



## **The Basics of Design Immunity: Creating a Paper Trail**

## ***Huckey v. Temecula*: The “New” Trivial Defect Rule for Public Sidewalks**

March 17, 2020

**Presented by: Robert C. Ceccon, Richards, Watson & Gershon**

# **The Basics of Design Immunity: Creating a Paper Trail**

# ***Alvis v. County of Ventura***

Ventura County Superior Court

Case No. CIV 238700

La Conchita Landslide of January 10, 2005

# Topics

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1. Facts relating to the La Conchita landslide
2. Overview of the law of design immunity
3. How Ventura County created a record showing substantial evidence of the reasonableness of design of a retaining wall

# Overview of Lawsuit

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- 90 plaintiffs
- 10 deaths
- Personal injuries – Soft tissue to fractures
- 4 people rescued after being buried alive
- 27 homes damaged or destroyed
- Personal property damage

# The Wall Identified by Pile Number

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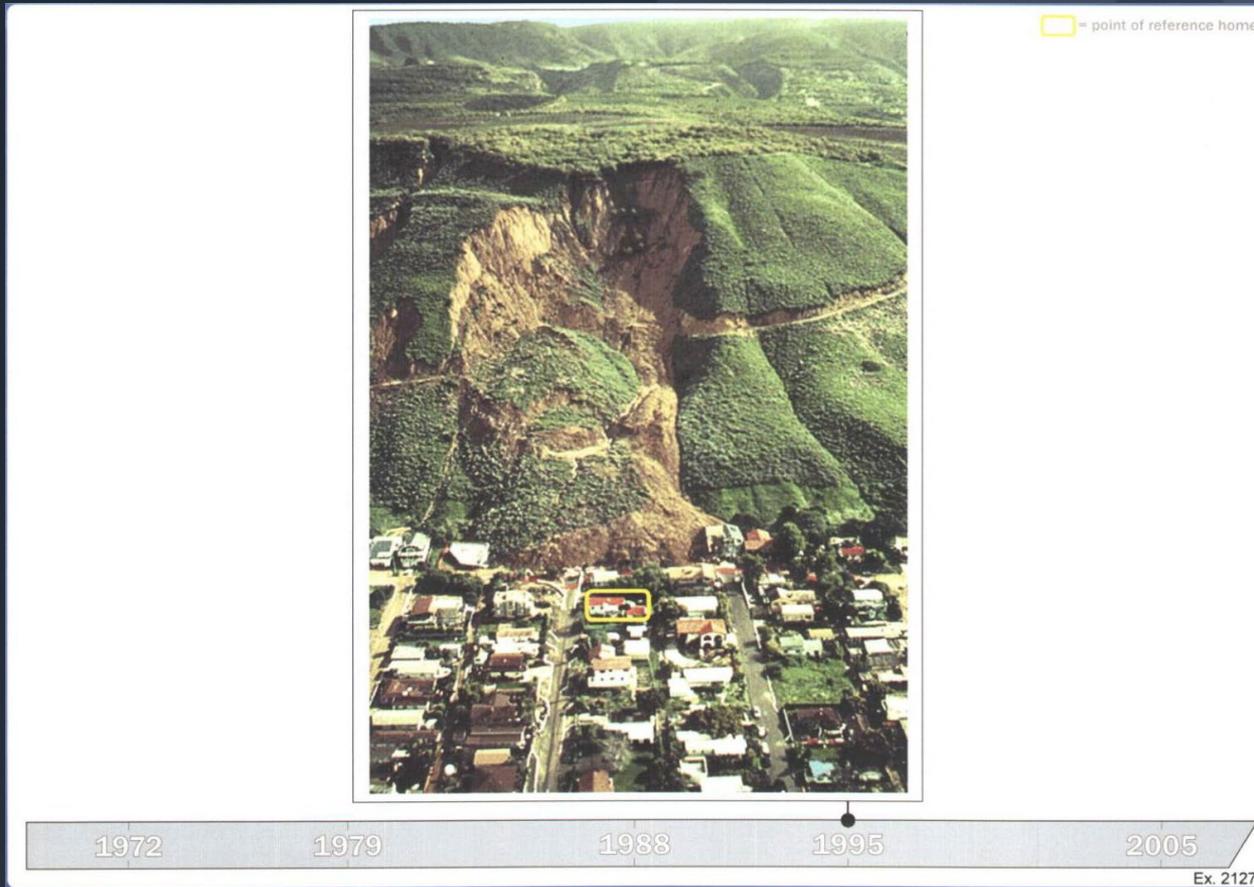


Ex. 21277

# 1988



# 1995



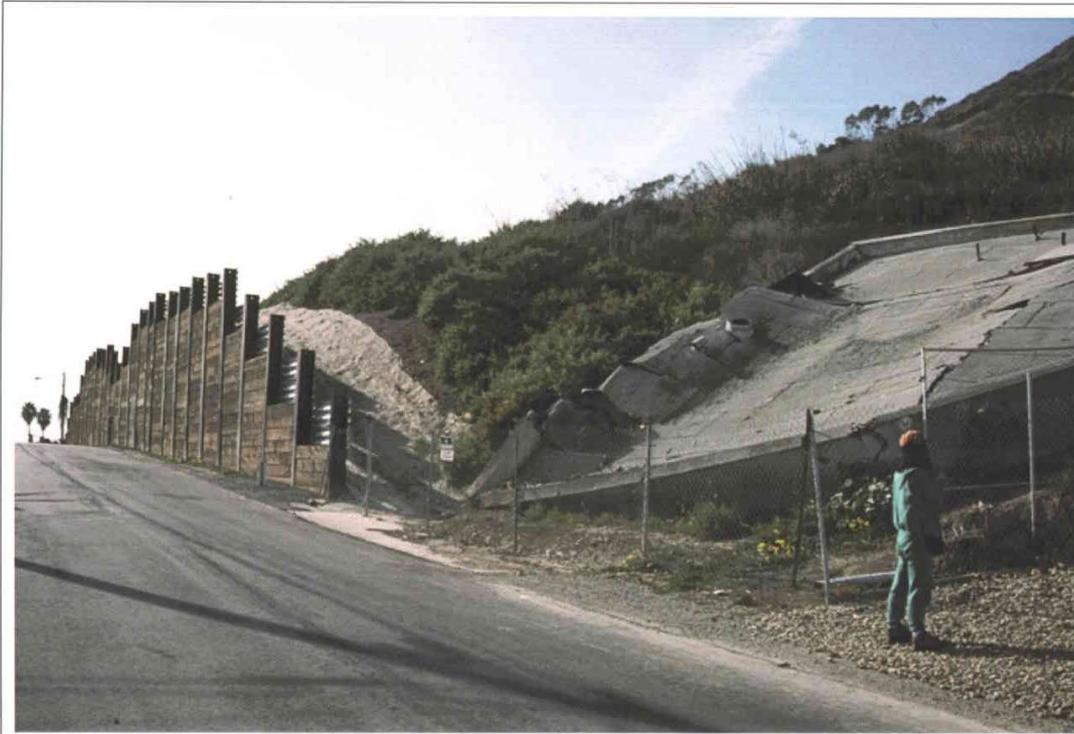
# The 1995 Slides Blocked Vista Del Ricon



Ex. 21318

# The Wall Soon After Completion

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Ex. 21303

# La Conchita Landslide – January 1909

LANDSLIDE BURIES WORKMEN AND TRAIN.  
DIRECT WIRE TO THE TIMES.  
Los Angeles Times (1886-Current File); Jan. 24, 1909; ProQuest Historical Newspapers (Los Angeles Times) (1881-1986)  
pg. 16

## LANDSLIDE BURIES WORKMEN AND TRAIN.

*Side of Mountain Descends Upon Espee Track at Punta Gorda, Near Ventura County Line, Engulfing Cars and Engine—Four Men Dead.*

LANDSLIDES on the Coast Line and a crevice on Tunnel No. 4, near Tockeep, yesterday, cut off all rail-road communication between Los Angeles and San Francisco, blocking both Southern Pacific routes, and tied up the Santa Fe between San Francisco and the East. All trains for the north were assailed before its time for the Ore's departure last evening. The Coast Line, on which a work-train and a number of men were buried under a mountain of earth, will likely not be open before late Tuesday or Wednesday, but it is hoped to resume traffic over the Valley line by tonight. Two local trains have been put on between this city and Ventura, running and returning via Chatsworth and Saugus, respectively, thus forming a loop. Passengers on trains held up some time by Coast Line landslides were transferred yesterday and brought in by a special last night. They took advantage of the low tide and walked along the beach around the buried tracks to the Los Angeles train.

(BY DIRECT WIRE TO THE TIMES.)

SANTA BARBARA, Jan. 23.—(Re-  
ceived) A landslide yesterday  
buried the west-bound ex-  
press on the Coast division of the  
Southern Pacific Railroad, four men,  
the engine and an "ore" car are  
buried beneath a mountain of earth  
about a mile south of Punta Gorda,  
about a mile south of the city and  
about a mile south of the city.  
The landslide occurred on the  
side of the mountain, near  
the tracks, in which were work-  
ing men. The landslide gave way.  
A shower of rocks and gravel  
fell over the side of the mountain,  
and the body of earth and  
heavier matter. The men  
dropping picks and shovels, scattered  
toward the ocean, leaving for the  
side. Some rushed toward the  
ocean ahead of the avalanche mass;  
others sought in the rushing, grinding  
earth and rocks, were hurled down-  
ward, nearly buried. Still others  
saw the light that greeted me.

"We really do not know how many  
men were buried under the slide. With  
that disaster in mind, and it must be  
terrible, for, and he may be under  
the slide. These Ore's laborers also  
would be found they may have es-  
caped and run away, but they may be  
under the earth."

FARRIED DOWN CLIFF.  
"I saw in the lab of my master," said  
fireman throughout. "I do not know  
where the engine is, or he has been  
seen at his place on the opposite side  
of the slide. Suddenly I heard

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## LANDSLIDE BURIES WORKMEN AND TRAIN.

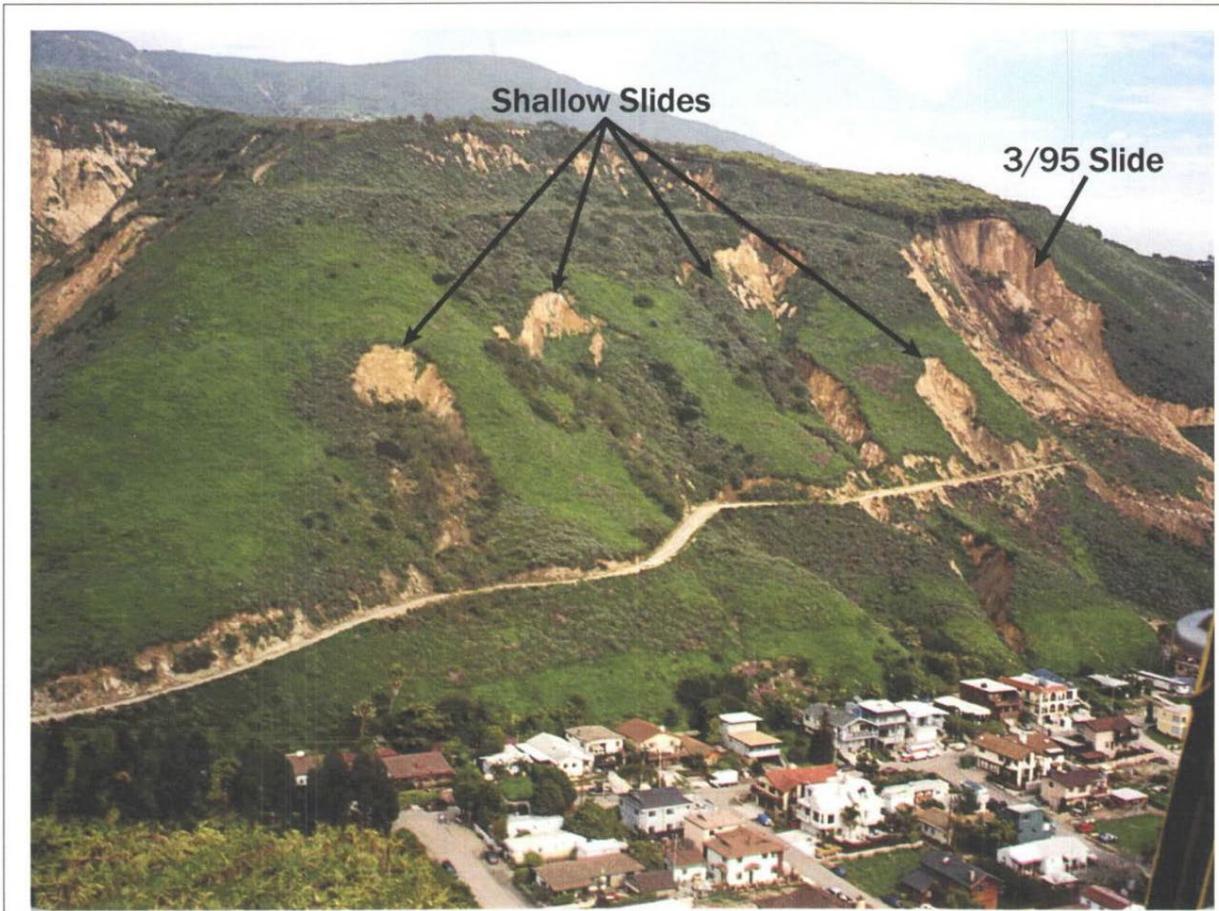
*Side of Mountain Descends Upon Espee Track at Punta Gorda, Near Ventura County Line, Engulfing Cars and Engine—Four Men Dead.*

[Ex. 20299]

LANDSLIDE BURIES WORKMEN AND TRAIN.  
DIRECT WIRE TO THE TIMES.

Los Angeles Times (1886-Current File); Jan. 24, 1909; ProQuest Historical Newspapers  
Los Angeles Times (1881-1986) pg. 16

Ex 21313



Ex. 21301

# WARNING

## GEOLOGIC HAZARD AREA

Based on the present information known about the landslide and ancient landslide, the following geologic hazards are present.

1. Catastrophic Failure. The large ancient landslide mass west of the existing failure could potentially fail impacting residences along Vista Del Rincon and within the Community. The amount of impact depends on several factors which are unknown at this time. The risk increases closer to Vista Del Rincon.
2. Mudflows: Mudflows could potentially impact all residences and access roads within the La Conchita Community. Mudflows will typically occur during or shortly after periods of intense rainfall.
3. Catastrophic Failure and Mudflows: Should both events occur simultaneously, the entire Community of La Conchita could be impacted. The overall lack of information precludes determining estimates of potential run-out and existing safety factors for the hillside.

**ENTER AT YOUR OWN RISK.**

**DO NOT REMOVE**



**BUILDING & SAFETY 654-2771**

April 6, 1995  
Page 2

# PCH: the morning of January 10, 2005



Ex. 21281



# La Conchita 2005 Slide Minor and Main Lobes



Ex. 21320



# Plaintiffs' Theories

---

- Wall caused water to dam up behind the wall, and destabilized the slope.
- Wall diverted debris to go to the south.

# Topics

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1. Facts relating to the La Conchita landslide
2. Overview of the law of design immunity
3. How Ventura County created a record showing substantial evidence of the reasonableness of design of a retaining wall

# Design Immunity

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- A public entity claiming design immunity must establish three simple elements:
  1. An alleged **causal relationship** between the design and the accident;
  2. **Discretionary approval** of the design before construction; and
  3. **Substantial evidence** supporting the reasonableness of the approval of the design.

- Govt. Code § 830.6

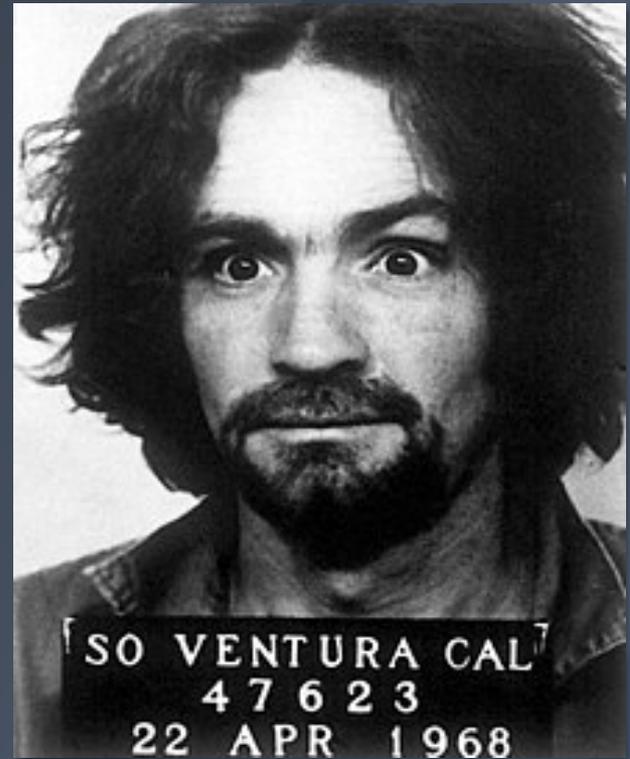
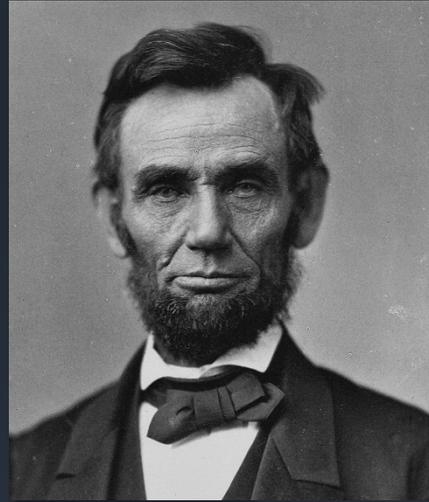
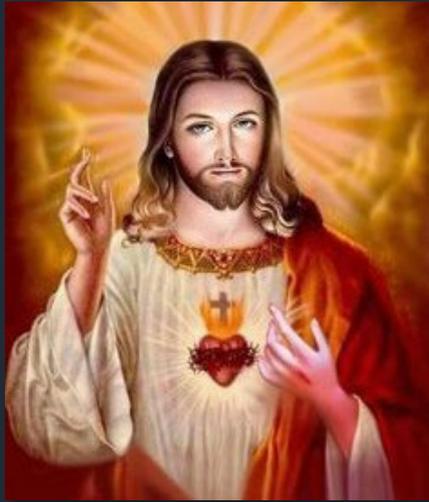
# Motion for Summary Judgment

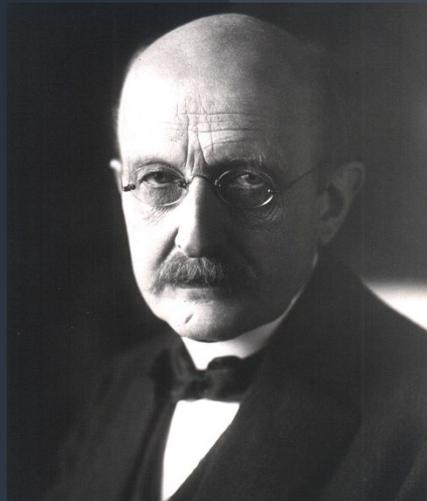
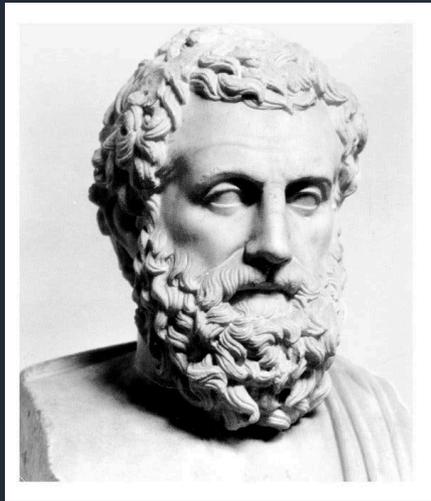
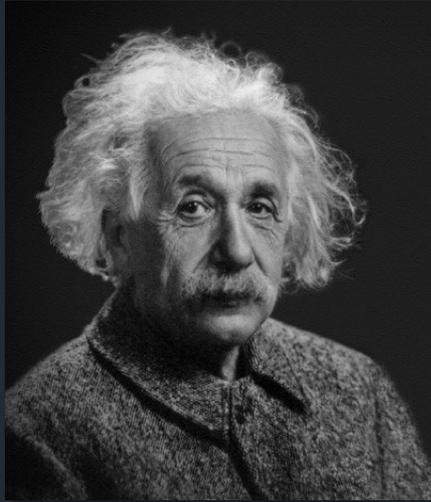
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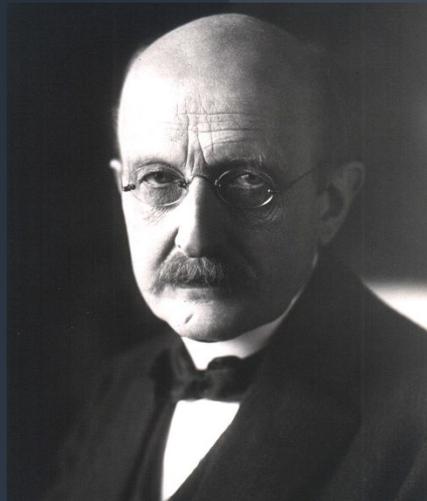
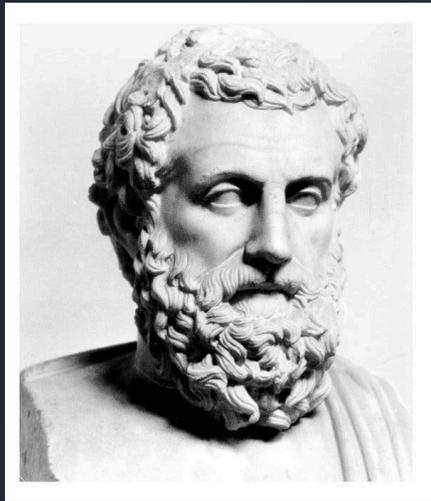
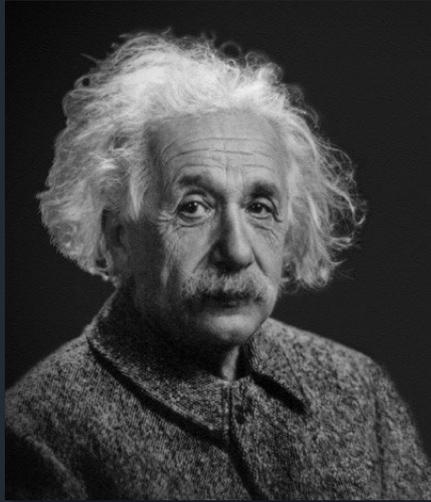
Question  
of Fact  
Standard

vs.

Substantial  
Evidence  
Standard







# Evidence of Reasonableness

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- The evidence of reasonableness need not be undisputed, as the statute provides immunity when there is substantial evidence of reasonableness, even if contradicted. The statute grants immunity as long as reasonable minds can differ concerning whether a design should have been approved.
  - *Dobbs v. City of Los Angeles* (2019) 41 Cal.App.5th 159, 162.

# Topics

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1. Facts relating to the La Conchita landslide
2. Overview of the law of design immunity
3. **How Ventura County created a record showing substantial evidence of the reasonableness of design of its retaining wall**

# Ventura's Design Examination

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- **October 12, 1999:** Consultant RJR Engineering writes letter with 17 questions concerning design.
- **October 19, 2009:** Board of Supervisors approves Zeiser Kling plans and specifications.
- **October 29, 1999:** Designer Zeiser Kling responds to 17 questions.
- **November 23, 1999:** RJR responds to October 29, 1999 letter with more questions.
- **December 23, 1999:** Zeiser responds to questions.
- **April 5, 2000:** Geotechnical engineers at Fugro West provide further comments.
- **April 17, 2000:** Public Works Director authors memo outlining the issues raised by O'Tousa, Bryant, and Zeiser, and concluded: "I am convinced that this project has been designed in accordance with reasonable professional engineering judgment, and with due consideration for public safety."

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF VENTURA

DANE W. ALVIS and AMELIA ALVIS,  
individually, as trustees if the Alvis Family  
Trust dated May 7, 1992, and as successors in  
interest to Michael Anthony Alvis, deceased;  
and DAN E. ALVIS, an individual,

Plaintiffs,

v.

LA CONCHITA RANCH COMPANY, a  
California limited partnership; VISTA LA  
CONCHITA CORPORATION, a California  
corporation; RINCON INVESTMENT CO., a  
California corporation; DAVID ORR, an  
individual; JAMES R. GRACE, an individual;  
WILLOUGHBY GRACE, an individual;  
JACK JAY, an individual; WILLIAM  
KITCHEN, an individual; SIDNEY  
BERMAN, an individual; HELEN  
SEYMOUR, an individual; COUNTY OF  
VENTURA, a public entity, and Does 1-100,  
inclusive,

Defendants.

AND ALL RELATED CROSS-ACTIONS.

Case No. CIV 238700

[Consolidated with Case Numbers:  
CIV 238701, CIV 238702, CIV 238703,  
CIV 238704, CIV 238705, CIV 238707,  
CIV 238708, CIV 238709, CIV 238710,  
CIV 238712, CIV 238713, CIV 238714,  
CIV 238715, CIV 238716, CIV 238717,  
CIV 238719, CIV 238720, CIV 238723,  
CIV 238725, CIV 238726, CIV 238727,  
CIV 238728]

Action filed on 1/26/06

*Assigned for all purposes to the Hon. Vincent J.  
O'Neill, Judge presiding in Department 40*

**DECLARATION OF WM. BUTCH BRITT  
IN SUPPORT OF MOTION FOR  
SUMMARY ADJUDICATION**

DATE: May 21, 2007

TIME: 8:30 a.m.

DEPT: 40

TRIAL DATE: November 7, 2007

I, Wm. Butch Britt, declare as follows:

1. I am presently employed by the County of Ventura (“County”). I have been employed by the County since 1992. I presently hold the title of Director of the Transportation Department. If called as a witness, I could and would testify of my own personal knowledge as follows:

31. On or about October 19, 1998, Zeiser Kling provided the County with a report summarizing the results of its investigation. The report is signed by geotechnical engineer Henry Kling and geologist Greg Raymer, and bears the professional registration stamp of Mr. Kling. I reviewed that report in its entirety. A true and correct copy of that report is attached as Exhibit 10. Ultimately, Zeiser Kling stated its opinion as follows:

“It is our opinion that the landslide debris can be removed from Vista Del

Rincon road without adversely affecting the stability of the La Conchita landslide as it currently exists. All three alternatives investigated and evaluated are geotechnically feasible provided the preliminary design recommendations presented below are incorporated into the final design and construction phases of the project.” (Emphasis added.)

40. On or about August 27, 1999, the County issued its notice inviting bids, to which the plans and specifications were attached. A true and correct copy of that document is attached as Exhibit 22. The County's Principal Engineer for road design and construction, Chris A. Hooke, placed his professional registration stamp on the Notice Inviting Bids.

41. Before the County issued the notice inviting bids, I reviewed the plans and specifications. Based on my professional training and experience, I determined that the plans relating to the Vista Del Rincon Debris Removal Project satisfied reasonable design criteria and reasonable engineering practices, and that the Project, including the retaining wall, was properly and reasonably designed in accordance with good engineering practice.

69. On November 23, 1999, Mr. O'Tousa authored a letter in response to the Zeiser Kling's letter of October 29, 1999. A copy of that letter is attached as **Exhibit 33**. I reviewed Mr. O'Tousa's letter in its entirety. Nothing in his letter changed my opinion that the Project satisfied reasonable design criteria and reasonable engineering practices, and that the Project, including the plans and specifications for the retaining wall, was properly and reasonably designed in accordance with good engineering practice.

77. We later received a letter dated April 5, 2000, in which Fugro stated opinions concerning the retaining wall. A true and correct copy of that letter is attached as Exhibit 38. I read and considered the letter of April 5, 2000. Nothing in the letter caused me to change my opinion that the design of the Vista Del Rincon retaining wall was reasonable.

80. Following my review of the letter of April 5, 2000, and after months of investigating the matter, I authored a memorandum to John C. Crowley, Interim Director of Public Works. A true and correct copy of that memorandum is attached as Exhibit 39. I concluded the memorandum by stating my opinion, based on my professional training and experience, following the review of all the plans and specifications, and following the review of the letters of Mr. O'Tousa, Fugro West, and Zeiser Kling, as follows:

“I am convinced that this project has been designed in accordance with reasonable, professional engineering judgment and with due consideration for public safety.”

94. It is my opinion today that the Project satisfied reasonable design criteria and reasonable engineering practices, and that the Project, including the plans and specifications for the retaining wall, was properly and reasonably designed in accordance with good engineering practice.

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF VENTURA**

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individually, as trustees if the Alvis Family  
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and DAN E. ALVIS, an individual,

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KITCHEN, an individual; SIDNEY  
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Case No. CIV 238700

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CIV 238719, CIV 238720, CIV 238723,  
CIV 238725, CIV 238726, CIV 238727,  
CIV 238728]

Action filed on 1/26/06

*Assigned for all purposes to the Hon. Vincent J.  
O'Neill, Judge presiding in Department 40*

**DECLARATION OF CHRIS A. HOOKE  
IN SUPPORT OF MOTION FOR  
SUMMARY ADJUDICATION**

*[Exempt from filing fees - Gov. Code § 6103]*

DATE: May 21, 2007

TIME: 8:30 a.m.

DEPT: 40

TRIAL DATE: November 7, 2007

**I, Chris A. Hooke, declare as follows:**

**1. I have been employed by the County of Ventura (the “County”) since 1999. I hold the title of Deputy Director of County’s Transportation Department. If called as a witness, I could and would testify of my own personal knowledge as follows:**

12. Before I signed the notice inviting bids, I reviewed the plans and specifications. A true and correct copy of the plans and specifications were attached to **Exhibit 22**. I reviewed and signed the plans.

13. By placing my professional stamp on the notice inviting bids, I certified that I had reviewed the plans and specifications, and that it was my opinion that the Project satisfied reasonable design criteria and reasonable engineering practices, and that the Project, including the plans and specifications for the retaining wall, was properly and reasonably designed in accordance with good engineering practice. Those same plans and specifications were also reviewed and signed by the County's acting Director of Public Works, Paul Ruffin, and Deputy Director of Public Works, Butch Britt.

30. As of the date of this declaration, it is still my professional opinion that the Project satisfied reasonable design criteria and reasonable engineering practices, and that the Project, including the plans and specifications for the retaining wall, was properly and reasonably designed in accordance with good engineering practice.

# Substantial Evidence of Reasonableness: Dissent is Acceptable

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- “Here there is ample evidence to support the reasonableness of the design. The plans bear the professional stamps of a geotechnical engineer and a civil engineer from Zeiser. The plans were approved by Britt, a registered civil engineer. Britt declared that the project has been designed with reasonable professional engineering judgment. Even geotechnical engineer, Samuel Bryan of Fugro, whom Alvis seeks to characterize as a dissenting voice, testified in his deposition: ‘We took no exceptions to their input parameters or we couldn't find any issues with their design.’

O'Tousa might be considered a dissenter, but he testified in his deposition that he did not review the plans. In any event, section 830.6 provides immunity **even if the evidence of reasonableness is contradicted.**”

- ***Alvis v. County of Ventura***, 178 Cal.App.4th 536, 553-554 (2009)

# Plaintiffs' Theories

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- Wall caused water to dam up behind the wall, and destabilized the slope.
- Wall diverted debris to go to the south.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF VENTURA

DANE W. ALVIS and AMELIA ALVIS,  
individually, as trustees of the Alvis Family  
Trust dated May 7, 1992, and as successors  
in interest to Michael Anthony Alvis,  
deceased, etc., et al.,

Plaintiffs,

v.

LA CONCHITA RANCH COMPANY, a  
California limited partnership, etc., et al.,

Defendants.

AND RELATED CROSS-ACTIONS

Case No. CIV 238700  
Assigned to Hon. Vincent J. O'Neill, Jr.  
Date: August 13, 2007  
Time: 10:00 a.m.  
Dept: 40

**DECLARATION OF AWTAR SINGH,  
PH.D IN OPPOSITION TO  
DEFENDANT COUNTY OF  
VENTURA'S MOTION FOR  
SUMMARY ADJUDICATION**

**[Memorandum Of Points And  
Authorities; Response To Separate  
Statement Of Undisputed Facts And  
Statement Of Additional Material Facts;  
Plaintiffs' Evidence In Opposition To  
The County Of Ventura's Motion For  
Summary Adjudication; Evidentiary  
Objections Filed Concurrently]**

Complaint Filed: January 26, 2006  
Trial Date: June 9, 2008

- 
- Singh declared. . .: “[The wall] had a ‘dam effect.’ It caused a rise in the groundwater table in the slide mass behind the wall and created a failure zone with a large volume of debris flow. This failure zone was a mass of soil behind the wall containing additional water that the wall did not permit to drain freely, and that was more likely to slide and create a debris flow.”
    - ***Alvis v. County of Ventura*** (2009) 178 Cal.App.4th 536, 545

# Evidence re: Drainage

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- **October 12, 1999:** O'Tousa raises question of whether wall will drain adequately.
- **October 29, 1999:** Zeiser's letter discusses installing a subdrain and notes: "lagged soldier pile walls typically contain spaces for water to travel through."
- **April 17, 2000:** County's Public Works Director's final memorandum states: "Landslide debris behind the wall would drain freely through the spaces between the timber lagging. We did consult with Zeiser Kling during the review process, and concur that the timber lagging will be self-draining because of the open spaces between the timber lagging. Accordingly, we did not require weepholes or internal drainage systems."

# County Considered Drainage

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- “It is undisputed that Zeiser and Britt considered the concerns of the County's consultants and rejected the need for any design changes to improve drainage. In particular, **Britt's memorandum of April 17, 2000, states he consulted with Zeiser during design review and concurred that the wall would be self-draining.** ‘Accordingly, we did not require weep holes or internal drainage systems.’ Weep holes and internal drainage systems are precisely the features Singh declared should have been added to the wall.

[T]he alleged change of conditions relate directly to the factors the County considered in making its design choices. **It is that sort of second-guessing of the County's design choices that section 830.6 was enacted to prevent.**”

- *Alvis v. County of Ventura*, 178 Cal.App.4th 536, 555-556 (2009)

# Plaintiffs' Theories

---

- Wall caused water to dam up behind the wall, and destabilized the slope.
- Wall diverted debris to go to the south.

# La Conchita 2005 Slide Minor and Main Lobes

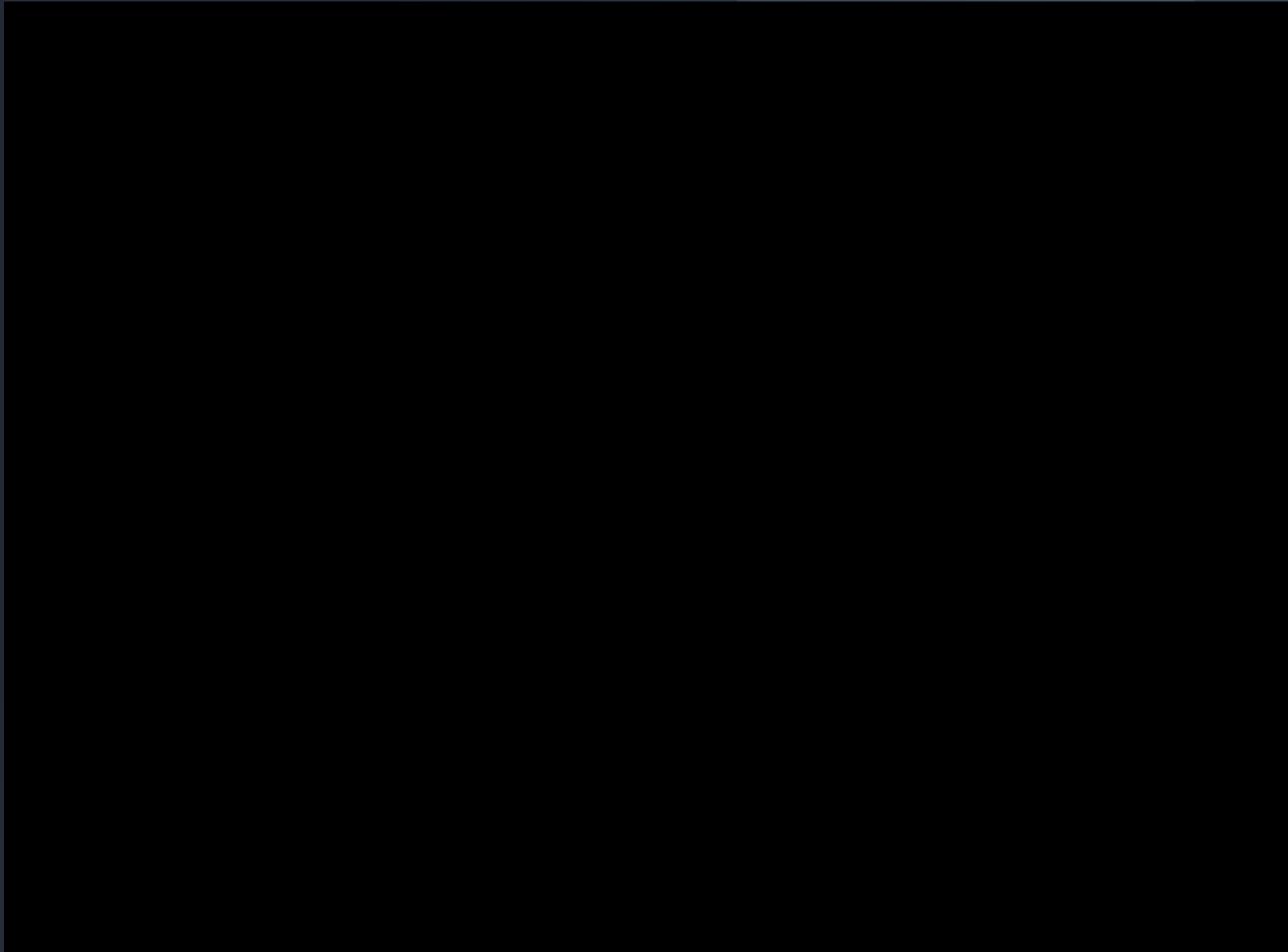


Ex. 21320

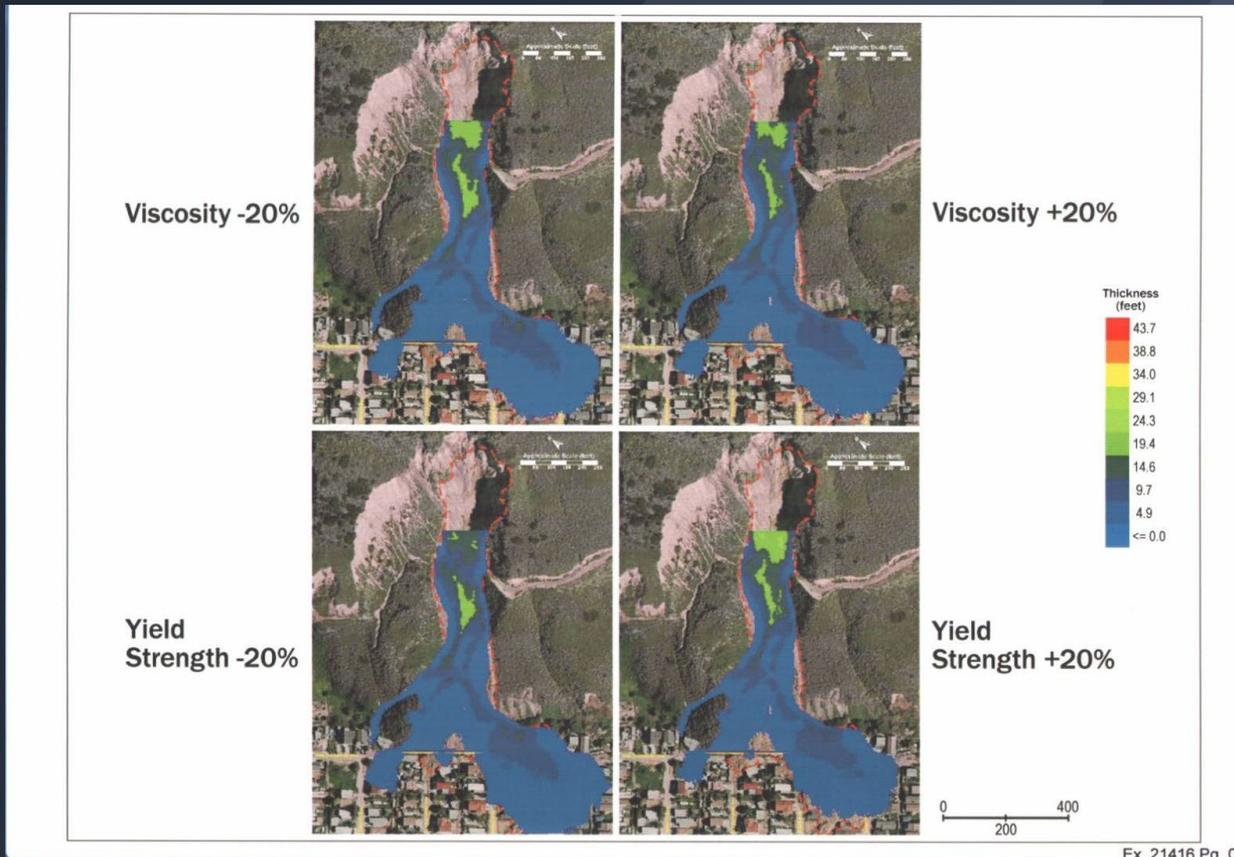
60. In the letter of October 29, 1998, which is attached as Exhibit 31, Mr. Kling and Mr. Raymer responded to each of Mr O'Tousa's questions. They placed their professional registration stamps on the letter. I reviewed that letter in its entirety. Throughout the letter, Mr. Kling and Mr. Raymer repeatedly acknowledge that the wall would not withstand a debris flow. They also stated that if a debris flow occurred, it would be "channelized in the drainage along the northern boundary of the La Conchita landslide."

# 1995 & 2005 Slide Path





# Sensitivity Analysis – With Wall

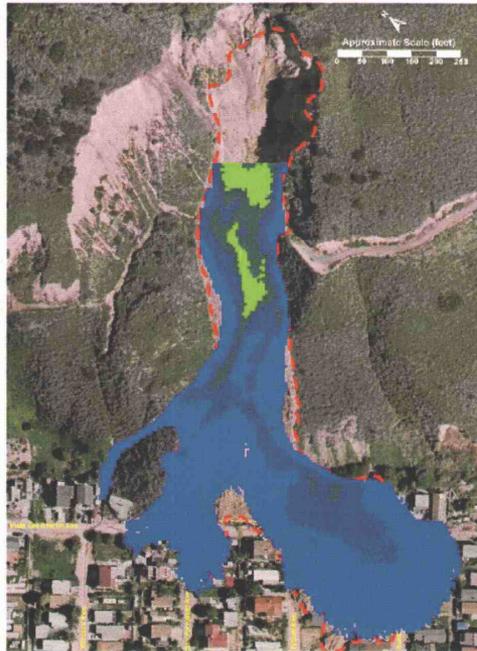


# Sensitivity Analysis

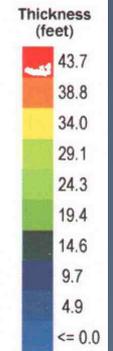
With Wall



Without Wall



Breached Wall



**Design immunity does not apply to  
inverse condemnation claims**

# Overview of Lawsuit

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- 90 plaintiffs
- ~~10 deaths~~
- ~~Personal injuries – Soft tissue to fractures~~
- ~~4 people rescued after being buried alive~~
- 27 homes damaged or destroyed
- Personal property damage

**LOEB&LOEB LLP**

A LIMITED LIABILITY PARTNERSHIP  
INCLUDING PROFESSIONAL  
CORPORATIONS

CLIENT TRUST ACCOUNT  
10100 SANTA MONICA BLVD.  
SUITE 2200  
LOS ANGELES, CA 90067

CITY NATIONAL BANK  
633 W. 5<sup>TH</sup> STREET  
LOS ANGELES, CA 90014  
18-1608  
1220

CHECK NO. 05413

DATE  
03/05/10

AMOUNT

PAY \*\*\*\*US Dollars:\$88,748.00\*\*\*\*

\$ 88,748.00

TO THE ORDER OF  
\*\*\*\*COUNTY of Ventura\*\*\*\*

LOEB&LOEB LLP

*Thomas A. Kelly*  
*Ken Benbaust*

TWO SIGNATURES REQUIRED

⑈005413⑈ ⑆1220⑆6066⑆ 210⑈08⑆275⑈

**LOEB&LOEB LLP** LOS ANGELES, CA 90067

DETACH AND RETAIN THIS STATEMENT  
THE ATTACHED IS IN PAYMENT OF ITEMS DESCRIBED BELOW

VENDOR NO.

INVOICE DATE	INVOICE NO.	DESCRIPTION	VOUCHER NO.	ACCOUNT NO./FILE NO.	AMOUNT
		Client:La Conchita			
<b>TOTAL</b> ➔					

*Huckey v. City of Temecula*

The “New” Trivial Defect Rule for Public Sidewalks

# The “New” Trivial Defect Rule

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- “Jack Cotter, plaintiff's witness, testified that approximately two months after the date of the injury, the depression in the sidewalk, at the scene of the accident, measured about **3/4 of an inch** at its deepest point.”
  - ***Felder v. City of Glendale*** (1977) 71 Cal.App.3d 719, 721.
- It is also undisputed that the height differential was at its highest at **one and 7/32 inches, or 1.21875 inches**, at the sidewalk's right edge.
  - ***Huckey v. City of Temecula*** (2019) 37 Cal.App.5th 1092, review denied (Nov. 13, 2019)

# The “New” Trivial Defect Rule

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- “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.”
  - ***Huckey v. City of Temecula*** (2019) 37 Cal.App.5th 1092, 1107 review denied (Nov. 13, 2019)

# The “New” Trivial Defect Rule

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1. Facts of the *Huckey* Case
2. Law governing trivial defects on public sidewalks
3. What your city can do to reduce liability

# The “New” Trivial Defect Rule

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1. Facts of the *Huckey* Case
2. Law governing trivial defects on public sidewalks
3. What your city can do to reduce liability

# Location of Huckey's Alleged Fall

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# Huckey Claim:

*Trip and Fall on December 12 at 4:00 p.m.*

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5. How and under what circumstances did the damage or injury occur? Specify the particular occurrence, event, act or omission you claim caused the injury or damage:

On December 12, 2015, at approximately 4:00 p.m., Claimant, Charles Huckey was walking on the sidewalk on the northeast corner of Rancho California Road and Meadows Parkway, City of Temecula, CA. As Claimant, Charles Huckey, was walking on the sidewalk, he tripped over a sidewalk panel that was negligently maintained and constituted a dangerous condition. Claimant is informed and believes that the sidewalk is owned, maintained and controlled by the City of Temecula.

# Photos Of Huckey's Injuries

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# Huckey Medical Records: Trip and Fall on December 15, 2015

TVH- Temecula Valley Hospital

Patient: HUCKEY, CHARLES H  
MRN: SWH03011831; TVH00427529  
DOB/Sec: 6/6/1961 / Male  
Attending: Meade, William A MD

Admit: 12/16/2015  
Disch: 12/16/2015  
FIN: TVH000070764048

## Emergency Department

Author: Meade, William A MD

### Basic Information

Time seen: Date & time 12/16/15 14:08:00, Provider Assignment  
Meade, William A MD assigned at 12/16/2015 13:58

History source: Patient

Arrival mode: Private vehicle.

History limitation: None.

Additional Information: Chief Complaint from Nursing Triage Note : Chief Complaint

12/16/15 14:02 PST Chief Complaint fall yesterday and hit head on concrete with LOC. states feels confuse today and had head pain. States stopped taking plavix 1 week ago. PT. slow to respond and not acting appropriately triage .

# Photographs Examined by a Computer Forensic Expert

## DECLARATION OF ERIK HAMMERQUIST

1  
2 I, Erik Hammerquist, declare:

3 1. I am an employee of FTI Consulting, Inc. ("FTI") in Los Angeles, California.  
4 Since 2007, I have worked in FTI's Computer Forensics practice, where I am a Senior  
5 Director. Prior to my employment by FTI, I was employed by INSYNC Consulting Group,  
6 Inc. from 2000 until 2007 where I developed and deployed computer network  
7 infrastructures and data protection methodologies and performed forensic data collection  
8 and analysis in support of investigations and litigations. I have an M.S. in Information  
9 Technology. I have substantial experience in the field of information technology, including  
10 the investigation and analysis of electronic data. A summary of my experience in this field  
11 is set forth in my professional bio, a true and correct copy of which is attached hereto as  
12 **Exhibit 1**. I make this Declaration based on my personal knowledge, except where noted  
13 below, and could testify competently thereto.

# Expert Hammerquist's Opinions Re Dates of Photos

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**Monday  
December 14  
4:56 p.m.**



**Tuesday  
December 15  
4:36 p.m.**



**Wednesday  
December 16  
8:29 a.m.**



**Wednesday  
December 16  
9:09 a.m.**









10:14:40 10 Q Have you driven that motorcycle in the past  
11 month?

12 A Well, like I told you earlier, I don't know.

13 Q Were you driving it in Old Town about two  
14 weekends ago?

10:14:57 15 A I don't know.

16 Q You don't remember driving your motorcycle  
17 down Old Town Front Street two weekends ago?

18 A I don't know.

14 Q How far is -- was it from your house on  
11:19:35 15 Classic Way to Old Town? Approximately how long does  
16 it take you to get there?

17 A Well, I have to take a staggered route. So  
18 if I went straight, probably five minutes, maybe  
19 seven.

11:19:52 20 Q Why did you go all the way to Old Town to go  
21 to the gas station? Why didn't you go to one closer  
22 to your house?

23 A 'Cause they don't have 76 fuel anywhere, and  
24 that's the only fuel I burn in that.

# Court of Appeal Mentions Inconsistent Testimony

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- **“Plaintiff had also been inconsistent about the date he fell.** In his deposition, he claimed he fell on the weekend of December 12 or 13, 2015, but he later testified he may have fallen on December 14 or 15, ‘a day or two’ before he went to the hospital.”
  - ***Huckey v. City of Temecula*** (2019) 37 Cal.App.5th 1092, 1100 review denied (Nov. 13, 2019)

# The “New” Trivial Defect Rule

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1. Facts of the *Huckey* Case
2. Law governing trivial defects on public sidewalks
3. What your city can do to reduce liability

# Government Code Section 830.2

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- “**A condition is not a dangerous condition** within the meaning of this chapter if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines as a matter of law that the risk created by the condition is 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.”

# Two Step Trivial Defect Analysis

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1. What is the size of the defect?
2. Are there other circumstances that render the rise dangerous?
  - a. Shadows or debris obscure condition?
  - b. Other accidents?
  - c. Cracked concrete?
  - d. Bad lighting?

# Step One: Size Of Defect

## Fielder's "Three-Quarter Inch Rule"

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- “In the present case the gradual rise from nothing **to three-quarters of an inch** in the pavement had existed for many years in the same condition and in a much traveled portion of the business section of the city. Many people walked daily over the sidewalk at that point. The defect was plainly visible. Its existence was common knowledge in the community. The plaintiff herself knew of it. She tripped over it in the daytime while she was walking toward the exposed side of the rise, without anything to obstruct her vision of the sidewalk area. She had good eyesight, was an excellent walker and frequently walked several miles in a day.’
  - **Fielder v. City of Glendale** (1977) 71 Cal.App.3d 719, 723

# Step One: Size Of Defect

## Huckey's "one and one-half inch rule"

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- "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**. (*Caloroso*, supra, 122 Cal.App.4th at p. 927, 19 Cal.Rptr.3d 254, citing *Barrett v. City of Claremont* (1953) 41 Cal.2d 70, 74, 256 P.2d 977 [and cases cited therein] and ***Fielder v. City of Glendale***, supra, 71 Cal.App.3d. at p. 724, fn. 4, 139 Cal.Rptr. 876 [same].) The City's prima facie showing shifted the burden to plaintiff to raise a triable issue of material fact concerning whether the height differential was trivial as a matter of law under the circumstances. (*Aguilar*, supra, at p. 849, 107 Cal.Rptr.2d 841, 24 P.3d 493.)"
- ***Huckey v. City of Temecula*** (2019) 37 Cal.App.5th 1092, 1107, review denied (Nov. 13, 2019)

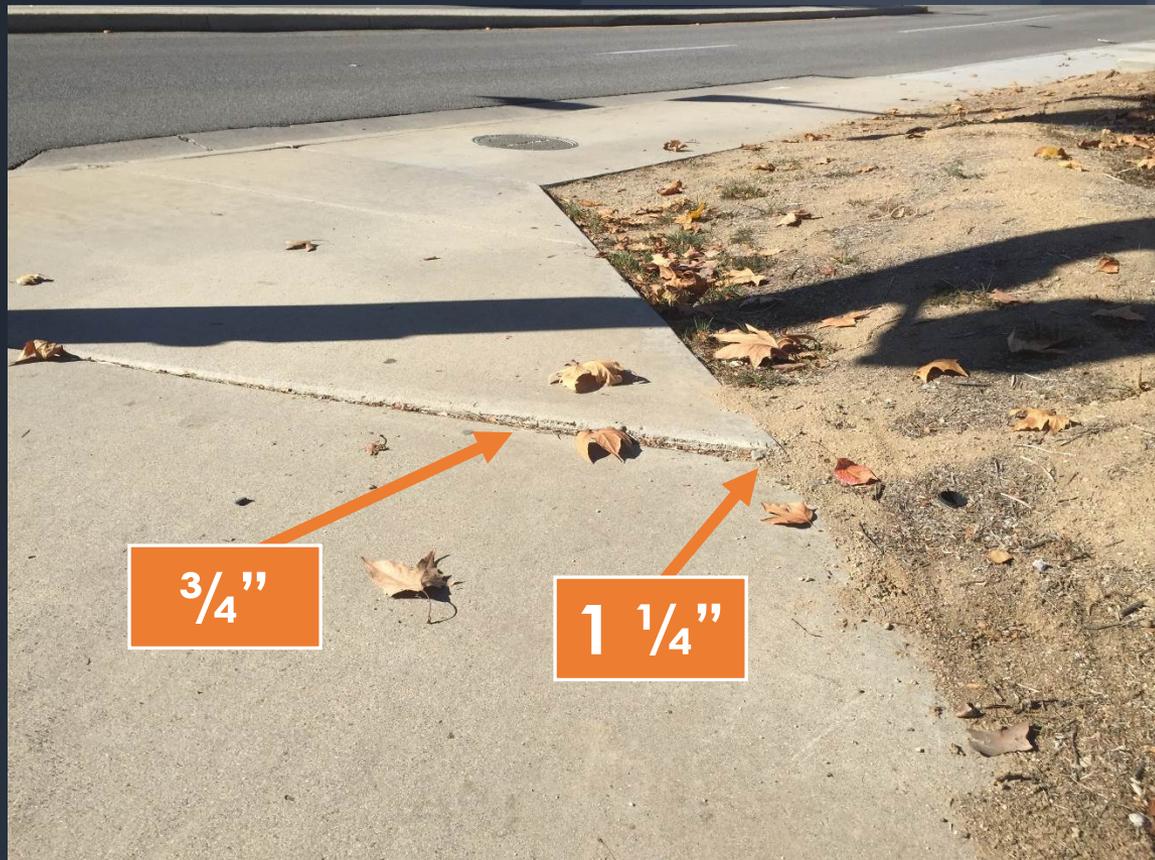
# Size Of Defect: Appellate Courts Begin Citing Huckey

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- “Absent evidence of ‘aggravating circumstances,’ courts have held such defects to be trivial as a matter of law where the height differential between slabs was as much as 1 and 7/32 inches (1.21875 inches). (See *Huckey v. City of Temecula* (2019) 37 Cal.App.5th 1092, 1108, 1109 [height differential between concrete sidewalk slabs of up to one and 7/32 inches held trivial where “[t]here were no broken concrete pieces or jagged concrete edges,” no evidence of other accidents, and plaintiff failed to show that “dirt and debris, including leaves, and the shadow from a light pole ... obstructed a pedestrian's view of the sidewalk and height differential at the time plaintiff fell”])”
  - ***Mollins v. EQR-SOMBRA*** 2008 (Cal. Ct. App., Oct. 18, 2019, No. H046172) 2019 WL 5288098, at \*3

Huckey alleges he was helping a realtor remove signs when he tripped on this elevation.

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# Step Two: Shifting of Burden to Plaintiff

## Huckey's "one and one-half inch rule"

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- "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. (*Caloroso*, supra, 122 Cal.App.4th at p. 927, 19 Cal.Rptr.3d 254, citing *Barrett v. City of Claremont* (1953) 41 Cal.2d 70, 74, 256 P.2d 977 [and cases cited therein] and *Fielder v. City of Glendale*, supra, 71 Cal.App.3d. at p. 724, fn. 4, 139 Cal.Rptr. 876 [same].) The City's prima facie showing **shifted the burden** to plaintiff to raise a triable issue of material fact concerning whether the height differential was trivial as a matter of law under the circumstances. (*Aguilar*, supra, at p. 849, 107 Cal.Rptr.2d 841, 24 P.3d 493.)"
- ***Huckey v. City of Temecula*** (2019) 37 Cal.App.5th 1092, 1107, review denied (Nov. 13, 2019)

# Are there other circumstances that render the rise dangerous?

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- a. Shadows or debris obscure condition?
- b. Other accidents?
- c. Cracked concrete?
- d. Bad lighting?

# Other Circumstances:

## Huckey Claims A Shadow Obstructed the Rise

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8           5.       I have printed out an exemplar screen showing the metadata relating to  
9 photograph IMG\_2211, which depicts a shadow on a sidewalk, and which is attached to the  
10 Plaintiff's Opposition as Exhibit H. (A true and correct copy of that exemplar screen is  
11 attached as **Exhibit 3**.) Looking at the metadata, we can determine that the photograph was  
12 taken on **January 11, 2016 at 2:03 p.m.** I understand that the area depicted is at Meadows  
13 Parkway and Rancho California in Temecula, California. The longitude and latitude stored  
14 in the metadata, *33 deg 30' 51.88" N, 117 deg 6' 16.83" W*, is consistent with that location.

# Other Circumstances:

## Huckey Claims A Shadow Obstructed the Rise

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- “In reply, the City argued there was no evidence that any dirt, debris, or a light pole shadow obscured the height differential at any of the times or dates plaintiff was claiming he fell, namely, between 3:00 and 5:00 p.m. on December 12 to 15, 2015. **Metadata on plaintiff's phone showed that the photograph plaintiff took of the light pole shadow obscuring the height differential was taken on January 11, 2016, at 2:03 p.m., not ‘at about the same time’ plaintiff fell, or on January 3, 2016, as plaintiff was claiming.”**
- ***Huckey v. City of Temecula*** (2019) 37 Cal.App.5th 1092, 1100 review denied (Nov. 13, 2019)

# Other Circumstances:

## Huckey Claims A Shadow Obstructed the Rise

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- **“The court correctly sustained the City's objections** to plaintiff's proffered photographs of dirt, debris, and the shadow obscuring the height differential as lacking in sufficient foundation. **No evidence showed that these photographs were taken at any time near the dates or the times of day plaintiff claimed he fell** or that these photographs showed the conditions on the sidewalk at the time plaintiff fell.”
  - ***Huckey v. City of Temecula*** (2019) 37 Cal.App.5th 1092, 1109 [250 Cal.Rptr.3d 336, 348], review denied (Nov. 13, 2019)

# Huckey Cited Re Metadata

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- The trial court did not abuse its discretion in ruling Local 721 failed to show Reyes transcribed her notes “at or near the time of the act, condition, or event.” Counsel for Local 721 never asked Reyes when she created her handwritten notes or how long after her interactions with Mitchell she transcribed them, and Local 721 provided no metadata or other evidence indicating when Reyes created the files in her personal information manager program. **(See *Huckey v. City of Temecula* (2019) 37 Cal.App.5th 1092, 1100 [metadata on the plaintiff’s phone showed the date and time the plaintiff took a photograph that the court admitted into evidence].)”**
  - ***Mitchell v. SEIU Local 721*** (Cal. Ct. App., Jan. 8, 2020, No. B289210) 2020 WL 89826, at \*10

# The “New” Trivial Defect Rule

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1. Facts of the *Huckey* Case
2. Law governing trivial defects on public sidewalks
3. What your city can do to reduce liability

# What can your city can do to reduce liability?

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- Accurately measure any rise involved in a claim
- Keep accurate maintenance records
- Have a concrete repair program
- Log citizen complaints
- Log other accidents
- Hire a lawyer that understands the trivial defect rule



**Thank you.**

**Robert Ceccon**  
rcecon@rwglaw.com