



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

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

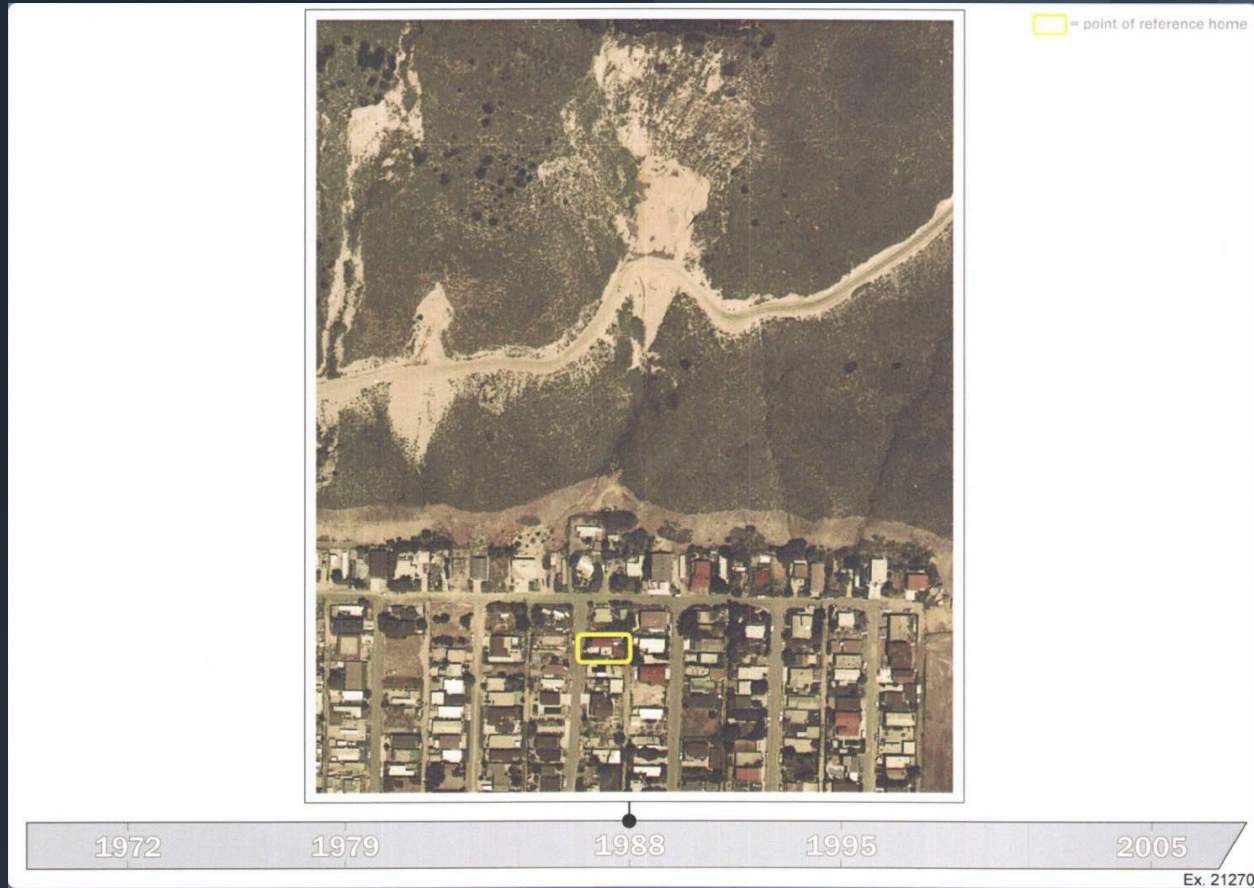
- 90 plaintiffs
- 10 deaths
- Personal injuries – Soft tissue to fractures
- 4 people rescued after being buried alive
- 27 homes damaged or destroyed
- Personal property damage

The Wall Identified by Pile Number

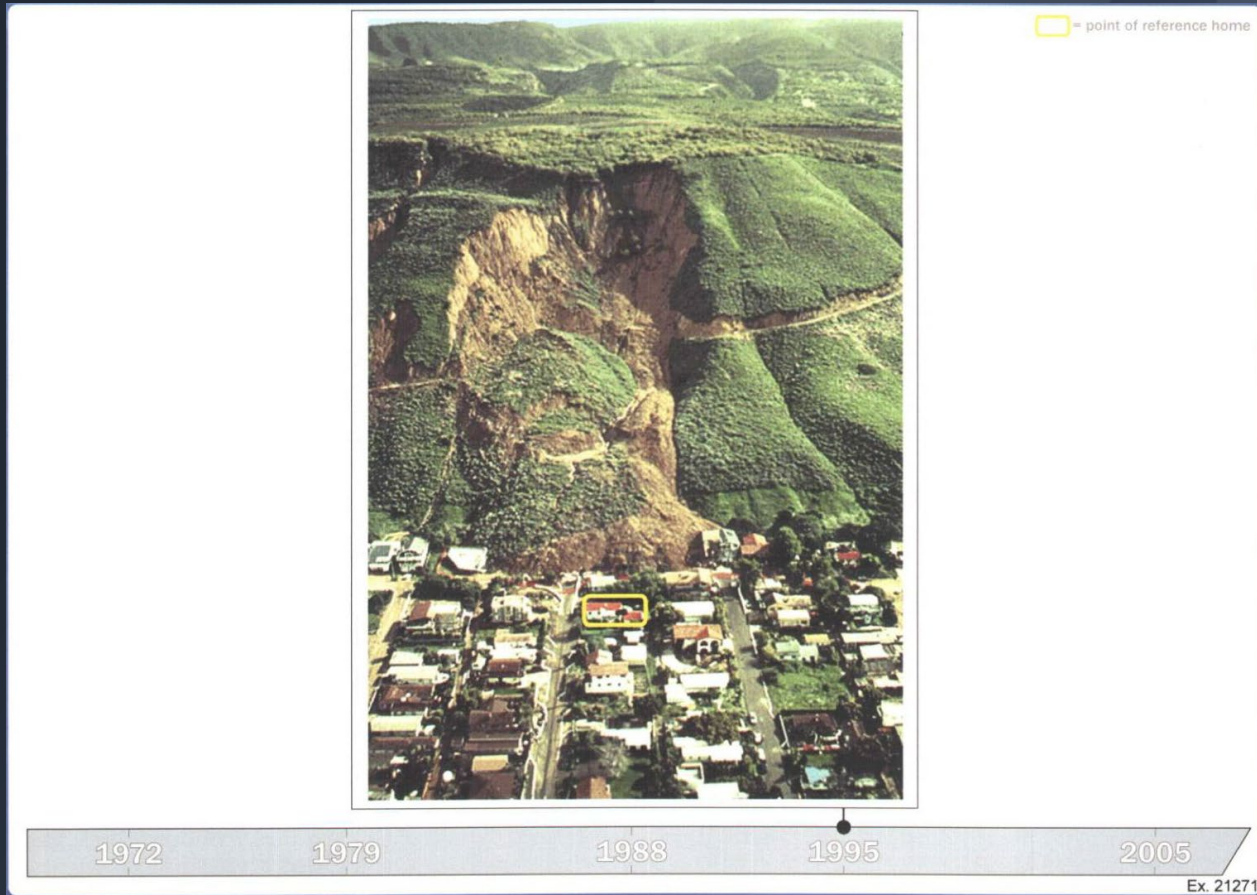


Ex. 21277

1988



1995

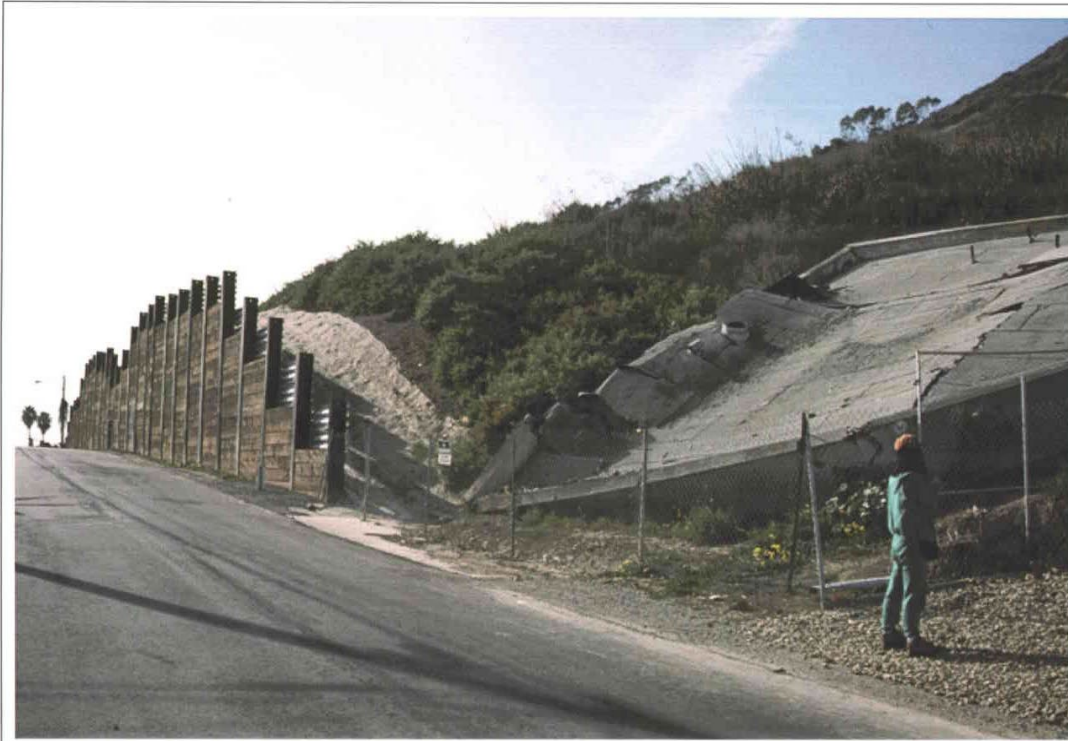


The 1995 Slides Blocked Vista Del Ricon



Ex. 21318

The Wall Soon After Completion



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

SWALLOWED UP.

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 cave-in on Tunnel No. 4, near Tomscheff, yesterday, cut off all railroading 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 stalled before the 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 land-slides 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-
cieve dispatch.) Yesterday this
morning, by the worst landslide ex-
perienced on the Coast division of the
Southern Pacific Railroad, four men, a
big engine and an "ore" car were bur-
ied beneath a mountain of earth at
Punta Gorda, sixteen miles south of
this city and about a mile south of
the Ventura county line. Without
warning the side of the mountain, high
above the tracks, in which were work-
ing thirty-five laborers, gave way. A
sluiceway of rocks and gravel preceded
the tremendous descending body of
earth and heavier matter. The men,
drugging picks and shovels, scattered
toward the ocean, leaving for life over
the cliff. Some rushed clear to the
coastside head of the overwhelming mass;
others caught in the crushing, grinding
earth and rocks, were hurled down-
ward, nearly buried. Still others—and
see the light that greeted me
"My father did not know how many
men-if any-were under this slide. With
that disaster in mind and would be
wounded for, and he may be under
the debris. These men laborers also
would be found. They may have es-
caped and run away, but they may be
under this rock."

FANNED DOWN CLIFF.

"I was in the act of the matter," said
fireman throughout. "I do not know
where the engine is, but I believe
was at the place on the opposite side
between the slide. Suddenly I heard

some screaming against the engine
bell, and looking out of the window
saw rocks and earth going over the
cliff. I leaned through the window—
don't know how, but I did it. The next
I knew I was being carried down,
down, down the cliff with the rocks
and gravel, and didn't stop a second.
I turned over and over until I hit the
water. Then I got up and ran some
distance from the slide. Rocks were
still coming down. I don't believe it
looked more than thirty seconds from the
time I heard the first rumble until it
was all over. I hated men paid me, I
went over the cliff."

"HOW I BURIED MY STERNUM."
Thomas Stewart, the 36-year-old
laborer among the injured, said: "I
was with another man. I don't know
his name, on the bank above the
tracks. We were watching out for
rocks that were falling down the hill
while the men below were clearing the

LANDSLIDE BURIES WORKMEN AND TRAIN.

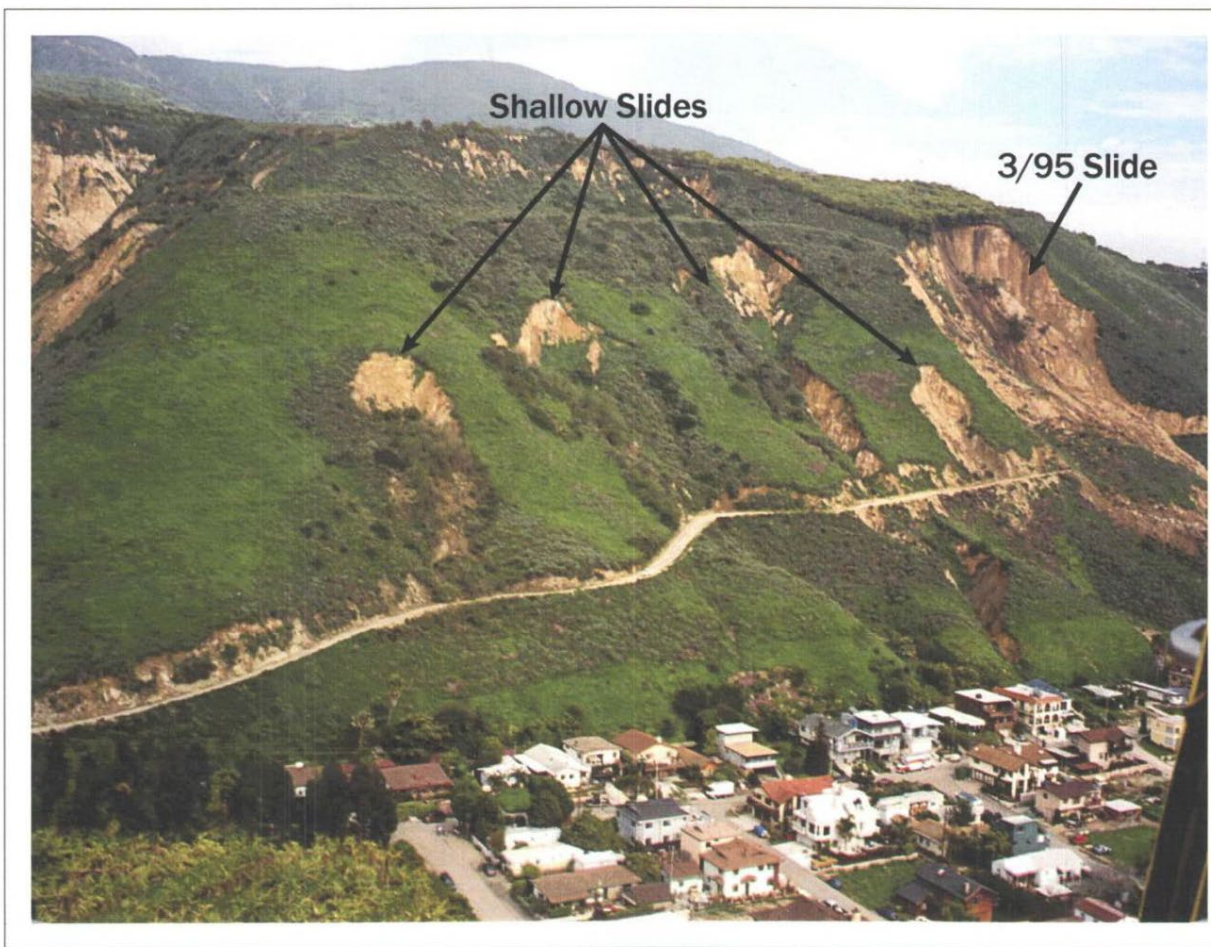
*Side of Mountain Descends Upon
Espee Track at Punta Gorda, Near
Ventura County Line, Engulfing
Cars and Engine—Four Men Dead.*

[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

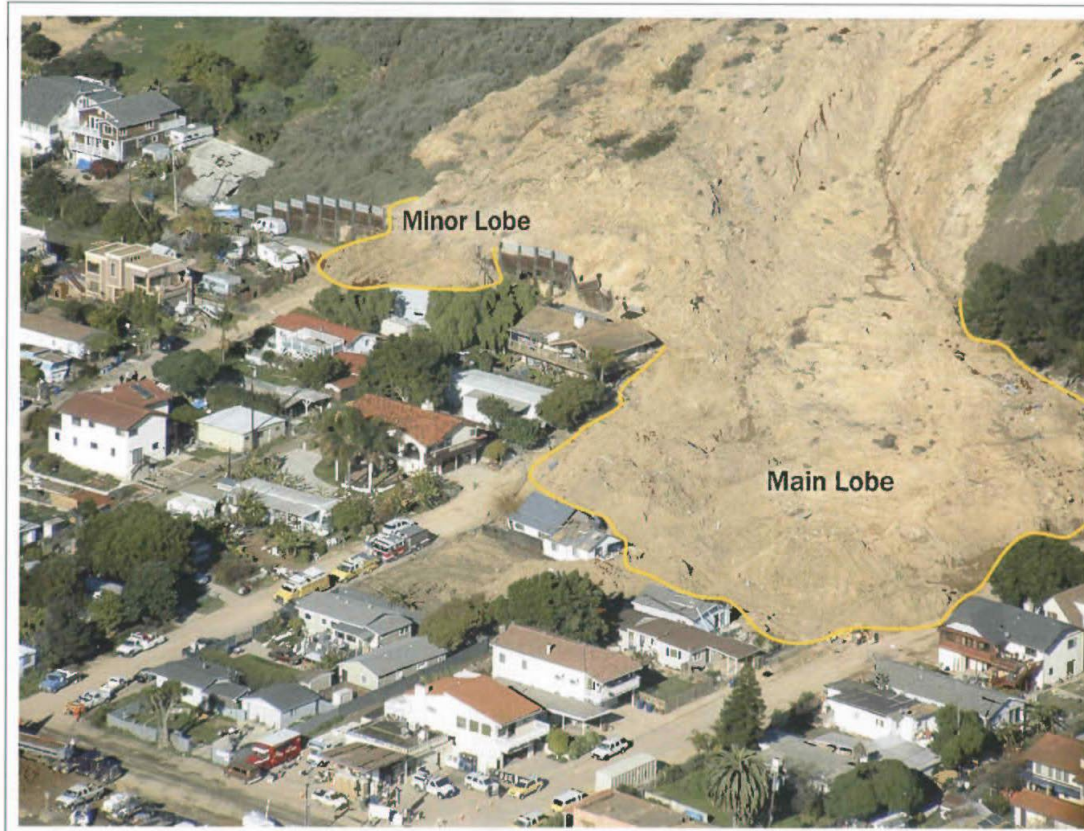
PCH: the morning of January 10, 2005



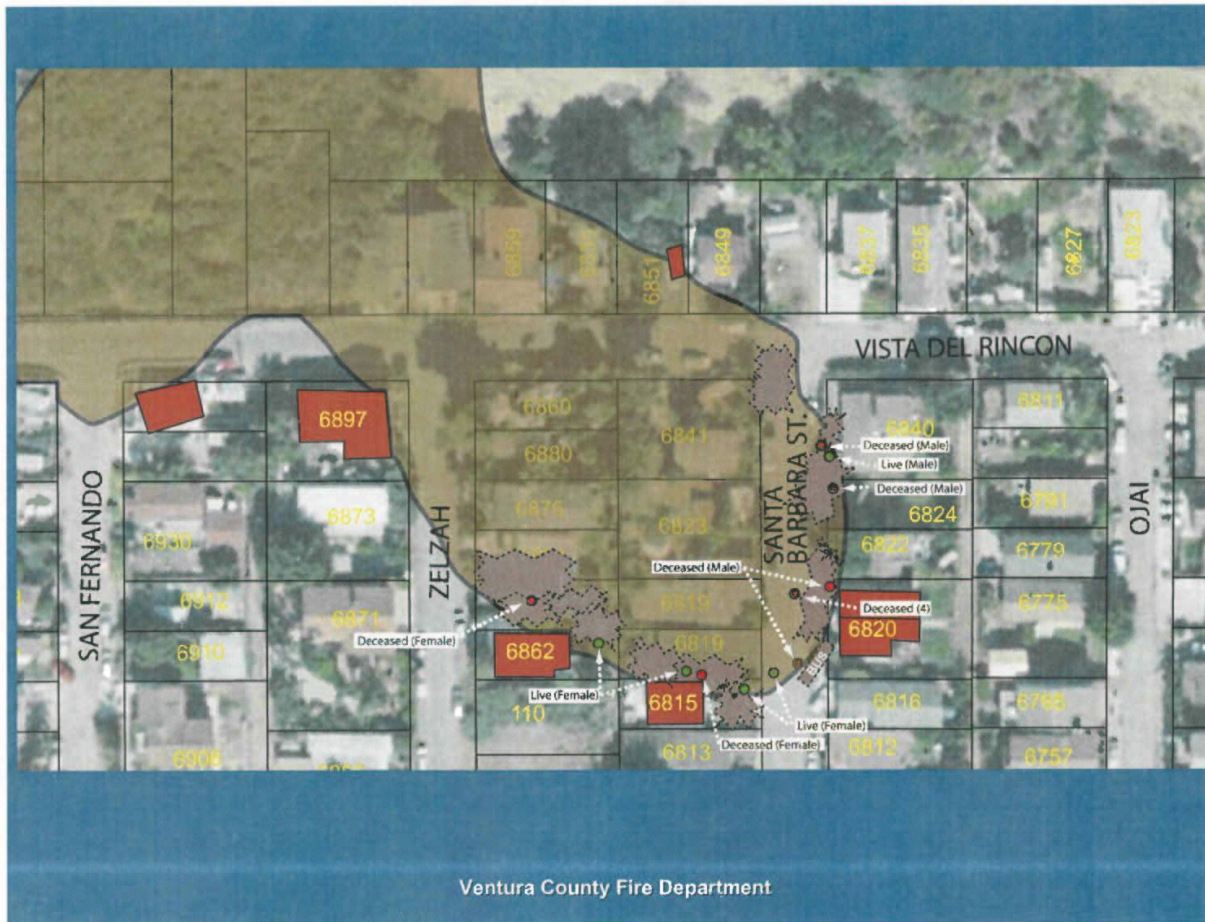
Ex. 21281



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

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

- 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.

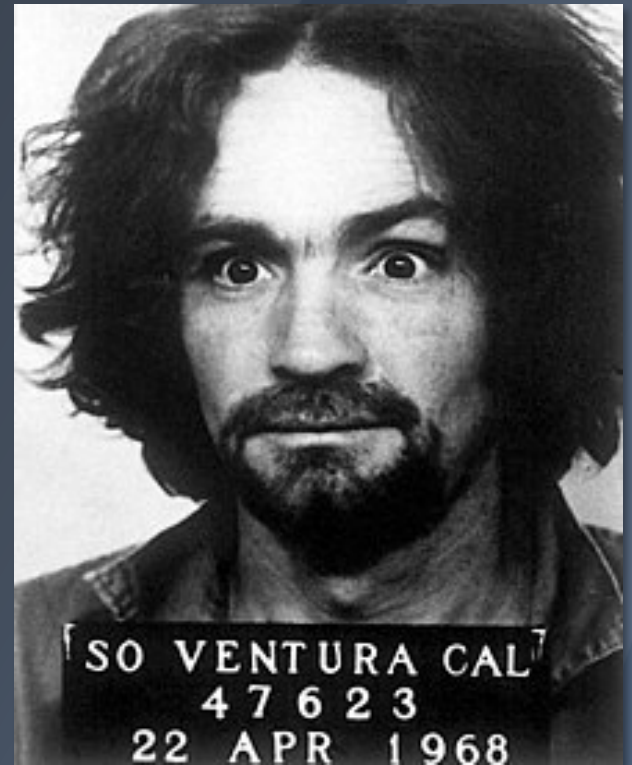
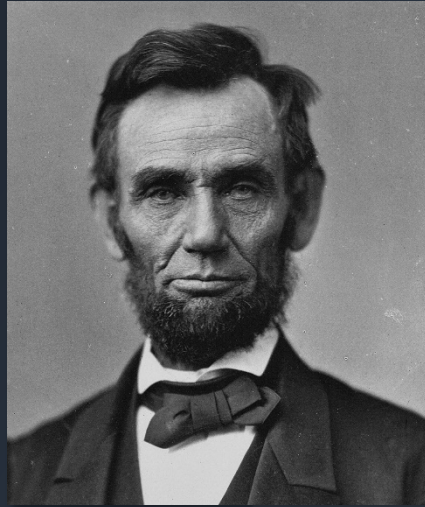
- Govt. Code § 830.6

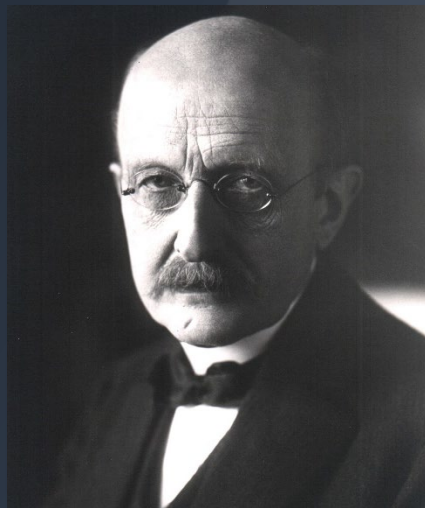
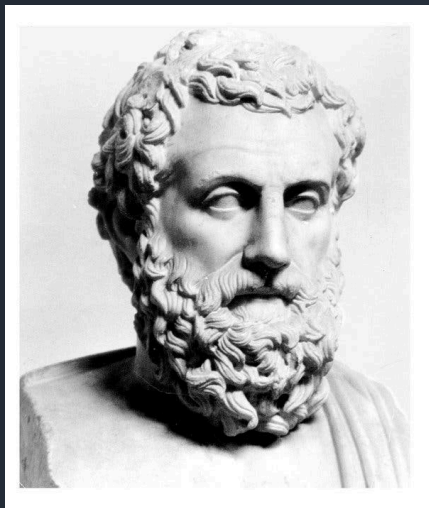
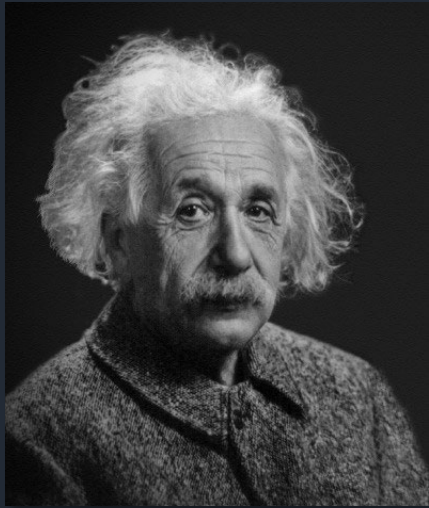
Motion for Summary Judgment

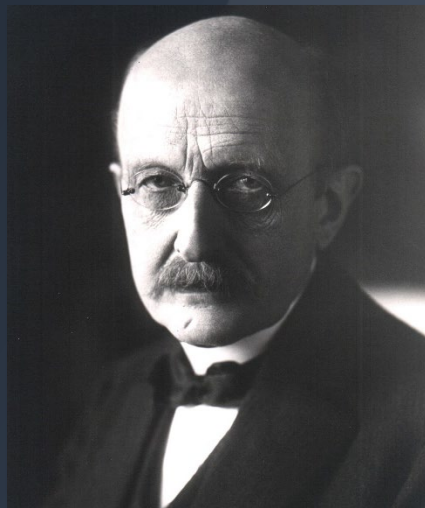
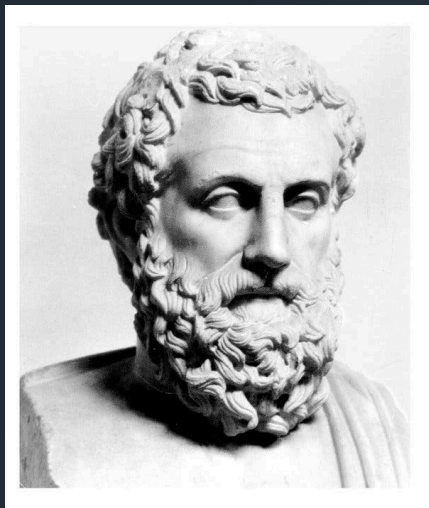
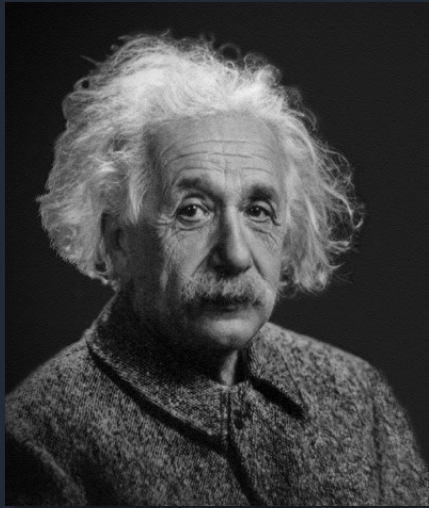
Question
of Fact
Standard

vs.

Substantial
Evidence
Standard







Evidence of Reasonableness

- 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

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

- **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."

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.

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,

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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

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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 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

- “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

- 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

- **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

- “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



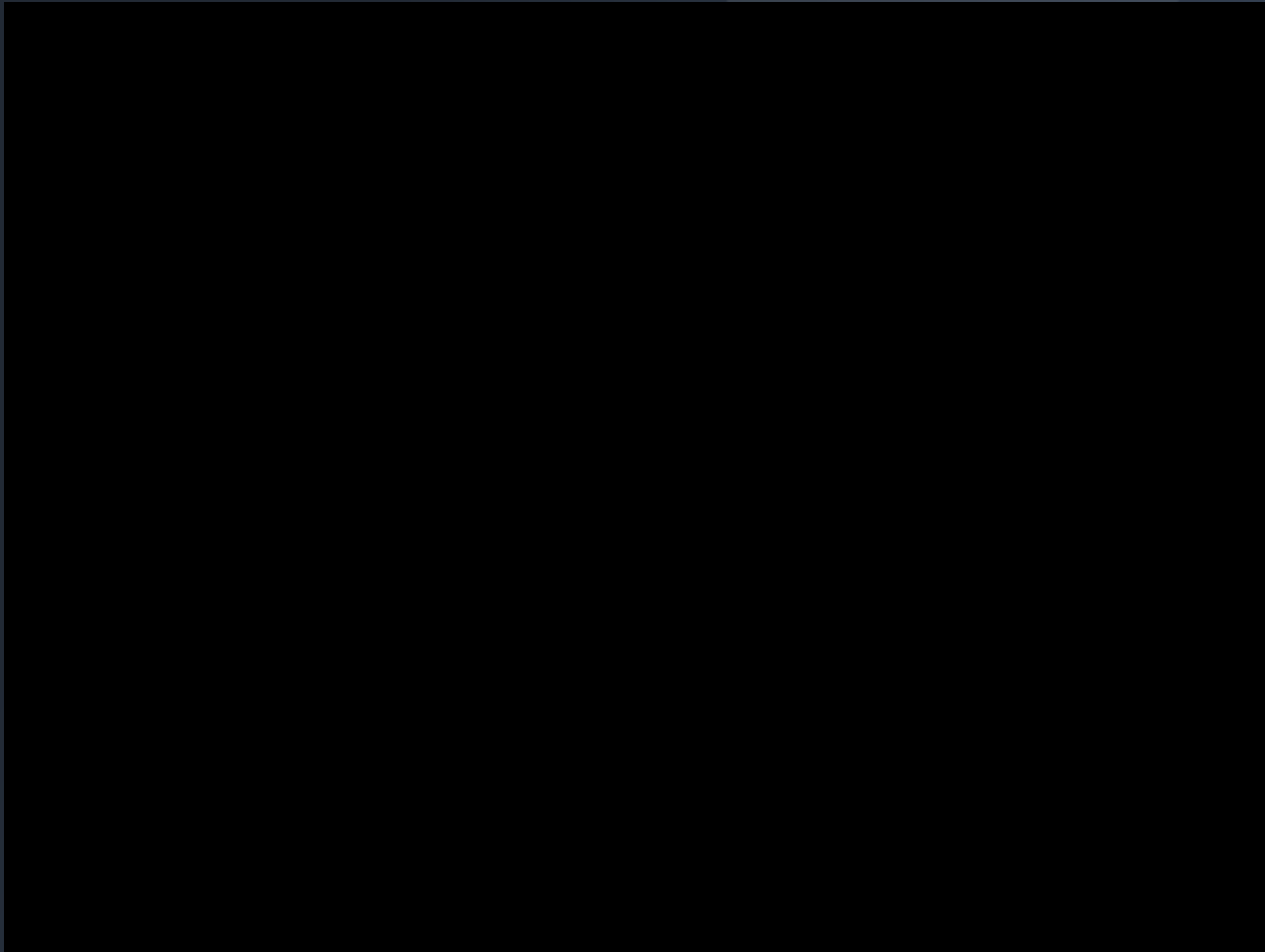
Ex. 21320

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."

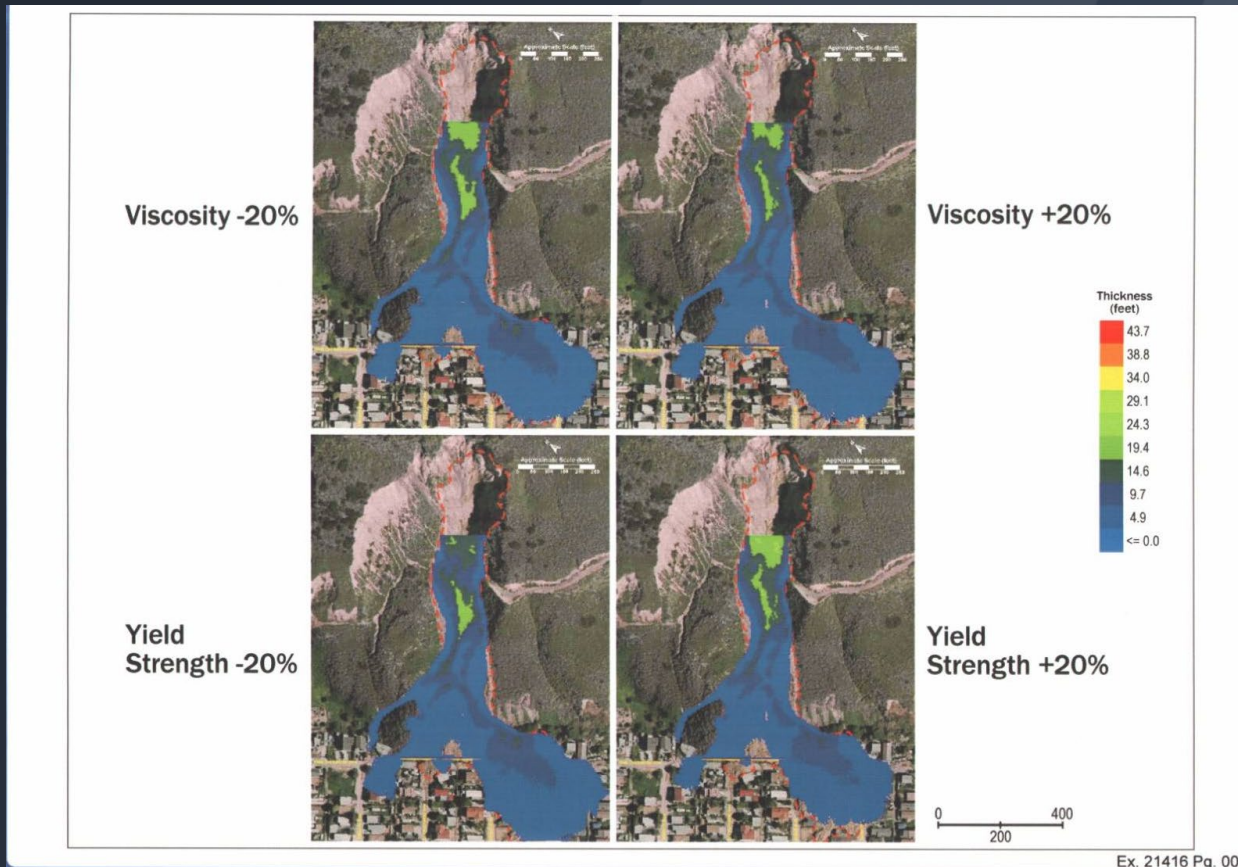
1995 & 2005 Slide Path



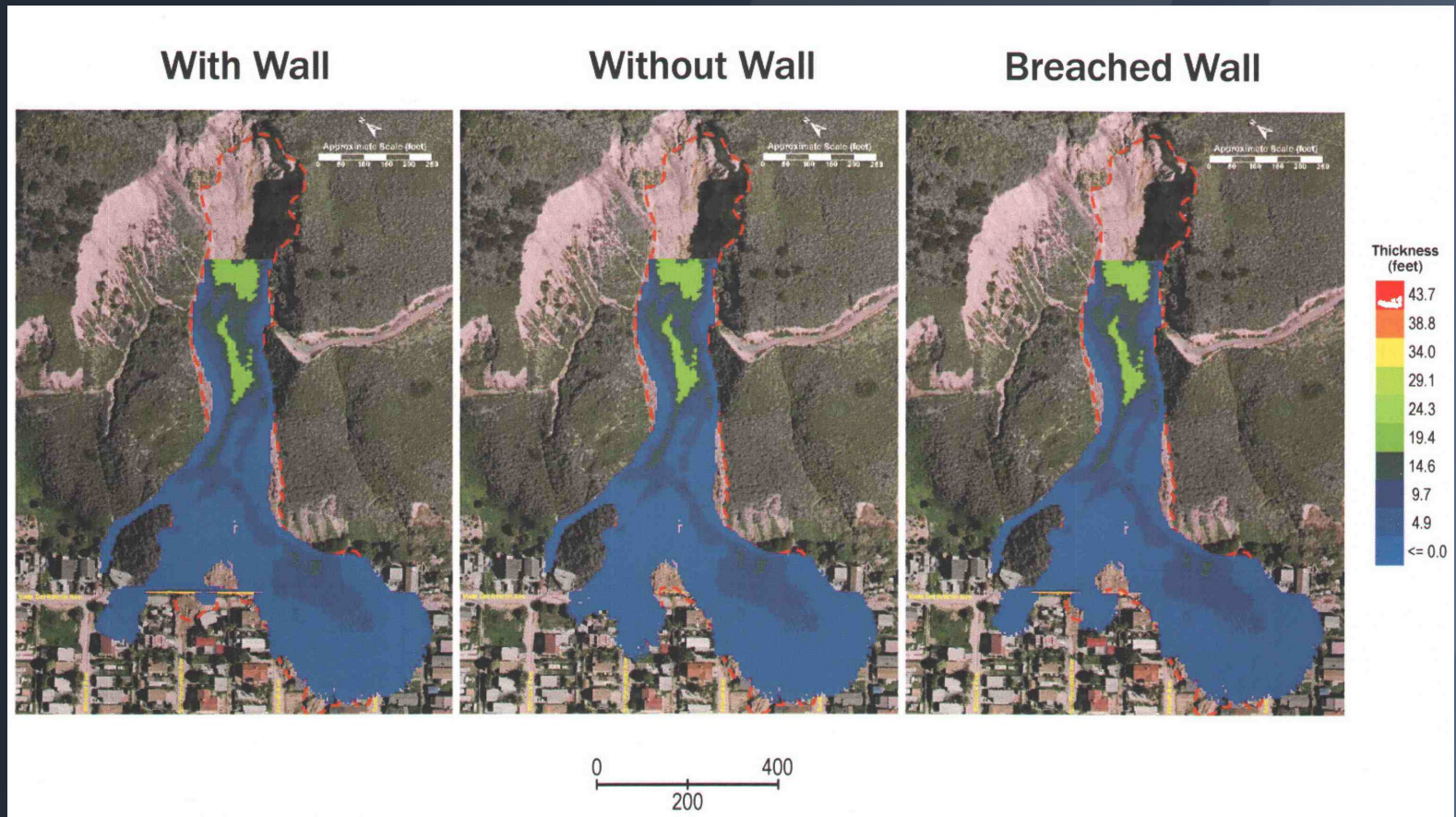
Ex. 21275



Sensitivity Analysis – With Wall



Sensitivity Analysis



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

Overview of Lawsuit

- 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 LLPA LIMITED LIABILITY PARTNERSHIP
INCLUDING PROFESSIONAL
CORPORATIONSCLIENT TRUST ACCOUNT
10100 SANTA MONICA BLVD.
SUITE 2200
LOS ANGELES, CA 90067CITY NATIONAL BANK
633 W. 5TH STREET
LOS ANGELES, CA 90014
18-1606
1220

CHECK NO. 05413

DATE
03/05/10

AMOUNT

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

\$ 88,748.00

TO
THE
ORDER
OF
****CONEY of Ventura****

LOEB&LOEB LLP




TWO SIGNATURES REQUIRED

⑈005413⑈ ⑆122016066⑆ 210⑈081275⑈

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			
TOTAL ➡					

Huckey v. City of Temecula
The “New” Trivial Defect Rule for Public Sidewalks

The “New” Trivial Defect Rule

- “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

- “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

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

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



Huckey Claim:

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

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



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

I, Erik Hammerquist, declare:

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

Expert Hammerquist's Opinions Re Dates of Photos



**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

- “**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

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

- “**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

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"

- “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

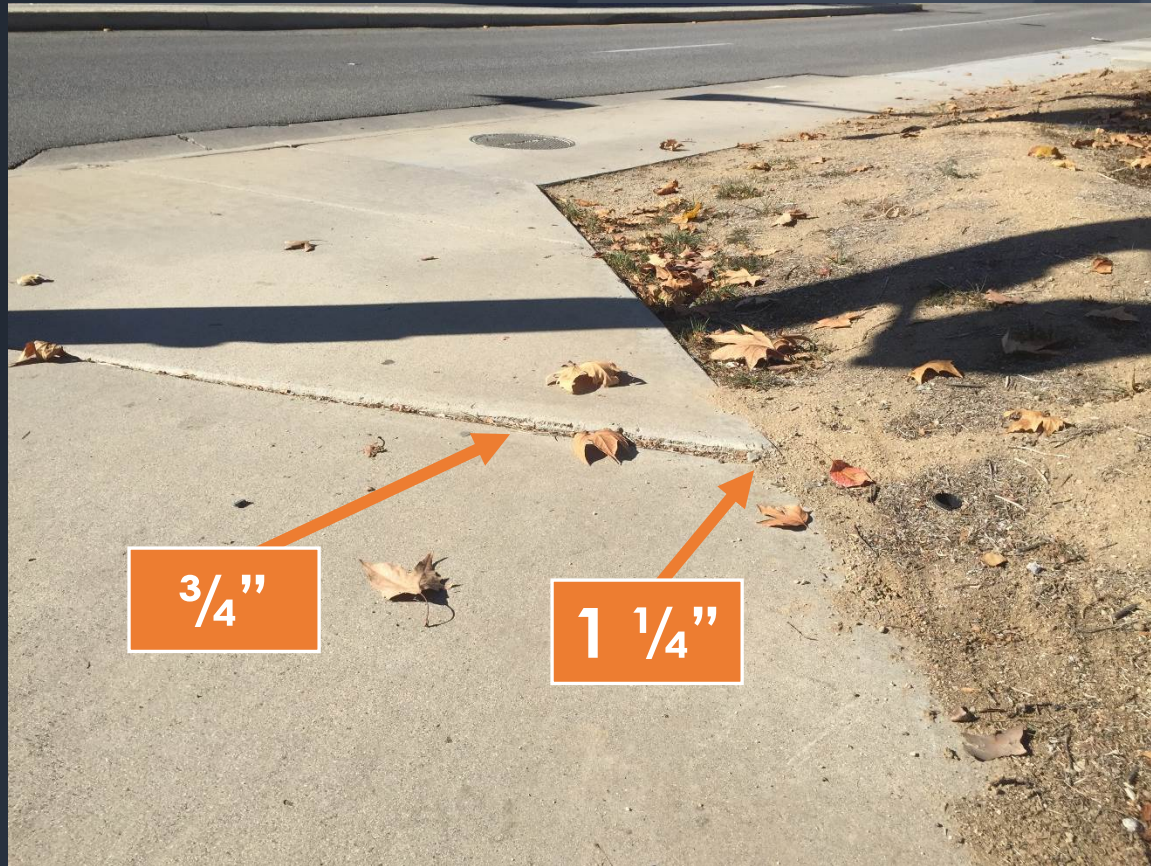
Huckey's "one and one-half inch rule"

- "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

- “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.



Step Two: Shifting of Burden to Plaintiff

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

- "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?

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

Other Circumstances:

Huckey Claims A Shadow Obstructed the Rise



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

- “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

- **“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

- 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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What can your city can do to reduce liability?

- 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