Dangerous Conditions: Avoiding and Defending Public Property Liability

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I. INTRODUCTION

Various public entities throughout California are constantly plagued with dangerous condition of public property claims. These claims include everything from raised sidewalks and "hidden" parking lot wheel stops, to "improper" road conditions. But dangerous condition claims can also include unique allegations such as a park swing that moves too fast, a window at a public building which is too clean, or allegations that a crosswalk should have been painted in the middle of a highway. Whatever the condition that may be alleged, Dangerous Condition of Public Property ("DCPP") claims have been on the rise throughout the state in recent years. Because of this, it is important that all public officials and employees understand the basic elements of and defenses to DCPP actions. This presentation will summarize the elements needed to establish a claim for a dangerous condition of public property, as well as the common immunities that can be asserted. Additionally, this presentation will provide practical advice on how to implement steps to prevent the tide of rising dangerous condition claims, as well as tactics and strategies for defending these claims once litigation has started. Lastly, this presentation will provide pointers to assist counsel in the preparation of a Motion for Summary Judgment should the opportunity present itself.

II. WHAT IS A DANGEROUS CONDITION OF PUBLIC PROPERTY AND WHAT MUST A PLAINTIFF PROVE?

A. What is the Definition of Public Property?

"Property of a public entity" or "public property" are defined as "real or personal property owned or controlled by the public entity, but do not include easements, encroachments and other property that are located on the property of the public entity, but are not owned or controlled by the public entity."[2] Thus, for example, property outside city limits can be public property of a city, if the city owns or controls it. Similarly, property within the city's limits might not be considered property of an entity if it is not owned or controlled by the city (property owned by a school district for example).

To determine if a public entity has sufficient control over a particular property, the key issue to look at is whether or not the public entity had the "power to prevent, remedy or guard against the dangerous condition."[3] For example, a City may be subject to liability even if it does not own the property but maintains or repairs it.

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[2] *Government Code* §830(c)

[3] (*Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 990.)

B. What is a Dangerous Condition?

Government Code Section 830(a) defines a "Dangerous Condition" as "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***."[4]

A condition is not dangerous if a court "viewing the evidence, most favorably to the plaintiff, determines as a matter of law that the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used."[5]

1. Trivial Defect Doctrine

While some conditions appear obviously dangerous (a giant sinkhole in the middle of a busy intersection, for example) others may be more difficult to determine (such as a two-inch lift in a section of a sidewalk). In dangerous condition cases involving potholes or uneven sidewalks, whether the alleged dangerous condition is substantial or trivial will often be a hotly litigated issue.

Though courts often refer to this principle as the "trivial defect defense," it is not actually an affirmative defense.[6] Rather, the plaintiff has the burden of proof of establishing that the defect actually caused his injury and was substantial rather than trivial.[7]

For example, as it pertains to sidewalks, the height of the differential is the first key question, and the *Huckey* case holds that "[s]idewalk elevations ranging from three-quarters of an inch to one and one-half inches have generally been held trivial as a matter of law."[8] The Court in *Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719, 725–726, references three cases in which the size of the differential was not dangerous as a matter of law. In determining whether a particular defect is substantial or trivial, "the court should *not* rely solely upon the size of the defect."[9] "Instead, the court should [also] determine whether there existed any circumstances surrounding the accident which might have rendered the defect more dangerous than its mere abstract depth would indicate."[10]

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[4] *Government Code* §830(a) (emphasis added)

[5] Gov. Code §830.2.

[6] (*Caloroso v. Hathaway* (2004) 122 Cal.App.4th 922, 927.)

[7] (*Ibid*.).

[8] (*Huckey v. City of Temecula* (2019) 37 Cal.App.5th 1092, 1107.)

[9] (*Id. at* 1105 [*emphasis in original*].)

[10] (*Fielder v. City of Glendale* (2023) 71 Cal.App.3d 719, 732.)

C. What are the elements a Plaintiff must prove to sustain a dangerous condition claim?

Government Code Section 835 lists the elements that a Plaintiff must prove in order to successfully establish a DCPP claim:

1. The public entity owned or controlled the property;
2. The property was in a "dangerous condition" at the time of the injury;
3. The dangerous condition created a reasonably foreseeable risk of the kind of injury that occurred;
4. The negligent or wrongful conduct of the public entity's employees acting within the scope of employment created the dangerous condition or the public entity had (actual or constructive) notice of the dangerous condition for a long enough time to have protect against it and did not;
5. Plaintiff was harmed; and
6. The dangerous condition was a substantial factor in causing the Plaintiff's harm.[11]

Plaintiff must prove all of the above elements to meet their burden in proving a dangerous condition of public property cause of action. Common law negligence is not the applicable standard as Government Code Section 835 is the only means a Plaintiff may use to seek redress from a public entity for claims of damages resulting from its property.[12] Should a Plaintiff assert such a common law negligence claim, it is advisable to meet and confer with Plaintiff's counsel early and provide them an opportunity to dismiss any improper negligence claims prior to filing a demurrer.

D. "Protect Against"

Government Code section 830(b) provides that a public entity can "protect against" a dangerous condition by repairing it, remedying it, or providing safeguards or warnings.[13] Section 835(b) further specifies that a public entity cannot be held liable if it has taken such measures to protect against the condition prior to the incident giving rise to Plaintiff's claim.

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[11] Gov. Code §835; CACI No. 1100; (*Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 758.)

[12] Gov't Code 815: Except as otherwise provided by statute: (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person; *Hilts v. Solano County* (1968) 265 Cal.App.2d 161, 169-171 (negligence claims against public entities are improper because they are not founded on statute). "Section 835 [of the Government Code] is the sole statutory basis for a claim imposing liability on a public entity based on the condition of public property." (*Brenner v. City of El Cajon* (2003) 113 Cal.App.4th 434, 438, citing, *Brown v. Poway Unified School Dist*. (1993) 4 Cal.4th 820, 82)

[13] (*Foremost Dairies, Inc. v. State of California* (1986) 190 Cal.App.3d 361, 367.)

Case law establishes that a public entity is not liable for failing to warn of a condition that is already known to the plaintiff.[14] Courts have repeatedly held that adequacy of a warning may be resolved as a matter of law where reasonable minds can reach only one conclusion.[15]

E. Actual v. Constructive Notice

Unless Plaintiff establishes that the alleged dangerous condition was created by the negligent or wrongful conduct of the public entity's employees acting within the scope of employment, Plaintiff will need to establish that the public entity had actual or constructive notice of the alleged dangerous condition a sufficient time prior to the incident to have protected the public against the alleged condition.

1. Actual Notice

To prove a public entity had actual notice of a dangerous condition, Plaintiff must establish that the entity actually knew of the condition and knew or should have known of its dangerous character. This is typically demonstrated by the public entity receiving a prior claim relating to the same property and its condition or a complaint or repair request prior to the incident giving rise to the claim.[16]

2. Constructive Notice

To prove a public entity had constructive notice of a dangerous condition, Plaintiff must prove that the condition existed long enough for the public entity to know or should have known of the alleged dangerous condition and that the condition was so obvious that it should have discovered the condition and its dangerous character if it had used due care. An example of evidence of due care would be an inspection system that would have potentially discovered the dangerous condition.[17]

III. COMMON CAUSES OF DANGEROUS CONDITION LIABILITY CASES

Virtually any condition of public property that is causally connected to an injury-causing incident could be found to be a dangerous condition if the proper elements are asserted and proven. Thus, dangerous condition liability has been asserted for such varying conditions as landslides, backed up sewers, crowd control at a 4th of July celebration, the design of park swings, and even a library window that was allegedly too clean.

However, the most common dangerous condition situations relate to sidewalk lifts, street potholes or lifts, or issues relating to traffic intersections. Because of this, public entities should

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[14] (*Belcher v. City and County of San Francisco* (1945) 69 Cal.App.2d 457, 463; *Bunker v. City of Glendale* (1980) 111 Cal.App.3d 325, 333.)

[15] (*Foremost, supra*, 190 Cal.App.3d at p.367.)

[16] Govt. Code §835.2(a)

[17] *Id*. at §835.2(b)

keep alert to possible issues on their sidewalks, streets and intersections, lest they find themselves facing significant tort liability.

IV. IMMUNITIES

A. Trail Immunity

Under Government Code Section 831.4, "A public entity . . . is not liable for an injury caused by a condition of: (a) Any unpaved road which provides access to fishing, hunting, camping, hiking, riding, including animal and all types of vehicular riding, water sports, recreational or scenic areas . . .;(b) Any Trail used for the above purpose; (c) Any paved trail walkway, path, or sidewalk on an easement of way which has been granted to a public entity, which easement provides access to any unimproved property."

To effectively take advantage of this immunity, public entities should post clear labels and signage to denote the existence of a trail. Additionally, for the specific form of paved trail as outlined in Government Code Section 831.4(c), in order to take advantage of this immunity, a clear and distinct warning must be posted of any known hazards that are present.

B. Design Immunity

Per Government Code Section 830.6, "Neither a public entity nor a public employee is liable … for an injury caused by the plan or design or construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body … or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously approved …."

A public entity claiming design immunity must establish three elements: (1) Causal relationship between the plan or design and the accident; (2) Discretionary approval of the plan or design prior to construction; and (3) Substantial evidence supporting the reasonableness of the plan or design.[18]

"The first two elements—causation and discretionary approval—involve factual questions to be resolved by a jury, unless the facts are undisputed. The third element—the existence of substantial evidence supporting the reasonableness of the plan or design—is a legal matter for the court to decide."[19] On the third element, " '[a] mere conflict in the testimony of expert witnesses provides no justification for the matter to go to a lay jury who will then second-guess the judgment of skilled public officials.' "[20]

[18] (*Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 69.)

[19] (*Id.*)

[20] (*Menges v. Department of Transportation* (2020) 59 Cal.App.5th 13, 21.)

As to the first element of causal relationship, 'This element is ordinarily established by the allegations in the complaint that the injury occurred as a result of the plan or design."[21] Simply put, the public entity has only to show that the property design and Plaintiff's allegations relate as alleged to satisfy the first Design Immunity Element.

Regarding the second element of discretionary approval, Courts consistently hold the approval element requires a simple showing that engineers prepared the plans, and that they were signed by a person or legislative body with discretionary authority to do so.[22] If the design is approved by an employee, the employee must have discretionary authority delegated to them by law. The basis of the authority could be found in a statute, ordinance, or charter. However, the person with discretionary authority may delegate that authority to another person. For example, in *Thomson v. City of Glendale* (1976) 61 Cal.App.3d 378, the city charter, and city code conferred authority on the director of public works, and the director then delegated authority to the superintendent of maintenance. The Court of Appeal held an employee had discretionary authority to approve a plan.[23] Thus, the person exercising discretionary authority need not be the person who is granted authority by law.

The third element of design immunity requires that the public entity provide "any substantial evidence" of the reasonableness of the design. Under the third prong of design immunity, Government Code Section 830.6 design immunity applies:

"[i]f the trial or appellate court determines that there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefore or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefore."

When a public entity moves for summary judgment based on design immunity, the trial court must only find that there is "any" substantial evidence that the plan is reasonable; it need not find that the plans are reasonable by a preponderance of the evidence. This is the same

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[21] (Van Alystyne, *Cal. Govt. Tort Liability Practice* (CEB 2019), §12.69; *Fuller v. Department of Transp.* (2001) 89 Cal.App.4th 1109, 1114 (public entity may rely on plaintiffs' pleadings to establish element of causation.)

[22] (*See, e.g. Alvarez v. State* (1999) 79 Cal.App.4th 720, 734 (disapproved on other grounds); *Cornette v. Department of Transportation* (2001) 26 Cal.4th 65 (approval satisfied by "detailed plan, drawn up by a registered professional engineer, and approved by district and State officials exercising their discretionary authority"); *Ramirez v. City of Redondo Beach* (1997) 192 Cal.App.3d 515 (plans signed by city engineers established approval); *Anderson v. City of Thousand Oaks* (1976) 65 Cal.App.3d 82, 89-90 ("a detailed plan, drawn up by a competent engineering firm, and approved by the city council in the exercise of its discretion, is certainly persuasive evidence of both prior approval and reasonableness for purposes of the design immunity defense.") "There is no requirement that the design be expressed in any particular form. The plan need only be sufficiently explicit to assure that it is understandable to the employee giving the approval." (*Thomson v. City of Glendale* (1976) 61 Cal.App.3d 378, 385.)

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

substantial evidence standard that a Court of Appeal would apply to a jury verdict.[24] Typically, "any substantial evidence" consists of an expert opinion as to the reasonableness of the design, or evidence of relevant design standards.[25]

"That a paid expert witness for plaintiff, in hindsight, found…the design was defective, does not mean, *ipso facto*, that the design was unreasonably approved."[26] The end result is that an opposing party cannot avoid the design immunity defense by presenting opposing affidavits alleging an unreasonable design.

Recognizing that design immunity is predicated upon the separation of powers doctrine, and that governmental entities need leeway designing public works, courts have developed liberal rules concerning what constitutes "substantial evidence." Ordinarily, a civil engineer's opinion that a design was reasonably approved constitutes "any substantial evidence" sufficient to support design immunity.[27] "The fact of approval by competent professionals can, in and of itself, establish the element of reasonableness."[28]

Given these factors, it is crucial for public entities to not only ensure that it has proper architectural plans for its structures and improvements that are approved by a duly appointed employee, but that a civil engineer (either from the public entity or a retained expert) has the qualifications and ability to opine on the reasonableness of the design in order to gain design immunity.

To ensure the best chances to obtain design immunity ensure that: (1) public entities delegate authority to approve plans to its engineer; (2) confirm that the plans are approved prior to construction; and (3) make sure that the plans are as detailed as possible so that they include the alleged dangerous condition.

However, it should be noted that the California Supreme Court recently held that design immunity does not categorically preclude failure to warn claims that involve a discretionarily approved element of a roadway and declined to overrule its prior precedent. In *Tansavatdi v. City of Rancho Pales Verdes* (2023) 14 Cal.5th 639, at issue was whether design immunity is limited to claims alleging that a public entity created a dangerous roadway condition through a defective design or whether design immunity also extended to claims alleging that a public entity failed to

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[24] (*King v. U.S. Bank National Association* (2020) 52 Cal.App.5th 711, 728.)

[25] (*See*, *Fuller, supra,* 89 Cal.App.4th at 1118; *Weinstein v. Department of Transportation* (2006) 139 Cal.App.4th 52, 59.)

[26] (*Sutton v. Golden Gate Bridge, Highway and Transportation Dist*. (1998) 68 Cal.App.4th 1149, 1158, quoting *Ramirez v. City of Redondo Beach* (1987) 192 Cal.App.3d 515, 525.)

[27] (*Sutton, supra*, 68 Cal.App.4th at 1162 (District Board's reliance on civil engineering opinions regarding median barrier was substantial evidence); *Fuller, supra,* 89 Cal.App.4th at 1118 (speed limits approved by traffic engineer constituted substantial evidence.))

[28] (*Higgins v. State* (1997) 54 Cal.App.4th 177, 187, disapproved on another point in *Cornette, supra*, 26 Cal.4th at pp.73-74.)

warn of a design element that resulted in a dangerous roadway condition. The Supreme Court held that while Cal. Gov. Code 830.6 shields public entities from liability for injuries stemming from the design of a roadway's physical features, they nonetheless have a duty to warn of known dangers the roadway presents to the public.

As a result of the *Tansavatdi* ruling, it is important for public entities to create evaluation systems of roadways and intersections. If it is revealed that these areas have a high propensity for accidents or damage due to its design, then a clear and distinct warning should be provided in order to mitigate against a potential failure to warn claim even if design immunity should apply.

Additionally, public entities should be aware of the factors that can negate the ability to claim design immunity such as: (1) a change of condition[29]; (2) the as-built plans differing from the previously approved design[30]; and (3) the authority to approve plans not delegated to person approving them[31].

For Plaintiff to negate design immunity by way of change of condition, Plaintiff must demonstrate that: (1) the location became dangerous due to a change in physical conditions; (2) the public entity had actual notice of the dangerous condition; (3) the public entity had the time and funds to correct the condition but failed to do so or the public entity was unable to fix the condition but did not provide adequate warnings.[32]

C. Dog Park Immunity

Government Code Section 831.7.5 states that: "(a) A public entity that owns or operates a dog park shall not be held liable for injury or death of a person or pet resulting solely from the actions of a dog in the dog park; (b) This section shall not be construed to affect the liability of a public entity that exists under the law; and (c) "Public entity" has the same meaning as Section 811.2, and includes, but is not limited to, cities, counties, cities and counties, and special districts.

In order to ensure that public entity can obtain the immunity provided by the Government Code for dog parks, it is advised to clearly and distinctly label all dog parks within your jurisdiction.

D. Sign Immunity

Government Code Section 830.4 states that, "A condition is not a dangerous condition within the meaning of this chapter merely because of the failure to provide regulatory traffic control signals, stop signs, yield right-of-way signs, or speed restriction signs, as described by

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[29] (*Cornette v. Dept of Transp.* (2001) 26 Cal. 4th 65)

[30] (*Castro v City of Thousand Oaks (2015)* 239 Cal.App. 4th 1451)

[31] (*Id.*)

[32] (*Cornette, supra.*)

the Vehicle Code, or distinctive roadway markings as described in Section 21460 of the Vehicle Code."

Further, Government Code Section 830.8 states that, "Neither a public entity nor a public employee is liable under this chapter for an injury caused by the failure to provide traffic or warning signals, signs, markings or devices described in the Vehicle Code. Nothing in this section exonerates a public entity or public employee from liability for injury proximately caused by such failure if a signal, sign, marking or device (other than one described in Section 830.4) was necessary to warn of a dangerous condition which endangered the safe movement of traffic and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care."

"Section 830.8 provides a limited immunity for public entities exercising their discretion in the placement of warning signs described in the Vehicle Code. 'The broad discretion allowed a public entity in the placement of road control signs is limited, however, by the requirement that there be adequate warning of dangerous conditions not reasonably apparent to motorists.' Thus where failing to post a warning sign results in a concealed trap for those exercising due care, section 830.8 immunity does not apply."[33]

Simply put, if the public entity has knowledge of a dangerous condition and/or a condition exists that could create a dangerous condition by way of a "concealed trap" at the specific site, then it has a duty to warn about it through the use of a clear and distinct warning. However, if a Plaintiff alleges that a sign was required and Plaintiff was injured as a result with no other dangerous condition being present, then the public entity is immune per the Government Code.[34]

E. Weather Immunity

Government Code Section 831 states that, "Neither a public entity nor a public employee is liable for an injury caused by the effect on the use of streets and highways of weather conditions as such. Nothing in this section exonerates a public entity or public employee from liability for injury proximately caused by such effect if it would not be reasonably apparent to, and would not be anticipated by, a person exercising due care. For the purpose of this section, the effect on the use of streets and highways of weather conditions includes the effect of fog, wind, rain, flood, ice or snow but does not include physical damage to or deterioration of streets and highways resulting from weather conditions."

Public entities should note that, even if Plaintiff's incident arises from a weather-related condition, should the public property be defective and/or if the incident in question was one that would not be anticipated by someone using due care, immunity could still not apply. Therefore, evaluate street conditions, and ensure that if there is knowledge of potential hazards developing in a particular area due to weather, that a clear and distinct warning be offered.

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[33] (*Kessler v. State of California* (1988) 206 Cal.App.3d 317, 321-322.)

[34] (*See, Chowdhury v. City of Los Angeles* (1995) 38 Cal.App.4th 1187, 1196-1197.)

F. Natural Conditions Immunity

Government Code Section 831.2 codifies the natural condition immunity which states, "Neither a public entity nor a public employee is liable for an injury caused by a natural condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach."

Unlike weather immunity, the immunity provided by Section 831.2 is "absolute and applies regardless of whether the public entity had knowledge of the dangerous condition or failed to give warning. The legislative purpose in enacting Section 831.2 was to ensure that public entities will not prohibit public access to recreational areas due to the burden and expense of defending against personal injury suits and of placing such land in a safe condition."[35] "The natural condition immunity applies even 'where the public entity had knowledge of a dangerous condition which amounted to a hidden trap.' As a consequence, courts have held there is no liability for failure to warn of a known dangerous condition when the danger is a natural condition of unimproved public property."[36] "The statutory immunity extends to 'an injury caused by a natural condition of any unimproved public property.' The use of the term 'caused' is significant. One such example is in *Meddock v. County of Yolo* (2013) 220 Cal.App.4th 170, where the Court noted that "although the injury occurred on improved property, that is, the paved parking lot, it was caused by the trees, native flora located near - and perhaps super adjacent to - the improved parking lot, but themselves on unimproved property."[37] "[T]o qualify public property as improved so as to take it outside the immunity statute 'some form of physical change in the condition of the property at the location of the injury, which justifies the conclusion that the public entity is responsible for reasonable risk management in that area, [is] required to preclude application of the immunity.'"[38] "Immunity under section 831.2 exists even where the public entity's nearby improvements together with natural forces add to the buildup of sand on a public beach."[39]

Simply put, in order for Plaintiff to overcome this immunity, he or she would have to demonstrate that the incident location was not only improved property, but it was the actual improvement that caused the alleged injury. If it can be demonstrated that a natural element or force caused Plaintiff's injury, even if it occurred on improved property, the public entity can still obtain natural condition immunity.

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[35] (*Goddard v. Department of Fish & Wildlife* (2015) 243 Cal.App.4th 350, 360.)

[36] (*Alana M. v. State of California* (2016) 245 Cal.App.4th 1482, 1488.)

[37] (*Meddock v. County of Yolo* (2013) 220 Cal.App.4th 170, 177.)

[38] (*Id*. at 178.)

[39] (*Morin v. County of Los Angeles* (1989) 215 Cal.App.3d 184, 188.)

G. Hazardous Recreational Immunity

Government Code Section 831.7(a) states that, "Neither a public entity nor a public employee is liable to any person who participates in a hazardous recreational activity, including any person who assists the participant, or to any spectator who knew or reasonably should have known that the hazardous recreational activity created a substantial risk of injury to himself or herself and was voluntarily in the place of risk, or having the ability to do so failed to leave, for any damage or injury to property or persons arising out of that hazardous recreational activity." Additionally, Government Code Section 831.7(b) defines "hazardous recreational activity" as "a recreational activity conducted on property of a public entity that creates a substantial, as distinguished from a minor, trivial, or insignificant, risk of injury to a participant or a spectator."

Per the Government Code, hazardous recreational activity can be anything from, "water contact activities, except diving, in places where, or at a time when, lifeguards are not provided and reasonable warning thereof has been given, or the injured party should have reasonably known that there was no lifeguard provided at the time," to "diving into water from other than a diving board or diving platform, or at any place or from any structure where diving is prohibited and reasonable warning thereof has been given," to activities such as "animal riding," "equestrian competition," archery," bicycle racing or jumping," boating," "pistol and rifle shooting," and skydiving."[40]

However, a public entity can lose this immunity if it: (1) fails "to guard or warn of a known dangerous condition or of another hazardous recreational activity known to the public entity or employee that is not reasonably assumed by the participant as inherently a part of the hazardous recreational activity out of which the damage or injury arose"; (2) if a fee was taken by the public entity to engage in the hazardous recreational activity; (3) injury was caused due to a failure to properly construct or maintain in good repair any structure utilized in the activity; (4) gross negligence in promoting the participation or observance of the activity (promotional literature or a public advertisement or announcement that merely describes the facilities and services on the property does not constitute a grossly negligent promotion.); and (5) an act of gross negligence by the public entity or employee of same caused the injury.[41]

Thus, to maintain this immunity, public entities should post warnings on piers or near rock formations at beaches warning the public that diving is not allowed. Additionally, public pools should have signs posted that there are no lifeguards on duty if this is the case, and if there are lifeguards offered, when and where they will be located, and ensure they are maintained during those specific time periods. Additionally, any warning that applies to the location should be posted prominently to warn the public of engaging in hazardous recreational activities, especially if there is advance knowledge that two different types of activities could be engaged in one area (i.e. boating and waterskiing.)

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[40] Gov. Code Section 831.7(b)(1-3) (a full list of all defined hazardous recreational activities is listed in Gov. Code Section 831.7(b)(3).

[41] *Id*. at Section 831.7(c)(1)(A-E.)

It should be noted that while waivers were once an applicable tool for public entities in mitigating such claims, the recent holding by the California Supreme Court in *Whitehead v. City of Oakland* (2025) 17 Cal 5th 735 has significantly altered that available avenue of protection. In *Whitehead*, Plaintiff was preparing for a fundraising bike ride and signed a release absolving the City of claims related to negligence with relation to the offered facilities. Specifically, the waiver covered public street hazards such as broken pavement. Plaintiff's front tire struck a pothole and Plaintiff's bike flipped over resulting in a Traumatic Brain Injury ("TBI").

The California Supreme Court held that California Civil Code Section 1668 renders anyone seeking to exempt anyone from violation of law, whether intentional or negligent, is unlawful. The Court held that an agreement to exculpate a party for future violations of statutory duty designed to protect public safety is against public policy, and unenforceable. The holding further stated that because Government Code Section 835 imposes a statutory duty on public entities to maintain roadways in reasonable safe conditions, a release cannot be applied to exempt a public entity from liability to comply with its statutory duty.

As a result of the holding in *Whitehead*, while it is still worth using waivers to further enhance protection for claims involving hazardous recreational activities, remember that a general release of a public entity's duty under Government Code Section 835 cannot be waived and the waiver should focus specifically on the actions within the activity rather than on public conditions typically subject to Government Code Section 835.

V. PRACTICE TIPS TO AVOID AND MITIGATE DANGEROUS CONDITION CLAIMS

In order to effectively reduce the potential for liability, public entities should implement the following recommended mitigation measures:

- **Establish and Implement an Inspection Program**: All public entities should establish a system that can help a municipal entity identify and eliminate dangerous conditions before an accident occurs not only reducing exposure to dangerous condition liability but making public property safer and more enjoyable. Ideally, an inspection system should include both proactive elements (such as a dedicated inspection team) and reactive elements (such as a complaint call-in center). If the public entity "maintained and operated …an inspection system with due care and did not discover the condition, it will be difficult to establish that the public entity had the actual or constructive notice required to hold that public entity liable."[42]
- **Remediate any Dangerous Conditions Identified**: Once a public entity has an inspection system in place, it should also have a system in place to quickly remediate it, thus making the community a better and safer place while also protecting itself from liability. If a dangerous condition cannot be remediated immediately, remediate as much as possible and place adequate warnings near the condition to warn the public of its

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[42] (Gov. Code § 835.2 (b)(2))

dangerous nature (including temporary warnings like spray painting sidewalk lifts), then assign funding and develop a plan to remediate the issue as soon as you are able.

- **Document, Document, Document**: Document all activities related to design, construction, maintenance, repair of any public property or project. This includes documenting with photographs any condition before and after repairs. This will help ensure consistent implementation of your projects, possibly protect you via design immunity and provide better evidence should the case go to trial.[43] It is also important to photograph and document the area of an incident as soon as the public entity receives a claim since property and conditions can change over time. Memories fade, witnesses retire or change jobs. So, if it might be important write it down!

The following are strategies and considerations for specific common causes of dangerous condition cases that should also be considered and implemented to minimize liability:

A. Sidewalks

1. Documented Inspection System

Implement an inspection system that optimally inspects for imperfections of public property on an ongoing basis. Upon completion of each inspection, ensure that staff create a detailed report and associated map demonstrating the area inspected and retain this information for at least five years.

a. Considerations for Documenting Sidewalk Deviations

Ensure that if your inspection team encounters a sidewalk deviation it is measured from the base of the actual lift to the top and a clear, up-close picture is taken to document the actual height of the lift. Under the trivial defect doctrine, the relevant measurement should be the size of the defect that creates a potential tripping hazard, not the aggregate elevation change from all surrounding slabs.[44] As previously discussed, courts tend to deem a sidewalk deviation of an inch or lower to be trivial as a matter of law. While there are cases that hold that a sidewalk deviation up to 1.5 inches falls within triviality, courts are less likely to do so, especially if other aggregate factors are present (i.e., poor lighting, obstructions, debris.) However, if a public entity can clearly demonstrate the height of the sidewalk deviation giving rise to the claim was an inch or less at the time of the incident , and there are no other aggravating factors, then there is a good chance it will be deemed trivial as a matter of law.

Additionally, should a public entity encounter a sidewalk deviation, it should provide a clear and distinct warning as soon as possible. The warning should make the condition open and obvious and command attention to alert pedestrians of the defect and satisfy the public entities

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[43] (Gov. Code §830.6)

[44] (*See Huckey v. City of Temecula* (2019) 37 Cal.App.5th 1092, 1107 [sidewalk elevations ranging from three-quarters of an inch to one and one-half inches have generally been held trivial as a matter of law]; *Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719, 725–726 [defects of about three-fourths of an inch are not dangerous as a matter of law].)

requirement that it is "protecting against" the alleged dangerous condition[45]. For example, spray painting the rise with a bright spray paint until work crews can repair a sidewalk deviation can be an effective tool to offer a warning that meets the Government Code's definition of "protect against." Also, a public entity might want to consider some form of temporary barrier such as cones. Furthermore, public entities should make every effort to ensure that in addition to providing a warning prior to repair, it also makes every effort to keep the deviation free from debris or obstruction in case a pedestrian were to have an incident prior to the time the entity is able to repair in order to further enhance the argument that the deviation is trivial as a matter of law.

B. Roads

Government Code Section 830.8 states that "Neither a public entity nor a public employee is liable under this chapter for an injury caused by the failure to provide traffic or warning signals, signs, markings or devices described in the Vehicle Code. Nothing in this section exonerates a public entity or public employee from liability for injury proximately caused by such failure if a signal, sign, marking or device (other than one described in Section 830.4) was necessary to warn of a dangerous condition which endangered the safe movement of traffic and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care" To that end, if Plaintiff raises a claim that an intersection rose to the level of a dangerous condition due to a lack of traffic lights or signage for example, the public entity could likely not be held liable as a result.

VI. CLAIMS CONSIDERATIONS

Whenever a public entity receives a claim alleging a dangerous condition of public property, there are recommended first steps that should be taken at the initial receipt stage to determine if a viable claim has been presented, and to prepare in the making of immediate challenges that could dismiss the case early.

First, ensure that your public entity has a complete, accurate, and up to date claim receipt database that can be searched by location area and date of incident and receipt of claim. This can provide a host of benefits. For example, if a lawsuit is received, and no claim has been filed within six months of the incident giving rise to the claim directly to the public entity and prior to filing suit, the City can either file a Demurrer/Motion to Strike or a Motion for Summary Judgment on the basis that Plaintiff failed to comply with the Tort Claims Act and is therefore precluded from bringing the action to Court.

Second, if Plaintiff filed a claim with the public entity prior to initiating suit, but did not do so within six months of the date of the incident, the public entity may also claim Plaintiff's failure to adhere to the Tort Claims Act as a basis for the case to be dismissed.

However, it should be noted that should a public entity receive a claim after the six month period, Plaintiff can present a written application to the public entity for leave to present

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[45] Government Code §§ 830 (b), 835 (b)

the claim, but the application must be presented along with the claim no more than one year after the date of the incident giving rise to the claim.[46] If an application is presented with the late filed claim, the public entity has 45 days to grant or deny the application, and the timing can be extended by written agreement. [47] If the public entity does not act in any manner on the application, then it is deemed denied on the 45th day.[48] A public entity "shall" grant the application if one or more of the following are applicable: "(1) The failure to present the claim was through mistake, inadvertence, surprise, or excusable neglect and the public entity was not prejudiced in its defense of the claim by the failure to present the claim within the time specified in Section 911.2; (2) The person who sustained the alleged injury, damage, or loss was a minor during all of the time specified in Section 911.2 for the presentation of the claim; (3) The person who sustained the alleged injury, damage, or loss was a minor during any of the time specified in Section 911.2 for the presentation of the claim, provided the application is presented within six months of the person turning 18 years of age or a year after the claim accrues, whichever occurs first; (4) The person who sustained the alleged injury, damage, or loss was physically or mentally incapacitated during all of the time specified in Section 911.2 for the presentation of the claim and by reason of that disability failed to present a claim during that time; (5) The person who sustained the alleged injury, damage, or loss was physically or mentally incapacitated during any of the time specified in Section 911.2 for the presentation of the claim and by reason of that disability failed to present a claim during that time, provided the application is presented within six months of the person no longer being physically or mentally incapacitated, or a year after the claim accrues, whichever occurs first; and/or (6) The person who sustained the alleged injury, damage, or loss died before the expiration of the time specified in Section 911.2 for the presentation of the claim."[49]

Conversely, if a Plaintiff files a late claim without the application mentioned previously, the public entity "any time within the 45 day period after the claim is presented, give written notice to the person presenting the claim that the claim was not filed timely and that it is being returned without further action."[50] In fact, the Government Code provides that the notice "shall be in substantially the following form:

'The claim you presented to the (insert title of board or officer) on (indicate date) is being returned because it was not presented within six months after the event or occurrence as required by law. See Sections 901 and 911.2 of the Government Code. Because the claim was not presented within the time allowed by law, no action was taken on the claim.

Your only recourse at this time is to apply without delay to (name of public entity) for leave to present a late claim. See Sections 911.4 to 912.2, inclusive, and Section 946.6 of the

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[46] Govt. Code Section 911.4(a-b).

[47] *Id*. at Section 911.6(a)

[48] *Id*. at Section 911.6(c).

[49] *Id*. at Section 911.6(b)(1-6).

[50] *Id*. at Section 911.3(a)

Government Code. Under some circumstances, leave to present a late claim will be granted. See Section 911.6 of the Government Code.

You may seek the advice of an attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so immediately.'"[51]

It is critical that public entities have a draft response to late filed claims without an application such as the above as "Any defense as to the time limit for presenting a claim described in subdivision (a) is waived by failure to give the notice set forth in subdivision (a) within 45 days after the claim is presented, except that no notice need be given and no waiver shall result when the claim as presented fails to state either an address to which the person presenting the claim desires notices to be sent or an address of the claimant."[52] Therefore, to preserve what could be an outright defense to a late filed claim without an application for leave to file late, it is imperative that notices are provided in this format right away.

Third, this form of organization allows for public entities to provide counsel with confirmation if the public entity had prior actual notice of the alleged dangerous condition, which can also be a strong defense in a Motion for Summary Judgment to dispense of a dangerous condition claim.

Additionally, ensure that your public entity has clearly delineated borders and boundaries, and that this information is readily accessible to the public in both online and physical format. Should a Plaintiff sue a public entity and that particular entity does not own, operate, control, manage, or employ those working at that property, then it cannot be held liable for a dangerous condition claim. In these circumstances, if a clear and distinct boundary is identifiable, you can share this information with Plaintiff and/or their counsel and confirm to them that the alleged dangerous condition is not within the public entity's jurisdiction and is therefore not responsible. In these instances, you can work with opposing counsel and staff to create a declaration that attests to the lack of ownership and control of the property, which can be provided in exchange for a dismissal without prejudice, thereby creating a cost effective and expedient method to resolve claims that are of no moment.

VII. CONSIDERATIONS FOR EFFECTIVE MOTIONS FOR SUMMARY JUDGMENT

While not every dangerous condition of public property lawsuit is suitable for a Motion for Summary Judgment (or in the Alternative Summary Adjudication) ("MSJ/MSA"), it is imperative to analyze the case or claim as soon as it is received and as part of this initial review ask questions such as:

(1) Does the alleged dangerous condition meet the definition per the Government Code?

[51] *Id.*

[52] *Id.* at Section 911.3(b).

(2) Is the alleged dangerous condition minor or trivial in nature?

(3) Even if a dangerous condition exists, did the public entity have actual or constructive notice? Did an employee of the public entity through negligence or omission create the dangerous condition?

(4) Did the public entity provide a warning prior to the incident giving rise to the claim?

(5) Do any immunities apply to the matter?

If the answer is yes to any of the above, then the strategy should focus on preparing to quickly dispose of the matter via an MSJ/MSA.

In order to strengthen the likelihood of success on such motions ensure that as a public entity, you have easy access to such documents as prior claims, contracts to construct the location to include construction plans and authorization by the public entity, repair and work orders, as well as photographs of any prior repairs or warnings applied, to include clear pictures of measurements of the height of any deviations.

In addition, in support of preparing for an MSJ/MSA, you should craft discovery requests and deposition questions that specifically target the elements Plaintiff must prove to substantiate their claim, as well as ask questions relating to defenses and immunities the public entity can raise in order to strengthen those positions and arguments. For example, questions to Plaintiff relating to the weather at the time of the incident, admitting to a lack of obstructions or debris at the incident location, their knowledge of the area or the alleged dangerous condition prior to the incident, whether they had prior knowledge and did not report it previously, or admitting to viewing a clear and distinct warning are all effective tools that can strengthen your ability to achieve summary judgment.

VIII. <u>PLAINTIFF'S MEDICAL DAMAGES AND USE OF MEDICAL RECORDS AND BILLING IN MITIGATING THE AMOUNT OF CLAIMED DAMAGES</u>

It is not uncommon for a personal injury Plaintiff to overstate or exaggerate their claimed medical claims in an attempt to gain payment for alleged damages sustained that is far greater than what is warranted. To effectively mitigate against Plaintiff's contentions, it is crucial to have knowledge of what the law allows, and strategies that can be used to evaluate the veracity of Plaintiff's alleged injuries.

One of the worst holdings from the California Court of Appeal came from *Pebley v. Santa Clara Organics, LLC* (2018) 22 Cal.App.5th 1266, which held that even if a Plaintiff has valid medical insurance, they can use a medical provider outside of their insurance plan and would be treated as uninsured in the eyes of the Court. As a result of *Pebley*, the Plaintiff personal injury bar has significantly increased the use of third-party lien-based medical providers in order to justify a grossly overinflated amount of damages for procedures that can cost between 30-70% less than what is actually billed. In reality, these providers essentially mark up their services, and once a settlement is on the horizon, counsel for Plaintiff will negotiate these rates with the provider knowing full well that the charged amount is nowhere near a fair market rate for the services provided.

However, the counter to *Pebley* comes in the form of the California Supreme Court decision in *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, which held that a Plaintiff can only present the amount either they themselves or their insurance company actually paid to the provider at trial and aspects such as contractual adjustments are not allowable in damages calculations.[53] Thus, when a Plaintiff's medical damages are being evaluated, if they are not from a third party lien-based provider, but rather from a hospital or other medical facility where a Plaintiff's medical insurance was used, then the process of implementing a *Howell* reduction is used to determine what Plaintiff's actual damages are.

For example, if Plaintiff presents to Cedar Sinai and is provided medical care that totals $100,000, but there is a contractual adjustment in the amount of $50,000, and the insurance payment remaining is $50,000, then Plaintiff can only present damages from this provider in the amount of $50,000 per *Howell*.

Therefore, when calculating medical damages, it is imperative that a *Howell* reduction of all medical bills (if applicable) be conducted to provide a clear brightline as to the level of exposure a public entity has on any particular case. However, it should be noted that many Plaintiff side personal injury attorneys will ignore *Howell* and attempt to justify ludicrous settlement figures based on general damages/pain and suffering.

When calculating a reasonable payment figure for third party lien-based providers, it is helpful to contact your carrier to inquire if they have any benchmarks or average cost for certain procedures. For example, many third-party lien-based providers will charge anywhere between $1,800-$3,000 per MRI. Most carriers will indicate that such a procedure typically would cost between $800-$1,200. Therefore, when encountering these providers, especially during deposition, it is vital to ask questions such as "How much do you typically reduce your liens by with a patient" and "Do you accept medical insurance" can assist in demonstrating the providers propensity to markup their services for nothing more than an increased bottom line to themselves and Plaintiff.

Third party lien-based providers may also recommend various procedures that are without any medical efficacy or proven effectiveness. One such procedure is Plasma Rich Platelet ("PRP") injections. This is a procedure where a patient's blood is extracted, cycled through a centrifuge, and then reinjected into the affected area. Providers claim that this stimulates healing through the use of the patients stem cells. However, there are little to no reputable medical journals that substantiate the viability of such a treatment. Additionally, providers will charge anywhere between $15,000-$25,000 per injection. In cases where we have consulted with various medical providers, not only will none of them provide the treatment because they classify it as a modern day "snake oil", they have also informed us that even if they were to offer it, the cost would be somewhere between $600-$800 per injection given the

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[53] *Id*. at 551.

minimal resources and effort necessary to administer this treatment. Therefore, we would strongly encourage any public entity to reject any claim for PRP injections given the exorbitant cost and lack of proven medical efficacy.

Turning to medical records, while granted, few of us are physicians by trade, familiarity with typical medical conditions found in personal injury cases, medications prescribed, and certain terminology, can pay dividends in mitigating and sometimes defeating a Plaintiff's medical claims.

First, although the "Eggshell Plaintiff" rule is something to consider, a Plaintiff's pre-existing condition, especially the surrounding circumstances of it, can lead to invaluable information. For example, if Plaintiff tells you in deposition that in the three years prior to the incident, they fell in a similar manner on more than one occasion, then it is vital to obtain those records, and evaluate the notes from both doctors and nurses to determine the level of damages from each fall. While the incident you are defending could exacerbate a pre-existing condition, if you can find the right information, you can argue that the incident in your matter was neither the mechanism or a cause of Plaintiff's alleged injuries.

For example, if Plaintiff has sustained falls multiple times prior to the incident, and has had a prior surgery, look to records to see if a surgeon recommended a further surgery prior to your incident. If so, you can use that to demonstrate that the subject incident did not cause the need for the surgery, and the public entity is therefore not liable for the cost of said surgery. Additionally, given that back injuries are common in personal injury cases, it is also crucial to not let medical terminology or the presence of disc bulges cause undue panic. Most if not all of us have some form of natural degradation of our back muscles and discs as we get older. Further, most disc bulges or narrowing of the spinal canal (known as stenosis) are not trauma induced, but rather a natural effect of the aging process. Also, a Plaintiff's line of work, (i.e. if they work in construction, or any position that requires constant physical exertion) can also be the culprit of such ailments.

One method to determine if a bulge or stenosis is trauma induced is to subpoena MRI's for several years prior to the incident (typically 5 years prior will stave off any challenges from opposing counsel.) to have an expert review the images side by side to determine if there has been any marked change prior to or after the incident. Additionally, the MRI reports will provide an overview of the noticed conditions in the MRI film. If you are able to determine that there is little to no difference in what has been reported from before and after the incident, then Plaintiff's condition is likely caused by either natural degeneration or some other physical factor not associated with the incident.

With respect to soft tissue injuries such as neck and lower back pain, many Plaintiffs will receive numerous Epidural Steroid Injections ("ESI") or Radiofrequency Ablations ("RFA"). During an ESI, a provider will inject a steroid or corticosteroid into the epidural space around the spinal nerves to ease pain. ESIs and RFAs are rarely necessary unless the pain/injury is severe and long lasting. Furthermore, these treatments are supposed to last several months, and most reputable medical resources will tell you that you should not have more than 3 within a 12-month period in any one area of the body. However, Plaintiffs will often have back-to-back injections in the same area approximately 2-3 weeks apart claiming that they feel no lasting relief. While this practice is not necessarily one that would rise to the level of medical malpractice, most doctors would be hesitant to administer such treatment repeatedly in such a short time span. Therefore, questions should be asked of the Plaintiff such as, "what was your pain on a scale of 1-10 prior to the injection, a few days after, a week, etc.?" Then ask follow-up questions such as, "Do you remember the name of the provider who administered the treatment?" This is of interest because sometimes medical providers will claim they administered the treatment and charge an applicable rate per medical coding, when in actuality, an assistant or a Nurse Practitioner who would command less for administering the treatment, provides it instead. Also, ESIs typically cost between $1,500-$3,000 per injection from most reputable providers, whereas third-party-lien-based providers will charge anywhere between $10,000-$15,000 per injection.

As for RFAs, this procedure essentially burns off nerve endings in certain areas of the body to stop them from sending pain signals to the brain. This procedure is only conducted after several ESIs have been administered, and the pain continues to return. Similar to ESIs while this procedure has medical efficacy, the conditions and cost should be highly scrutinized. For example, if Plaintiff has an RFA without two ESIs prior, then it should be questioned for its need at such an early stage of treatment. Additionally, these procedures typically benchmark anywhere between $2,000-$4,000, and third-party lien based providers will charge upwards of $20,000-$25,000 per procedure.

Another consideration to analyze is the medications Plaintiff was prescribed prior to the incident, in conjunction with other conditions not associated with the incident. It is helpful to start learning side effects of commonly used medications and any potential interactions that could explain Plaintiff's claimed symptoms. For example, Plaintiff could claim that since the incident took place, they are suffering from dizziness and foggy memory and use this as a justification for a TBI diagnosis. However, if this patient was taking Xanax for anxiety and was also taking a opioid such as Oxycodone, these two medications combined could easily explain both symptoms, and not necessarily the incident itself. Therefore, when creating discovery or deposition questions, be sure to ask about Plaintiff's use of their medications, and have them admit the frequency and usage of each medication, and confirm they had taken them prior to the incident, in order to have an argument that medications explain their symptoms and not the incident in question.

Further, if a Plaintiff suffers from a condition such as Type 2 Diabetes, and it is not medicated, this can present significant issues with numbness in extremities such as the legs and arms, even to the point where there would be difficulty walking, which could be used as a basis to create comparative fault for the incident for not using due care.

Lastly, medical records can be a veritable treasure trove of information to defending personal injury claims. Doctors and nurses are apt to note a patient's recount of events in preparing treatment. There are many instances where facts alleged by Plaintiff do not coincide with what was presented to their physician. For example, Plaintiff might tell the doctor that they fell on their right hand, and received treatment for it, when they are alleging they injured their left hand in an incident. Sometimes, even accompanying relatives or spouses can provide information to a medical provider that makes its way to the notes that can provide useful information. For example, if a spouse tells the doctor that Plaintiff had been experiencing shuffling gait or balance issues prior to the incident, and they were prescribed a cane or walker and didn't use it at the time, this information can be used to forward a claim for comparative fault thereby reducing the overall amount the public entity would be liable for.

Therefore, taking additional time to understand the language and contents of medical and billing records with your matter can provide useful information that can be used to defend against the cost of Plaintiff's treatment for their injuries and lead to information that can help experts solidify their diagnosis that the incident didn't cause their alleged injuries at all.

IX. CONCLUSION

With dangerous condition of public property cases showing no signs of abating anytime soon, it is even more imperative that public entities fully examine their internal practices in not just claim handling, but in their preventive measures, repairs, warnings, and record keeping. Having a photograph of a sidewalk deviation clearly being one inch in height, or a photograph of a clear and distinct warning could be the difference between a successful MSJ/MSA, or a long litigation and trial process.

By implementing regular evaluations and cost-effective measures internally, in conjunction with recognizing the importance of discovery, depositions, MSJ/MSA's, and medical records and billing, a public entity can face any "dangerous" situation it faces head on with conviction and unwavering strength in pursuit of its defense.