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

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

JEFFREY R. BURTIS,

Plaintiff and Appellant,

v.

CITY OF RIVERSIDE,

Defendant and Respondent.

E073298

(Super.Ct.No. RIC1708830)

OPINION

APPEAL from the Superior Court of Riverside County. L. Jackson Lucky IV,  
Judge. Affirmed.

Skapik Law Group, Mark J. Skapik, and Blair J. Berkley for Plaintiff and  
Appellant.

Gary G. Geuss, City Attorney, Rebecca L. Mckee, Assistant City Attorney,  
Richard S. Hall, Deputy City Attorney; Greines, Martin, Stein, & Richland, Timothy T.  
Coates and Carolyn Oill, for Defendant and Respondent.

Plaintiff and appellant Jeffrey R. Burtis was injured in a car accident. He brought  
suit against defendant and respondent City of Riverside (City), alleging that the

intersection where the collision occurred constituted a dangerous condition of public property. The trial court granted summary judgment in favor of the City, finding that it had established the affirmative defense of design immunity. We affirm the judgment.

## I. BACKGROUND

On June 7, 2016, Burtis was driving south on Main Street, approaching the intersection with First Street. At that intersection, Main Street has two lanes of travel in each direction, with left-turn pockets for traffic in each direction. The intersection is traffic-controlled, such that vehicles turning left from Main Street onto First Street have a green arrow. Left turns also are allowed, however, on a circular green light, after yielding to opposing traffic. The posted speed limit is 35 miles per hour.

As Burtis approached the intersection, defendant Ricardo Cervantes attempted to turn left from northbound Main Street onto westbound First Street on a circular green light. Burtis's truck struck the passenger side of Cervantes's car.

Burtis alleged a single cause of action against the City, for dangerous condition of public property under Government Code section 835.<sup>1</sup> According to Burtis, a change in vertical grade or "dip" on Main Street immediately to the north of its intersection with First Street impedes the sightlines of northbound traffic, such that a vehicle travelling

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<sup>1</sup> Further undesignated statutory references are to the Government Code. Burtis also brought suit against Cervantes and the City's Director of Public Works. Those claims were resolved separately. Only Burtis's claim against the City is at issue in this appeal.

south on Main Street is not visible to a northbound car turning left onto First Street until it is “too late to avoid a collision.”

The trial court granted the City summary judgment, finding that it had established the affirmative defense of design immunity.

## II. DISCUSSION

### A. *Applicable Law*

#### 1. *Standard of Review*

Under Code of Civil Procedure section 437c, subdivision (c), a motion for summary judgment shall be granted if all the papers submitted show there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. A defendant meets its burden on summary judgment by showing that the plaintiff cannot prove its causes of action, or by establishing a complete defense to the plaintiff's causes of action. (*Id.*, subd. (p)(2).) The burden then shifts to the plaintiff to show a triable issue of fact material to the causes of action or defense. (*Ibid.*) Claims and theories not supported by admissible evidence do not raise a triable issue. (*Id.*, subd. (b)(3).)

We evaluate a summary judgment ruling de novo, independently reviewing the record to determine whether there are any triable issues of material fact. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767.) “In practical effect, we assume the role of a trial court and apply the same rules and standards that govern a trial court's determination of a motion for summary judgment.” (*Distefano v. Forester* (2001) 85

Cal.App.4th 1249, 1258.) In general, we give no deference to the trial court’s ruling or reasoning, and decide only whether the right result was reached. (*Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.)

## 2. *Design Immunity*

The Government Code provides that a public entity is “liable for injury caused by a dangerous condition of its property” if the plaintiff establishes certain elements.<sup>2</sup>

(§ 835.) A public entity can avoid some kinds of liability for a dangerous condition of public property by establishing the affirmative defense of design immunity, codified at section 830.6. (*Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 69

(*Cornette*.) A showing of design immunity requires three elements: “(1) a causal relationship between the plan or design and the accident; (2) discretionary approval of the plan or design prior to construction [or conformity with discretionarily approved standards]; and (3) substantial evidence supporting the reasonableness of the plan or design.”<sup>3</sup> (*Ibid.*; see § 830.6.)

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<sup>2</sup> Specifically, the public entity is liable “if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either: [¶] (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or [¶] (b) The public entity had actual or constructive notice of the dangerous condition . . . a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.” (§ 835.)

<sup>3</sup> These elements derive from the statutory language, providing that the public entity is not liable “for an injury caused by the plan or design caused by the plan or design of a construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the

Our Supreme Court has explained that “[t]he rationale for design immunity is to prevent a jury from second-guessing the decision of a public entity by reviewing the identical questions of risk that had previously been considered by the government officers who adopted or approved the plan or design.” (*Cornette, supra*, 26 Cal.4th at p. 69.)

“““[T]o permit reexamination in tort litigation of particular discretionary decisions where reasonable men may differ as to how the discretion should be exercised would create too great a danger of impolitic interference with the freedom of decision-making by those public officials in whom the function of making such decisions has been vested.”””

(*Ibid.*) Therefore, “““as long as reasonable minds can differ concerning whether a design should have been approved, then the governmental entity must be granted immunity.”””

(*Sutton v. Golden Gate Bridge, Highway & Transportation Dist.* (1998) 68 Cal.App.4th 1149, 1158.)

The defense of design immunity may be resolved on a motion for summary judgment. (*Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931, 939-940 (*Grenier*).)

The first two elements may be decided as an issue of law when the material facts pertaining to those elements are undisputed, while the third is always “a matter for the court, not the jury.” (*Cornette, supra*, 26 Cal.4th at p. 72; accord *Grenier, supra*, 57 at

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legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved, if the trial or appellate court determines that there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefore.” (§ 830.6.)

pp. 939-940; § 830.6 [“..., if the trial or appellate court determines that there is any substantial evidence” of reasonableness].) A defendant may rely on the allegations of the complaint to help show the plan or design on which its design immunity defense is predicated was the cause of the accident. (*Alvis v. County of Ventura* (2009) 178 Cal.App.4th 536, 550; *Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1349-1350 [pleadings limit the issues on motion for summary judgment].)

#### B. *Analysis*

Burtis contends that the City failed to show that it was entitled to summary judgment based on design immunity, arguing that the City did not establish the first two elements of the defense. We are not persuaded.

The first question is whether there is undisputed evidence that the accident was caused by an aspect of the City’s plan or design, and not some other cause. (*Grenier, supra*, 57 Cal.App.4th at p. 941 [“The injury-producing feature must have been a part of the plan approved by the governmental entity”]; see also *Higgins v. State of California* (1997) 54 Cal.App.4th 177, 185 [“Design immunity is intended to immunize only those design choices which have been made”].) The parties do not dispute, at least for present purposes, that it is the characteristics of the intersection that caused the accident. No doubt, if the matter were to proceed to trial, the negligence or lack thereof of Cervantes, the driver of the car that collided with Burtis’s vehicle, would be an issue, and also perhaps the degree of care with which Burtis was driving. Nevertheless, a premise of

Burtis's claim against the City is that the intersection was dangerous, and that the accident was a "proximate result" of that dangerous condition.

It is undisputed that Main Street's change in vertical grade north of First Street is both "readily apparent" and "part of the natural topography of the area." Burtis asserts that it is "inexplicable" that a natural topographical feature could be construed to have been a part of the City's plan or design for the intersection. We find Burtis's assertion perplexing. As the City correctly points out, the decision to have the road follow the natural topography is a design decision, just as a decision to change the topography by means of a bridge or some other means would have been. The same is true for the intersection of two (or more) roads. The issue is whether the injury producing feature of the intersection—or, as the case may be, the adjacent topography affecting the flow of traffic into and through the intersection—is "the result of, or conformed to, a design approved by the public entity vested with discretionary authority." (*Gonzales v. City of Atwater* (2016) 6 Cal.App.5th 929, 951-952.) It is irrelevant whether the injury producing feature was a constructed part of the design or a legacy of the natural topography of the area that was incorporated into the design.

Burtis prefers to frame the issue to focus only on the change of Main Street's vertical grade north of First Street. As pleaded, however, the allegedly injury producing feature of the intersection was not just that change. Rather, it was the change in vertical grade *combined with* traffic control signals allowing vehicles to turn left from northbound Main Street onto westbound First Street on a circular green light, after having yielded to

oncoming traffic. Facts alleged as part of the complaint's "General Allegations" and incorporated into each of the alleged causes of action establish that the accident occurred when Cervantes turned left on a steady circular green light in front of Burtis's vehicle. In the cause of action asserted against the City, Burtis further alleges that the accident occurred because "northbound vehicles turning left at First Street cannot see southbound vehicles on Main Street until it is too late to avoid a collision." There is no basis in the alleged facts—either the general facts, or the facts specific to the cause of action asserted against the City—for concluding the change in vertical grade alone, absent vehicles turning left across oncoming traffic as allowed by the traffic control signals, was dangerous in any way. Burtis's counsel conceded as much during argument on the City's summary judgment motion, stating: "All they had to do was put a hard red arrow and not allow the person to make the left turn."

The traffic control signals for the intersection of Main and First Streets were most recently redesigned as part of a City project, completed in 2013, for "Main Street Maintenance from Third Street to SR 60 Freeway." The plans for the intersection reflect that left turns from Main Street onto First Street on a circular green light were to be permitted, after yielding to oncoming traffic. The engineer who prepared those plans submitted a declaration in support of the City's motion for summary judgment, stating that in the performance of his duties over "many years with the City's Traffic Engineering Division," he had "gained personal familiarity with Main Street in the area of the Project, including the intersection of Main Street and First Street." In preparing

the plans for changes for traffic control signals, including at the intersection in question, he also inspected “the entirety of Main Street between Third Street and SR 60,” including the intersection at issue. That inspection “confirmed the existence of a vertical grade approaching the intersection of Main Street and First Street for drivers southbound on Main Street.” Thus, the injury producing features of the intersection—the change in vertical grade immediately north of the intersection, combined with traffic control signals allowing left turns from Main Street onto First Street on a circular green light—conformed to the City’s design. We conclude, therefore, that there is no disputed issue of material fact on the first element of the City’s design immunity defense.

Burtis argues that *Flournoy v. State* (1969) 275 Cal.App.2d 806 (*Flournoy*) requires a different conclusion. Not so. In *Flournoy*, the Court of Appeal found that design immunity did not apply because the accident at issue, caused by ice that formed on a bridge, was not “a design-caused accident.” (*Id.* at p. 812.) The appellate court concluded that the ice was not part of the design of the bridge, because the evidence did not point to any particular “engineering choice as the source of the freezing phenomenon.” (*Ibid.*) The facts here are different. As alleged against the City, the accident was the product of several engineering choices, namely, to have Main Street follow the natural topography of the area, rather than changing that topography one way or another, and to install traffic control signals that permitted northbound cars to turn left from Main Street onto First Street on a circular green light, after yielding to oncoming traffic. Neither *Flournoy*, nor any other case, supports the proposition that a natural

phenomenon cannot be an element of or incorporated into a design for purposes of design immunity, as Burtis would have it.

There also is no disputed issue of material fact on the approval element of the design immunity defense. The plans for modifying the traffic control signals of the intersection, prepared by an engineer—then a “Senior Engineer” in the “Traffic Engineering Division” of the City’s “Public Works Department”—were approved in advance of construction by someone with the authority to do so, specifically, the city engineer at the time. Such evidence satisfies the City’s evidentiary burden for the second element of the design immunity defense. (See *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1263 (*Laabs*) [in a case regarding construction of an intersection, approval of city engineer, who had been delegated authority to exercise such discretion, satisfied the city’s evidentiary burden regarding approval element].)

Burtis makes much of the lack of any explicit reference to the change in vertical grade in the plans for the intersection. The plan for the redesign of the traffic signals at the intersection of Main and First Streets does not attempt to describe the topography of the area. Other plans, part of the same broader project for maintenance of Main Street, show an area of lower elevation north of First Street, as part of a depiction of a proposed concrete gutter near its low point. The elevation of Main Street immediately adjacent to the intersection of Main and First Streets, however, is not depicted. In Burtis’s view, this means there is no evidence that the city engineer who approved the plans ever considered the change in grade when he approved the plans. He concludes on that basis that the City

cannot meet its burden on the approval element of its design immunity defense. Further, according to Burtis, the change in grade should not be considered a part of the City's design at all, since it is not expressly described or otherwise included in the approved plans.

Our Supreme Court rejected similar arguments relatively recently in *Hampton v. County of San Diego* (2015) 62 Cal.4th 340 (*Hampton*). There, the plaintiffs, a driver injured in an automobile accident at an intersection and his wife, sued the County of San Diego for a dangerous condition of public property. They alleged that the intersection “afforded inadequate visibility under applicable County design standards” because of a high embankment that impaired visibility. (*Id.* at p. 344.) In opposing a motion for summary judgment based on design immunity, the plaintiffs argued that there were disputed issues of fact regarding discretionary approval because the plans for the intersection did not show the embankment. (*Id.* at p. 345.) They contended that an engineer can only make a discretionary decision to approve a design, despite its nonconformity to governing standards, if the engineer realizes the nonconformity; “[b]y contrast, an engineer who approves a nonconforming design on the mistaken belief it conformed to governing standards has acted through inadvertence, not discretion.” (*Id.* at pp. 348-349.)

The Supreme Court disagreed, finding the plaintiffs' claim was essentially a claim for abuse of discretion, which is considered under the reasonableness element of the statute, not the discretionary approval element. (*Hampton, supra*, 62 Cal.4th at p. 349.) The Court found to hold otherwise "would implicate the adequacy of the deliberative process at the discretionary approval stage and would lead a jury into just the sort of second-guessing concerning the wisdom of the design that the statute was intended to avoid." (*Id.* at pp. 349-350.) It found also that the plaintiffs' interpretation conflicted with the statutory language: "That the statute permits, as one alternative, that the discretionary approval element may be established through proof that the design complies with discretionarily approved standards suggests that the other alternative, that is, discretionary approval by the appropriate employee, does not require evidence of the employee's awareness of and compliance with standards." (*Id.* at p. 350.) The Court also noted practical problems of how to show the reasoning underlying the decision making process: "Although objective proof of the fact of approval by an employee with authority to approve the plan may be readily available, evidence of the standards actually considered by the decision makers, as well as the reasoning and motivation of those employees, will be much more scarce with the passage of time." (*Id.* at p. 351.) Thus, the discretionary approval element asks only whether a person vested with discretion to approve the design or plan actually approved it. (*Id.* at p. 357.)

Burtis reads *Cameron v. State of California* (1972) 7 Cal.3d 318 (*Cameron*) to mean that, to establish the discretionary approval element of design immunity, it is the

City's burden to affirmatively show that the official who approved the design took the change in grade into account in deciding to approve the design. *Hampton*, however, forecloses this reading of *Cameron*. The approving employee's subjective *awareness* of a factor that may bear on the reasonableness of the design at issue is relevant to the reasonableness element of the defense, not the discretionary approval element: "[T]he discretionary approval element of design immunity asks whether a person vested with discretion to approve the plan did approve the plan or design that was built," while "the question whether it was wise to approve the plan is judged under the reasonableness element of the statute." (*Hampton, supra*, 62 Cal.4th at p. 357.)

Here, therefore, in relation to the discretionary approval element of the design immunity defense, we do not ask whether the city engineer who approved the intersection's design was aware of the change in Main Street's vertical grade north of First Street, either from the plans or from any other source. Our only question is whether someone with discretion to approve the design of the intersection did in fact approve it. (*Hampton, supra*, 62 Cal.4th at p. 357.) The undisputed answer to this question is yes.

Finally, there also is no disputed issue of fact regarding whether there is substantial evidence supporting the reasonableness of the City's design for the intersection. This element is typically satisfied by an expert opinion as to the reasonableness of the design. (*Laabs, supra*, 163 Cal.App.4th at p. 1264; see also *Compton v. City of Santee* (1993) 12 Cal.App.4th 591, 596-597 ["The issue is not whether the trial court or jury could find the design unreasonable based on conflicting

evidence, but whether there is *any* reasonable basis on which a reasonable public official could initially have approved the design”].) Here, the evidence submitted in support of the City’s motion for summary judgment includes two such expert opinions. The engineer who designed the intersection’s current traffic control signals, who is now the “Deputy Director/City Engineer for the City of Riverside’s Public Works Department,” opined in his declaration that the intersection’s design “was reasonable and consistent with applicable design and safety standards.” A second expert, currently employed by the City as “a Principal Engineer in the Public Works Department, Engineering Division,” expressed the same opinion. Both of these engineers were well aware of the change in vertical grade that is the focus of Burtis’s arguments when they formulated their opinions.<sup>4</sup> We find their opinions to constitute substantial evidence of reasonableness, sufficient to satisfy the third element of the design immunity defense. Indeed, Burtis has not attempted to argue otherwise.

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<sup>4</sup> In contrast, in *Cameron*, the public entity produced no evidence that the feature of a road that allegedly caused injury—the “uneven superelevation” of a curve—was considered either by the engineers who designed the road or the public entity that ultimately approved the plans for it. The plan for the road contained “no mention of the superelevation intended or recommended,” and there was no other evidence that the superelevation “was the result of or conformed to” the design. (See *Cameron, supra*, 7 Cal.3d at pp. 325-326.)

We conclude that the City met its evidentiary burden, and Burtis failed to show a triable issue of material fact, on each of the three elements of the design immunity defense.<sup>5</sup> Summary judgment was therefore properly granted to the City.

### III. DISPOSITION

The judgment is affirmed. The City is awarded its costs on appeal.

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RAPHAEL  
J.

We concur:

RAMIREZ  
P. J.

McKINSTER  
J.

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<sup>5</sup> We therefore need not, and do not, address the parties' arguments regarding the City's alternative contention that Burtis cannot show a triable issue of fact regarding whether the intersection constituted a dangerous condition of public property.