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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

JUN YANG, Plaintiff and Appellant, v. CITY OF SANTA BARBARA, Defendant and Respondent.	B267587 (Super. Ct. No. 1467569) (Santa Barbara County)

In this personal injury action based on an allegedly dangerous condition of public property, Jun Yang appeals from the judgment entered after the trial court had granted a motion for summary judgment filed by the City of Santa Barbara, respondent. Appellant contends that the trial court erroneously (1) ruled that respondent had established the affirmative defense of design immunity (Gov. Code, § 830.6),[1] and (2) refused to permit him to amend his complaint. We affirm.

[1] Unless otherwise stated, all statutory references are to the Government Code.

Factual and Procedural Background

In November 2013 appellant, who is legally blind and does not speak English, was injured when he fell off Stearns Wharf into the water below. The wharf is in the City of Santa Barbara and "is 20 feet above grade." Appellant testified that he and a companion went to the wharf for "sightseeing." They entered a fishing tackle shop on the wharf because appellant's companion wanted to buy a fishing line. When they left the shop, appellant was walking behind his companion. Appellant walked "a very short distance" and "without being able to see and without having any opportunity to be assisted whatsoever, [he] just fell" off the wharf. His companion did not warn him of the danger.

It is undisputed that appellant would not have fallen into the ocean if there had been a guardrail at the location of the fall. "There are guardrails from the foot of Stearns Wharf out past the commercial buildings (restaurants and tackle shop). But beyond that there are no railings with two exceptions: the location where people get on and off whale watching and harbor cruise boats and an area where visitors can look through a hole in the wharf deck." Appellant fell off the wharf about 30 feet beyond the tackle shop and 170 feet before the end of the wharf. "There are no warnings at Stearns Wharf about the lack of guardrails." (Bold omitted.)

Appellant's complaint alleged that the absence of a railing constituted a dangerous condition of public property. (§ 835.) Respondent filed a motion for summary judgment alleging that it was immune from liability because the absence of a railing was part of the design or plan for the wharf.

Elements of Design Immunity

"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 preventive measures. [Citations.] [¶] However, a public entity may avoid such liability by raising the affirmative defense of *design immunity*. (§ 830.6.) A public entity claiming design immunity must establish 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; and (3) substantial evidence supporting the reasonableness of the plan or design. Citations.]" (*Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 66, fn. omitted.)

Trial Court's Ruling

The trial court wrote a thorough 34-page ruling. It noted that the parties had agreed that respondent established the first element of design immunity - a causal relationship. It determined that there were no triable issues of material fact as to the second and third elements. The court rejected appellant's argument that, in addition to its pleaded theory of dangerous condition of public property, respondent "'should be liable to [appellant] under a failure to warn theory.'"

Standard of Review

"'[A] defendant moving for summary judgment based upon the assertion of an affirmative defense . . . "has the initial burden to show that undisputed facts support each element of the affirmative defense" . . . . If the defendant does not meet this burden, the motion must be denied.' [Citations.] [¶] "'There is

no obligation on the opposing party . . . to establish anything by affidavit unless and until the moving party has by affidavit stated "'facts establishing *every element* [of the affirmative defense] necessary to sustain a judgment in his favor. . . .'"'" (*Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 467-468.) "[T]he burden shifts to the plaintiff to show there is one or more triable issues of material fact regarding the defense after the defendant meets the burden of establishing all the elements of the affirmative defense. [Citations.]" (*Jessen v. Mentor Corp.* (2008) 158 Cal.App.4th 1480, 1484.)

"[W]e independently review the record that was before the trial court when it ruled on [respondent's] motion. [Citations.] In so doing, we view the evidence in the light most favorable to [appellant] as the losing part[y], resolving evidentiary doubts and ambiguities in [his] favor. [Citation.]" (*Martinez v. Combs* (2010) 49 Cal.4th 35, 68.)

"We must presume the judgment is correct . . . ." (*Jones v. Department of Corrections and Rehabilitation* (2007) 152 Cal.App.4th 1367, 1376.) "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.] . . . '[D]e novo review does not obligate us to cull the record for the benefit of the appellant in order to attempt to uncover the requisite triable issues. 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.]" (*Claudio v. Regents of University of California* (2005) 134 Cal.App.4th 224, 230.)

Second Element of Design Immunity

Government Code section 830.6 defines the second element - discretionary approval - as consisting of either of two parts: "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 [first part] 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 [second part] such plan or design is prepared in conformity with standards previously so approved . . . ." "A detailed plan, drawn up by a competent engineering firm, and approved by a city engineer in the exercise of his or her discretionary authority, is persuasive evidence" that the requirements of the first part have been met. (*Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931, 940.)

The trial court concluded: "[T]he undisputed material facts show that [in 1980] the City Public Works Director [Robert W. Puddicombe], a registered engineer, approved the design for the restoration of Stearns Wharf [after portions of the pier had been destroyed by a fire]." "The plans show that the area of the pier where [appellant] fell was designed to not include a handrail, and was constructed as designed. Although there is a later set of plans for reconstruction of a portion of the pier for fire repairs in 2000-2001, the design with respect to the location of railings was not changed by those plans." "Thus, the City can prove the second element of design immunity."

The trial court relied on the declaration of R. Patrick Kelly, a registered civil engineer and respondent's "City

Engineer, Assistant Director of Public Works." Attached to his declaration are the 1980 plans for the restoration of the pier.

As to the second element of design immunity, appellant provides only perfunctory argument: "[Respondent] relied exclusively below on the Declaration of R. Patrick Kelly to try to establish design approval. [Record citation.] But Kelly did not approve anything, and he could only offer hearsay as to who signed off on some 1980 plans. [¶] More importantly, Kelly and [respondent] said nothing on the issue of who signed off on plans for the 2000-2001 reconstruction of the outer part of Stearns Wharf which included the location where [appellant] fell in 2013."

The trial court overruled appellant's objection that Kelly's declaration contained hearsay. Appellant provides no legal analysis, with citations to supporting authority and the record, explaining why Kelly's statement "as to who signed off" on the 1980 plans was inadmissible hearsay, or why the admission of the hearsay is reversible error.

Furthermore, appellant does not explain why it was necessary for Kelly to state who "signed off" on the 2000-2001 reconstruction plans. Since, as Kelly declared, "the design with respect to the location of railings was not changed by those plans," the identity of the person who signed off on them is irrelevant. Design immunity is based on the 1980 plans, not the 2000-2001 plans. Thus, appellant has not fulfilled his "'responsibility to affirmatively demonstrate error and . . . to point out the triable issues [he] claims are present by citation to the record and . . . supporting authority.'" (*Claudio v. Regents of University of California*, *supra*, 134 Cal.App.4th at p. 230.)

Third Element of Design Immunity

The third element of design immunity is that the public entity must present "substantial evidence supporting the reasonableness of the plan or design." (*Cornette v. Department of Transportation*, *supra*, 26 Cal.4th at p. 66.) "The third element . . . must be tried by the court, not the jury. Section 830.6 makes it quite clear that 'the trial or appellate court' is to determine whether '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.'" (*Ibid*.)

Appellant claims that there is no substantial evidence supporting the reasonableness of the design omitting guardrails in the area where he fell off the pier. "[B]y not installing guardrails . . . , [respondent] violated its duty to both the public at large and to [appellant] in particular to protect against harm."

"We are not concerned with whether the evidence of reasonableness is undisputed; the statute provides immunity when there is substantial evidence of reasonableness, even if contradicted. [Citations.]" (*Grenier v. City of Irwindale*, *supra*, 57 Cal.App.4th at p. 940; see also *Arreola v. County of Monterey* (2002) 99 Cal.App 4th 722, 757 ["If the record contains the requisite substantial evidence, the immunity applies, even if the plaintiff has presented evidence that the design was defective"].) Thus, "[s]ummary judgment on the ground of design immunity cannot be defeated by the creation of evidentiary conflicts as to reasonableness." (*Grenier v. City of Irwindale*, *supra*, 57 Cal.App.4th at pp. 941-942.)

"[A]s long as reasonable minds can differ concerning whether a design should have been approved, then the governmental entity must be granted immunity. The statute does not require that property be perfectly designed, only that it be given a design which is reasonable under the circumstances. By deciding on a 'reasonableness' standard, the Legislature intended that government officials be given extensive leeway in their decisions concerning public property." (*Ramirez v. City of Redondo Beach* (1987) 192 Cal.App.3d 515, 525.)

"In order to be considered substantial, the evidence must be of solid value, which reasonably inspires confidence. [Citations.] Keeping that standard in mind, we review the evidence to determine whether there [was] a basis upon which a reasonable [public] official could have approved the . . . design" without the installation of guardrails where appellant fell. (*Arreola v. County of Monterey*, *supra*, 99 Cal.App.4th at pp. 757-758.) We are concerned only with what a reasonable public official would have done in 1980, when the plans were approved, not what a reasonable public official would do today. (See *Thomson v. City of Glendale* (1976) 61 Cal.App.3d 378, 387 [that the "Uniform Building Code was changed and that the [prior] construction in question did not conform to the new standards, does not establish the existence of a dangerous condition"].)

Stearns Wharf was originally constructed "to accommodate commercial transportation of people and goods by ship." It did not have "barriers along the edge of the deck as such barriers would hinder the movement from ship to shore and in some . . . cases would become a safety hazard."

Stearns Wharf was closed to the public after a 1973 fire. "[I]mmediately before the 1973 fire the end of the wharf was

not open to the public." Access to the end of the wharf was restricted "to commercial fishing boats and the oil industry for service vessels servicing platforms and related oil exploration activities."

After the fire, respondent redeveloped the wharf and opened it to the public in about 1980. When it was opened, the wharf had railings from the "foot of the pier" to "all the way out past the commercial buildings." Beyond that point, there are "no railings with the exception of a short section . . . by the passenger loading ramp for loading and offloading passengers" for whale-watching boats, cruise boats, and other "commercial activities." There are also railings around a hole in the middle of the wharf to keep people "[f]rom falling in."

Karl Treiberg, the manager of the wharf, opined that in 1980 railings were not installed beyond the commercial buildings "to maintain the historic integrity of the wharf [as] a working wharf for loading and offloading of cargo, passengers." "Working wharves do not have handrails, guardrails." Treiberg noted, "[T]here was some fish loading and offloading at least for a while after 1980, but there hasn't been any since I started in 2004." There is presently no loading or offloading of cargo. Fishing is restricted to certain areas on the wharf, including areas with no railings.

James Crumpley, a registered civil and structural engineer who has "been involved in the inspection, evaluation and design of waterfront structures for over 45 years," declared: "Building code requirements for guardrails and handrails do not apply to piers and wharves." "[I]n areas of the wharf where commercial buildings have been constructed, it is natural to add a barrier because of the confined space. On the other hand,

beyond the commercial buildings in areas where the dock is wide open [and where appellant fell], preserving the historic character of Stearns Wharf is appropriate. It is my opinion that the design and configuration of the area of Stearns Wharf where there are no railings is a reasonable and not unusual design." Crumpley observed: "There are many examples of piers and wharves that allow public access and fishing without having guardrail type barriers. Prime examples in California are Municipal Wharf 2 in Monterey Harbor, Morro Bay 'T' Pier, and the Fort Baker Pier in San Francisco Bay."

Based on the above evidence, in 1980 a reasonable public official could have approved the design without the installation of railings on the portion of the wharf beyond the commercial buildings where appellant fell. The reason for the approval would have been to preserve the character of this portion as a working wharf. Before the 1973 fire, the wharf was used by commercial fishing boats and the oil industry. After respondent redeveloped the wharf and opened it to the public in 1980, "fish loading and offloading [continued] at least for a while."

Design immunity applies even though, when appellant fell in 2013, the wharf was no longer being used for loading cargo. We recognize that "a public entity's design immunity defense may be lost by proof of changed conditions." (*Cornette v. Department of Transportation*, *supra*, 26 Cal.4th at p. 69, capitalization and bold omitted.) But appellant does not claim that changed conditions resulted in a loss of design immunity. In his reply brief, appellant acknowledges that "lost design immunity is a nonissue."

Trial Court's Refusal to Permit Amendment of the Complaint

"If either party wishes the trial court to consider a previously unpleaded issue in connection with a motion for summary judgment, it may request leave to amend. [Citations.] Such requests are routinely and liberally granted." (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1663–1664.) At the hearing on the motion for summary judgment, appellant filed a motion for leave to file an amended complaint alleging a second cause of action for "negligently" failing to warn appellant of "the lack of guardrails at Stearns Wharf." The trial court denied the motion. We review its ruling for abuse of discretion, which appellant has the burden of establishing. (*Emerald Bay Community Assn. v. Golden Eagle Ins. Corp.* (2005) 130 Cal.App.4th 1078, 1097.)

The motion to amend the complaint did not indicate how respondent could have warned appellant of the lack of guardrails. At the hearing on the motion for summary judgment, the trial court asked appellant's counsel, "How would you propose [respondent] warn?" Counsel replied, "What I have seen so far in the investigation that I have is tactile surfaces that are utilized at times and . . . lately seems to be popular. I am not sure how that would work on a wood wharf. It would take an expert to establish that. That is one thing that could be done. That is my thought on the failure to warn."

In denying leave to amend, the trial court reasoned: "[Appellant] has presented no viable argument as to what [respondent] should or could have done to warn [appellant]. [Since appellant is legally blind and does not speak English,] [h]e

cannot reasonably argue that [respondent's] failure to post warning signs was causative of his injuries. Nor would it make sense to have docents stand by to aid a blind sightseer." "[T]he concept that the method of 'warning' [appellant] such as installing tactile [surfaces] appears to be unpersuasive." The court also "considered it too late in the proceeding" to file an amended complaint alleging a second cause of action for failure to warn.

The trial court reasonably concluded that the proposed second cause of action was without merit because counsel had failed to explain how respondent could have warned appellant of the absence of guardrails. Counsel's vague allegations about the installation of "tactile surfaces" were insufficient. Counsel was "not sure how that [i.e., tactile surfaces] would work on a wood wharf." Accordingly, the trial court did not abuse its discretion in denying leave to amend the complaint to allege a cause of action for failure to warn. (See *Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 652.)

Moreover, appellant presents no argument showing that the trial court abused its discretion in finding it "too late in the proceeding" to allow the amendment. "[U]nwarranted delay in seeking leave to amend may be considered by the trial court when ruling on a motion for leave to amend [citation], and appellate courts are less likely to find an abuse of discretion where, for example, the proposed amendment is '"offered after long unexplained delay . . . or where there is a lack of diligence"' [citation]. Thus, when a plaintiff seeks leave to amend his or her complaint only after the defendant has mounted a summary judgment motion directed at the allegations of the unamended

complaint, even though the plaintiff has been aware of the facts upon which the amendment is based, '[i]t would be patently unfair to allow plaintiffs to defeat [the] summary judgment motion by allowing them to present a "moving target" unbounded by the pleadings.' [Citations.]" (*Falcon v. Long Beach Genetics, Inc.* (2014) 224 Cal.App.4th 1263, 1280.)

Finally, respondent's design immunity defense precluded a cause of action for failure to warn: "'It would be illogical to hold that a public entity immune from liability because the design was deemed reasonably adoptable, could then be held liable for failing to warn that the design was dangerous.' [Citation.] Since [respondent] could not be held liable for [the absence of guardrails] as [a] dangerous condition[], it could not be held liable for failing to warn of [the absence of guardrails]." (*Weinstein v. California Dept. of Transportation* (2006) 139 Cal.App.4th 52, 61.)

Appellant argues that the unamended complaint pleaded a claim for failure to warn of the lack of guardrails. Since respondent "did not address the claim in its summary judgment motion," the motion should have been denied. This issue is forfeited because appellant failed to raise it below. (See *North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 28.) In his motion to amend the complaint, appellant stated that "the addition to the pleadings of a failure to warn cause of action is necessary." The addition would have been unnecessary if the unamended complaint had already pleaded a failure to warn claim.

In any event, the unamended complaint did not plead a failure to warn claim. The fourth page of the complaint includes a box for a cause of action for "failure to warn."

Appellant did not check this box. Instead, he checked the box for "Dangerous Condition of Public Property." Even if the unamended complaint had pleaded a cause of action for failure to warn, summary judgment would still have been granted because respondent's design immunity defense precluded a cause of action for failure to warn. (*Weinstein v. California Dept. of Transportation*, *supra*, 139 Cal.App.4th at p. 61.)

Disposition

The judgment is affirmed. Respondent shall recover its costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Thomas P. Anderle, Judge

Superior Court County of Santa Barbara

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