S208130

Supreme Court No. _____

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

ANTONIO and JANIS CORDOVA,

Plaintiffs and Appellants,

vs.

CITY OF LOS ANGELES,

Defendant and Respondent.

After a Published Decision by the Court of Appeal,
Second Appellate District, Division One
Court of Appeal No. B236195
Los Angeles Superior Court Nos. BC442048, BC444004, BC443948
Hon. William F. Fahey

PETITION FOR REVIEW

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Petitioners Antonio and Janis Cordova hereby request that this Court grant review of the December 20, 2012 published decision of the Court of Appeal, Second Appellate District, Division One. A copy of the Court of Appeal's published opinion is attached to this petition as Exhibit 1.

ISSUES PRESENTED

1. A vehicle is forced off a city road by a criminally negligent driver and crashes into a large tree planted dangerously close to the roadway in the center median. The collision with the tree kills or seriously injures the vehicle's occupants. Can the City escape liability for the dangerous roadside condition merely because the tree itself did not cause the vehicle to veer off the roadway?

2. On summary judgment, a trial court excludes the plaintiffs' expert testimony and supporting evidence on the existence of a dangerous condition under Government Code section 835. What is the standard of review for evidentiary rulings on summary judgment, and did the trial court err by excluding plaintiffs' evidence and granting summary judgment?

WHY REVIEW SHOULD BE GRANTED

Review should be granted to secure uniformity of decision on an important issue of law arising under Government Code section 835. In a published opinion, the Court of Appeal ruled that the City of Los Angeles could not be held liable for a hazardous roadside condition because the

roadside object—a large magnolia tree planted in a center median—did not itself cause the vehicle to veer off the roadway.

This ruling is directly contrary to the holdings of *Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707 and *Lane v. City of Sacramento* (2010) 183 Cal.App.4th 1337. *Ducey* and *Lane* definitively establish that a public entity *may* be liable for a hazardous roadside condition that increases the risk of injury from an out-of-control vehicle—even if the hazardous condition itself did not contribute to the vehicle leaving the roadway. (*Ducey*, *supra*, 25 Cal.3d at pp. 715-721 [state liable for absence of median barrier that would have prevented out-of-control vehicle from crashing into oncoming traffic]; *Lane*, *supra*, 183 Cal.App.4th at p. 1348 [city not entitled to summary judgment on causation even though allegedly dangerous concrete lane divider did not cause plaintiffs to swerve into divider].)

The Court of Appeal's published decision inexplicably muddles a previously settled area of law without discussing or distinguishing *Ducey* and *Lane*. The Court of Appeal instead relied on a 2002 opinion of this Court involving a courthouse shooting, and it quoted a sentence of the opinion stating that the alleged "defect in the physical condition of the property must have some *causal relationship* to the third party conduct that actually injures the plaintiff." (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1136.) But *Zelig* itself explained that the causal relationship

must be "between the defect and the injury" (*id.* at p. 1135), and that this causal relationship is established when "the risk of injury from third parties" is "increased or intensified by any condition of the public property." (*Id.* at p. 1137.) Here, the risk of injury *was* increased by the presence of a hazardous fixed object placed too close to the roadway.

The Court of Appeal's contrary interpretation of *Zelig* conflicts with the holding of *Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749. In *Cole,* the Court of Appeal rejected the town's claim that an allegedly dangerous condition of public property must somehow have contributed to the third-party conduct of a drunk driver who left the road and hit the plaintiff. (*Id.* at pp. 769-774.) The court found that *Zelig* did not establish "a rule requiring a direct causal link between a dangerous condition and the conduct of the third party, *as distinct from the harm to the plaintiff.*" (*Id.* at p. 771, emphasis added.) In reaching this result, the *Cole* court "decline[d] to follow" the holding of *City of San Diego v. Superior Court* (2006) 137 Cal.App.4th 21 "insofar as it adopts a new and extremely restrictive rule for determining when the conduct of a third party will operate as a superseding cause excusing a public entity from liability for a dangerous condition of its property." (*Cole, supra,* 205 Cal.App.4th at p. 774.) Notably, the Court of Appeal below relied on *City of San Diego* but did not cite or mention *Cole.* (Ex. A, p. 14.)

Review should be granted to resolve these blatant conflicts between published decisions. Clarity and consistency are particularly important in this area because it is a recurring issue. California courts have repeatedly recognized that it is common and foreseeable for drivers to lose control of their vehicles and leave the roadway for reasons having nothing to do with lack of due care. (See, e.g., *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 775 ["Drivers are supposed to control their vehicles and keep them on the traveled roadway, but common experience shows they do not always do so"]; *Ducey*, *supra*, 25 Cal.3d at p. 720 ["many traffic accidents, including cross-median accidents, occur without the negligence of any party"]; *Laab v. Southern California Edison Co.* (2009) 175 Cal.App.4th 1260, 1273 [cars stray off the road "in a number of ways: a front tire blowout could cause a driver to lose control of his car; a driver could take evasive action to avoid a hazard and lose control of his car; a car could careen out of control following a collision with another vehicle"]; *Hurley v. County of Sonoma* (1984) 158 Cal.App.3d 281, 286-287 [triable issue of fact whether bridge abutment seven feet from highway constituted "a dangerous condition, given the foreseeability of vehicles, for a variety of reasons, straying off the road"].)

Alternatively, review should be granted and the case transferred back to the Court of Appeal with directions to reconsider its decision in light of

Ducey, *Lane*, and *Cole*. Our system depends on faithful adherence to judicial precedents. The Court of Appeal's published decision should not be allowed to stand without at least *some* explanation for its departure from these controlling precedents. "Adherence to precedent must ... be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts." (Cardozo, The Nature of the Judicial Process (1921) p. 34.)

Finally, this case also presents an opportunity for this Court to decide what standard of review applies to a trial court's evidentiary rulings on summary judgment. In *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, this Court held that de novo review is appropriate when the trial court fails to rule on evidentiary objections. But the Court stated: "[W]e need not decide generally whether a trial court's rulings on evidentiary objections based on papers alone in summary judgment proceedings are reviewed for abuse of discretion or reviewed de novo." (*Id.* at p. 535.) Review should be granted to resolve the issue left undecided in *Reid*.

STATEMENT OF FACTS

The Court of Appeal's opinion accurately summarizes the factual and procedural history of the case. (Ex. A, pp. 2-8.) But the opinion does not fully discuss the "clear zone" concept of roadside safety set forth in relevant publications of the American Association of State Highway and

Transportation Officials (AASHTO).[1]

Beginning in the 1960's, AASHTO began developing the "clear zone" or "clear roadside" concept to prevent vehicles from colliding with fixed obstacles along the side of the road when drivers lose control and leave the roadway. AASHTO first published this concept in a 1967 report entitled Highway Design and Operational Practices Related to Highway Safety, which recommended creating a "clear recovery area" free of hazardous fixed objects along the side of the road. (2 AA 389-390.) In 1977, AASHTO "modified the earlier clear zone concept by introducing variable clear zone distances based on traffic volumes and speeds, and on roadside geometry." (2 AA 447.) And in 1996, AASHTO discussed the "clear zone" concept in a comprehensive Roadside Design Guide intended as "a synthesis of current information and operating practices related to roadside safety ...." (2 AA 433.)

As explained in these AASHTO publications: "Even the most superficial study of traffic accident experience shows that a substantial number of vehicles leave the traveled way, inadvertently or otherwise. Because this is true, every reasonable effort should be made to design the

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[1]Although the trial court excluded the AASHTO publications as well as plaintiffs' expert testimony based on the "clear roadside" concept, petitioners challenged these evidentiary rulings on appeal. (AOB 17-27.) The Court of Appeal decided the appeal on the assumption that "plaintiffs' evidence was wrongly excluded ...." (Ex. A, p. 10.) Accordingly, plaintiffs will discuss the content of the AASHTO publications in this petition.

roadsides for this eventuality. The motorist must be given as safe a roadside situation as it is practicable to provide." (2 AA 398.) "The elimination of [roadside] obstructions from existing streets and highways and their exclusion from subsequent design plans can and must be expedited by deliberately engineering the roadside for safety." (2 AA 398.) "The forgiving roadside concept allows for errant vehicles leaving the roadway and supports a roadside design where the serious consequences of such an incident are reduced." (2 AA 440.)

Large trees are one of the roadside hazards singled out in these publications. As AASHTO explained: "Trees of ultimately large trunk size planted too close to the traveled way are potential hazards." (2 AA 399.) "Single vehicle collisions with trees account for nearly 25 percent of all fixed-object fatal accidents annually and result in the deaths of approximately 3000 persons each year." (2 AA 480.) "The removal of individual trees should be considered when those trees are determined both to be obstructions and to be in a location where they are likely to be hit." (2 AA 480.) If they cannot be removed, "a properly designed and installed traffic barrier can be used to shield them." (2 AA 481.)

Although the "clear zone" concept was developed primarily for high-speed rural highways, it applies to urban roads and streets to the extent feasible under the circumstances. AASHTO's original report of 1967

included a separate section entitled "Roadside Hazards on Conventional Roads and Streets." (2 AA 409-410.) This section stated: "Recognizing the narrow right-of-way and existence of many utility poles, trees, and walls on both public and private property, it may well be that roadside obstructions on these roads constitute a problem altogether different from that of higher type roads. On the other hand, it is obvious that many roadside hazards do appear in the accident experience and can be removed, or motorists protected from them, or the roadway redesigned. Active programs to this end should be an integral and important part of the overall highway program in each State." (2 AA 409.)

AASHTO's Roadside Design Guide of 1996 is more explicit about applying the "clear zone" concept to urban settings. Chapter 10 of the Roadside Design Guide is entitled "Roadside Safety in Urban and/or Restricted Environments." (2 AA 524.) This chapter covers "urban" or "urban-like" "highways or streets where the following type conditions may be found: lower speeds; dense abutting development; limited right-of-way; closely spaced intersections and access to properties; high traffic volumes; and the presence of special users including mass-transit vehicles, delivery trucks, bicycles, and pedestrians." (2 AA 524.)

Chapter 10 emphasizes: "The clear roadside concept is still the goal of the designer; however, this is often not attainable and compromises may

be necessary." (2 AA 525, emphasis added.) Within the "constraints of the urban roadside," AASHTO recommended that the following "design options for treatment of fixed objects should be considered in each case":

> • Remove the obstacle or redesign it so it can be safety traversed.
>
> • Relocate the obstacle to a point where it is less likely to be struck.
>
> • Reduce impact severity by using an appropriate break-away device.
>
> • Redirect a vehicle by shielding the obstacle with a longitudinal traffic barrier and/or impact attenuator.
>
> • Delineate the obstacle if the above alternatives are not appropriate. (2 AA 525.)

AASHTO devoted another section of this same chapter to urban landscaping. This section provides further support for applying the "clear zone" concept to large roadside trees in urban environments. Specifically, it stated: "In general, in urban areas with lower travel speeds, large trees should be kept at least 2 to 3 meters from the edge of the traveled way, *certainly outside of the clear zone*." (2 AA 530, emphasis added.)

The Roadside Design Guide is intended "a resource document from which individual highway agencies can develop standards and policies." (2 AA 433.) "While much of the material in the guide can be considered universal in its application, there are several recommendations that are subjective in nature and may need modification to fit local conditions." (2

AA 433.) This is particularly true for urban environments: "To a greater extent than when designing for roadside safety for high-speed rural highways, each site in a restricted road environment should be individually studied." (2 AA 525.)

In 2008, the Transportation Research Board of the National Academies (TRB) published an exhaustive report on urban roadside safety that was sponsored by AASHTO in cooperation with the Federal Highway Administration. (NCHRP Report 612, Safe and Aesthetic Design of Urban Roadside Treatments (2008), available online at www.trb.org.)[2] The report stated that a clear zone should be created in urban areas where feasible, or if not feasible, measures should be taken to minimize the severity of potential impacts with fixed roadside objects, such as by shielding or cushioning them. (*Id.* at pp. 5-6, 12-13.)

The TRB report included an extensive discussion on "lateral offset placement of trees and landscaping" in urban areas, as well as an analysis of existing safety research on roadside trees. (*Id.* at pp. 20-24.) Two studies discussed in the report are particularly relevant here. First, a 1990 study of

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[2]The TRB report was not cited in the trial court. Petitioners cite it here to demonstrate that trees planted too close to the roadway present a genuine safety concern even in urban areas, and it is a recurring danger significant enough to warrant this Court's attention. (See also *Aragon v. City of Newport Beach* (Oct. 24, 2001) 2001 WL 1297494 [unpublished opinion in case alleging that tree in median of Newport Beach road was a dangerous condition of property].)

"urban tree safety" in Huntsville, Alabama "concluded that mature trees with diameters larger than 10 cm (4 in.) should not be permitted within a roadside clear zone region."[3] (*Id.* at p. 23.) Second, researchers at California Polytechnic State University completed a three-phase study in 2004 "in which they evaluated the street tree application specifically for the urban median condition." (*Id.* at p. 24.) "The researchers concluded that large trees located in medians are associated with more total crashes as well as more fatal and injury crashes."[4] (*Ibid.*)

LEGAL DISCUSSION

I.

REVIEW SHOULD BE GRANTED TO SECURE UNIFORMITY OF DECISION ON AN IMPORTANT ISSUE OF LAW

A. The Court of Appeal's Published Opinion Conflicts With *Ducey* and *Lane*

The Court of Appeal ruled that "even assuming plaintiffs' evidence was wrongly excluded, they cannot show that the magnolia tree contributed to Shnayder's criminally negligent driving ...." (Ex. A, p. 10.) The Court of Appeal further explained:

Even considering plaintiff's excluded evidence, we conclude

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[3]Turner & Mansfield, *Urban Trees and Roadside Safety*, 116 J. Transportation Engineering (1990) pp. 90-104.

[4]Reports on all three phases of the Cal Poly study are available online at http://ceenve3.civeng.calpoly.edu/sullivan/Trees.

> as a matter of law the magnolia tree in the median strip does not constitute a dangerous condition. There is nothing about Colorado Boulevard that would cause a person driving at or near the speed limit to suddenly veer into the magnolia trees. Plaintiffs do not contend the view of the median was in any way obscured such that the tree was a surprise obstacle in the roadway, or that the median and trees caused cars to travel at unsafe speed (including the freeway speeds the plaintiffs' decedents were driving here) such that persons using the roadway with due care would be hit by such vehicles. (Ex. A, p. 14, citing *Zelig*, *supra*, 27 Cal.4th at p. 1136.)

This causation ruling conflicts directly with the holdings of *Ducey* and *Lane*. Under *Ducey* and *Lane*, a roadside condition that increases the risk of injury from an out-of-control vehicle *can* constitute a dangerous condition of property—even if it does not play a role in causing the vehicle to leave the roadway.

In *Ducey*, the plaintiffs were seriously injured when a car driving in the opposite direction on a state freeway crossed the median and collided head-on with their vehicle. (*Ducey*, *supra*, 25 Cal.3d at pp. 711-712.) The plaintiffs sued the state for failure to install a median barrier. The state argued that it could not be held liable under Government Code section 835 for failing "to protect plaintiffs from dangers that allegedly were not of the state's own making." (*Id.* at p. 715.) "Because in the instant case the conduct of the [other] vehicle, rather than any defect in the roadway, was, in the state's view, the precipitating cause of the accident, the state maintains that the trial court should have directed a verdict in its favor." (*Ibid.*)

In an opinion authored by Justice Tobriner, the Court rejected the state's causation argument. The Court held that a public entity's liability "may be predicated on its failure to take protective measures to safeguard the public from dangers that may not necessarily be of the entity's own creation." (*Ducey*, *supra*, 25 Cal.3d at p. 716.) The court ruled that "if the condition of [the] property creates a substantial risk of injury even when the property is used with due care, the state gains no immunity from liability simply because, in a particular case, the dangerous condition of its property combines with a third party's negligent conduct to inflict injury." (*Id.* at p. 719.)

The Court also rejected the state's claim that because cross-median accidents are usually caused by negligence, the absence of a median barrier did not create a substantial risk of injury when the freeway was used with due care. (*Ducey*, *supra*, 25 Cal.3d at p. 719.) The Court noted that "numerous expert witnesses identified various situations in which cross-median accidents might occur in the absence of negligence, as when accidents result, for example, from mechanical failure, sudden illness, or animals in the road." (*Ibid.*) "Moreover, ... the jurors were free to draw upon their own common driving experiences which might well have suggested to them that many traffic accidents, including cross-median accidents, occur without the negligence of any party." (*Id.* at p. 720.) Thus,

the Court affirmed a judgment against the state. (*Id.* at p. 721.)

Ducey is directly on point. If the Court of Appeal's decision below were correct, the state could not possibly have been liable in *Ducey*. The absence of a median barrier in *Ducey* obviously did not cause the other vehicle to lose control and leave the freeway. Rather, it merely increased the risk of injury from an out-of-control vehicle. Under the holding of *Ducey*, "a physical condition of the public property that increases the risk of injury from *third party conduct* may be a 'dangerous condition' under the statutes." (*Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 153-154.) In other words, the condition of the public property need not increase the *likelihood* of the third party conduct—it need only increase the "risk of injury" from the third party conduct. (*Ibid.*)

Lane is also directly on point. In *Lane*, a motorist driving on a city street swerved to the left when the vehicle immediately to his right appeared to be too close. His vehicle struck a concrete center divider that separated the westbound and eastbound lanes. The motorist and his passenger sued the City of Sacramento, asserting that the center divider was a dangerous condition of public property under Government Code section 835. (*Lane*, *supra*, 183 Cal.App.4th at pp. 1339-1340.)

The city argued that "it was not liable because the center divider was not the proximate cause of plaintiffs' injuries in that the divider did not

cause Montgomery to move his car to the left." (*Lane*, *supra*, 183 Cal.App.4th at p. 1341.) Reversing a summary judgment ruling in favor of the city, the Court of Appeal concluded that this argument "misapprehends the nature of the required causal connection." (*Id.* at p. 1348) "Under the governing statute, the pertinent question is not whether the divider caused Montgomery to swerve or move to the left; rather, the pertinent question is whether plaintiffs' 'injury was proximately caused by the dangerous condition.'" (*Ibid.*, quoting Gov. Code, § 835.) Because there was "no dispute ... that both plaintiffs suffered injuries as a result of Montgomery's car striking the concrete divider," the court ruled that "the city failed to show that the plaintiffs could not establish a proximate causal connection between the divider *and their injuries from the collision with the divider.*" (*Ibid.*, emphasis added.)

The Court of Appeal's reasoning below cannot be reconciled with *Lane*. To paraphrase *Lane*, "the pertinent question is not whether the [tree] caused [the vehicle] to swerve or move to the left; rather, the pertinent question is whether plaintiffs' 'injury was proximately caused by the dangerous condition.'" (*Lane*, *supra*, 183 Cal.App.4th at p. 1348, quoting Gov. Code, § 835.) The Court of Appeal's focus on whether the magnolia tree itself played a role in causing the vehicle to leave the roadway "misapprehends the nature of the required causal connection." (*Ibid.*)

Plaintiffs cited *Lane* in their opening brief and devoted a whole section of their reply brief to *Lane*'s holding on dangerous condition and causation. (AOB 21; ARB 4-10.) But the Court of Appeal cited *Lane* only in passing for the unremarkable proposition that absence of a dangerous condition may be decided as a matter of law if no reasonable person could find a dangerous condition to exist. (Ex. A, p. 12.) The Court of Appeal did not discuss the actual holding of *Lane* on the causation issue, nor did it explain how its conclusion could be reconciled with *Lane*. Plaintiffs also cited and discussed *Ducey* in their briefing of the causation issue (AOB 32-33), but the Court of Appeal did not mention *Ducey* anywhere in its opinion. Review should be granted to resolve this conflict.

B. The Court of Appeal's Interpretation of *Zelig* Conflicts With *Cole*

Emphasizing that the plaintiffs' vehicle was forced off the road by a third party's "criminally negligent driving" (Ex. A, p. 10,) the Court of Appeal held that "the alleged 'defect in the physical condition of the property must have some *causal relationship* to the third party conduct that actually injures the plaintiff.'" (Ex. A, p. 13, quoting *Zelig*, *supra*, 27 Cal.4th at p. 1136.) The Court of Appeal cited this same page of *Zelig* again in ruling that there was nothing about the magnolia trees that caused the plaintiffs' vehicle to veer off the roadway. (Ex. A, p. 14.) This interpretation of *Zelig* conflicts with the holding of *Cole*, *supra*, 205

Cal.App.4th at pp. 771-774.

In *Zelig*, the children of a woman who was fatally shot by her ex-husband in a courthouse sued the county. This Court held that the county could not be held liable under Government Code section 835 because the injury was not caused by any dangerous condition of the property. (*Zelig*, *supra*, 27 Cal.4th at p. 1137.) The Court acknowledged that a public entity may in some circumstances be liable for a dangerous condition of property even though "the injury to the plaintiff was caused by the criminal activity of third persons." (*Id.* at p. 1135.) But it emphasized "that liability is imposed only when there is some defect in the property itself and a causal connection is established between the defect and the injury." (*Ibid.*)

After a lengthy discussion of the relevant authorities on injuries caused by a combination of property defects and acts of third parties, the Court in *Zelig* concluded:

> To summarize: "If the risk of injury from third parties is in no way increased or intensified by any condition of the public property ... courts ordinarily decline to ascribe the resulting injury to a dangerous condition of the property. In other words, there is no liability for injuries caused *solely* by acts of third parties. [Citations.] Such liability can arise only when third party conduct is coupled with a defective condition of property." (*Zelig*, *supra*, 27 Cal.4th at p. 1137, citation omitted.)

Zelig is perfectly consistent with plaintiffs' theory of liability. It explicitly held that the required "causal connection" must be "between the

defect and the injury." (*Zelig*, *supra*, 27 Cal.4th at p. 1135.) Here, the alleged defect is the presence of the magnolia tree too close to the roadway, and the collision with the magnolia tree is what caused the deaths and injuries. *Zelig* also recognized that a public entity may be liable if the risk of injury from third parties is "increased or intensified" by a condition of the property. (*Id.* at p. 1137.) Here, the risk of injury from being run off the road by another driver was "increased or intensified" by the presence of the large magnolia trees too close to the roadway.

The Court of Appeal's contrary interpretation of *Zelig* conflicts with *Cole*, *supra*, 205 Cal.App.4th at pp. 771-774. In *Cole*, the plaintiff was standing by her vehicle along a gravel strip between a park and a road when a drunk driver named Rodriguez left the road and hit her. The gravel strip, park, and road all belonged to the Town of Los Gatos. The plaintiff sued the town for a dangerous condition of property. (*Id.* at p. 754.) After the trial court granted summary judgment, the Court of Appeal reversed. (*Id.* at p. 781.)

On causation, the Court of Appeal specifically rejected the trial court's ruling that "Town cannot be liable for a dangerous condition of its property unless that condition *caused Rodriguez's conduct*." (*Cole*, *supra*, 205 Cal.App.4th at pp. 769-770.) After an extensive discussion of *Zelig*, the Court of Appeal concluded: "We do not believe the Supreme Court had

any intention of adopting such a rule in *Zelig*, with the possible exception of situations where the plaintiff's injuries could not have occurred but for an intervening act of deliberate violence." (*Id.* at p. 774.)

Contrary to *Cole*, the Court of Appeal below construed *Zelig* to require a causal relationship between the dangerous condition of property (the tree) and Shnayder's criminally negligent driving. (Ex. A, pp. 10, 13, 14.) But the Court of Appeal did not cite or discuss *Cole* in reaching its decision.

The Court of Appeal's contrary interpretation of *Zelig* would also lead to absurd and anomalous results. If plaintiffs had lost control of their vehicle and crashed into the tree for reasons *other than* the negligence of a third party, *Zelig* would not apply and the city could be held liable for the dangerous condition. But because they lost control of their vehicle due to another driver's negligence, the Court of Appeal has interpreted *Zelig* to require a causal connection between the tree and the third party's negligence. This makes no sense. Plaintiffs should not have *less* protection merely because they were forced off the road by another driver's negligence—as opposed to a mechanical failure, a tire blowout, a medical emergency, an animal in the road, or any other cause not involving third party negligence. Review should be granted to correct this anomalous interpretation of *Zelig*.

C. Alternatively, Review Should be Granted and the Case Transferred Back to the Court of Appeal for Reconsideration in Light of *Ducey*, *Lane*, and *Cole*

There is another procedural mechanism available to ensure that the Court of Appeal at least addresses the holdings of *Ducey*, *Lane*, and *Cole*. Although grant-and-transfer orders are most common following the Court of Appeal's summary denial of a writ petition, this Court has also made use of them when the Court of Appeal appears to have overlooked controlling law on appeal. (See, e.g., *People v. Chacon*, No. S112675 (Feb. 11, 2003 docket entry: "The matter is transferred to the Court of Appeal, Fifth Appellate District, with directions to vacate its decision, filed November 26, 2002, and to reconsider the matter in light of Welfare and Institutions Code section 1732.6, subdivision (b)"); *Lane v. Hughes Aircraft*, No. S059064 (March 19, 1997 docket entry: "Petition for review granted; transferred to CA 2/7 w/directions to vacate its decision & reconsider in light of Neal v. Farmers Insurance Exchange (1978) 21 Cal.3d 910, 932-933 and Jones v. Citrus Motors Ontario, Inc. (1973) 8 Cal.3d 706, 710-711).)

Because the Court of Appeal's published opinion failed to address conflicting precedents, a grant-and-transfer order would be appropriate even if this Court decides not to resolve the conflict itself.

II.

REVIEW SHOULD BE GRANTED TO DECIDE WHAT STANDARD OF REVIEW APPLIES TO A TRIAL COURT'S EVIDENTIARY RULINGS ON SUMMARY JUDGMENT

The trial court excluded much of plaintiffs' expert testimony and supporting evidence on the existence of a dangerous condition. (3 AA 626-638.) Plaintiffs challenged these evidentiary rulings in a separate 10-page section of their opening brief on appeal. (AOB 17-27.) But the Court of Appeal assumed that plaintiffs' evidence was wrongly excluded and resolved the appeal on the causation issue. (Ex. A, pp. 10, 14.) Thus, the Court of Appeal did not have to decide what standard of review applies to evidentiary rulings on summary judgment.

In *Reid v. Google, supra,* 50 Cal.4th 512, this Court held that de novo review is appropriate when the trial court fails to rule on the evidentiary objections. But the Court stated: "[W]e need not decide generally whether a trial court's rulings on evidentiary objections based on papers alone in summary judgment proceedings are reviewed for abuse of discretion or reviewed de novo." (*Id.* at p. 535.)

Review should be granted to resolve the issue left undecided in *Reid.* "Whether abuse of discretion is the proper standard of review when rulings on evidentiary objections are based on papers alone presents an interesting question, one that is by no means settled." (*Nazir v. United Airlines, Inc.*

(2009) 178 Cal.App.4th 243, 255, fn. 4.) As one court has recently noted (with one Justice disagreeing on the issue), "it may be arguable that evidentiary rulings at a summary judgment proceeding, such as lack of foundation, should be reviewed de novo ...." (*Howard Entertainment, Inc. v. Kudrow* (2012) 208 Cal.App.4th 1102, 1114; *see also id.* at pp. 1122-1124 (conc. opn. of Turner, P.J.) [disagreeing with majority and arguing that abuse of discretion is proper standard of review]; *Williams v. Saga Enterprises, Inc.* (1990) 225 Cal.App.3d 142, 149 fn. 2 ["The record does not reflect whether the trial court ruled on the objections. However, that is of no consequence; we must determine the validity of those objections ourselves since our standard of review is a de novo examination of the order which granted the motion for summary judgment."].)

Although petitioners did not argue for de novo review of the evidentiary rulings in the Court of Appeal, they *did* challenge the trial court's evidentiary rulings in a discrete section of their opening brief. (AOB 17-27.) Because the Court of Appeal found it unnecessary to decide the evidentiary issues, it has not been deprived of an opportunity to rule on the matter. Further, this Court has authority to consider issues not raised in the lower courts, and it has done so in the past when the case presents "an issue of law that does not turn on the facts of [the] case, it is a significant issue of widespread importance, and it is in the public interest to decide the

issue at this time." (*Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 6.)

This is such an issue. Summary judgment motions are litigated and decided on a daily basis in our legal system. Evidentiary rulings on summary judgment are commonplace. And not only do summary judgment appeals frequently turn on the lower court's evidentiary rulings, but the applicable standard of review is often outcome-determinative. Further, the standard of review is a pure issue of law that does not depend on the particular facts of the case. Because this is a purely legal issue of widespread importance that effectively controls the results of many different types of civil appeals, there should not be any lingering uncertainty on the issue. Review should be granted to decide once and for all what standard of review applies to evidentiary rulings on summary judgment.

CONCLUSION

Review should be granted for two reasons: (1) to resolve the conflicts between the Court of Appeal's published decision and the decisions in *Ducey*, *Lane*, and *Cole*, and (2) to decide what standard of review applies to evidentiary rulings on summary judgment. Alternatively, review should be granted and the matter transferred back to the Second Appellate District, Division One, with directions to vacate its decision of December 20, 2012 and reconsider the matter in light of *Ducey*, *supra*, 25 Cal.3d at pp. 715-721; *Lane*, *supra*, 183 Cal.App.4th at p. 1348; and *Cole*, *supra*, 205 Cal.App.4th at pp. 769-774.

Dated: Jan. 21, 2013

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By: _____

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Antonio and Janis Cordova)

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.504(d) of the California Rules of Court, I certify that the foregoing Petition for Review was produced on a computer in 13-point type. The word count, including footnotes, as calculated by the word processing program used to generate the brief is 5,490 words.

Dated: Jan. 21, 2013

LAW OFFICES OF MARTIN N. BUCHANAN

By: _____

Martin N. Buchanan
(Attorney for Petitioners
Antonio and Janis Cordova)

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ANTONIO CORDOVA et al., Plaintiffs and Appellants, v. CITY OF LOS ANGELES, Defendant and Respondent.	B236195 (Los Angeles County Super. Ct. Nos. BC442048, BC444004, BC443948)

APPEAL from a judgment of the Superior Court of Los Angeles County, William F. Fahey, Judge. Affirmed.

Law Offices of Martin N. Buchanan, Martin N. Buchanan; Girardi/Keese and John A. Girardi for Plaintiffs and Appellants.

Carmen A. Trutanich, City Attorney, Amy Jo Field, Supervising City Attorney, and Sara Ugaz, Deputy City Attorney for Defendant and Respondent.

Plaintiffs Antonio Cordova and Janis Cordova appeal judgment in their wrongful death action against the City of Los Angeles (City) based on the dangerous condition of the roadway. The Cordova's children Cristyn, Toni, and Andrew Cordova were killed in an automobile accident on Colorado Boulevard in Eagle Rock, and claim that the City's design of the roadway, with trees in a center median, was in violation of principles of roadway design and maintenance which call for a clear zone. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Colorado Boulevard in Eagle Rock is three lanes wide in either direction, and has grassy center medians planted with magnolia trees in the stretch immediately east of Eagle Rock Boulevard. Some of the medians have left-turn pockets, and are generally 15.5 feet wide. The posted speed limit is 35 miles per hour.

On August 27, 2008, at approximately 10:30 p.m., Cristyn Cordova was driving westbound on Colorado Boulevard in Eagle Rock in the inside lane in her 2006 Nissan Maxima. Cristyn had four passengers—her sister Toni, her brother Andrew, her boyfriend Carlos Campos, and her friend Jason Gomez.[1] Everyone in the car was wearing their seatbelts. Driving next to Cristyn in another vehicle was Rostislav Shnayder. As Cristyn approached Hermosa Avenue, Shnayder's car veered into Cristyn's car, pushing her into the grassy median where her car hit a magnolia tree and crumpled. Cristyn and her unborn baby, Toni, Andrew, and Gomez were killed by the collision; Campos was seriously injured. Shnayder was arrested at the scene and later convicted of vehicular manslaughter. (Pen. Code, § 192, subd. (c)(2).)

On July 22, 2010, the Cordovas commenced this action for wrongful death against the City based on a dangerous condition of public property.[2] The Cordovas asserted that

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[1] To avoid confusion, we refer to the Cordovas by their first names.

[2] The complaint also named as defendants Shnayder and Irina Krichenko, and asserted claims against them based on negligence. They are not parties to this appeal. The parents of Jason Gomez and Carlos Campos commenced separate actions against the City and Shnayder and Krichenko that were settled.

Colorado Boulevard was in a dangerous condition because, among other things, it did not have "clear zones"—that area of the roadway that must be left unobstructed and allow drivers to remain on the roadway. They alleged the magnolia tree on the median, the height of the curb, and other design features of Colorado Boulevard were in contravention of sound safety and engineering principles. They asserted that "the roadway had a 7-foot recovery zone which was inadequate" and "a large tree was . . . maintained with the minimum clear zone width, thereby presenting a non-crashworthy severe hazard to encroaching vehicles."

1. The City's Motion for Summary Judgment

On June 3, 2011, the City filed a motion for summary judgment based on its assertion that the subject center median of Colorado Boulevard was safe when used in a reasonably foreseeable manner; the median was not damaged, deteriorated, defective or latently hazardous in any fashion; and the accident that killed the Cordovas' children and Gomez and injured Campos was the result of third-party criminal conduct.

The City's evidence in support of its motion asserted that the speed limit on Colorado Boulevard is 35 miles per hour. At the time of the collision, Cristyn's car was travelling 68 miles per hour and Shnayder was traveling 66 miles per hour. The City's expert calculated this speed using accident reconstruction techniques, tire marks, and vehicle geometry. After Cristyn's car was sideswiped by Shnayder, she missed the first tree on the median and then began to rotate counter-clockwise and collided with the magnolia tree on the west end of the median. The magnolia tree had a 17-inch diameter. Cristyn did not have a valid driver's license, nor had she ever had one.

The segment of Colorado Boulevard between Hermosa Avenue and Highland View avenue where the accident occurred runs east/west, and Hermosa Avenue and Highland View Avenue run north/south. The speed limit was calculated by a speed study that determined 85 percent of vehicles traversing the area go between 35 and 40 miles per hour. The City's Department of Transportation (LADOT) designated Colorado Boulevard as a major scenic highway, but the designation did not determine the speed

limit. The design of the relevant stretch of Colorado Boulevard from Townsend Avenue to Eagle Rock Boulevard was approved in July 1948.

According to the City's Bureau of Engineering (BOE) Street Design Manual, medians "serve as buffers between opposing traffic, provide refuge for pedestrians, and are strategic locations for traffic signs, traffic, signals, and landscaping." The inner two westbound lanes and inner three eastbound lanes of Colorado Boulevard are ten feet wide, and the left turn pocket is ten feet wide. The third lane is 19 feet wide to allow for parking. The center median between Hermosa Avenue and Highland View Avenue is 270 feet long and 15.5 feet wide before the left turn pocket begins. When the left turn pocket begins, the width of the median gradually decreases to about 5.5 feet. The City's expert found the construction of the median complied with the BOE's plans.

A minimum width of 14 feet is required where piers or abutments are located on medians. Under the Street Design Manual, center medians are suitable for fixed, immovable objects as long as there is five feet of clearance from the face of the structure to the inner edge of the painted traffic lane. The center median has a standard six-inch curb face, and there is seven feet of clearance from the magnolia tree to the inner edge of the painted traffic lane. Thus, the center median island and the positioning of the magnolia tree complied with the BOE's Street Design Manual.

Landscaping elements were not included in BOE and LADOT plans because those matters are under the authority of other departments, such as the Bureau of Street Services or the Department of Recreation and Parks. Nonetheless, the median island and the magnolia trees are easily visible and readily apparent to motorists exercising due care and paying attention to their surroundings. The City's expert was aware of "[n]o widely accepted design guideline which is applicable to low-speed roadways" that indicates "it is inappropriate to position fixed, immovable objects adjacent to the roadway." On the contrary, "it would be impractical, if not impossible to apply such a rule regarding clear zones in urban settings. To provide such a 'clear zone,' items such as parked cars, utility

poles, bridge columns, buildings, public transit structures, bus benches, and signs would have to be eliminated from center medians and sidewalk areas."

The City contended under the American Association of State Highway and Transportation Officials (AASHTO)[3] "guidelines for the provision of a clear zone [did] not apply [because those] guidelines were developed to apply to state highways and to high-speed generally rural roadways with limited access." The relevant segment of Colorado Boulevard was low speed and high access with local streets regularly intersecting it. According to AASHTO, immovable objects may be positioned in low speed roadways as long as they are at least 18 inches from the face of the curb. The City's expert did not believe the magnolia tree was hazardous to drivers traveling at or near the speed limit; further, the magnolia tree was at least seven feet from the face of the curb for westbound traffic.

On the other hand, trees provide shade, pollution reduction and speed reduction because drivers drive more slowly under a tree; thus, they are removed only when a specific safety hazard has been identified. The LADOT's collision history report indicated that none of the accidents involved the median trees; thus, nothing in the accident record would provide notice to the City of anything dangerous or latently hazardous about the median. The traffic volume on the relevant segment of Colorado Boulevard was 32,500 vehicles per day, meaning that as of June 2011, since the date of the accident, more than 26 million vehicle trips had been safely made through the intersection.

The LADOT's traffic collision history for the intersection of Colorado Boulevard and Highland View Avenue disclosed 12 accidents for the period August 27, 2003 to

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[3] "AASHTO is an organization of state and federal transportation officials, established in 1914, to foster the development of a nationwide integrated transportation system. [Its] active membership consists of the heads of the various state departments of transportation." The organization is funded by annual dues payments of its members. (*Center for Auto Safety v. Cox* (D.C. Cir. 1978) 580 F.2d 689, 690.)

August 27, 2008, excluding the Cordova accident. None of the accidents involved a fatality.

2. Plaintiffs' Opposition to Summary Judgment

Plaintiffs asserted that triable issues of fact existed whether the location, size and condition of the magnolia tree constituted a dangerous condition within the meaning of Government Code sections 830 and 835, whether the tree created a reasonably foreseeable risk of injury to the public, whether the City had notice of the dangerous condition, and whether the location and size of the tree exposed motorists to increased risk of danger from third party negligence or criminality.

Plaintiff's evidence in support established that of the magnolia trees on Colorado Boulevard, there were eight "scars" indicating impacts with cars, and two tree stumps had scars indicating impact. Plaintiffs asserted the magnolia tree Cristyn hit had a trunk diameter exceeding 24 inches and there was no barrier protection around the tree. Even if a car was traveling at a speed of 35 miles per hour, the six-inch curbs would not redirect an out-of-control vehicle to prevent it from striking the magnolia trees.

The tree at the accident site was over 50 years old; the City had no records indicating whether anyone who was alive at the time the tree was planted or the landscaping was put in would have knowledge of any assessment of the safety concerns regarding the tree's location to the traffic. Trees are the second most commonly hit fixed objects on roadways according to the U.S. Department of Transportation's study ("Conventional Road Safety, Phase 1") published in August 1979.

According to plaintiffs, the California Highway Patrol reported that there had been 142 accidents between Casper Avenue and Townsend Avenue on Colorado Boulevard (where the median is located) from January 1998 through April 2009; of these, 32 were sideswipe collisions, and 139 persons were either injured or killed.[4]

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[4] Plaintiffs' data actually indicates that aside from the accident at issue, with four fatalities, there was only one other fatality, on August 27, 2006, when a pedestrian was hit near Maywood Avenue.

In 1967, an earlier organization, American Association of State Highway Officials (AASHO) developed the concept of recovery areas and clear zones, and determined such zones were necessary where potential impact with trees or poles existed. AASHTO's 1996 "Roadside Design Guide," provided guidelines for the placement of guardrails and fixed objects within close proximity to travel lanes of a roadway. Objects which have a diameter of even four to six inches have the ability to penetrate a vehicle and cause injuries and death. As a result, plaintiffs contend the danger of a large tree at the accident site was foreseeable to the City, and the City should either have removed the tree or provided protection in the form of a barrier.

In constructing a median, City arborists and landscapers give consideration to visibility so that traffic control devices, such as signals, can be seen. Before planting trees, the City does a site inspection, considers what type of tree is suitable for the location given the visibility issues and the size of the parkway. However, the City does not consider the effect of a car hitting a tree in determining whether the tree is appropriate for a median; trees are generally planted in the middle of the median. The City does not consider the amount of traffic on the roadway, nor does it consider the speed of traffic on the street or the distance of the tree from the roadway. Trees are removed if they are dead, or if the tree is in conflict with existing infrastructure or for street widening.

According to plaintiffs, the City was aware of the presence of the large tree in the area, as well as the large number of sideswipe accidents in the area, presented the hazard of injury and fatalities from sideswipe accidents hitting the trees. The numerous "out-of-control" accidents on the roadway made it foreseeable a catastrophic collision would occur if appropriate safety measures were not taken. If the tree had not been there, it is likely the Nissan would have struck the median, slowed to a stop over a longer distance, and there would not have been serious or fatal injury.

3. The City's Reply

In reply, the City asserted that the accident was caused solely by Shnayder's criminal negligence and plaintiffs had not raised a triable issue of fact that the alleged

defect, the magnolia tree, was a concurrent cause of the accident, or that it facilitated or encouraged Shnayder's negligent driving.

4. Trial Court's Evidentiary Rulings

The trial court sustained evidentiary objections to much of plaintiffs' evidence, including the Highway Patrol Summary of accidents between 1998 and 2009; AASHO's 1967 development of "clear zones;" a U.S. Department of Transportation study entitled "Conventional Road Safety, Phase 1" published in August 1979; and AASHO's February 1967 report of its Traffic Safety Committee; as well as the conclusions of plaintiffs' experts that the City was on notice of the dangers of large trees placed on medians, that such a tree constituted a dangerous condition of public property, and the curbs were insufficient to stop a vehicle from traveling into the median.

The trial court also sustained evidentiary objections to the City's evidence, including its evidence that Cristyn did not have a valid driver's license; evidence based on the City's studies concerning the 35 miles per hour speed limit, the LADOT traffic collision reports; and the City's experts' conclusions that the median's design was suitable for trees.

5. Hearing on Motion; Trial Court Ruling

The trial court announced its tentative ruling was to grant the motion because the tree did not constitute a dangerous condition, and there was a lack of causation because of Shnayder's conduct. Plaintiffs argued that even at 35 miles per hour, the tree posed a danger without a guardrail in the case of a sideswipe accident. The court noted that boulders, mailboxes, and other items by the side of the road would all have to be removed under plaintiffs' theory. The court did not find it good policy to extend liability to all fixed objects that happened to cause injury; further, it did not find any causal connection between the tree and the accident, and denied the motion. The court entered judgment in the City's favor.

DISCUSSION

I. Standard of Review

"[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) "Once the [movant] has met that burden, the burden shifts to the [other party] to show that a triable issue of one or more material facts exists as to that cause of action." (Code Civ. Proc., § 437c, subd. (p)(1); *Aguilar*, at p. 850.) A triable issue of material fact exists where "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar*, at p. 850.) Where summary judgment has been granted, "[w]e review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)

"'A different analysis is required for our review of the trial court's . . . rulings on evidentiary objections. Although it is often said that an appellate court reviews a summary judgment motion "de novo," the weight of authority holds that an appellate court reviews a court's final rulings on evidentiary objections by applying an abuse of discretion standard. [Citations.]' [Citation.]" (*Miranda v. Bomel Construction Co., Inc.* (2010) 187 Cal.App.4th 1326, 1335.)

II. The Magnolia Tree in the Center Median Did Not Constitute a Dangerous Condition of Public Property as a Matter of Law

Plaintiffs contend that it was foreseeable a sideswiped vehicle would be forced off the roadway and collide with one of the magnolia trees planted near the curb, causing serious injury or death: Their experts established that serious or fatal injuries would occur even if a motorist were traveling at the posted speed limit of 35 miles per hour; an appropriate barrier on the median would have prevented the fatalities and injuries here;

and the other magnolia trees on the median supported the conclusion that drivers were leaving the road and hitting the trees; further, plaintiffs contend the trial court erred in sustaining the City's evidentiary objections to their evidence. The City contends that there is no evidence the magnolia tree caused Shnayder to drive in a criminally negligent fashion and sideswipe the plaintiffs' decedents' vehicle. We conclude that even assuming plaintiffs' evidence was wrongly excluded, they cannot show that the magnolia tree contributed to Shnayder's criminally negligent driving, and affirm the trial court.

A public entity is not liable for an injury arising out of the alleged act or omission of the entity except as provided by statute. (Gov. Code, § 815.)[5] Section 835 is the sole statutory basis for a claim imposing liability on a public entity based on the condition of public property. (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 829.) Under section 835, a public entity may be liable if it creates an injury-producing dangerous condition on its property or if it fails to remedy a dangerous condition despite having notice and sufficient time to protect against it. (*Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931, 939.)

To recover in an action against a public entity under section 835, a plaintiff must plead and prove: "(1) a dangerous condition existed on the public property at the time of the injury; (2) the condition proximately caused the injury; (3) the condition created a reasonably foreseeable risk of the kind of injury sustained; and (4) the public entity had actual or constructive notice of the dangerous condition of the property in sufficient time to have taken measures to protect against it." (*Brenner v. City of El Cajon* (2003) 113 Cal.App.4th 434, 439; § 835.)

Section 830 defines a "'[d]angerous condition'" as "a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property is used with due care in a manner in which it is reasonably foreseeable that it will be used." Section 830.2 explains further that "[a] condition is not

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[5] All statutory references herein are to the Government Code unless otherwise noted.

a dangerous condition within the meaning of this chapter if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines as a matter of law that the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used."

Property is not "dangerous" within the meaning of the statutory scheme if the property is safe when used with due care and the risk of harm is created only when foreseeable users fail to exercise due care. (*Chowdhury v. City of Los Angeles* (1995) 38 Cal.App.4th 1187, 1196 (*Chowdhury*).) As *Chowdhury* explained, "any property can be dangerous if used in a sufficiently improper manner. For this reason, a public entity is only required to provide roads that are safe for reasonably foreseeable careful use." (*Ibid.*) A public entity's liability for a dangerous condition of property "may ensue only if the property creates a substantial risk of injury when it is used with due care." (*Schonfeldt v. State of California* (1998) 61 Cal.App.4th 1462, 1466.) "'A condition is not dangerous . . . unless it creates a hazard to those who foreseeably will use the property or adjacent property with due care. Thus, even though it is foreseeable that persons may use public property without due care, a public entity may not be held liable for failing to take precautions to protect such persons.'" (*Ibid.*)

The plaintiff has the burden of establishing that the condition existed on property owned by the public entity at the time of the injury, and that the condition was dangerous, i.e., that it created a hazard to persons who foreseeably would use the property with due care. (*Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, 239.) Plaintiff also has the burden of showing that the public entity had actual or constructive notice of the dangerous condition of its property in sufficient time to have taken measures to protect against that dangerous condition. (*Brenner v. City of El Cajon*, *supra*, 113 Cal.App.4th at p. 439.)

Whether property is in a dangerous condition ordinarily is a question of fact, but if "no reasonable person would conclude the condition [of the property] created a substantial risk of injury when such property is used with due care in a manner in which it is reasonably foreseeable that it would be used," then the question is one of law. (*Lane v. City of Sacramento* (2010) 183 Cal.App.4th 1337, 1344.)

"'[W]here the circumstances are similar, and the happenings are not too remote in time, other accidents may be proved to show a defective or dangerous condition, knowledge or notice thereof, or to establish the cause of an accident.'" (*Genrich v. State of California* (1988) 202 Cal.App.3d 221, 227.) Before evidence of previous injuries can be admitted on the issue of whether the condition was a dangerous one, """it must first be shown that the conditions under which the alleged previous accidents occurred were the same or substantially similar to the one in question."""" (*Goebel v. City of Santa Barbara* (2001) 92 Cal.App.4th 549, 557.) The admissibility of evidence of prior accidents is confined to the trial court's sound discretion. (*Genrich*, at p. 233.)

With regard to third party conduct, "[a] public entity may be liable for a dangerous condition of public property even where the immediate cause of a plaintiff's injury is a third party's negligent or illegal act . . . if some physical characteristic of the property exposes its users to increased danger from third party negligence or criminality." However, """[t]hird party conduct by itself, unrelated to the condition of the property, does not constitute a 'dangerous condition' for which a public entity may be held liable."""" Rather, "[t]here must be a defect in the physical condition of the property and that defect must have some causal relationship to the third party conduct that injures the plaintiff." As a result, "'[p]ublic liability lies under [Government Code] section 835 only when a feature of the public property has "increased or intensified" the danger to users from third party conduct.' [Citation.]" (*Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1348.) As a result, in order for there to be a dangerous condition where third party conduct is involved, the condition of the property must increase or intensify the risk of injury. (*City of San Diego v. Superior Court* (2006) 137 Cal.App.4th

21, 30.) In other words, the alleged "defect in the physical condition of the property must have some *causal relationship* to the third party conduct that actually injures the plaintiff." (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1136.) "'If the risk of injury from third parties is in no way increased or intensified by any condition of the public property . . . courts ordinarily decline to ascribe the resulting injury to a dangerous condition of the property. In other words, there is no liability for injuries caused solely by acts of third parties. [Citations.] Such liability can arise only when third party conduct is coupled with a defective condition of property.' [Citations.]" (*Id.* at p. 1137.)

In *Sun v. City of Oakland* (2008) 166 Cal.App.4th 1177, the plaintiff attempted to cross a four-lane thoroughfare in an unmarked crosswalk. A driver saw the plaintiff step into the crosswalk and stopped for her, but the car travelling next to that driver failed to stop and hit the plaintiff when she walked pass the first car. (*Id.* at p. 1181.) Plaintiff sought to show a dangerous condition of public property based upon the City's failure to repaint the crosswalk markings after it repaved the street and installed bulb-out sidewalk extensions to make the intersection more "'pedestrian friendly.'" (*Id.* at p. 1184.) Plaintiffs contended the bulb-outs, which invited persons to cross the street, along with the traffic pattern on the street, contributed to the danger the intersection posed to pedestrians using it with due care. (*Id.* at p. 1189.) Relying on *Chowdhury*, *supra*, 38 Cal.App.4th 1187, the court found that there was no unusual physical characteristic of the crosswalk where the plaintiff was killed, such as visual obstructions, which would establish a dangerous condition. "Here, the only risk of harm was from a motorist who failed to exercise due care" by not obeying the traffic laws requiring him to yield to a pedestrian. (*Sun*, at p. 1190.)

In *Milligan v. Golden Gate Bridge Highway & Transportation Dist.* (2004) 120 Cal.App.4th 1, a 14-year-old girl jumped to her death from the Golden Gate Bridge. (*Id.* at p. 24.) The plaintiff sought to establish a dangerous condition of public property because it lacked a suicide barrier in addition to the existing three and one-half foot high safety railing. "By definition, persons who use the bridge to commit suicide *are not* using

the bridge in a manner used by the general public exercising ordinary care." *Milligan* held the defendant was not liable for failing to provide a suicide barrier for those who would intentionally use the bridge without due care. (*Id.* at p. 7.)

The issue here is whether a large tree in a median that is at least seven feet away from the street's traffic lanes could constitute a dangerous condition of public property even when persons driving on the street are exercising due care. Even considering plaintiff's excluded evidence, we conclude as a matter of law the magnolia tree in the median strip does not constitute a dangerous condition. There is nothing about Colorado Boulevard that would cause a person driving at or near the speed limit to suddenly veer into the magnolia trees. Plaintiffs do not contend the view of the median was in any way obscured such that the tree was a surprise obstacle in the roadway, or that the median and trees caused cars to travel at unsafe speed (including the freeway speeds the plaintiffs' decedents were traveling here) such that persons using the roadway with due care would be hit by such vehicles. (See *Zelig v County of Los Angeles*, *supra*, 27 Cal.4th at p. 1136; *City of San Diego v. Superior Court*, *supra*, 137 Cal.App.4th at pp. 30–31.) In *City of San Diego,* the passengers in a car were hit by street racers that frequented a stretch of Imperial Avenue located in the city. The speed limit on the four-lane road was 50 miles an hour; the street racers, one of whom did not have the car's lights on, were traveling 85 miles per hour. (*City of San Diego*, at p. 26.) The plaintiffs contended poor street lighting prevented them from seeing the car that did not have its lights on. (*Id.* at p. 24.) *City of San Diego* rejected the contention the poorly lit condition of the street was a dangerous condition: relying on *Zelig*, the court concluded the road was otherwise safe when used as intended by the public, and there was an insufficient nexus of causation between the condition and the accident. (*Zelig*, at p. 30–31.)

DISPOSITION

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

CERTIFIED FOR PUBLICATION.

JOHNSON, J.

We concur:

ROTHSCHILD, Acting P. J.

CHANEY, J.

CERTIFICATE OF SERVICE

I, Martin N. Buchanan, am employed in the County of San Diego, California. I am over the age of 18 years and not a party to the within action. My business address is 600 B Street, Suite 1900, San Diego, California 92101. On Jan. 21 2013, I served the foregoing **PETITION FOR REVIEW** by mailing a copy by first class mail in separate envelopes addressed as follows:

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(Attorneys for Respondent)

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Hon. William F. Fahey
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Los Angeles, CA 90012

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on Jan. 21, 2013, at San Diego, California.

Martin N. Buchanan