Filed 10/26/09 City of Moreno Valley v. Superior Court CA4/2

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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| CITY OF MORENO VALLEY,<br><br>Petitioner,<br><br>v.<br><br>THE SUPERIOR COURT OF RIVERSIDE COUNTY,<br><br>Respondent;<br><br>JUSTIN FITCH,<br><br>Real Party in Interest. | E047606<br><br>(Super.Ct.No. RIC414978)<br><br>OPINION |

ORIGINAL PROCEEDINGS; petition for writ of mandate. Gloria Trask, Judge. Petition granted.

Bell Orrock & Watase, Stanley O. Orrock, Michael A. Fortino; Robert D. Herrick, City Attorney, Robert L. Hansen, Assistant City Attorney, Steve Hardman, Deputy City Attorney; Greines, Martin, Stein & Richland and Timothy T. Coates for Petitioner.

No appearance for Respondent.

Kirby, Kirby and Kirby, Steven C. Kirby, Aimee E. Kirby; The Traut Law Firm and Eric V. Traut for Real Party in Interest.

This is a personal injury action arising out of an automobile versus motorcycle accident involving real party in interest Justin Fitch while he was riding on streets, and at an intersection, owned or controlled by petitioner City of Moreno Valley (the City). The City demurred and moved to strike. Both motions were based on the legal theory that, contrary to real party in interest's allegations, there was no actionable "dangerous condition" at the subject intersection because the City was entitled to "sign/signal" immunity. (Gov. Code, §§ 830, 830.4.)[1] The trial court denied the motions and the City filed a petition for writ relief.

STATEMENT OF THE CASE

The complaint alleges that real party in interest was proceeding southbound on Kitching Street "north of John F. Kennedy" when Jesus Ramirez (Ramirez), driving northbound, attempted to make a left turn, colliding with real party in interest's motorcycle within the intersection. It is further alleged that there was no left turn lane and "the light sequence was such that traffic on northbound Kitching and southbound Kitching would have a green light at the same time." We take this to mean that there was no separate dedicated "left turn arrow." Finally, it was alleged that Ramirez's view of

[1] All further statutory references are to the Government Code unless otherwise indicated.

real party in interest's vehicle was "obstructed by the other vehicles in front of him attempting to turn and by vehicles of a higher profile in front of the [real party in interest]'s motorcycle."

The City argued that it was completely immune from liability under these allegations, primarily pursuant to section 830.4. That section provides 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 the Vehicle Code, or distinctive roadway markings as described in Section 21460 of the Vehicle Code." This statute does not create an immunity; however, section 830.8[2] expressly provides that "[n]either 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."[3] The City's position was that real party in interest's claim was based on the lack of a dedicated left turn signal, and that it was immune on this point and/or there was no dangerous condition as a matter of law.

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[2] This section was cited in the City's reply.

[3] A left turn green arrow, yellow arrow, and red arrow are described in Vehicle Code sections 21451 through 21453.

Real party in interest responded by suggesting[4] that the intersection where the accident occurred was dangerous due to high traffic, had a "high" rate of accidents, and was known by City personnel to have "safety issues." He pointed to the declaration of his expert opining that the intersection was dangerous due to the lack of a left turn signal, and the alleged fact that one has now been installed.

DISCUSSION

First, we will reject any contention that the allegations concerning the claim that larger vehicles blocked either real party in interest's or Ramirez's view of oncoming traffic could be the basis for liability. It is quite true that a public entity may be liable for collisions resulting from obstructions to the vision of motorists using a public street. (E.g., *Bakity v. County of Riverside* (1970) 12 Cal.App.3d 24, 30 [tree branches].) However, we are unaware of any authority to the effect that a public entity, which allows large vehicles on its streets will be liable if these vehicles block the view of drivers

[4] Much of real party in interest's response was done by reference to a previous motion for summary judgment (Code Civ. Proc., § 437c) by the City based on a theory of "design immunity" under Government Code section 830.6. As that material is not part of the record, our review is to some extent hampered. However, as a demurrer and motion to strike both attack the face of the pleading, extraneous evidence is not particularly relevant. (See *Price v. Dames & Moore* (2001) 92 Cal.App.4th 355, 359.) Although real party in interest asked the trial court to take judicial notice of the evidence submitted with respect to the motion for summary judgment, the court could not assume that the evidence presented was true or that it usefully amplified the pleading. Nevertheless, to some extent we have considered real party in interest's arguments, especially in considering whether further leave to amend should be granted. The previous ruling also came to this court, which reversed the grant of summary judgment in favor of the City, finding a triable issue of fact as to whether the original "design immunity" might have been lost over time. (*Fitch v. City of Moreno Valley* (Mar. 21, 2008, E041090) [nonpub. opn.].)

behind them, and we decline to create such authority. A condition is not "dangerous" within the meaning of section 830 if it constitutes a risk only if not used "with due care." In our view, it is obvious that for a driver to use "due care," he or she must not proceed until he or she can see what is coming. These allegations cannot state a cause of action against the City.

It is also well established that traffic alone, even heavy traffic, does not constitute a "dangerous condition." (*Mittenhuber v. City of Redondo Beach* (1983) 142 Cal.App.3d 1, 7.) This is true even if traffic volumes and speeds increase over time. (*Brenner v. City of El Cajon* (2003) 113 Cal.App.4th 434, 440.) Real party in interest does not point to any other *physical attribute* of the intersection that would tend to indicate that it is dangerous—for example, there is no allegation of deceptive sightlines or peculiar road configuration. (Cf. *Bunker v. City of Glendale* (1980) 111 Cal.App.3d 325, 327-328 [steep hill created "surprise" for motorists reaching top].)[5] Nor is there any allegation or contention that the signals were malfunctioning. (Cf. *Mathews v. State of California ex rel. Dept. of Transportation* (1978) 82 Cal.App.3d 116, 119 [lights stuck on green and red].)

[5] Section 830.8 creates an exception to the immunity if "a signal, sign, marking or device (other than one described in Section 830.4) was necessary to warn of a dangerous condition which . . . would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care."

Indeed, the complaint appears to allege that the signals were consistent in showing "green" for drivers or riders going both north and south on Kitching.[6]

Real party in interest's only basis for liability, therefore, must be that there was no dedicated left turn signal that would have required him to safely stop while Ramirez completed his turn—or, put another way, which would have prohibited Ramirez from turning while real party in interest was crossing through the intersection. In light of section 830.4, this contention is simply untenable.

As explained in *Mittenhuber v. City of Redondo Beach*, *supra*, 142 Cal.App.3d at page 6, section 830.4 was a codification of *Perry v. City of Santa Monica* (1955) 130 Cal.App.2d 370 at page 372, in which the Court of Appeal, stressing that "a city is not an insurer of the safety of travelers," held that the defendant had no duty to erect stop signs even at an allegedly blind intersection. Although on its face this proposition may seem somewhat surprising, it has been consistently recognized and upheld. (See *City of South Lake Tahoe v. Superior Court* (1998) 62 Cal.App.4th 971, 978 [there having been no duty to erect a stop sign, there could be no liability for the failure to replace it after it was knocked down]; *Chowdhury v. City of Los Angeles* (1995) 38 Cal.App.4th 1187, 1195 [no liability when city-installed traffic signals became inoperative due to power failure;

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**6** To argue that the signals were "improperly phased" is not to say that they were defective or misleading. It is clear that real party in interest acknowledges that the signals were functioning as they were designed to do. He simply argues that they should have been designed with additional features.

absence of signals could not mislead and Veh. Code § 21800 requires motorists to stop at an inoperative signal].)

It is clear, therefore, that if the City had left the intersection *without traffic control of any kind*, it would have had no possible liability to anyone injured at the intersection.[7] This is true even though such a situation would indisputably have been far more dangerous to far more drivers than the intersection as it stood at the time of real party in interest's accident. Nevertheless, it is asserted that because the City here *did* install traffic control devices, it can be liable because it did not install "enough" or "suitable" devices. With this we disagree.

The most obvious reason for rejecting this argument is that to adopt it would discourage public entities from installing any traffic signals and other control devices at all because the ingenuity of counsel would almost always permit the argument that "better" or at least "different" devices would have prevented any particular accident in question. At the very least, this would lead public entities into protracted litigation that sections 830.4 and 830.8 are clearly designed to avoid. Furthermore, a construction that would tend to persuade public entities to adopt a dangerous practice of inaction is obviously absurd, and it is axiomatic that statutes should be construed to *avoid*

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[7] There may be isolated exceptions to this rule; for example, if a local entity has designated a highway as a "through highway," it shall install devices requiring all vehicles to stop before entering or crossing that highway. (See Veh. Code, § 21101, subd. (b); *Irvin v. Padelford* (1954) 127 Cal.App.2d 135, 142-143.) Whether the result in *Irvin* would have been obtained following the enactment of Government Code sections 830.4 and 830.8 is unclear. In any event, neither the statute nor the case applies here.

absurdities, not to create them. (*Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049, 1055.)

Secondly, real party in interest's desired construction would require us to insert words into the statutes. In section 830.4, for example, we would have to read it as providing that "[a] condition is not a dangerous condition within the meaning of this chapter merely because of the failure to provide **[any]** regulatory traffic control signals," and section 830.8 would have to read that "[n]either a public entity nor a public employ is liable under this chapter for an injury caused by the failure to provide **[any]** traffic or warning signals . . . ." Again, if the language of a statute is clear, there is no judicial power to add to it. (*Trope v. Katz* (1995) 11 Cal.4th 274, 280.)

Finally, if we accept that absent obstructions, unusual visual effects, or "traps," a roadway is not ipso facto dangerous just because it is busy, then how could the City's failure to install any particular kind of traffic control have *made* it dangerous? A public entity is entitled to assume that drivers will obey the driving laws (*Chowdhury v. City of Los Angeles*, *supra*, 38 Cal.App.4th at p. 1195)—in this case, that Ramirez would yield to real party in interest. (Veh. Code, § 21801, subd. (a).) Ramirez's alleged failure to do so constitutes the type of """"[t]hird party conduct by itself, unrelated to the condition of the property, [which] does not constitute a "dangerous condition" for which a public entity may be held liable.""" (*Sun v. City of Oakland* (2008) 166 Cal.App.4th 1177, 1187.) Nothing in the City's election to install simple directional signals increased any risk to real party in interest and, because as a matter of law no "dangerous condition" existed in

the absence of those signals, it is analytically impossible to conclude that the installation of the signals *created* such a condition.

Accordingly, we conclude that real party in interest's complaint clearly revealed the existence of an insuperable bar and defense in favor of the City. As we have noted, this case has already proceeded once to this court, on the issue of "design immunity." Real party in interest has, therefore, had ample time to uncover the facts and settle on a viable theory of liability. We can imagine no additional facts that could colorably be pleaded to get around sections 830.4 and 830.8.

DISPOSITION

Accordingly, the petition for writ of mandate is granted. The superior court is directed to vacate its order denying the City's demurrer and motion to strike, and to enter a new order sustaining the demurrer and granting the motion to strike, both without leave to amend.

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HOLLENHORST
Acting P.J.

I concur:

GAUT
J.

KING, J., Dissenting.

I believe the trial court was correct in overruling the demurrer to real party in interest's amended complaint. I would deny the present petition for writ of mandate.

"'In examining the sufficiency of the complaint, "[w]e treat the demurrer as admitting all material facts properly pleaded . . . ." [Citations.] "[W]e give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. . . ." [Citation.]'" (*Curtis T. v. County of Los Angeles* (2004) 123 Cal.App.4th 1405, 1414.) Here, real party in interest alleged, and for purposes of the demurrer, must be regarded as true:

1. Kitching Street, at its intersection with John F. Kennedy Drive, is a north/south roadway with one lane in each direction;

2. The intersection is controlled by signal lights with no left-hand turn signal;

3. There is no left-hand turn lane on Kitching Street for drivers of northbound vehicles wishing to turn left and proceed westbound on John F. Kennedy Drive;

4. At this intersection there is an equal or greater number of vehicles making left-hand turns across oncoming traffic as there are vehicles proceeding straight through the intersection;

5. The design criteria of the State of California provides that if there are an equal or greater number of vehicles turning left as there are proceeding straight and there can be no provision for a left-hand turn lane, then the signal lights should be phased

and/or sequenced separately, such that both northbound and southbound traffic do not proceed through the intersection at the same time;

6. The signal lights were improperly phased and/or sequenced in that northbound and southbound vehicles, including those wishing to make left-hand turns, proceeded through the intersection at the same time;

7. The intersection was dangerous for failing to have a left-hand turn lane and/or separate phasing or sequencing of the signal lights for northbound and southbound traffic.

To begin with, I note the majority has inappropriately limited the scope of real party in interest's pleading. At page 2 of the majority opinion it states: "It is further alleged that there was no left turn lane and 'the light sequence was such that traffic on northbound Kitching and southbound Kitching would have a green light at the same time.' *We take this to mean that there was no separate dedicated* '*left turn arrow.*'" (Italics added.)[1]

In making its own construction of what is meant by the allegation, the majority totally neglects to mention paragraph 14 of the amended complaint. Therein, real party in interest alleges: "Section 9-03.6 of the Cal Trans Traffic Manual, states '[o]pposing

[1] And at page 6, the majority further construes the issue as: "Real party in interest's only basis for liability, therefore, must be that there was *no dedicated left turn signal* that would have required him to safely stop while Ramirez completed his turn—or, put another way, which would have prohibited Ramirez from turning while real party in interest was crossing through the intersection." (Italics added.)

operation should be used where the left turn volume per lane is very high in either direction and is about equal or greater than the companion through movement. This method is especially useful when [one] of the through lanes must be optional turning lane or where a separate left lane cannot be provided.' Kitching and John F. Kennedy, at the time of [real party in interest's] accident had a very high left-turn volume per lane on Kitching in both directions that was equal to or greater than the traffic manual. This volume warranted a traffic review and modification according to the Cal Trans Traffic Manual, and opposing operation (separate phasing for south and northbound traffic) should have been ordered in 1994. Thus a modification to the signaling, separating the time for when southbound and north bound Kitching had a green light, was warranted and should have been done according to the volumes since 1994."

In failing to recognize real party in interest's allegations relative to improper phasing, the majority is more able to address the issue as "a failure to provide," thus theoretically covered by Government Code section 830.4.[2]

In its petition for writ of mandate, petitioner City of Moreno Valley (the City) initially contends that the complaint does not "plead a specific physical condition of property rendering the intersection dangerous." (Capitalization and bolding omitted.) This argument is erroneous. Real party in interest has specifically alleged that there is no

[2] All further statutory references are to the Government Code unless otherwise indicated.

left-hand turn lane and that the signal lights are improperly phased. Both of these features are *specific physical conditions* allegedly rendering the intersection dangerous.

The City's final argument is that it is immune from liability because "[real party in interest's] claim is premised on the absence of a traffic control device and hence barred by section 830.4." (Bolding omitted.) I disagree. The amended complaint is not based on the "absence of a traffic control device"; it is based on an allegation that the *existent* traffic control device is improperly phased and therefore dangerous.

As section 830.4 provides: "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 the Vehicle Code, or distinctive roadway markings as described in Section 21460 of the Vehicle Code." (Italics added.) "Cases interpreting this statute have held that it provides a shield against liability only in those situations where the alleged dangerous condition exists *solely* as a result of the public entity's failure to provide a regulatory traffic device or street marking. If a traffic intersection is dangerous for reasons other than the failure to provide regulatory signals or street markings, the statute provides no immunity." (*Washington v. City and County of San Francisco* (1990) 219 Cal.App.3d 1531, 1534-1535; see *Paz v. State of California* (2000) 22 Cal.4th 550, 564.) Here, and as alleged, the governmental entity did provide regulatory traffic control devices, i.e., the traffic signals. Real party in interest does not contend that the intersection is dangerous because of their *absence*, rather he alleges that the intersection was dangerous because they are

*improperly phased*. "[A]lthough a public entity is not liable for failure to install traffic signs or signals (Gov. Code, §§ 830.4, 830.8), when it undertakes to do so and invites public reliance upon them, it may be held liable for creating a dangerous condition in so doing. [Citations.]" (*De La Rosa v. City of San Bernardino* (1971) 16 Cal.App.3d 739, 746 [Fourth Dist., Div. Two].)

It is doubtful that the City would be arguing its broad application of section 830.4 if it had phased the lights such that cross-traffic in all four directions at the intersection simultaneously had a green light. Under such facts, as here, it would not be the absence of traffic control devices that allegedly created the dangerous condition, it would be the improper phasing and/or sequencing. In reversing the sustaining of a demurrer, the court in *Teall v. City of Cudahy* (1963) 60 Cal.2d 431, stated, relative to a dangerous configuration of signal lights: "[The dangerous condition] is not materially different from one in which, because of a mechanical defect, all lights at an intersection are green simultaneously. [Citation.] The allegations of the complaint are therefore sufficient to state a cause of action." (*Id.* at p. 434.)

More pertinent to our pleading is that real party in interest has generally alleged a high volume of traffic, traveling at high rates of speed. Occurring at the intersection are a significant number of left-hand turn accidents. Given the speed, traffic volume, and the fact that the roadway is only one lane in each direction, left-hand turning drivers risk being rear-ended, and/or find it difficult to find breaks in oncoming traffic. Real party in interest specifically alleges that because the signal lights for northbound and southbound

travel are not phased, so as allow unobstructed left-hand turn movements in conjunction with through traffic in the same direction, the intersection is dangerous.

The City relies on three cases for the proposition that section 830.4 precludes liability. Each of the cases is inapposite. In *Brenner v. City of El Cajon* (2003) 113 Cal.App.4th 434, the plaintiff was injured when struck by a car while she was walking across the street. In her operative pleading she alleged various facts relative to there being substantial pedestrian traffic, and high traffic volume. She then alleged that the intersection was dangerous because the city "'failed to install traffic [regulatory] devices, traffic safety devices, traffic control devices, signs or traffic signs, or take any steps to manage, control, or reduce the automobile traffic flow or speed on Chase Avenue and/or . . . failed to take steps to prevent increased risk of harm and injury to the pedestrians . . . .'" (*Id.* at p. 438.) As is apparent from the charging allegation, the plaintiff did not plead that there was any physical defect in the public property itself, other than the "fail[ure] to install traffic [regulatory] devices," for which the entity is immune. (*Id.* at p. 442.) Again, this is not our case. The allegations here do not allege a failure to install, rather they involve a failure to safely phase and/or sequence.

In *Mittenhuber v. City of Redondo Beach* (1983) 142 Cal.App.3d 1, a westbound bicyclist was involved in an intersection collision with a southbound motorist. A stop sign controlled westbound traffic into the intersection. The bicyclist proceeded into the intersection without stopping at the stop sign. The complaint alleged that the roadways were heavily traveled. As to the roadway's dangerousness, the plaintiff contended that as

the westbound bicyclist approached the intersection he could not see to the north, and there should have been a stop sign controlling the southbound motorist's movements. In affirming the sustaining of a demurrer, the court concluded that the inability of the bicyclist to see to the north as he approached the intersection was irrelevant. As noted, "[t]he complaint does not, for example, allege that bicyclists obeying a stop sign posted on Voorhees could not see motorists traveling southbound on Phelan from the vantage point of the stop sign limit line." (*Id.* at p. 12.) Given this, the only other alleged physical defect in the property was the failure to have a stop sign for southbound traffic on Phelan, for which the city was immune under section 830.4. (See *id.* at pp. 6-7.)

And lastly, in *Chowdhury v. City of Los Angeles* (1995) 38 Cal.App.4th 1187, the traffic signals were inoperative in all directions due to a power outage. A driver entered into the intersection without stopping, and collided with the plaintiff's vehicle. In comparing its facts with situations in which liability would attach with a green light in all four directions at an intersection, the court stated: "If the government[al entity] turns off traffic signals entirely to avoid confusion, liability does not attach. 'When the [traffic] lights were turned off, their defective condition could no longer mislead or misdirect the injured party.' [Citations.]" (*Id.* at p. 1195; see *City of South Lake Tahoe v. Superior Court* (1998) 62 Cal.App.4th 971 [where failure to replace stop sign at intersection is protected under § 830.4, because the entity is immune for failure to provide stop signs].)

In each of the cases relied upon by the City, the sole physical defect in the property was the absence of a stop sign or the absence of a signal light, both of which the

City is immune from providing. Here, the intersection had signal lights; real party in interest's contention is that the state design criteria for the proper phasing of the signal light was not being complied with. While the City may not agree with the allegation and while a jury may find no liability based thereon, real party in interest has nonetheless alleged a viable theory which is not precluded by the application of section 830.4.[3]

/s/ King
J.

[3] As both parties acknowledge, this case was previously before this court based on the trial court's granting of a motion for summary judgment. In that appeal, the City contended that it was immune from liability based on the design immunity defense, section 830.6. The City argued that the design immunity defense precluded liability based on the prior approval of the intersection design and the phasing of the traffic signals. In that appeal, we held that the design immunity defense did apply but that there was a triable issue of fact as to whether the immunity had been lost based on changed circumstances.