No. S208130

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

ANTONIO CORDOVA, et al.,

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,
Los Angeles Superior Court Nos. BC442047, BC444004, BC443948
Hon. William F. Fahey

OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

This court has limited review to the following issue: "May a government entity be liable where it is alleged that a dangerous condition of public property existed and caused the injury plaintiffs suffered in an accident, but did not cause the third party conduct that led to the accident?"

INTRODUCTION

Plaintiffs' three grown children and two other passengers were driving on a city highway when another negligent driver clipped their vehicle and forced it onto the center median. Their vehicle crashed into a large tree planted dangerously close to the highway in the center median on city property. The collision with the tree crushed the vehicle and killed four of its occupants, including plaintiffs' three children. The Court of Appeal ruled that the city could not be liable under Government Code section 835 because the tree itself did not cause the vehicle to leave the roadway. This court granted review on the causation issue.

The Court of Appeal got it wrong. Ordinary principles of concurrent causation apply to a public entity's liability for a dangerous condition of public property under Government Code section 835. Where a dangerous condition of public property combines with third party negligence to cause an injury, the public entity may be held liable. (*Baldwin v. State of California* (1972) 6 Cal.3d 424, 428, fn. 3.) The dangerous condition need

not play any role in causing the third party's negligent conduct—so long as it is a substantial factor in contributing to the resulting injury.

This issue was resolved by this court nearly 35 years ago. In *Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, the court ruled that a public entity *may* be liable for a dangerous condition of public property that contributed to the plaintiff's injuries in a car accident, but did not cause the third party conduct that led to the accident. (*Id.* at pp. 715-721 [state liable for absence of median barrier that would have prevented out-of-control driver from crossing median and crashing into oncoming traffic].) The Courts of Appeal have reached the same result. (See, e.g., *Cole v. Town of Los Gatos* (2012) 205 Cal.App. 4th 749, 769-774 [town may be liable even though allegedly dangerous condition did not contribute to conduct of drunk driver who left roadway and hit plaintiff]; *Lane v. City of Sacramento* (2010) 183 Cal.App. 4th 1337, 1348 [city may be liable even though allegedly dangerous lane divider did not cause plaintiffs to crash into divider].)

These cases correctly applied established principles of concurrent causation under the substantial factor test of proximate cause. If a dangerous condition of public property is a substantial factor in causing injury, the public entity "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 [the] injury." (*Ducey*, *supra*, 25

Cal.3d at pp. 718-719.) Thus, the judgment of the Court of Appeal should be reversed.

STATEMENT OF FACTS

The trial court excluded much of the evidence submitted by both sides on summary judgment. (3 AA 626-660.) On appeal, plaintiffs challenged the trial court's adverse evidentiary rulings.[1] (AOB 17-27.) But the Court of Appeal affirmed the trial court's summary judgment ruling without deciding the evidentiary issues, based on its assumption that plaintiffs' evidence was wrongly excluded. (Slip op. at pp. 10, 14.) Because this court has not granted review on the evidentiary issues, plaintiffs will likewise assume that their evidence was wrongly excluded and summarize both the admitted and excluded evidence in this brief.

A. Admitted Evidence

The segment of Colorado Boulevard intersecting Hermosa Boulevard has three lanes of traffic in each direction. It is designated as a scenic major highway. The posted speed limit is 35 miles per hour. (1 AA 39, 61; 3 AA 538.)

There are 14 curbed, center median islands separating the two

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[1]By contrast, the city did *not* contest any of the trial court's rulings excluding its evidence. (See, e.g., 3 AA 651 [sustaining objections to City Department of Transportation's 2001 Street Resurfacing Project Plans]; 3 AA 652 [sustaining objections to City Department of Transportation's 24-hour Count of Vehicle Traffic Volume]; 3 AA 658-659 [sustaining objections to City Bureau of Engineering Street Design Manual].)

directions of traffic along a 0.7 mile stretch of Colorado Boulevard between Townsend Avenue (to the east) and Eagle Rock Boulevard (to the west), which includes the block between Hermosa and Highland View. These center medians were designed and constructed by the City of Los Angeles Bureau of Engineering ("BOE") in 1948. (1 AA 40; 2 AA 281; 3 AA 533, 539.) The medians have a 6-inch raised curb perimeter. (2 AA 281; 3 AA 599.) The BOE design plans called for landscaping on the center islands, but did not specify trees or the type of landscaping. (1 AA 41; 3 AA 539.) Landscaping elements are generally not included in BOE plans because they are under the authority of other city departments. (1 AA 62; 3 AA 539.)

There are 32 magnolia trees distributed along 12 of the medians on this section of Colorado Boulevard. Four are stump remnants of larger trees that were removed for unknown reasons. The trees are of the Southern Magnolia variety. Sixteen of the Southern Magnolias are large trees with diameters ranging from 11.1 inches to 26.7 inches. (2 AA 282; 3 AA 599.)

On the median between Hermosa and Highland View, there are two magnolia trees. (1 AA 70; 3 AA 533.) The magnolia tree at the west end has a trunk diameter exceeding 24 inches, with measurements up to 30 inches in some parts. (2 AA 236; 3 AA 596.) Most of the center median is about 15½ feet wide, but it narrows at the west end to accommodate a left-turn pocket from westbound Colorado Boulevard onto Highland View. (1

AA 61-62; 3 AA 539-540.) The magnolia tree at the west end is located just east of the left-turn pocket on the portion of the median that is about 15½ feet wide. (1 AA 71; 3 AA 540.) There is roughly 7 feet of clearance from the tree to the inner edge of the number one lane of westbound traffic on Colorado Boulevard.[2] (3 AA 541.)

Hector Banuelos is the Acting Street Trees Superintendent for the City of Los Angeles. (2 AA 344.) According to Banuelos, the city does not consider any of the following factors in determining whether a tree species is appropriate for a specific median: (1) the potential for a vehicle crash into the tree; (2) the traffic speed or traffic volume on the adjacent roadway; or (3) the distance from the tree to the edge of the median. (2 AA 349-350, 359-360, 363.) The city also does not rely on any written documents on highway or road design in determining what trees are appropriate for parkways or medians. (2 AA 359.)

On the night of August 27, 2008, Cristyn Cordova, was driving her 2006 Nissan Maxima westbound on Colorado Boulevard in the number one lane approaching Hermosa Avenue. She had four passengers in the vehicle: Toni-Marie Cordova (her sister), Andrew Cordova (her brother), Jason

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[2]The city's expert measured an even 7 feet on either side of the tree to the *inner* edge of the painted traffic line in the roadway, i.e., the edge of the line closest to the traffic and farthest from the tree. (1 AA 42.) According to one of the plaintiffs' experts, the tree was "approximately 6 feet *from curb face* where the impact occurred." (2 AA 298, emphasis added.)

Gomez (her friend), and Carlos Campos (her boyfriend). Cristyn was pregnant. (1 AA 71; 2 AA 279; 3 AA 532.) All occupants of the Nissan were wearing seatbelts. (2 AA 279; 3 AA 596.)

Next to Cristyn's vehicle, Rostislav Shnayder was driving a 2004 Mitsubishi Eclipse in the number two lane westbound. (1 AA 71; 3 AA 532.) As Cristyn's vehicle approached Hermosa Avenue, Schnayder's vehicle crossed into the number one lane and hit her vehicle. (1 AA 71; 3 AA 533.) After the collision, Schnayder's vehicle moved right and skidded to a stop. (1 AA 72; 3 AA 533.) Cristyn's vehicle veered left and climbed the curb onto the center median island between Hermosa Avenue and Highland View Avenue. (1 AA 72; 3 AA 533.)

Cristyn's vehicle rotated counter-clockwise and ultimately collided with the large magnolia tree located at the west end of the center median. (1 AA 90, 92, 94.) There was no form of protection surrounding the trunk of the tree as the Nissan as slid sideways through the median area. (2 AA 236; 3 AA 596.) Photos taken after the accident show the vehicle completely crumpled against the tree. (1 AA 90, 92, 94.)

Cristyn Cordova, her unborn baby, Toni-Marie Cordova, Andrew Cordova, and Jason Gomez were killed as a result of the collision with the tree. Carlos Campos was seriously injured. (3 AA 532.)

The city submitted the declaration of an accident reconstruction

expert who opined that Cristyn's vehicle was traveling about 68 m.p.h. and Shnayder's vehicle was traveling about 66 m.p.h. when the two vehicles collided. (1 AA 72.) Although plaintiffs disputed this fact below, they did not dispute that both vehicles were exceeding the speed limit. (3 AA 533.)

Shnayder was arrested at the scene of the accident and booked on murder charges. In August 2010, a jury found Shnayder guilty of four counts of misdemeanor vehicular manslaughter with ordinary negligence. He was sentenced to a term in county jail. (1 AA 196-206; 3 AA 534-535.)

Kurt D. Weiss has been employed as a mechanical engineer for Automotive Safety Research, Inc. for over 24 years. He has extensive experience in collision reconstruction, forensic testing, and occupant restraint system analysis. (2 AA 278-279, 286-292.)

Weiss reviewed case-related documents and personally inspected the accident scene. (2 AA 279-281.) In his opinion, the extreme structural deformation of the Nissan suggested an impact speed that was likely above the 35 m.p.h. speed limit. However, even a 35-40 m.p.h. impact with an unyielding tree of this diameter would have resulted in a serious collision and would have challenged the ability of the vehicle and its restraint systems to offer adequate occupant protection. (2 AA 283-284.)

The magnolia tree involved in the accident had an impact scar consistent with a collision with a vehicle. Weiss had observed this type of

artifact in many other unrelated investigations in which a vehicle collided with a large tree. Weiss inspected the other magnolia trees and stumps along Colorado Boulevard and found ten more artifacts that appeared to be impact scars. (2 AA 282.)

Jacqueline G. Paver is a biomechanical engineer with extensive experience in biomechanical analyses of real-world accidents, including research and study of injury potential to occupants in automobile crashes. (2 AA 331-335.)

Paver reviewed the case materials and performed a biomechanical engineering analysis. (2 AA 336-337.) She concluded that if an appropriate barrier had been constructed at the crash location, the vehicle would have slowed and redirected without serious-to-fatal injury. Alternate injuries, if any, sustained by occupants of the vehicle would have been minimal. (2 AA 339.)

B. Excluded Evidence

Plaintiffs submitted two publications by the American Association of State Highway and Transportation Officials ("AASHTO")[3] on the "clear

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[3]Prior to 1973, AASHTO was known as the American Association of State Highway Officials ("AASHO"). For simplicity, it is referred to throughout this brief as AASHTO. AASHTO is an organization of state and federal transportation officials. Its active membership consists of the heads of the various state transportation departments, and it acts as an advisory committee to the Federal Highway Administration. (See *Center for Auto Safety v. Cox* (D.C. Cir. 1978) 580 F.2d 689, 690.)

zone" or "clear roadside" concept of roadside safety: (1) the 1967 Highway Design and Operational Practices Related to Highway Safety; and (2) the 1996 Roadside Design Guide. (2 AA 386-530.)

These AASHTO publications recommend the creation of a "clear zone" or "clear recovery area" free of hazardous fixed objects along the side of the road. (2 AA 389-390.) The AASHTO publications state: "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.)

AASHTO's Roadside Design Guide of 1996 explicitly applies the "clear zone" concept of roadside safety to urban settings. Chapter 10 of the Roadside Design Guide is entitled "Roadside Safety in Urban and/or Restricted Environments." (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.) This chapter

states that 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.)[4]

Within the "constraints of the urban roadside," Chapter 10 of the Roadside Design Guide recommends 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.)

The AASHTO recommendations are not rigid guidelines and they "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

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[4]The city's expert erroneously asserted: "The AASHTO design guide and other applicable design guidelines indicate fixed, immovable objects are appropriate to position in center medians on low speed urban roadways as long as they are at least 18 inches from the face of the curb." (1 AA 62-63.) There is nothing in the AASHTO publications supporting this assertion.

restricted road environment should be individually studied." (2 AA 525.)

Harry J. Krueper is a registered Civil Engineer and Traffic Engineer. He has nearly 60 years of experience in highway construction and traffic engineering, including highway design and safety evaluation. (2 AA 234-235, 241-250.) Krueper based his opinions on: (1) his knowledge, training, and experience; (2) his familiarity with applicable design and construction standards; (3) his review of the discovery and summary judgment materials; (4) his familiarity with the accident location; (5) a California Highway Patrol ("CHP") summary of 142 accidents along this stretch of Colorado Boulevard from January 1998 through April 2009, including 32 side-swipe collisions; and (6) the traffic safety principle of removing fixed roadside objects to provide a clear recovery area, or reducing the potential severity of a collision by means of a buffer, as developed in AASHTO publications such as the Roadside Design Guide. (2 AA 236-237, 252-253.)

According to Krueper, the large tree located in the median of a moderate to high-speed roadway in this case constituted a dangerous condition of public property. Because of the large number of documented side-swipe accidents on this section of the highway, and the moderate to high vehicle speeds, it was foreseeable that a catastrophic collision like this would occur if appropriate safety measures were not taken. (2 AA 238.)

In his declaration, Kurt Weiss described a 1979 study conducted in

cooperation with the U.S. Department of Transportation called "Conventional Road Safety, Phase I." The report described the search for cost-effective ways of reducing collisions on conventional state highways in California, and it addressed four fixed object hazards: ends of bridge railings, utility poles, traffic sign posts, and trees. It was noted that trees were the second most common frequently struck object. And while this study pertained to conventional highways with speed limits greater than that posted on Colorado Boulevard, it clearly addressed the need to protect the public from impact with fixed roadside objects. (2 AA 283.)

According to Weiss, the six-inch curb of the center medians on Colorado Boulevard was not sufficient to stop vehicles with standard diameter passenger car tires. (2 AA 284.) Curb heights of six inches would not redirect out-of-control vehicles and prevent them from striking the large magnolia trees. (2 AA 284.) Without adequate shielding, the 28 magnolia trees presented a significant collision danger for the motoring public on Colorado Boulevard. (2 AA 284.)

In Jacqueline Paver's opinion, a lateral crash involving a 35-45 m.p.h. impact speed into a tree would likely result in a serious-to-fatal injury. If the median had appropriate landscaping such as shrubs, rather than a tree, the Cordova vehicle would have slowed to a stop over a longer distance and any resulting injuries would have been minimal. (2 AA 339.)

STATEMENT OF THE CASE

In July 2010, appellants Antonio and Janis Cordova, the parents of decedents Cristyn, Toni, and Janis Cordova, filed a wrongful death complaint against the City of Los Angeles and other defendants. (1 AA 104-111.) The sole cause of action against the city was a claim for dangerous condition of public property. (Gov. Code, § 835.) The complaint alleged that the city's roadway where the accident occurred was a dangerous condition because the trees in the center median were located too close to the traveled portion of the road "in violation of principles of roadway design and maintenance which call for a clear zone as a safety precaution in the event of an accident which reasonably must be anticipated." (1 AA 108.)

In June 2011, the city filed a motion for summary judgment on three grounds: (1) the roadway and median were "safe when used in a reasonably foreseeable manner"; (2) the roadway and median were "not damaged, deteriorated, defective, or latently dangerous in any way"; and (3) the accident "was not caused by a condition of public property, but rather was the result of third party criminal conduct." (1 AA 2.)

At the summary judgment hearing, the trial court announced that its tentative ruling was to grant the city's motion because the tree was not a dangerous condition and it did not cause the accident. (RT 2:7-14, 10:5-

10.) On August 25, 2011, the trial court issued a minute order granting the city's motion for summary judgment (3 AA 663) and separate orders sustaining evidentiary objections to much of the evidence submitted by both sides. (3 AA 626-638, 639-660.)

On November 14, 2011, the trial court issued another written order granting the city's motion for summary judgment on two grounds. First, the court found that "[t]he tree positioned in the center median island does not constitute a dangerous condition of public property." (3 AA 686.) Second, the court found that "[t]he tree did not cause the accident that killed the Cordova children." (3 AA 686.) The court entered final judgment in favor of the city on December 5, 2011. (3 AA 706.)

On September 21, 2011, plaintiffs filed a premature notice of appeal from the August 25, 2011 minute order. (3 AA 709.) On February 9, 2012, the Court of Appeal granted plaintiffs' motion for an order deeming the premature notice of appeal to be from the final judgment of December 5, 2011.

On appeal, plaintiffs raised three issues: (1) the trial court abused its discretion by sustaining many of the city's evidentiary objections to their evidence and expert declarations; (2) the existence of a dangerous condition of property was a triable issue of fact; and (3) causation was also a triable issue of fact. (AOB 17-34.)

The Court of Appeal affirmed the judgment on the ground that the magnolia tree did not constitute a dangerous condition of public property as a matter of law. (Slip op. at pp. 9-14.) The court summarized its ruling as follows: "We conclude that even assuming plaintiffs' evidence was wrongly excluded, they cannot show that the magnolia tree contributed to Shnayder's criminal negligent driving, and affirm the trial court." (*Id.* at p. 10.) The court further explained:

> 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 driving here) such that persons using the roadway with due care would be hit by such vehicles. (*Id.* at p. 10.)

This court granted review solely on the causation issue quoted in the Issue Presented.

ARGUMENT

I.

A PUBLIC ENTITY MAY BE LIABLE FOR A DANGEROUS CONDITION OF PUBLIC PROPERTY THAT PROXIMATELY CAUSES INJURIES SUFFERED IN AN ACCIDENT, BUT DOES NOT CAUSE THE THIRD PARTY CONDUCT THAT LED TO THE ACCIDENT

The Court of Appeal ruled that the city could not be held liable for a dangerous condition of property under Government Code section 835 solely because the plaintiffs "cannot show that the magnolia tree contributed to Shnayder's criminally negligent driving ...." (Slip op., p. 10.) This ruling was legally incorrect. Under settled principles of concurrent causation, the city may be liable so long as the magnolia tree was a substantial factor in contributing to the deaths of the Cordova children.

A. Ordinary Principles of Concurrent Causation Apply to Cases Against Public Entities Under Government Code Section 835

Under Government Code section 835, the plaintiff must prove that "the injury was proximately caused by the dangerous condition" of public property. (Gov. Code, § 835.) California has "definitively adopted" the substantial factor test of legal or proximate cause. (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 968-969.) "One's wrongful acts or omissions are a legal cause of injury if they were a substantial factor in

bringing it about." (*In re Ethan C.* (2012) 54 Cal.4th 610, 640, citing cases.) Thus, a plaintiff who sues a government entity under Government Code section 835 "must show that the dangerous condition in question was a substantial factor in causing his or her harm." (*Milligan v. Golden Gate Bridge Highway and Transp. Dist.* (2004) 120 Cal.App.4th 1, 8-9; see also CACI No. 1100.)

Under the substantial factor test, a plaintiff need not establish that the dangerous condition of public property was the *only* cause of the injury. (*Bakity v. County of Riverside* (1970) 12 Cal.App.3d 24, 32.) Rather, a public entity may be held liable for an injury that was concurrently caused by both the negligence of a third party and a dangerous condition of public property. (*Baldwin*, *supra*, 6 Cal.3d at p. 428, fn. 3 [negligence of third party driver in rear-ending plaintiff did not absolve state from liability for dangerous condition of intersection]; see also *Hayes v. State of California* (1974) 11 Cal.3d 469, 472 ["Liability for injury caused by a dangerous condition of property has been imposed when an unreasonable risk of harm is created by a combination of defect in the property and acts of third parties."].) "The intervening or concurrent negligent act of a third person does not break the chain of causation provided the dangerous condition contributed in some way to the injury." (*Bakity*, *supra*, 12 Cal.App.3d at p. 32, citing cases.)

Applying ordinary principles of concurrent causation, a defendant may be liable if its wrongful conduct is a substantial factor in increasing or aggravating the injuries caused by someone else's negligence. (See, e.g., *Doupnik v. General Motors Corp.* (1990) 225 Cal.App.3d 849, 865-871 [vehicle manufacturer liable where plaintiff's injuries from accident were concurrently caused by his own negligence in driving off road and defectively manufactured roof pillar]; see also *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572-573 [vehicle manufacturer may be liable for design defect if it was a "substantial factor" in causing plaintiff's "enhanced injuries" in car accident].) "If the actor's wrongful conduct operated concurrently with other contemporaneous forces to produce the harm, it is a substantial factor, and thus a legal cause, if the injury, *or its full extent*, would not have occurred but for that conduct." (*In re Ethan C.*, *supra*, 54 Cal.3d at p. 640, emphasis added.)

These principles apply to cases against public entities under Government Code section 835. (*Baldwin*, *supra*, 6 Cal.3d at p. 428, fn. 3.) "In fact, if the third party's negligence or criminal conduct is foreseeable, such third party conduct may be the very risk which makes the public property dangerous when considered in conjunction with some particular feature of the public property, viz, the lack of a fence or barrier ...." (*Swaner v. City of Santa Monica* (1984) 150 Cal.App.3d 789, 804.)

B. This Court Has Previously Ruled that the Dangerous Condition Need Not Cause the Third Party Conduct That Led to the Accident

Contrary to the Court of Appeal's ruling, this court has already decided that a public entity *may* be held liable for a dangerous condition of public property that contributed to the plaintiff's injuries in a car accident, even if it did not cause the third party conduct that led to the accident. (*Ducey*, *supra*, 25 Cal.3d 707.)

In *Ducey*, the plaintiffs were 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 by Justice Tobriner, this court rejected the state's 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 explained: "[I]f 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 pp. 718-719.)

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, *Ducey* affirmed a judgment against the state under Government Code section 835. (*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* did not cause the driver of 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.*)

In this case, the magnolia tree in the center median increased the risk of injury to occupants of vehicles forced off the road, whether by the negligence of other drivers or other causes. If the tree had not been planted in the center median, or had been shielded by an appropriate barrier or shrubbery, the resulting injuries would have been minimal rather than fatal. (2 AA 339.) Because the tree was a substantial factor in causing the deaths of the Cordova children, it is at least a triable issue of fact whether the dangerous condition of public property was a concurrent cause of the deaths along with Shnayder's negligent driving.

C. Court of Appeal Decisions Have Also Concluded That the Dangerous Condition Need Not Cause the Third Party Conduct That Led to the Accident

Both before and after *Ducey*, the Courts of Appeal have reached the same result applying ordinary principles of concurrent causation. In *Morris*

v. State of California (1979) 89 Cal.App.3d 962, for example, a negligent driver crossed a freeway median into oncoming traffic and collided with the plaintiff's vehicle. The plaintiff sued the state for a dangerous condition of public property because there was an unrepaired gap in the median barrier. (*Id.* at p. 964.) There was no evidence that the gap somehow contributed to the other driver's negligent driving. Nevertheless, the Court of Appeal held that "the concurrence of [the other driver]'s negligence as a proximate cause of [plaintiff's] injuries with that of the State of California in allowing the median barrier to remain in a condition of disrepair does not immunize the state from liability." (*Id.* at p. 966, citing *Murrell v. State of California* (1975) 47 Cal.App.3d 264, 267; *Harland v. State of California* (1977) 75 Cal.App.3d 475, 483-484; *Matthews v. State of California* (1978) 82 Cal.App.3d 116, 121.)

In *Hurley v. County of Sonoma* (1984) 158 Cal.App.3d 281, the plaintiff was a passenger in a vehicle that drove off the road and hit a concrete bridge abutment seven feet from the roadway. (*Id.* at p. 283.) The plaintiff sued the county alleging that the bridge abutment was a dangerous condition of property. The trial court granted summary judgment for the county on the ground that "the sole cause of the accident was the driver's inattentiveness." (*Id.* at p. 284.) The Court of Appeal reversed: "Because the supporting papers present factual questions as to whether the bridge

abutment constituted a dangerous condition, we are not here concerned with the apparent negligence of driver Silva. '[I]t is established that although a third person may have been concurrently negligent with a public entity, the latter is not necessarily relieved from liability.'" (*Id.* at p. 288, quoting *Callahan v. City and County of San Francisco* (1967) 249 Cal.App2d 696, 701.)

In *Lane v. City of Sacramento, supra*, 183 Cal.App.4th 1337, a motorist (Montgomery) 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. (*Id.* 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, emphasis added.) 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.)

In *Cole v. Town of Los Gatos*, *supra*, 205 Cal.App.4th 749, the plaintiff (Cole) 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.) In granting summary judgment on causation, the trial court applied "a rule of law under which Town cannot be liable for a dangerous condition of its property unless that condition *caused Rodriguez's conduct*." (*Id.* at p. 769-770.) "Thus the [trial] court found no evidence to the effect that a defect in the property 'actually caused or contributed to '*the third party conduct that injured Cole.*'" (*Id.* at p. 770.)

The Court of Appeal reversed the summary judgment ruling and found that the trial court's reasoning on causation did not "accurately state the governing principles." (*Cole*, *supra*, 205 Cal.App.4th at p. 770.)

"Under traditional tort principles, once a defendant's conduct is found to have been a cause in fact of the plaintiff's injuries, the conduct of a third party will not bar liability unless it operated as a superseding or supervening cause, so as to break the chain of legal causation between the defendant's conduct and the plaintiff's injuries." (*Ibid.*) "[N]othing in this record would permit a conclusion that Rodriguez's conduct—either in driving after drinking, or in driving off the road—was, as a matter of law, a superseding cause relieving Town of any liability that might otherwise be imposed." (*Id.* at p. 771.)

In this case, the Court of Appeal's reasoning below cannot be reconciled with any of these authorities. 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.) There is substantial evidence in the record that the deaths of the Cordova children were proximately caused by the tree planted dangerously close to the roadway.

D. *Zelig* Did Not Overule This Line of Cases

The Court of Appeal quoted and relied on one sentence from this court's decision in *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, which stated that "the defect in the physical condition of the property must

have some *causal relationship* to the third party conduct that actually injures the plaintiff." (*Id.* at p. 1136.) But *Zelig* was only discussing cases where the plaintiff's sole theory of liability was that some condition of the public property actually increased the *likelihood* of criminal conduct by a third party—such as a claim that inadequate lighting of the public property contributed to the commission of a crime. *Zelig* was not addressing the line of cases relevant here, where the plaintiff's theory of liability is that the condition of public property increased or exacerbated the resulting injury from foreseeable third party conduct. (See *Zelig*, *supra*, 27 Cal.4th at pp. 1139-1140 [distinguishing *Ducey*].)

In *Zelig*, the children of a woman who was fatally shot by her ex-husband in a courthouse sued the county. They alleged that inadequate security screening and other physical features of the courthouse contributed to the shooting. However, this court held that the county could not be held liable under Government Code section 835 because the injury was not in fact caused by any physical defect of the property itself. (*Zelig*, *supra*, 27 Cal.4th at pp. 1137-1140.) In reaching this result, the court acknowledged "that a public entity may be liable if it 'maintained the property in such a way so as to increase the risk of criminal activity' or in such a way as to 'create[] a reasonably foreseeable risk of criminal conduct.'" (*Id.* at pp. 1134-1135, quoting *Peterson v. San Francisco Community College*

Dist. (1984) 36 Cal.3d 799, 812 [trees with thick foliage on college campus could be dangerous condition if they facilitated criminal activity against students].)

The sentence from *Zelig* relied on by the Court of Appeal was part of the court's discussion of conditions of public property that allegedly increase the *likelihood* of criminal activity:

> Other courts have pointed out that the defect in the physical condition of the property must have some *causal relationship* to the third party conduct that actually injures the plaintiff. In *Constance B. v. Superior State of California* (1986) 178 Cal.App.3d 200, 223 Cal.Rptr. 645, for example, the court determined that although the state may have some duty to enhance the personal safety of motorists using state highway rest stops, the state's conduct in placing lights and trees so as to case a shadow over the entrance to the women's restroom was not a substantial cause of the plaintiff's injuries at the hands of a third party assailant—the plaintiff's assailant did not take advantage of the shadows but stood in the light. (*Zelig*, *supra*, 27 Cal.4th at p. 1136.)

In cases like *Zelig*, where the plaintiff alleges that some condition of the public property increased the *likelihood* of third-party criminal conduct, it makes perfect sense to say "that the defect in the physical condition of the property must have some *causal relationship* to the third party conduct that actually injures the plaintiff." (*Zelig*, *supra*, 27 Cal.4th at p. 1136.) But *Zelig* did not purport to address cases like this one—where the theory of liability is that a condition of public property resulted in greater injury from a foreseeable accident precipitated by some other cause.

It is settled that the language of an opinion must be construed with reference to the facts and issues presented by the case. (*Trope v. Katz* (1995) 11 Cal.4th 274, 284.) Thus, *Zelig* does not support the Court of Appeal's ruling that there must be a causal connection between the dangerous condition and the third party conduct even in cases where the plaintiff is merely claiming that the dangerous condition increased or exacerbated the injury from foreseeable third party conduct. (See *Cole, supra*, 205 Cal.App.4th at p. 771 [finding 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"].)

The same logic applies to the Court of Appeal's reliance on *City of San Diego v. Superior Court* (2006) 137 Cal.App.4th 21. In *City of San Diego*, one person was killed and another injured in an illegal street race. The plaintiffs sued the city alleging that its inadequate street lighting constituted a dangerous condition of property. Following *Zelig*, the Court of Appeal rejected this argument on two grounds: (1) the failure to install lighting did not constitute a physical condition of property; and (2) "there is no evidence the racers were influenced by the absence of street lights." (*Id.* at p. 31.) But the plaintiffs there were not making any claim that the dangerous condition exacerbated the injuries from the accident. Unlike the magnolia tree in this case, the absence of street lighting obviously did not

cause anyone to suffer any greater injuries than they otherwise would have in the accident.

Other language in the *Zelig* opinion directly supports plaintiffs' position that there need only be a causal connection between the dangerous condition *and the injury*. The court stated: "We emphasize ... 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*." (*Zelig*, *supra*, 27 Cal.4th at p. 1135, emphasis added; see also *id.* at p. 1138 [liability depends upon "the existence of *some* defect in the property itself and the existence of a causal connection between that defect and the plaintiff's injury"].) Moreover, the court summarized its holding as follows:

> 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." (*Id.* at p. 1137, citation omitted.)

In this case, the risk of death or serious injury from being run off Colorado Boulevard *was* increased or intensified by the presence of the magnolia tree planted dangerously close to the roadway. Thus, plaintiffs' theory of liability is consistent with *Zelig*. *Zelig* did not alter the rule that a public entity "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." (*Ducey*, *supra*, 25 Cal.3d at pp. 718-719.)

E. This Result is Supported by Applicable Principles of Statutory Interpretation

The plain language of Government Code section 835 requires the plaintiff to establish that "*the injury* was proximately caused by the dangerous condition." (Emphasis added.) It does *not* require the plaintiff to prove that *the accident leading to the injury* was caused by the dangerous condition. Because the magnolia tree was a substantial factor in causing the deaths of the Cordova children, the deaths were proximately caused by the dangerous condition. "When the statutory language is unambiguous, 'we presume the Legislature meant what it said and the plain meaning of the statute governs.' [Citation.]" (*Bonnell v. Medical Bd. of California* (2003) 31 Cal.4th 1255, 1261.)

The Court of Appeal's contrary interpretation of *Zelig* would lead to absurd and anomalous results. If the Cordovas had lost control of their vehicle and crashed into the tree for reasons *other than* the negligence of a third party, the Court of Appeal could not have invoked *Zelig* to bar liability for the dangerous condition. But because they lost control of their vehicle due to another driver's negligence, the Court of Appeal interpreted *Zelig* to require a causal connection between the roadside condition and the third party's negligence. This makes no sense. Drivers should not have less

protection merely because they are 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. A statute should be interpreted "to make it workable and reasonable" and "avoid an absurd result." (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1122.)

F. The Court of Appeal's Faulty Causation Analysis Tainted Its Finding of No Dangerous Condition

The Court of Appeal ruled that "the magnolia tree in the median strip does not constitute a dangerous condition" because "[t]here is nothing about Colorado Boulevard that would cause a person driving at or near the speed limit to suddenly veer into the magnolia trees." (Slip op. at p. 14.) Thus, the Court of Appeal simply assumed that the trees could not be a dangerous condition unless they were the precipitating cause of the accident. It never even considered whether the tree could be a dangerous condition because it was a substantial factor in exacerbating the injuries and causing the deaths suffered in the accident. On this record, it is at least a triable issue of fact whether the magnolia tree constituted a dangerous condition because it created a substantial risk of injury to drivers exercising due care who were forced off the road and onto the center median.

Government Code section 830 defines a dangerous 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." Government Code section 835 in turn states that the plaintiff must prove "the injury was proximately caused by the dangerous condition."

"Whether the condition of property posed a substantial risk of injury to foreseeable users exercising due care is an objective standard and is measured by the risk posed to an ordinary foreseeable user. [Citation.]" (*Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 992.) The statute "does not require that the plaintiff show he or she was using the property with due care." (*Milligan*, *supra*, 120 Cal.App.4th at p. 7.) "So long as a plaintiff-user can establish that a condition of the property creates a substantial risk to *any* foreseeable user of the public property who uses it with due care, he has successfully alleged the existence of a dangerous condition regardless of his personal lack of due care." (*Fredette v. City of Long Beach* (1986) 187 Cal.App.3d 122, 131.) Where "reasonable minds could differ" on the question, it is a factual issue for the trier of fact. (*Huffman*, *supra*, 84 Cal.App.4th at pp. 992-993.)

Contrary to the Court of Appeal's opinion, nothing in the legal definition of a "dangerous condition" precludes liability for a condition that caused or exacerbated injuries suffered in an accident, but did not cause the

third party conduct that led to the accident. The authorities previously discussed demonstrate that the law is to the contrary. By focusing solely on the cause of the underlying accident, and failing to consider whether the tree was a substantial factor in contributing to the deaths, the Court of Appeal misapplied the governing law.

Viewing the evidence in the light most favorable to the plaintiffs, the existence of a dangerous condition is a triable issue of fact. 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*, *supra*, 158 Cal.App.3d at pp. 286 [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"].)

Because it is foreseeable that drivers exercising due care will be forced off the roadway, a public entity may be held liable for failing to maintain its property to safeguard the public from resulting injuries. (See *Ducey*, *supra*, 25 Cal.3d at pp. 715-720.) As the court explained in *Hurley:* "'[I]t is settled that what is required to be foreseeable is the general character of the event or harm -e.g., [a car straying off the highway and striking the abutment]-not its precise nature or manner of occurrence.'" (*Hurley*, *supra*, 158 Cal.App.3d at p. 288, quoting *Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 Cal.3d 49, 57-58 [bracketed text altered by *Hurley*].)

The AASHTO publications demonstrate that fixed roadside objects located too close to the roadway are a major hazard for occupants of out-of-control vehicles. Specifically, large trees planted too close to the roadway result in thousands of fatalities each year. (2 AA 399, 480.) Within the practical constraints of the urban environment, AASHTO recommends that even on streets with lower vehicle speeds, fixed roadside objects (including large trees) should be removed from the "clear zone" or shielded with appropriate barriers or "impact attenuator[s]" to the extent feasible. (2 AA 524-525, 530.)

Plaintiffs' expert testimony and the AASHTO publications at least

created a triable issue of fact on the existence of a dangerous condition. Krueper relied on the AASHTO "clear roadside" concept as support for his opinion that the magnolia trees in the center median constituted a dangerous condition of public property. (2 AA 234-238.) Weiss also testified that without adequate shielding, the magnolia trees presented a significant collision danger for the motoring public. (2 AA 284.) Similarly, Paver testified that the injuries to the occupants of the Cordova vehicle would have been minimal if shrubbery had been planted in the median instead of trees, or an appropriate barrier had been constructed. (2 AA 339.)

The expert declarations of Weiss and Paver also established that a collision with the tree would likely have resulted in serious or fatal injuries even if the vehicle had only been traveling 35-45 m.p.h. (2 AA 283-284, 339.) Thus, the totality of the evidence created triable issues of fact on: (1) the existence of a "condition of property" that posed a substantial "risk of injury" to motorists using the roadway "with due care" in a "reasonably foreseeable" manner (Gov. Code, § 830(a)); and (2) an "injury [that] was proximately caused by the dangerous condition." (Gov. Code, § 835.) The judgment should therefore be reversed.

CONCLUSION

Applying ordinary principles of concurrent causation, a government entity *may* be held liable under Government Code section 835 where a dangerous condition of its property was a substantial factor in causing the injury plaintiffs suffered in an accident, but did not contribute to the third party conduct that led to the accident. Thus, the judgment of the Court of Appeal should be reversed.

Dated: April 18, 2013

LAW OFFICES OF MARTIN N. BUCHANAN

By: _____

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Antonio and Janis Cordova

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.520(c) of the California Rules of Court, I certify that the foregoing Opening Brief on the Merits 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 8,408 words, exclusive of the matters that may be omitted under subdivision (c)(3).

Dated: April 12, 2013

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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 655 West Broadway, Suite 1700, San Diego, California 92101. On April 18, 2013, I served the **OPENING BRIEF ON THE MERITS** by mailing a copy by first class mail in sealed envelopes with postage prepaid and addressed as follows:

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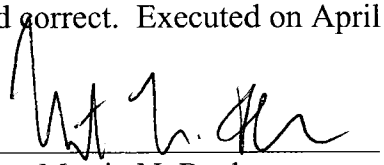
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on April 18, 2013, at San Diego, California.



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