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Securing success in sidewalk suits

USING A GOVERNMENT ENTITY'S OWN INSPECTION AND REPORTING SYSTEMS
TO ESTABLISH NOTICE OF THE DANGEROUS CONDITION

The City of Los Angeles has approximately 10,750 miles of sidewalks. About a third of those miles of sidewalks need some degree of repair. Despite nearly a decade of planning efforts and funding dedicated to repairing sidewalks, the City of Los Angeles continues to approach the problem at a glacial pace. As long as the City of Los Angeles sidewalks are obstacle courses, people will continue to get injured. Holding the City of Los Angeles accountable is the best way to remedy this problem.

Basics

As with all premises cases, these sidewalk cases immediately require an expert. While government entities, and the City of Los Angeles in particular, claim *ad nauseum* they do not have the resources to repair sidewalks nor do they have the responsibility to do so, the moment you file a government claim,

you will find that the government entity conveniently finds the time to repair the sidewalk within a few days. Be sure to take all photos and measurements of the condition, including measuring any depth discrepancies, prior to filing a government claim. Ideally, you will retain an expert and have them go to the scene to take proper measurements. However, sometimes due to timing issues this is not possible, so be sure even if you cannot get an expert that someone gets out to the scene and takes pictures of the condition.

As you and/or your expert walk the scene, look for signs of the government entity making inspections in the area. This includes signs of tree trimming, traffic-light maintenance, visits from the Department of Water and Power, trash collection, or street sweeping.

Your claim may not just be against the government entity. It may also be against the adjacent property owner or

owners. When you inspect the scene, in addition to identifying any properties adjacent to the defect, also look to see what may have caused the defect. Often the root cause is an overgrown tree (pun intended). If that tree is on private property, the owner of that property should also be a defendant. You may also find that a government entity planted the tree. Such trees are called street trees and provide an even stronger path to liability against a government entity since instead of just showing notice of the dangerous condition, you can now prove the government entity created the dangerous condition by planting the tree in the first place.

To prove a dangerous condition of public property claim, the plaintiff must show that: (1) the property was owned or controlled by a public entity at the time of the incident; (2) the property was in a dangerous condition at the time of the

injury; (3) the injury was proximately caused by the dangerous condition; (4) the dangerous condition created a reasonably foreseeable risk of injury; and (5) there was a negligent or wrongful act or omission by the entity that created the condition or the entity had actual or constructive notice of the dangerous condition. (*Moncur v. City of Los Angeles* (1977) 68 Cal.App.3d 118.)

Plaintiff also has the burden to prove that the property was used with due care. Ultimately, sidewalk cases against a government entity live and die on proving actual or constructive notice of the condition. At least in the City of Los Angeles, due to a variety of factors, sidewalks have been inspected and evaluated, just not repaired, and there are many fruitful avenues for proving actual or constructive notice, or even the creation of the condition.

Sidewalks in Los Angeles – A brief history

Sidewalks in Los Angeles are notoriously a disaster. Pick a street, any street, at random and you are likely to find sidewalks in disrepair. The main reason for this is simple: Approximately 100 years ago, the City of Los Angeles planted hundreds of trees across the City without any study into the potential impact to come. The City then failed to maintain these trees as their roots grew so large that they consistently lifted portions of the sidewalk at random, creating tripping hazards on every path.

While this of course creates a danger for every person walking in the City of Los Angeles, the lifts are so large that they impede those with mobility disabilities from accessing the City's sidewalks, curb ramps, crosswalks, pedestrian crossings, and other walkways. This impediment was the subject of the *Willits* class action lawsuit, and ultimately resulted in the *Willits* settlement. As part of the settlement, the City of Los Angeles committed \$1.37 billion dollars over 30 years to fixing sidewalks. Sidewalks across the City of Los Angeles are evaluated pursuant to a prioritization system

created by the City of Los Angeles Bureau of Engineering, which assigned different point values depending on a variety of factors. The City of Los Angeles entered into the *Willits* settlement in 2015.

A collision course with Vision Zero

At the same time the City negotiated the *Willits* settlement and committed \$1.37 billion dollars to repairs, the City of Los Angeles also became a Vision Zero signatory. Vision Zero is a project originating out of Sweden, with the goal of eliminating all traffic-related deaths. As part of Vision Zero, communities (they can be cities, counties, etc.) have to provide specific plans and metrics they will meet for eliminating high risk threats, known as "High Injury Network." In the City of Los Angeles, more than 200 people are killed in traffic crashes per year, and nearly half of those are people walking or bicycling. Most often, they are children or older adults.

The City of Los Angeles Bureau of Engineering came up with a prioritization system for how to repair and address these sidewalks. The Board of Engineering's initial scoring system allocated points based on a variety of factors, including whether the sidewalk defect was specifically named in the *Willits* settlement and whether the defect was in an area that is part of a High Injury Network.

Evaluating/scoring sidewalk damage

As the City of Los Angeles continued to struggle making progress repairing sidewalks, the City Council voted to instruct the Bureau of Engineering to adjust its allocation score, effectively deprioritizing the repairs at Vision Zero High Injury Network locations.

Sidewalk damage is now scored as follows: (A) 10-70 points for damage given priority per the *Willits* settlement such as damage near access points or damage complained of by a *Willits* claimant; (B) 10 points if the damage is within 500 feet of a High Injury Network; (C) 10 points if the damage is within the Metro First-Last Mile Priority network; (D) 5-20 points depending on

the number of claims or complaints about the damage; (E) 0-40 points depending on the severity of the damage; and (F) 0-10 points depending on the cost effectiveness of the repair. This information can all be found in the City of Los Angeles's Sidewalk Repair Program – Prioritization and Scoring System document, Council File 14-0163-S3, dated September 26, 2017. The Prioritization and Scoring System document includes photographs of the different severity index criteria, complete with photo examples of different damage severity.

The biggest takeaway from the prioritization system and different metrics for sidewalk assessment is this: The City of Los Angeles is actively looking at these sidewalks and deciding the order of repair. This is massive for a sidewalk case since one of the biggest hurdles to clear is showing the government entity had actual or constructive notice of the dangerous condition. It is not a defense that the government entity was aware of the dangerous condition and just had not gotten around to fixing it yet, unless the time between awareness and when your incident occurred is quite short. Between complaints, the City of Los Angeles's obligations under the *Willits* settlement, and the City of Los Angeles's obligations pursuant to Vision Zero, the odds that someone has looked at and analyzed the portion of sidewalk relevant to your case are high. Research this before you even consider the more traditional methods for establishing notice, such as street sweeping, trash collection, or other repairs in the area.

Pre-litigation document requests and search tools

Public record requests are your friend in cases against government entities. Each government entity has a different process for a public records request but many, including the City of Los Angeles, allow you to submit these requests online. You will want to request at least all sidewalk requests, complaints, and/or repairs within 500 feet of the incident location.

The City of Los Angeles recently admitted in writing that it is not making sufficient progress with repairing and rebuilding sidewalks due in large part to the City's inefficient strategy. The letter and report authored by Los Angeles Controller Ron Galperin from November 17, 2021 is a must-read for anyone litigating or considering taking on sidewalk cases in the City of Los Angeles.

The Los Angeles Controller also created a new online database of complaints as part of the November 17, 2021 report regarding the City of Los Angeles's sidewalk strategy. The online database tells you not only the nature of the complaint (cracked, raised/uneven, or access request), it will also show you where the nearest mobility access ramps are. This feature can help show constructive notice because it is more reasonable that a government entity would inspect areas where it knows those with mobility restrictions expect to be able to access and use the sidewalks.

In addition to the usual public record requests for information regarding other incidents and complaints in the area, neighborhood associations can be great resources. Concerned residents in underserved communities often do not follow traditional complaint channels. I have encountered cases where residents of the community would show up in person to their city council representative's office where they would be told to fix it themselves and given "repair permits." These "permits" and complaints were not logged anywhere and did not show up in any records requests.

If there is a tree in the area near the sidewalk defect and you think it might be a street tree, the Bureau of Street Services, Urban Forestry Division, has additional resources for you. The City of Los Angeles is currently in the process of its first tree inventory since the late 1990s. As of the date of publication, the inventory is approximately halfway done.

The claim and the complaint

As with any case against a government entity, you need to comply

with the California Tort Claims Act, which requires you to send notice of your claim in writing to the municipal entity, government entity, or public employee at issue within six months from the date of occurrence. The single biggest mistake I see people make is naming the incorrect government entity. If there is any chance a different government entity is involved, for example, if the sidewalk at issue is on a state route, submit a claim for every possible entity.

While you do have potential remedies if you name the incorrect entity, it is much easier to include all possible entities from the start and not risk having your case thrown out for failing to comply with the California Tort Claims Act. Most government entities have claim forms on their website with instructions on where to submit the claim form. Additionally, consider submitting a claim both through certified mail and through regular mail. If for some reason certified mail delivery is unsuccessful, certified mail will provide you with proof that the government entity did *not* receive your claim.

If the claim is denied, which it almost certainly will be, you will receive notice in writing. Subject to certain exceptions, you have six months from the notice of denial's date of service to file a court action on your claim.

Discovery

Written requests should seek a lot of the information you already sought through public record requests. You will likely find that every time you request information, you receive new documents. Often the people looking for responsive documents are overworked and lacking resources, so you want to continue to try to ask for new documents in case on that day the person searching for documents finds something new and helpful to your case.

Be sure to also include requests for production with all deposition notices when litigating cases against a public entity. Similarly, noticing the deposition of the government employee who signed the government entity's verifications to

written discovery can prove fruitful. You are entitled to this deposition under *Melendrez v. Superior Court* (2013) 215 Cal.App.4th 1343, 1352-1353, even if the verifying person is someone with the city attorney's office, for example. Ask that person what they did to verify the discovery. For requests for production, ask what they did to search for records and how they searched, or how they directed someone else to search. Do not just stop there. Include a category in your PMK deposition notice for the search for documents responsive to each discovery request.

Common defense arguments

Generally, a sidewalk offset that is less than 1.25 inches can be considered a trivial defect, and therefore not a dangerous condition absent other contributing factors such as shading, lighting, other obstructions that make it difficult to see. (*Huckey v. City of Temecula* (2019) 37 Cal.App.5th 1092.)

This is not an affirmative defense, rather it is part of duty. Other factors besides the size of the defect that can help you get around trivial defects are the nature and quality of the defect (are there lots of broken pieces? Are the edges jagged to the point measuring the defect becomes difficult?), dirt or other material blocking the pedestrian's view of the defect, lighting conditions, and weather. (*Felder v. City of Glendale* (1977) 71 Cal.App.3d 719.) Additionally, if the defect has caused other incidents, this is another factor that weighs in favor of a finding that the defect is not trivial as a matter of law.

Another favorite argument on sidewalk cases is that the defect was open and obvious and the plaintiff should have been able to avoid it because it was so obvious. This is nonsense. This "defense" is the defendant saying, "Hey, we let this get so bad that it actually isn't our fault, it is the plaintiff's fault for not avoiding this bad thing we ignored for so long." This argument is only a defense if you made a claim for failure to warn, which you likely did not do. A defect being open and

obvious does not free the controlling defendant from a duty to repair the defect.

Other case strategies

As discussed above, sidewalk cases most often involve multiple defendants because until you get into discovery it can be difficult to figure out which defendant truly had control and is at fault for the defect. As the case progresses, you should have a better idea of who you have the strongest case against at trial.

If you have a much stronger case against one defendant or know that one defendant has funds to recover while one does not (perhaps one of the homeowners is uninsured, for example), consider stipulating to file a non-opposition to a motion for summary judgment in exchange for a waiver of costs. This will prevent any remaining defendant from pointing the finger at the uninsured defendant at trial, which would create confusion and additional difficulty for your case, and instead allows everyone to focus on the parties remaining.

Dismissing a defendant against whom you have a weaker case early on in the process (or failing to include them in the first place) allows other defendants to point the finger at someone who is not present or fighting for themselves, leaving you to both put on your case and defend the empty-chair defendant.

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