Design Immunity: Discovery to Defeat Summary Judgment

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I. INTRODUCTION

Design immunity, codified at Government Code § 830.6, is one of the strongest and most effective tools used by public entities to avoid liability for dangerous conditions of public property. The elements of the immunity are basic, but with proper and focused discovery, you can establish that the entity has lost the immunity through changed conditions of public property. This article is intended to provide a basic outline of design immunity law and suggestions as to what discovery can be done in anticipation of a summary judgment based upon design immunity.

II. THE LAW OF DESIGN IMMUNITY

As government liability is derived from statute, so are government immunities. Design immunity, codified by Government Code § 830.6 is one of the most effective and far-reaching of these immunities. The Legislature intended § 830.6 to prevent a jury from reweighing the factors that were considered by the entity in approving the design.[1] The burden of proof for this affirmative defense rests with the defendant[2] and it has been long held that application of design immunity is an issue for the Court, and not the jury.[3]

A. How Government Code § 830.6 Works

Government Code § 830.6, if properly plead and proved, provides immunity to a public entity if the following three elements are satisfied:

1. A showing that the injuries were caused by a feature inherent in an approved plan or design.
2. That the plan or design was discretionally approved prior to construction or improvement
3. There exists substantial evidence supporting the reasonableness of the plan or design.

1. Injuries Caused by an Inherent Feature

This element requires the entity to show that some feature of the design was the cause of the injuries.[4] The element may also be satisfied if the design shows the absence of a safety feature that would have prevented the injuries.[5] This element is not applicable to those risks that arise during construction, even if the finished product is a feature of the design.[6]

Also, this immunity does not protect from a feature that was either not part of the design or was a substantial divergence from design parameters. The former would be outside factors[7] and those changes that were made during the construction that were not part of the design[8] and the latter would apply when the finished product does not substantially comport with the design.[9] Finding that the feature, as-built, does not conform with the specifications of the design is likely the most common way to attack the elements of the immunity.

2. Discretionary Approval of the Design

The design must be approved *before* construction by either a) the legislative body or some employee with the authority to discretionarily approve the design, or b) by showing that the design conformed with previously approved standards.[10] Also, the injury-causing design feature has to be on the design that is approved, not added at some later date.[11]

Authority to approve a design is a case-specific analysis.[12] A city superintendent that was not an engineer or architect has been found to have authority,[13] but a consultant engineer has been found to lack the requisite authority.[14] Who actually has authority is often declared by local statute. In discovery, it is important to determine who approved the plans, their authority to do so, and the basis of the approval.

Even if an injury-causing feature is not identified within a design, this element can be satisfied if the entity can show it conforms with previously-approved standards.[15] This has been applied in claims regarding conformity of signage,[16] median width with regard to barrier requirements,[17] traffic signal timing[18] and highway limit lines.[19]

3. Evidence of Reasonableness of Design

This element is satisfied with “any substantial evidence” that the plan or design could have been adopted by a reasonable public entity or employee.[20] This element is often difficult to challenge, but it is essential that you determine the basis for the approval, thereby requiring the public entity to establish the substantial evidence requirement.

B. Defeating Design Immunity

Even if a public entity can satisfy the element of § 830.6 design immunity, a plaintiff can prove that the entity has lost that immunity by showing:

1. That the design has become a dangerous condition as a result of changed circumstances,
2. That the entity had actual or constructive notice of the dangerous condition that had been created, and
3. That the public entity either had reasonable time and funds to remedy the condition or, if remedy was impossible or funds were unavailable, the public entity failed to provide adequate warnings to users.[21]

Changed circumstances can be mean many different things. It is most often established by showing a combination of a significant increase in traffic, abnormal elevation of accidents, and changes in signage, striping or other conditions. However, the passage of time or increased traffic, alone, is not a changed condition.[22] Nor is a redrafting of design standards,[23] installation of center medians on other similar roads,[24] technological advances in barrier design,[25] or the mere fact that a speed limit was increased.[26] But these can be evidence as to what measures should have been taken to address changes in roadway use.

Notice of changed condition can be established through accident history. A plaintiff must show that it is either abnormal or that there is a higher-than-expected accident rate on the road.[27] In a case against the State of California, it is important that you use the TASAS accident summaries or SWITRS accident summary printouts, which will give you essential accident information. You also should look at the response of the public entity to the accident information as well as the manner in which they gather accident information, e.g. do they wait for a computer printout or do they proactively monitor? Last, whether the public entity had time and funds or adequately warned of the condition is largely a factual argument based upon discovery.

III. FORMING A DISCOVERY PLAN TO DEFEAT DESIGN IMMUNITY

In dangerous condition of public property suits, a plaintiff must anticipate the design immunity defense from day one and perform discovery with the summary judgment opposition in mind.

A. Interrogatories and Requests for Documents

Public entities retain a wealth of information and documents, but it remains your job to form the proper requests. Below is a standard outline of initial interrogatory/document request categories.

• Road Design – a public entity can't claim design immunity without satisfying the elements of Government Code § 830.6. For both original construction and each improvement to your defined area, find out who approved the work, a description of what work was done, the dates the act were performed, and who recommended the work.

o Define your subject area to be large enough to provide a view as to what the entity had done at other points on the same road. Also make sure to include the area on both sides of the roadway extending through the entity's right of way. This may provide evidence of notice of a dangerous condition.

- o Make sure that you include design plans, "as-builts," drawings, specifications, environmental impact reports, negative declarations, project reports and internal memos as well as communication from third parties as part of your document request.
- o Proposed modifications (especially those that were never implemented) are another often-overlooked category. These documents also may show that the entity had notice of a dangerous condition but rejected a suggested solution.
- o Design Manuals – what the entity relied upon can support an argument regarding the reasonableness of its decisions.
- o Contract Plans – compare contract documents with design plans to verify that the road was built in accordance with the plans that were approved.

- Maintenance – first, maintenance responsibilities can show ownership/control of the subject property. Second, it can also be used to show that the entity may have had notice of the dangerous condition as well as changes that required further action.
- Accident History – this is essential. Chapter 3 of the Caltrans Traffic Manual can be found at http://www.dot.ca.gov/hq/traffops/signtech/signdel/pdf/TMChapter3.pdf. Records of the SWITRS (Statewide Integrated Traffic Records System) and TASAS (Traffic Accident Surveillance and Analysis System) are essential if you are attempting to show a changed condition. A review of this chapter prior to drafting any discovery will educate you as to what records are available to the entity and, if relevant, what is discoverable.
  - o Police Reports – the SWITRS and TASAS printouts only include brief summaries. Request the underlying accident reports to see if a case can be made for notice.
  - o Lawsuits – a prior lawsuit for dangerous condition at or near the accident location can certainly provide notice also.
  - o Other – an often-overlooked source of accident information is reports from tow services who respond to accident scenes. Frequently, you will find evidence of other accidents that did not get into the State computers.
- Joint Powers – there may be another entity responsible for the condition, and this information may be very useful.
- Budgets – this information relates to the third element necessary to show that a public entity has lost its design immunity.
- People – first request the identities and job title of each person in the chain of command for responsibilities pertaining to design, traffic safety, and maintenance for the subject area.

B. Depositions

First, review the persons identified in the written discovery responses and take the depositions of those that may have useful information. Second, the person most qualified (PMQ) depositions (CCP § 2025.230) should be used to force the entity to commit to a position and inform you as to what else needs to be discovered.

PMQ depositions regarding designs, basis of approval of design, alternate designs considered, accident information and maintenance can shed light on this analysis. These deponents should be questioned with regard to both of the avenues of attack for design immunity, to argue the elements of Government Code § 830.6, and to support a possible future argument for loss of design immunity.

IV. OPPOSING THE SUMMARY JUDGMENT

Properly drafted initial discovery propounded in advance of any summary judgment allows you to perform a second round of fact-specific discovery once the motion is served. This process takes time, and it benefits you to have the majority of the information in your possession as early as possible. Also, in the event that the summary judgment is granted, appeals are heard with *de novo* review but there will be no chance for further discovery.

V. CONCLUSION

Establishing and defeating design immunity is a technical, fact-dependent exercise. Planning for the often-inevitable summary judgment starts at the beginning of the suit, before the summary judgment motion is ever filed. This practice should afford you and your clients the best chance at surviving summary judgment. ■

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[1] *Baldwin v. State* (1972) 6 Cal.3d 424, 432 n7.

[2] *Cameron v. State* (1972) 7 Cal.3d 318, 325.

[3] *Alvarez v. State* (1999) 79 Cal.App.4th 720, 727.

[4] *Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931, 940.

[5] *BART Dist. v. Superior Court* (1996) 46 Cal.App.4th 476.

[6] *Winig v. State* (1995) 37 Cal.App.4th 1772, 1777.

[7] *Flournoy v. State* (1969) 275 Cal.App.2d 806.

[8] *Mozzetti v. City of Brisbane* (1977) 67 Cal.App.3d 565.

[9] See *Wyckoff v. State* (2001) 90 Cal.App.4th 45.

[10] *Thomson v. City of Glendale* (1976) 61 Cal.App.3d 378.

[11] *Johnston v. County of Yolo* (1969) 274 Cal.App.2d 46.

[12] See *Johnston, supra,* and *Uyeno v. State* (1991) 234 Cal.App.3d 1371.

[13] *Thomson, supra*, 61 Cal.App.3d at 385.

[14] *Levin v. State* (1983) 146 Cal.App.3d 410.

[15] *Weinstein v. Department of Transportation* (2006) 139 Cal.App.4th 52, 59.

[16] *Id*.

[17] *Higgins v. State* (1997) 54 Cal.App.4th 177, 186.

[18] *Uyeno, supra,* 234 Cal.App.3d 1371.

[19] *Hefner v. County of Sacramento* (1988) 197 Cal.App.3d 1007.

[20] *Higgins, supra,* 54 Cal.App.4th 177.

[21] *Cornette v. Department of Transportation* (2001) 26 Cal.4th 63.

[22] *Mirzada v. Department of Transportation* (2003) 111 Cal.App.4th 802.

[23] *Dole Citrus v. State* (1997) 60 Cal.App.4th 486, 493, see also *Alvarez v. State* (1999) 79 Cal.App.4th 720, 738.

[24] *Mirzada* 111 Cal.App.4th 802.

[25] *Sutton v. Golden Gate Bridge Highway and Transp. Dist.* (1998) 68 Cal.App.4th 1149, 1162.

[26] *Wyckoff, supra,* 90 Cal.App.4th at 60.

[27] See *Weinstein* 139 Cal.App.4th 52, see also *Compton v. City of Santee* (1993) 12 Cal.App.4th 591, 599.