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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JONATHAN ALLAN DEAN, an Incompetent Person, etc., Plaintiff and Appellant, v. LOS ANGELES COUNTY METROPOLITAN TRANSIT AUTHORITY, Defendant and Respondent.	B245737 (Los Angeles County Super. Ct. No. BC413809)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard L. Fruin, Jr., Judge. Reversed with directions.

Nelson & Natale and Silvio Natale for Plaintiff and Appellant.

Veatch Carlson, Mark A. Weinstein, William J. Glazer and Gina Genatempo for Defendant and Respondent.

INTRODUCTION

In this personal injury action involving a train accident, plaintiff Jonathan Allan Dean (Dean), by and through his guardian ad litem, William J. Dean, appeals from the summary judgment entered in favor of defendant Los Angeles County Metropolitan Transit Authority (LACMTA). Dean challenges the constitutionality of the summary judgment statute and contends that triable issues of material fact compel reversal of the judgment. We reject Dean's constitutional challenges, and we conclude that, although summary adjudication was properly granted as to Dean's dangerous condition of public property cause of action based on design immunity, triable issues of material fact precluded summary adjudication of Dean's negligence cause of action. We therefore reverse the summary judgment and remand with directions.

FACTUAL AND PROCEDURAL BACKGROUND

On the morning of April 7, 2008, an LACMTA Blue Line train operated by Billie Green (Green) struck Dean in the crosswalk at the intersection of Washington Boulevard and Grand Avenue in Los Angeles as it approached the Grand Avenue station. Dean, who was 19 years old at the time, sustained severe physical injuries and extreme brain damage.

The Blue Line is a street running light rail train. The Grand Avenue station is positioned between the east and westbound street running train tracks. The crosswalk in which Dean was injured is located to the east of the station.

At the time of the accident, the Blue Line train was proceeding west on Washington Boulevard toward the Grand Avenue station. A video of the accident taken from the train operator's cab shows Dean leave the northwest corner of Grand Avenue and Washington Boulevard, enter the crosswalk leading to the entrance to the Grand Avenue station platform, wait for a car to pass and then run or jog southbound within the crosswalk across two lanes of traffic while looking westbound. Dean does not appear to

see the oncoming train until shortly before impact. Green was unable to stop the train in time to avoid hitting Dean.

At the time Dean entered the crosswalk, the tri-phase traffic signal[1] visible to him was working, but the "don't walk" pedestrian signal was inoperable because the light was out. All traffic and train signal lights are maintained by the City of Los Angeles.

A. *Litigation Is Commenced*

On May 13, 2009, Dean filed a complaint against LACMTA, alleging causes of action for negligence (first) and dangerous condition of public property pursuant to Government Code section 835[2] (second). Dean alleged, generally, that he was "run over" by the train and suffered "extreme brain damage," preventing him from assisting in his own litigation and necessitating the appointment of a guardian ad litem.

In his first cause of action for negligence, Dean alleged that LACMTA and Green "negligently, carelessly and recklessly owned, operated, leased, maintained, equipped, modified, serviced, repaired, [e]ntrusted, managed, supervised, oversaw, authorized and controlled the use of" the train that struck Dean. Based on information and belief, Dean alleged that Green drove the train "in an unsafe manner, including but not limited to operating the train at an excessive speed for conditions, operated with inattention to crossing pedestrians, failed to warn by use of audio warning device, [i.e.,] horn" and that Green's negligence, as well as that of LACMTA, "directly, proximately and legally caused" Dean's severe injuries for which he incurred medical and rehabilitative expenses.

In his second cause of action for dangerous condition of public property, Dean alleged, among other things, that LACMTA "owned," "controlled," and "maintained" "the train loading and unloading station located at the intersection of Washington

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1 A tri-phase traffic light refers to a standard traffic light with red, amber and green lights.

2 All further statutory references are to the Government Code unless otherwise noted.

B[oulevard] and Grand Ave[nue] including but not limited to pedestrians crosswalk and warning signals which was the situs of the accident . . . ." Dean further alleged that the property was in a dangerous condition and that LACMTA was "aware that the property was in a dangerous condition at the time of the incident." LACMTA also "knew or should have known before this crash that the width of the train itself extends over the rails to such an extent that pedestrians standing on the roadway in areas demarcated as safe zones for pedestrians will get hit." Dean was hit by the train "while walking in the 'safe harbor' of the train operating area," causing him "to suffer broken legs, head and internal injuries, coma, and brain damage."

On November 10, 2009, LACMTA filed its answer. As one of its many affirmative defenses, LACMTA alleged that it had design immunity under section 830.6.

B. ***LACMTA's Motion for Summary Judgment***

On May 25, 2012, LACMTA filed a motion for summary judgment or, in the alternative, for summary adjudication of the following issues:

Issue No. 1: "Whether Plaintiff's second cause of action for an alleged dangerous condition of public property has any merit as to defendant LACMTA."

Issue No. 2: "Whether the 'design immunity' of [section] 830.6 applies to provide an affirmative defense to Plaintiff's claims against LACMTA for an alleged dangerous condition."

Issue No. 3: "Whether Plaintiff's second cause of action for an alleged dangerous condition of public property has any merit as to defendant LACMTA due to the condition or absence of warning devices."

Issue No. 4: "Whether Plaintiff's first cause of action for alleged general negligence has any merit as to defendant LACMTA."

LACMTA made its motion "on the grounds that the causes of action against it have no merit, including that it is immune from liability for injury caused by the plan or design of construction of public property pursuant to [section] 830.6." Along with its

motion, LACMTA filed a separate statement of undisputed facts and supporting evidence.

Dean filed an opposition, along with supporting evidence, and a response to LACMTA's separate statement of undisputed facts. LACMTA thereafter filed a reply to Dean's opposition, a reply in support of its separate statement of undisputed material facts, additional evidence, and evidentiary objections to some of Dean's evidence.

C. *The Trial Court Grants LACMTA's Motion for Summary Judgment*

On October 3, 2012, the trial court held a hearing on LACMTA's motion for summary judgment. In its tentative decision, which it adopted as its ruling, the court granted summary adjudication as to all four of LACMTA's issues and summary judgment as to the entire action.

With regard to Issues Nos. 1 and 2, the court ruled that Dean's second cause of action had no merit and was barred by LACMTA's affirmative defense of design immunity. The court found that LACMTA established that "the design for a light rail running street crossing, such as the accident site, were approved by the Public Utilities Commission, and that the layout and signalization for this particular site were approved by [LACMTA] engineers" such that design immunity attaches under section 830.6. The court further found that Dean failed to present evidence demonstrating a loss of design immunity, and that Dean "impermissibly raised this 'change in physical conditions' for the first time in the opposition," citing *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1253.

As to Issue No. 3, pertaining to the absence of warning devices, the trial court ruled that "[t]he 'don't walk' signal on the southwest corner was no[t] functioning at the time of the accident. The signal is owned by the City of Los Angeles; the City is responsible for its operation; and the City had checked the signal two days before the accident."

With respect to Issue No. 4, involving Dean's negligence cause of action, the trial court ruled that "[t]he facts do not support negligence on the part of the train operator.

The operator sounded the bell and braked the train when [he saw] plaintiff walking into the path of the train. The undisputed evidence is that there was inadequate time for the train to stop to avoid the accident."

Finally, the trial court granted summary judgment for LACMTA. Judgment in favor of LACMTA was entered on October 17, 2012, and Dean timely appealed.

DISCUSSION

A. *Constitutional Challenges to the Summary Judgment Statute*

For the first time on appeal, Dean challenges the constitutionality of the summary judgment statute. He contends that Code of Civil Procedure section 437c, subdivision (c),[3] violates the right to a jury trial, is vague and overbroad, and is unconstitutional as applied.

"In civil cases, constitutional questions not raised in the trial court are considered waived." (*In re Marriage of S.* (1985) 171 Cal.App.3d 738, 745; accord, *Hepner v. Franchise Tax Bd.* (1997) 52 Cal.App.4th 1475, 1486; see also *Neil S. v. Mary L.* (2011) 199 Cal.App.4th 240, 254 [""[t]ypically, constitutional issues not raised in earlier civil proceedings are waived on appeal""]; *Fourth La Costa Condominium Owners Assn. v. Seith* (2008) 159 Cal.App.4th 563, 585 [same]; *Bettencourt v. City and County of San Francisco* (2007) 146 Cal.App.4th 1090, 1101 [same].) As our Supreme Court has

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[3] Subdivision (c) of section 437c of the Code of Civil Procedure provides: "The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment may not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact."

observed, however, "[w]hile '"[i]t is the general rule applicable in civil cases that a constitutional question must be raised at the earliest opportunity or it will be considered as waived"' [citation], application of this principle is not automatic." (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394.) The court expounded: "We have held that a litigant may raise for the first time on appeal a pure question of law which is presented by undisputed facts. [Citations.] Moreover, although California authorities on the point are not uniform, our courts have several times examined constitutional issues raised for the first time on appeal, especially when the enforcement of a penal statute is involved [citation], the asserted error fundamentally affects the validity of the judgment [citation], or important issues of public policy are at issue [citation]." (*Ibid*.) In this case, we exercise our discretion to reach Dean's constitutional claims, as most of them present pure questions of law.[4]

1. Right to Jury Trial

The law has long been settled that the summary judgment statute does not unconstitutionally violate the right to a jury trial. (*Scheiding v. Dinwiddie Construction Co.* (1999) 69 Cal.App.4th 64, 70 ["California and federal courts long ago agreed that nothing in the summary judgment procedure is inherently unconstitutional"], citing *Fidelity & Deposit Co. v. United States* (1902) 187 U.S. 315 [23 S.Ct. 120, 47 L.Ed. 194]; *Bank of America, etc., v. Oil Well S. Co.* (1936) 12 Cal.App.2d 265, 270; accord, *Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 395.) We thus reject Dean's constitutional challenge to the statute on the basis it violates the right to a jury trial.

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[4] "A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual." (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.)

2. Vagueness, Overbreadth and As Applied Challenges

Dean, however, argues additional constitutionally-based challenges to the statute; namely, that it is vague, overbroad, and unconstitutional as applied. "'"[D]ue process of law is violated by 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'"' [Citation.]" (*Bisno v. Kahn* (2014) 225 Cal.App.4th 1087, 1108.) "'The underlying concern of a vagueness challenge "is the core due process requirement of adequate *notice.*" [Citation.]' [Citation.] 'Statutes or ordinances that are not clear as to the regulated conduct are void for three reasons: (1) to avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of the laws based on arbitrary and discriminatory enforcement by government officers; and (3) to avoid any chilling effect on the exercise of First Amendment freedoms. [Citation.]' [Citation.]" (*Mission Springs Water Dist. v. Verjil* (2013) 218 Cal.App.4th 892, 914-915.)

"Like a vagueness challenge, an overbreadth challenge implicates the constitutional interest in due process of law. [Citations.] The overbreadth doctrine provides that 'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' [Citation.]" (*Williams v. Garcetti* (1993) 5 Cal.4th 561, 577.)

"[A]n as applied challenge assumes that the statute or ordinance violated is valid and asserts that the manner of enforcement against a particular individual or individuals or the circumstances in which the statute or ordinance is applied is unconstitutional." (*Tobe v. City of Santa Ana*, *supra*, 9 Cal.4th at p. 1089.)

The summary judgment statute, which Dean challenges, is neither regulatory nor penal, and it does not restrict freedoms protected by the First Amendment. It is strictly a procedural statute, which simply provides the trial court with a mechanism to determine if there is a triable issue of material fact warranting a trial. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843; *Bank of America, N.A. v. Roberts* (2013) 217

Cal.App.4th 1386, 1392.) Dean has not directed our attention to any case discussing whether or not the summary judgment statute is subject to review for vagueness or overbreadth or with respect to the manner in which it is applied, and we have found none that addresses this precise issue.

Cases discussing the applicability of these doctrines in other contexts, however, strongly suggest that not all statutes are subject to review for vagueness and overbreadth. (See, e.g., *Schall v. Martin* (1984) 467 U.S. 253, 268, fn. 18 [104 S.Ct. 2403, 81 L.Ed.2d 207] ["outside the limited First Amendment context, a criminal statute may not be attacked as overbroad"]; *Mission Springs Water Dist. v. Verjil*, *supra*, 218 Cal.App.4th at p. 915 ["because the initiatives are not penal and do not restrict speech, vagueness review is at its lowest ebb, assuming it applies at all"]; *Duffy v. State Bd. of Equalization* (1984) 152 Cal.App.3d 1156, 1171-1172 [questioning whether vagueness review applies to nonpenal, nonspeech-related statutes].)

Dean has not pinpointed any particular constitutional right (other than a right to a jury trial) which is implicated by the summary judgment statute. Under these circumstances, we conclude that Code of Civil Procedure section 437c is either not susceptible to a challenge for vagueness, overbreadth, or "as applied," or that these doctrines do not affect the section's enforceability. To the extent a trial court misapplies the standards set forth in Code of Civil Procedure section 437c, a remedy already exists in appellate review. As stated in *Bank of America, etc., v. Oil Well S. Co.*, *supra*, 12 Cal.App.2d at p. 270: "The objections pointed out by appellant do not follow from the alleged inherent invalidity of the section, but from the improper application of its provisions. Its inappropriate application is but an error of judgment or abuse of discretion, for which, without disturbing the validity of the section, the law affords adequate protection." We thus reject Dean's constitutional challenge.

B. *Summary Judgment Law and Standard of Review*

"'"The standard for deciding a summary judgment motion is well-established, as is the standard of review on appeal." [Citation.] "A defendant moving for summary

judgment has the burden of producing evidence showing that one or more elements of the plaintiff's cause of action cannot be established, or that there is a complete defense to that cause of action. [Citations.] The burden then shifts to the plaintiff to produce specific facts showing a triable issue as to the cause of action or the defense. [Citations.] Despite the shifting burdens of production, the defendant, as the moving party, always bears the ultimate burden of persuasion as to whether summary judgment is warranted. [Citation.]" [Citation.] [¶] "On appeal, we review de novo an order granting summary judgment. [Citation.] The trial court must grant a summary judgment motion when the evidence shows that there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. [Citations.] In making this determination, courts view the evidence, including all reasonable inferences supported by that evidence, in the light most favorable to the nonmoving party. [Citations.]" [Citation.]' [Citation.]" (*American Way Cellular, Inc. v. Travelers Property Casualty Co. of America* (2013) 216 Cal.App.4th 1040, 1050.)

"'On review of a summary judgment, the appellant has the burden of showing error, even if he did not bear the burden in the trial court. [Citation.] . . . " . . . As with an appeal from any judgment, it is the appellant's responsibility to affirmatively demonstrate error and, therefore, to point out the triable issues the appellant claims are present by citation to the record and any supporting authority. In other words, review is limited to issues which have been adequately raised and briefed." [Citation.]' [Citation.]" (*Golightly v. Molina* (2014) 229 Cal.App.4th 1501, 1519.)

C. *LACMTA's Appealability Claim*

LACMTA contends that the propriety of the issues summarily adjudicated is beyond the scope of review because, in his notice of appeal, Dean appealed from the summary judgment but not the four summarily adjudicated issues. In support of its contention, LACMTA also cites to Dean's opening brief in which he states he seeks reversal of the order granting LACMTA's motion for summary judgment. There is no merit to LACMTA's contention.

An order granting summary adjudication is interlocutory and thus is not appealable in its own right. Such an order, however, may be reviewed on appeal from the final judgment. (*Angelica Textile Services, Inc. v. Park* (2013) 220 Cal.App.4th 495, 503.) Here, Dean properly appealed from the summary judgment.

D. *LACMTA's Evidentiary Objections Are Preserved for Appellate Review*

As part of its reply to Dean's opposition, LACMTA filed written evidentiary objections to certain declarations, exhibits, and deposition testimony relied upon by Dean. The trial court did not rule on any of these objections in its tentative decision.

During the hearing on the motion for summary judgment/summary adjudication, counsel for LACMTA asked the trial court to rule on its objections twice. The first time, the trial court stated, "Well, I have to deal with it eventually. I'm not going to deal with it right now." The second time, the trial court stated, "I'm not going to go through the objections just for the exercise of doing it. Apparently, you want me to rule upon particular objections. Would you send me a letter and tell me what objections you want me to rule upon that are related to the issue of whether or not plaintiff has raised a triable issue as to the . . . theory that . . . Mr. Dean was sucked into the train rather than being hit by the front of the train?" Counsel for LACMTA replied it was the objections to Dean's expert witness, Kenneth Solomon's testimony. The court stated that if it was limited to testimony, it would rule on the objection. It never did so, however. There also is no indication in the record that LACMTA submitted a letter to the trial court specifying the objections upon which it wanted the court to rule.

In *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, the California Supreme Court held that "written evidentiary objections made *before* the hearing [on the motion for summary judgment], as well as oral objections made at the hearing are deemed made 'at the hearing' under [Code of Civil Procedure] section 437c, subdivisions (b)(5) and (d), so that either method of objection avoids waiver. The trial court must rule expressly on

those objections."[5] (*Id*. at pp. 531-532, fns. omitted.) "If the trial court fails to rule, the objections are preserved on appeal." (*Id*. at p. 532.)

In the discussion that follows, objections will be discussed where necessary to resolution of the issues on appeal.

E. ***LACMTA Failed To Establish Entitlement to Judgment as a Matter of Law on Dean's First Cause of Action for Negligence***

"'The elements of a negligence cause of action are the existence of a legal duty of care, breach of that duty, and proximate cause resulting in injury. . . .' [Citation.]" (*McIntyre v. The Colonies-Pacific, LLC* (2014) 228 Cal.App.4th 664, 671.)

As noted above, in his negligence cause of action, Dean alleged that Green "operat[ed] the train at an excessive speed for conditions, operated with inattention to crossing pedestrians, [and] failed to warn by use of audio warning device, [i.e.,] horn" and that Green's negligence proximately caused Dean's severe injuries.

In granting summary adjudication of Dean's negligence cause of action, the trial court concluded that "[t]he facts do not support negligence on the part of the train operator. The operator sounded the bell and braked the train when [he saw] plaintiff walking into the path of the train. The undisputed evidence is that there was inadequate time for the train to stop to avoid the accident."

On appeal, Dean "disputes" that Green sounded the train's horn and bells when he saw Dean enter the crosswalk, that Green applied the brakes in a timely fashion when Dean approached the train through westbound traffic, that the train warning lights were

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[5] Code of Civil Procedure section 437c, subdivision (d), provides: "Supporting and opposing affidavits or declarations shall be made by any person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations. Any objections based on the failure to comply with the requirements of this subdivision shall be made at the hearing or shall be deemed waived." Subdivision (b)(5) specifies that "[e]videntiary objections not made at the hearing shall be deemed waived."

flashing, that Green was traveling within the speed limit as the train approached the intersection, that Green approached the intersection on a proceed signal, and that Dean disregarded all warning signs and impacted the front of the train and thus could not have been in the safety zone.

We find a triable issue of material fact exists as to whether Green sounded the train's horn or other warning device after seeing Dean enter the crosswalk on his approach to the tracks. LACMTA presented evidence that Green sounded the horn when he saw Dean step off the curb. Green estimated that the train was in the middle of the intersection or about 10 or 15 feet back when Green hit the emergency brake and honked the horn. Green also testified that before entering a grade crossing or intersection in street running territory, train operators are required to ring a bell.

Anna Medrano was a passenger in the train at the time of the accident. Medrano was standing in the front of the train close to the operator's cab when she heard the horn sound. Having learned that the train sounds its horn before making a stop, Medrano looked outside to see where the train was. She saw Dean "running" in the crosswalk toward the train. Medrano could not remember hearing any other horns or bells. The only horn Medrano heard started to sound when the train was nearing McDonald's, which the video of the incident shows to be one block east of Grand Avenue.

Jacqueline Trapp, a LACMTA bus operator, witnessed the accident. Trapp was driving her bus southbound on Grand Avenue. She stopped her bus for a red light at the northwest corner of Washington Boulevard and Grand Avenue. She heard the train's horn about 10 to 15 seconds before the accident and could see the train approaching from her left side. It was a little past McDonald's at the time. Trapp observed six people waiting at the corner, when suddenly Dean "just took off running" across the street. Trapp heard the train sound its horn before impact.

Dean, however, testified at his deposition that he did not hear the horn of the train.[6] Angelo Sorrells, who witnessed the accident, testified similarly at his deposition. Sorrells was driving northbound on Grand Avenue when he stopped at the intersection of Grand Avenue and Washington Boulevard. Sorrells saw Dean cross against the red light and get hit by the train. At no time before the accident did Sorrells hear the train sound its horn or bells.[7]

While we recognize that not hearing a horn or bells does not necessarily mean they were not sounded, Dean's and Sorrell's testimony nevertheless conflicts with LACMTA's evidence and thus creates a triable issue of fact as to whether Green sounded the train's warning horn or bells after seeing Dean.

Although the trial court concluded that undisputed evidence established that there was inadequate time for the train to stop to avoid the accident, this conclusion followed the court's erroneous conclusion that there was no triable issue of fact as to whether Green sounded the horn after seeing Dean. The issue is material. If a jury were to determine that Green did not sound the horn after seeing Dean, then it could also determine that if Green had done so, Dean would have reacted to the horn, stopped earlier, and avoided the accident.

We find there is also a triable issue of fact regarding whether the train was operating at a reasonable speed prior to the impact with Dean, and whether Green applied the brakes at a reasonable time. Dean submitted deposition testimony from Solomon regarding his conclusion that the train was operating too fast for conditions. Solomon testified that the train had gone through two intersections without slowing on a warning light prior to entering the Grand Avenue intersection, and had been traveling at 39 miles per hour at some time prior to entering that intersection. Solomon estimated the speed of

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[6] The select portions of Dean's deposition testimony to which LACMTA objected did not include Dean's statement that he did not hear the train's horn.

[7] Although LACMTA did object to some of Sorrell's deposition testimony, it did not object to the testimony set forth above.

the train at around 35 miles per hour when it entered the intersection. Solomon testified that had Green applied the brakes when he first saw Dean step off the curb, the train could have been stopped prior to the intersection. Further, Solomon testified that Dean was stationary at the time of impact, and had the train been traveling at less than 35 miles per hour at that time, there would have been no "suction" effect pulling Dean into contact with the train.

LACMTA objected to portions of Solomon's testimony arguing it conflicted with other evidence in the record, including "undisputed" photographic evidence. We find the Solomon testimony may properly be considered. It will be up to the jury to resolve any conflicts in the evidence.

Based on the presence of triable issues of fact regarding whether the train operator reasonably sounded the horn or other warning device or timely applied the brakes after seeing Dean, and whether the train was being operated at a reasonable rate of speed at the time of the accident, we find the trial court erred in granting summary adjudication of Dean's first cause of action for negligence. For this reason, the summary judgment must be reversed.

F. *Dean's Second Cause of Action for Dangerous Condition of Public Property Is Barred by the Doctrine of Design Immunity*

1. Applicable Law

"[A] public entity is liable for injury proximately caused by a dangerous condition of its property if the dangerous condition created a reasonably foreseeable risk of the kind of injury sustained, and the public entity had actual or constructive notice of the condition a sufficient time before the injury to have taken preventative measures." (*Martinez v. County of Ventura* (2014) 225 Cal.App.4th 364, 368, citing § 835, subd. (b)[8].) The term

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[8] In its entirety, section 835 provides: "Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property 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

"'[d]angerous condition' means a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used." (§ 830, subd. (a).) The terms "'[p]roperty of a public entity' and 'public property' mean real or personal property owned or controlled by the public entity, but do not include easements, encroachments and other property that are located on the property of the public entity but are not owned or controlled by the public entity." (§ 830, subd. (c).)

Liability for a dangerous condition of public property can be avoided if the public entity establishes the affirmative defense of design immunity. (§ 830.6[9]; *Martinez v.*

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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 under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition."

[9] Section 830.6 provides: "Neither a public entity nor a public employee is liable under this chapter for an injury 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 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 therefor. Notwithstanding notice that constructed or improved public property may no longer be in conformity with a plan or design or a standard which reasonably could be approved by the legislative body or other body or employee, the immunity provided by this section shall continue for a reasonable period of time sufficient to permit the public entity to obtain funds for and carry out remedial work necessary to allow such public property to be in conformity with a plan or design approved by the legislative body of the public entity or other body or employee, or with a plan or design in conformity with a standard previously approved by such legislative body or other body or employee. In the event that the public entity is unable to remedy such public property because of practical impossibility or lack of sufficient funds, the immunity provided by this section shall

County of Ventura, *supra*, 225 Cal.App.4th at p. 368.) To prove design immunity, three elements must be established: "(1) a causal relationship between the [project] plan or design and the accident; (2) discretionary approval of the plan or design prior to construction; and (3) substantial evidence supporting the reasonableness of the plan or design." (*Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 69; *Hernandez v. Department of Transportation* (2003) 114 Cal.App.4th 376, 383.) The third element of design immunity is to be resolved by the trial or appellate court rather than the jury. (§ 830.6; *Cornette*, *supra*, at pp. 66, 72.)

Design immunity may be lost, however, "where the plan or design in its actual operation becomes dangerous under changed physical conditions. [Citation.] To demonstrate loss of design immunity, plaintiff must establish three elements: '(1) the plan or design has become dangerous because of a change in physical conditions; (2) the public entity had actual or constructive notice of the dangerous condition thus created; and (3) the public entity had a reasonable time to obtain the funds and carry out the necessary remedial work to bring the property back into conformity with a reasonable design or plan, or the public entity, unable to remedy the condition due to practical impossibility or lack of funds, had not reasonably attempted to provide adequate warnings.' [Citation.]" (*Alvis v. County of Ventura* (2009) 178 Cal.App.4th 536, 554.)

2. LACMTA Sustained Its Initial Burden of Producing Evidence To Support Its Defense of Design Immunity

Undisputed evidence that the accident occurred at the intersection of Washington Boulevard and Grand Avenue on the Blue Line route establishes the first element of defense of design immunity—i.e., a causal relationship between the project plan or

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remain so long as such public entity shall reasonably attempt to provide adequate warnings of the existence of the condition not conforming to the approved plan or design or to the approved standard. However, where a person fails to heed such warning or occupies public property despite such warning, such failure or occupation shall not in itself constitute an assumption of the risk of the danger indicated by the warning."

design and the accident. (*Cornette v. Department of Transportation, supra*, 26 Cal.4th at p. 69.) The second element, discretionary approval of the plan or design prior to construction (*ibid.*), was established by LACMTA's evidence that the California Public Utilities Commission (PUC) approved its Application No. A-88-09-034 to construct the Blue Line.

Paragraph 5 of the LACMTA Application states: "Attached as Exhibit C hereto are drawings of the subject crossings showing the signing and striping. Attached as Exhibit D hereto are drawings of the subject crossings showing the traffic signal installations." In its Opinion, the PUC found, among other things, that "[p]ublic convenience and necessity require construction of the tracks at grade along Flower Street and Washington Boulevard across eighteen crossings, as set forth in the appendix" and that "[p]ublic safety requires that protection at the crossings be [light rail transit] traffic signals and traffic lights, as set forth in the appendix." The PUC concluded that "[t]he application should be granted as set forth in the following order."

In the order that followed, the PUC authorized LACMTA to proceed with its light rail vehicle projects and specified that "[p]rotection at the crossings shall be as set forth in the appendix." The order also provided that "[p]reemption of traffic signals, pedestrian crossing signals and no left turn signals, shall be actuated by the approach of on-rail vehicles of [the Los Angeles County Transportation Commission] and as more fully described in the application and appendix attached to this order." The appendix specified that the crossing protection for the intersection of Washington Boulevard and Grand Avenue would consist of "[t]raffic signals with [light rail train] controlled signals."

John Miller, a civil engineer, participated in drafting the applications that were submitted to the PUC to construct grade crossings for the Blue Line in accordance with the Public Utilities Code. Although Miller did not create the drawings, he supervised their preparation and suggested changes when necessary. With respect to the street running areas of the Blue Line, Miller worked closely with the City of Los Angeles. This

included the Grand Avenue station. No PUC application was required for the train station itself.

According to Miller, the PUC required that warnings be installed at grade crossings. Toward that end, Miller worked with the City of Los Angeles to ensure that it provided adequate signals for the governance of pedestrian, vehicle and train traffic, particularly in street running areas.

Exhibit 23 to Miller's declaration was a drawing depicting the Grand Avenue grade crossing. The drawing was prepared by the City of Los Angeles and listed the detail of the traffic control devices. The drawing also included a phase system, designating "who travels where and when and what sequence, in other words." Miller worked with the City of Los Angeles "to receive their proposed location of the control devices." This is what the PUC wanted to see, so it was included in the application. Miller confirmed that the PUC's order approved the warnings at Grand Avenue as stated in the appendix.

As to the third and final element of design immunity, i.e., substantial evidence supporting the reasonableness of the plan or design (*Cornette v. Department of Transportation*, *supra*, 26 Cal.4th at p. 69), Matthew Manjarrez opined that the "subject pedestrian crossing, including its layout, markings, signing and associate signal indications, is reasonable and appropriate." The bases for his opinion were (1) "the pedestrian crossing is controlled by traffic signal indications that were approved by the [PUC] and implemented in accordance with the . . . California Manual On Uniform Traffic Control Devices"; and (2) "pedestrians are provided with a safety zone that serves as a waiting area adjacent to the Grand [Avenue] station platform entrance ramp."

LACMTA established a prima facie case that it was entitled to the defense of design immunity. (*Cornette v. Department of Transportation*, *supra*, 26 Cal.4th at p. 69.)

3. Dean Did Not Present Evidence Raising a Triable Issue of Material Fact as to Design Immunity

Dean contends that there are triable issues of fact as to whether the PUC approved the absence of train warning signs for pedestrians at the Grand Avenue station and the intersection where he was injured. Dean also maintains that design immunity does not apply because "[s]ignage at the Station and exit ramp to warn pedestrians of oncoming trains was not part of the [PUC] approval process . . . ." As best as we can discern, Dean appears to be arguing that because the PUC did not approve any signage at the pedestrian ramp connected to the Grand Avenue station itself, design immunity does not apply. Miller testified that PUC approval was not required for the train station itself. Dean has not directed our attention to any evidence to the contrary. In any event, the absence or presence of signage at the base of the station's pedestrian ramp is irrelevant. This is not the location of the accident.

To be distinguished from the signage at the station, is the signage and signals in the grade crossing. As explained in the previous section, the PUC did approve the actual signage at the intersection of Grand Avenue and Washington Boulevard as set forth in LACMTA's original application for the Blue Line. That a train signal for pedestrians was not included in the plan for the Grand Avenue and Washington Boulevard grade crossing does not *negate* design immunity. In fact, the PUC approved the design without such a signal.

4. Dean's Evidence Did Not Create a Triable Issue of Material Fact as to Loss of Design Immunity

a. *Dean Was Entitled To Raise the Issue of Loss of Design Immunity*

In his opposition to LACMTA's motion for summary judgment, Dean argued that LACMTA lost any design immunity it had because LACMTA's change from a two-car train to a three-car train on the Blue Line constituted a "change in physical condition." The trial court rejected this argument, and noted additionally that Dean improperly raised the issue of loss of design immunity for the first time in his opposition.

Although *Laabs v. City of Victorville, supra,* 163 Cal.App.4th 1242, which the trial court cited, does hold that "'[t]he pleadings delimit the issues to be considered on a motion for summary judgment'" and that a "'defendant moving for summary judgment need address only the issues raised by the complaint'" (*id*. at p. 1253), that holding does not apply to this case. With exceptions inapplicable here, "a complaint need not anticipate any defense or new matter affirmatively pled in the answer." (*Smith v. County of Santa Barbara* (1988) 203 Cal.App.3d 1415, 1426.) Design immunity was an affirmative defense pled by LACMTA in its answer. As such, Dean was not required to allege loss of design immunity in his complaint.

b. *Dean Has Not Established All Elements Required To Negate Design Immunity*

As noted above, the trial court rejected Dean's argument that LACMTA's decision to operate a three-car train, rather than a two-car train, on the Blue Line was a change in physical condition of public property.

We need not resolve this issue. Even if the addition of a car to the train was a "change in condition," Dean must also show that the change produced a dangerous condition causing injury (*Baldwin v. State of California* (1972) 6 Cal.3d 424, 438; *Alvis v. County of Ventura, supra,* 178 Cal.App.4th at p. 554) and that LACMTA had actual or constructive notice of the dangerous condition created by the change in condition (*Alvis, supra*, at p. 554).

In support of his claim that the addition of a third car created a dangerous condition, and that LACMTA was on notice that the change created a dangerous condition, Dean points to a long list of Exhibits, many of which were the subject of evidentiary objections.

While some of this evidence should properly have been excluded by the trial court, we need not address each separate objection. Even if we were to consider the objectionable evidence along with the admissible evidence, we find that it does not

establish that LACMTA was on notice that the addition of a third car created a dangerous condition at the Washington Boulevard-Grand Avenue grade crossing.

Russell Quimby, one of Dean's experts, opined that LACMTA was aware of confusing signage for motorists at the intersection and should have been aware of confusing signage for pedestrians. This opinion has nothing to do with notice to LACMTA that the addition of a third car to the train created a dangerous condition. Nor does the declaration of Lester Hollins, a former Blue Line train operator, pertain to notice.

The report concerning the grade crossing safety improvement project says nothing about the effect of adding a third car, nor can notice be concluded from the portions of the Metro Blue Line Train Operations Manual submitted. The fact that different signage is utilized at different intersections is not probative on the issue of notice. Nor does the pedestrian-train accident history for the accident site support a finding of notice that the addition of a third car to the train created a dangerous condition.[10] Dean has not linked any of the evidence discussed above with notice that the change in car configuration created a dangerous condition.

Dean failed to establish that there was one or more triable issues of material fact as to whether LACMTA lost the protection of design immunity. We conclude that LACMTA established an entitlement to judgment as a matter of law on Dean's second cause of action for dangerous condition of public property.

Because we conclude that summary adjudication was appropriate as to the second cause of action based on design immunity, we need not address LACMTA's other basis for summary adjudication of the dangerous condition cause of action—that it did not control the signals at Grand Avenue and Washington Boulevard.

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[10] In his brief, Dean does not direct us to any evidence of when LACMTA added a third car to the Blue Line. The evidence shows the last pedestrian-train accident at this grade crossing occurred 11 years prior to Dean's accident.

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court with directions to vacate its order granting LACMTA's motion for summary judgment, as well as its order summarily adjudicating Dean's first cause of action for negligence, to enter a new order granting only LACMTA's motion for summary adjudication as to Dean's second cause of action for dangerous condition of public property, and to set the matter for trial on the negligence cause of action. Dean is awarded costs on appeal.

STROBEL, J.*

We concur:

PERLUSS, P. J.

ZELON, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.