show that the public entity’s proof of reasonableness does not constitute substantial evidence. Showing a conflict in evidence or dispute between expert-design opinions is not enough. Rather, you must produce expert testimony that the design feature was inherently unreasonable. The design may be inherently unreasonable if there is a higher-than-expected accident rate or if the public entity failed to follow its own design standards.

Loss of design immunity

If the public entity is successful in establishing immunity, the plaintiff’s last opportunity to succeeding on a claim is to show that the entity lost its immunity under the limited exception set forth in *Cornette v. Dept. of Transportation* (2001) 26 Cal.4th 63. The entity loses its immunity if the plaintiff shows that: (1) the roadway design became dangerous due to change in physical condition; (2) defendant had notice of the dangerous condition created because of a change in physical condition; and (3) defendant had a reasonable time to obtain the funds to do the necessary corrective work or defendant could not correct the condition due to practical impossibility or lack of funds and did not provide an adequate warning of the dangerous condition.

The existing case law neither defines nor provides examples of what constitutes a change in physical condition. Rather, it tells us what is not enough to be a change in physical condition on their own, including:

- A great increase in traffic volume that does not exceed the design capacity of the freeway (*Wyckoff v. State* (2001) 90 Cal.App.4th 45.);
- An increase in speed limit (*Ibid.*);
- The mere passage of time (*Cameron v. State* (1972) 7 Cal.3d 318.);
- Technological advances in the development of median barriers (*Sutton v. Golden Gate Bridge, Highway & Transportation Dist.* (1998) 68 Cal.App.4th 1149.);
- Changes in the public entity’s design standards (*Dole Citrus v. State* (1997) 60 Cal.App.4th 487); and
- The fact that median barriers are installed on similar roads. (*Dammann v. Golden Gate Bridge, Highway & Transportation Dist.* (2016) 212 Cal.App.4th 335.)

Absent further guidance from the courts, it is advisable to identify several conditions that may collectively function as a changed physical condition and distinguish your situation from the aforementioned cases.

See Wong, Next Page

Pre-litigation Public Records Act requests

One benefit of claims against public entities is that they maintain lots of records that you can acquire before litigation through a Public Records Act request. Obtaining information early will help you get a head start on developing your case. Another potential benefit of a Public Records Act request is that the public information officer may be more generous in disclosing documents in response to your request than the public entity's attorney will be in responding to discovery.

Depending on the facts of your case, you may want to request the following items:

- Traffic Collision Report for your incident, including photos and video;
- CAD report and audio for your incident;
- SWITRS report for the incident location (provides key data from traffic collision reports, which may be relevant to notice of a dangerous condition or a changed physical condition);
- TASAS (CalTrans accident history tables for highways);
- Traffic studies (e.g., speed limit, traffic volume, pedestrian volume, classification counts, signal warrant, median barrier warrant);
- Design plans, drawings, specifications, and as-built plans for the roadway (including those proposed or considered, but not implemented);
- Photologs;
- The manuals, guidelines, and standards relied on for designing the roadway;
- Internal memos and communications;
- City council/board meeting agendas and minutes;
- Maintenance records for the roadway;
- Comments and complaints from the public about the dangerous condition;
- Contracts that were awarded for any modification or improvement of the subject roadway.

Public entity websites

The public entity's website may contain a treasure trove of free and readily accessible information relevant to your

case. For example, some city and county public-entity websites contain board-meeting agendas and minutes, resolutions, legislation, roadway project information, and design policies and guidelines. The type of information available online will vary depending on the public entity.

Visit the California Department of Transportation's website to obtain a copy of the California Highway Design Manual, which contains the state's policies and procedures regarding highway design functions. (<http://www.dot.ca.gov/design/manuals/hdm.html>) You can also download copies of the federal and state versions of the Manual on Uniform Traffic Control Devices. The manual provides the standards and specifications for all traffic control devices on public streets, highways, and bikeways in California. (<https://mutcd.fhwa.dot.gov/> and <http://www.dot.ca.gov/trafficops/camutcd/>)

Images of roadway

Be sure to visit the scene of the incident as soon as possible to take lots of photos of the roadway and the surrounding environment because you never know when changes will be made. Google Maps and Google Earth are also useful tools for exploring and documenting the scene. Google Maps is a free online resource, which provides a map of a street, intersection, or a neighborhood. You can also view 2D and 3D aerial images of the scene. The street view has a large collection of imagery collected over the years, which enables you to see how the street and surrounding area has changed over time.

Google Earth is a database of satellite imagery, airplane photography, and street-view video that enables you to view any location in the world in 3D as well as save and print the imagery or create a video tour. Other helpful features include the ability to view historical images and to measure the distance between any two points that you designate, such as the length of a crosswalk.

Written discovery

For the initial set of written discovery requests, you should ask for the same

items you sought in your Public Records Act request. Although seemingly duplicative, you never know if you will receive additional or different documents because a different person is responding to your request. Also, propound discovery requests addressing the potential liability and immunity issues based on the information you obtained pre-litigation.

It is helpful to hire a traffic engineering consultant early on to review the materials received from the Public Records Act request. The consultant can provide some initial insights regarding your theory of liability and suggest additional ideas for discovery. Keep in mind that this consultant's opinions will be crucial to oppose a motion for summary judgment and to establish liability at trial.

Conclusion

It can be a tough road litigating roadway-design cases, but with careful planning and strategic digging for information, you will put yourself in the best position to overcome potential obstacles in these cases.

Kimberly Wong is a trial team leader and trial attorney at The Veen Firm, P.C. in San Francisco. She litigates complex catastrophic personal injury cases involving negligence, premises liability, wrongful death, products liability, industrial injuries, and exceptions to the workers' compensation exclusive remedy doctrine. Ms. Wong is a frequent lecturer and author of published articles on various topics related to personal injury litigation, including third-party liability claims arising from workplace injuries. She has had several settlements featured in The Recorder's annual report of "California's Million-Dollar Settlements." Ms. Wong has also been selected by her peers to the Northern California Super Lawyers Rising Star list each year from 2012 to the present and the Super Lawyers list in 2018. She serves on the Board of Directors of the Consumer Attorneys of California and Queen's Bench in addition to being an active member of the San Francisco Trial Lawyers Association and the Asian American Bar Association.

