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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, CASE NO. B236195

ANSWER BRIEF ON THE MERITS

Carmen A. Trutanich, City Attorney (SBN 86629)
Amy Jo Field, Supervising City Attorney (SBN 143827)
Blithe Smith Bock, Deputy City Attorney (SBN 163567)
Sara Ugaz, Deputy City Attorney (SBN 239031)
200 North Main Street, Room 916
Los Angeles, CA 90012-4130
Telephone: (213) 473-6878
Facsimile: (213) 473-6818
Email: Sara.Ugaz@lacity.org
Attorneys for Defendant and Respondent City of Los Angeles

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Los Angeles, CA 90012-4130
Telephone: (213) 473-6878
Facsimile: (213) 473-6818
Email: Sara.Ugaz@lacity.org
Attorneys for Defendant and Respondent City of Los Angeles

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INTRODUCTION

The Court granted the Cordovas' petition for review to address a single question: May a governmental 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?

The City of Los Angeles agrees with the trial court and the Court of Appeal that the answer to this question is a resounding "no." In order for a governmental entity to be concurrently liable for a plaintiff's injuries, the plaintiff must, at a minimum, show a causal link between the alleged dangerous condition and the third party conduct. If the government's only transgression is that it owns the property that injured the plaintiff – but nothing about the property would endanger a reasonable user of it – then no liability should result.

For example, if an individual is injured during a street race, but nothing about the highway caused the race or the accident to occur, the city cannot be liable. (*City of San Diego v. Superior Court* (2006) 137 Cal.App.4th 21, 24.) Nor is the City liable where the alleged defect in the roadway did not cause the driver to strike the pedestrian. (*Sun v. City of Oakland* (2008) 166 Cal.App.4th 1177, 1187.) And if a plaintiff is assaulted

in the dark landing of a college campus, then the college would be liable for the assault only if its failure to more quickly fix a shattered light was *a cause* of the assault. (*Constance B. v. State of California* (1986) 178 Cal.App.3d 200, 211-212.)

In the three cases that the Cordovas cite to argue that concurrent liability should arise where public property causes an injury, but not an accident, the dangerous condition was, in fact, *a cause* of the third party conduct. In *Ducey*, the absence of a median barrier led the third party driver to careen into opposing traffic and crash into plaintiff's car; in *Cole*, the unsafe configuration of the roadway and the adjacent parking strip caused the drunk driver to strike plaintiff while she was standing in the parking strip; and in *Lane*, the unusually narrow lane caused the near side-swipe collision which in turn caused plaintiff to collide with the median barrier. (*Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707 ("*Ducey*"); *Cole v. Town of Los Gatos* (2012) 205 Cal.App4th 749 ("*Cole*"); and *Lane v. City of Sacramento* (2010) 183 Cal.App.4th 1337 ("*Lane*").)

But no such causal link exists here between the allegedly dangerous condition and the third party conduct.

The three children of Appellants Antonio and Janis Cordova were fatally injured in a car accident. (1 AA 086:19-22.) Cristyn Cordova was

driving with her two younger siblings along Colorado Boulevard in the City of Los Angeles. (1 AA 087:1-6.) At the time of the accident, Cristyn[1] was driving in the number one lane at a speed of about 68 m.p.h. (1 AA 071:18-20; 1 AA 072:1-3.) She was side-swiped by a car that was traveling in the number two lane at a speed of about 66 m.p.h. (1 AA 071:18-23; 1 AA 072:1-3.) The force of the side-swipe collision caused Cristyn's vehicle to move left, climb the curbed median island, rotate counter-clockwise, and finally collide with a magnolia tree located at the end of the median island. (1 AA 072:10-18.) The speed limit for the street was 35 m.p.h. (1 AA 061:10-13.) There is 7 feet of clearance in between the tree and the number one lane. (1 AA 041:24-28; 1 AA 042:1-8; 1 AA 057.)

What was the City of Los Angeles' role in this tragic accident? Over fifty years ago it planted the magnolia tree into which Cristyn's car crashed. (*Cordova v. City of Los Angeles* (2012) 212 Cal.App.4th 243, 250.) Although the Cordovas argue that the tree was planted "dangerously close" to the street, no evidence whatsoever supports this proposition. As the undisputed facts demonstrate, the tree in the median strip did not cause the third party motorist to side-swipe the Cordova vehicle, nor did it cause the

[1] The City of Los Angeles respectfully refers to decedent Cristyn Cordova as "Cristyn" in order to distinguish her from her mother, Appellant Janis Cordova, and her sister, decedent Toni-Marie Cordova.

excessive speeding. Therefore, the Court should affirm the ruling of the Court of Appeal because no physical characteristic of the street caused the third party conduct and the tree does not meet the statutory definition of a dangerous condition.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

1. The Cordovas' Excluded Evidence Is Outside of the Scope of Review.

The Cordovas' Opening Brief is premised on the faulty assumptions that their evidence was wrongly excluded by the trial court and that such evidence should be considered by this Court. In fact, the Court of Appeal never overruled the evidentiary objections, so the trial court's sustaining of the City's objections prevail.

Contrary to the Cordovas' implication, the Court of Appeal did not rule that any of their evidence was wrongly excluded. The Court of Appeal stated that "even assuming plaintiffs' evidence was wrongly excluded" and "considering" it, we conclude "as a matter of law the magnolia tree in the median strip does not constitute a dangerous condition." (*Cordova v. City of Los Angeles* (2012) 212 Cal.App.4th 243, 253, 256.) In other words, even assuming, for sake of argument, that their evidence was admissible, it would have made no difference in the outcome of this case. The Court of Appeal

did not indicate even the slightest possibility that the Cordovas' excluded evidence (which was about highway safety guidelines and the dangers posed by a tree seven feet away from the street) was admissible or even helpful.

Accordingly, the City of Los Angeles' sustained objections stand as the law of the case. This Court has discretion to grant review on only certain issues and leave undisturbed the Court of Appeal's decision on the remaining issues. (See California Rule of Court, Rule 8.516; *Snukal v. Flightways Manufacturing, Inc.* (2000) 23 Cal.4th 754, 772-773.) Despite the Cordovas' request, this Court specifically declined to review the admissibility of their excluded evidence. In so doing, this Court has intentionally left undisturbed the Court of Appeal's decision not to overturn any of the City of Los Angeles' sustained objections. The Cordovas are distorting the language used by the Court of Appeal to back-door their evidentiary challenges and improperly enlarge this Court's clearly stated scope of review.

Nonetheless, as argued below, even if this Court considers all of the Cordovas' excluded evidence, it would not change the fact that the tree in the median strip does not constitute a dangerous condition as a matter of law.

2. The Undisputed Facts Regarding the Car Accident.

On August 27, 2008, at around 10:30 p.m., Cristyn Cordova, Cristyn's unborn baby, Toni-Marie Cordova, Andrew Cordova, and Jason Gomez were killed in a car accident in the Eagle Rock area of the City of Los Angeles. (1 AA 086:19-23.) Passenger Carlos Campos was seriously injured as a result of the car accident. (1 AA 086:19-23.)

Cristyn was driving westbound on Colorado Boulevard in the number one (inside) lane and approaching Hermosa Avenue. (1 AA 087:1-3.) She had four passengers in her 2006 Nissan Maxima: Toni-Marie Cordova (her sister), Andrew Cordova (her brother), Jason Gomez (her friend), and Carlos Campos (her boyfriend). (1 AA 087:3-6.) Cristyn did not have a driver's license. (1 AA 088:1-7.)

Next to her vehicle, in the number two lane travelling westbound was a 2004 Mitsubishi Eclipse driven by Rostislav Shnayder. (1 AA 087:6-7.) As Cristyn's vehicle approached Hermosa Avenue, Mr. Shnayder swerved his vehicle into the number one lane and collided into Cristyn's vehicle. (1 AA 071:24-27.) The City's accident reconstruction expert Michael Varat opined that at the time of this side-swipe collision, Cristyn's car was travelling at about 68 m.p.h. and Mr. Shnayder's car was travelling at about 66 m.p.h. (1 AA 072:1-7.) The Cordovas dispute these speed estimations; however they

concede that both vehicles were exceeding the 35 m.p.h. speed limit. (1 AA 039:23-26; 1 AA 061:11; 3 AA 533.) Notably, none of the Cordovas' three engineering experts opined as to how fast the cars were travelling at the time of the side-swipe collision despite the existence of extensive physical evidence (e.g., skid marks, accident scene photographs, witness statements, resultant damage to the cars involved and the tree, etc.).

After the side-swipe, Mr. Shnayder's vehicle moved right and skidded to a stop, leaving 210 feet of locked wheel-braking skid marks. (1 AA 072:8-10; 1 AA 083; 1 AA 085.) Cristyn's vehicle, on the other hand, moved left. (1 AA 072:11-13; 1 AA 083; 1 AA 085.) Her car passed Hermosa Avenue and then climbed the curbed, center median island in between Hermosa Avenue and Highland View Avenue. (1 AA 072:11-13; 1 AA 083; 1 AA 085; 1 AA 087:12-13.) Two magnolia trees and a water fixture are positioned on this curbed, center median island. (1 AA 041:9-10.) Cristyn's vehicle did not collide with the first magnolia tree located at the east-end of the median island. (1 AA 072:14-15; 1 AA 083; 1 AA 085.) Rather, Cristyn's vehicle rotated counter-clockwise and then collided with the magnolia tree at the west-end of the median island. (1 AA 072:16-17; 1 AA 083; 1 AA 085; 1 AA 087:13-14; 1 AA:090; 1 AA 092; 1 AA 094.)

Mr. Shnayder was arrested at the scene of the accident by the LAPD

and booked on murder charges (Penal Code section 187). (1 AA 087:15-16.) A jury found Mr. Shnayder guilty of the misdemeanor crime of Vehicular Manslaughter with ordinary negligence, a violation of Penal Code section 192(c)(2), for the deaths of the Cordova children and Jason Gomez. (1 AA 199-201.)

3. The Undisputed Facts Regarding the Street and Center Median Island.

Colorado Boulevard runs east/west and the particular segment of Colorado Boulevard where the Cordova vehicle crashed has three lanes of traffic in both directions. (1 AA 061:1-2.) It is designated by the City of Los Angeles' Department of Transportation (LADOT) as a scenic major highway because it is long corridor that begins in Pasadena, passes through the City of Los Angeles, and ends in Glendale. (1 AA 039:27-28.) Nonetheless, it remains a street with a speed limit of 35 m.p.h. (1 AA 061:2-3; 1 AA 39:25; 3 AA 538.) The car accident occurred in an area of mixed-use development—businesses are positioned along Colorado Boulevard, but residences are located directly behind them. (1 AA 039:13-24; 1 AA 039:24-25.) Highland View Avenue and Hermosa Avenue are local streets that run north/south. (1 AA 061:4.) The curbed, center median island in between Highland View Avenue and Hermosa Avenue has a left-turn pocket

for westbound traffic to turn left onto Highland View Avenue. (1 AA 061:5-6.)

This particular median island was designed in 1948 by the City of Los Angeles' Bureau of Engineering (BOE) and was part of a larger BOE median island design project. (1 AA 040-041; 4 AA 210.) In total, the BOE designed and constructed 14 center median islands along a 0.7 mile stretch of Colorado Boulevard from Townsend Avenue to Eagle Rock Boulevard. (1 AA 040-041; 4 AA 210.) The design called for most of the center median islands to be landscaped, including the center median island in between Hermosa Avenue and Highland View Avenue. (1 AA 040-041; 4 AA 210.) Although the landscaping elements of the center median island (the two magnolia trees) are not included in the BOE or LADOT plans, the Bureau of Street Services or the Department of Recreation and Parks oversees these designs. (1 AA 062:3-4;1 AA 062:5-8.)

Under the guidelines set forth in the BOE's Street Design Manual, a curbed, center median island must be at least 14 feet wide if piers or abutments (i.e. bridge columns, etc.) are to be located on the median. (1 AA 041:14-23; 1 AA 050-057.) The center median island at issue here is approximately 270 feet long (about 20 car lengths) and is about 15 ½ feet wide for 175 feet (starting from Hermosa Avenue and approaching

westbound to Highland View Avenue). (1 AA 070:25-28; 1 AA 071:1-4; 1 AA 081; 1 AA 096; 1 AA 098; 1 AA 099.) It begins to gradually decrease in width at this point because of the left-turn pocket. (1 AA 071:3-4; 1 AA 081.) The magnolia tree that Cristyn's vehicle collided into is located on the west-end of the median near Highland View Avenue. (1 AA 071:6-7; 1 AA 081; 1 AA 087:13-14; 1 AA 090-094.) The magnolia tree is located about 181 feet from the east end of the median at Hermosa Avenue at the portion of the median that is about 15 ½ feet wide. (1 AA 071:7-10; 1 AA 081.) The median island is about 5 ½ feet wide at the left-turn pocket lane. (1 AA 071:12; 1 AA 081.)

Under the BOE's standards, the width ultimately chosen must provide a minimum of 5 feet of clearance between the face of the structure and the inner edges of the painted traffic lane or curb face. (1 AA 041:14-23; 1 AA 050-057.) There is 7 feet of clearance from the magnolia tree that Cristyn's car collided into and the inner edge of the number one lane of westbound traffic on Colorado Boulevard. (1 AA 041:24-28; 1 AA 042:1-8; 1 AA 057.) Accordingly, the center median island, including the magnolia tree positioned there, conforms to (and even exceeds) the BOE's Street Design Manual standards. (1 AA 042:6-8.)

The LADOT's 2001 Street Resurfacing Project Plans for Colorado

Boulevard from Eagle Rock Boulevard to Figueroa Street (A-2899) established the lane width and striping elements of the roadway. (1 AA 024:22-23; 4 AA 210.) This resurfacing project of Colorado Boulevard included the cross-streets of Highland View Avenue and Hermosa Avenue. (1 AA 024:23-25.) As depicted in the LADOT resurfacing plan, the curbed, center median island in between Hermosa Avenue and Highland View Avenue has a left turn pocket. (1 AA 024:26-27; 4 AA 210.) The median island is also clearly defined by yellow striping around its perimeter about a foot from its curb. (1 AA 024-025:28-2; 1 AA 090-099.) There are three lanes of traffic in each direction for this segment of Colorado Boulevard (westbound and eastbound). (1 AA 025:1-2; 1 AA 096-099.) According to the plan, the number one and number two lanes for westbound traffic are ten feet wide. (1 AA 025:2-3; 4 AA 210.) The left turn pocket for westbound traffic is also ten feet wide. (1 AA 025:4-5; 4 AA 210.) The number three lane is nineteen feet wide in order to allow for curb parking. (1 AA 025:5-6; 4 AA 210.) These lane widths are standard. (1 AA 025:6.) As shown in the lower right-hand corner of the plan, the design was approved by Tim Conger, Transportation Engineer, and Thomas Jones, Senior Transportation Engineer in February 2001. (1 AA 025:6-8; 4 AA 210.) Under the City Charter, the Transportation Engineer has the authority to approve the design.

(1 AA 025:8-9.) The executed striping and lane width complied with the 2001 LADOT Resurfacing Project Plans. (1 AA 025:10-11.)

The center median island and the magnolia trees positioned there are easily visible and readily apparent to motorists. (1 AA 062:10-11.) In fact, the center median island has yellow striping around its perimeter. (1 AA 061:28; 1 AA 024:27; 1 AA 025:1; 1 AA 090-099.)

The daily traffic volume at or very near this segment of Colorado Boulevard is approximately 32,500 vehicles per day. (1 AA 025:12-18; 1 AA 037; 1 AA 063:25-26.)

4. The Cordovas' Lawsuit Against the City of Los Angeles.

On July 22, 2010, Antonio and Janis Cordova, the parents of Cristyn, Andrew, and Toni-Marie Cordova, filed a complaint against the City of Los Angeles and Rostislav Shnayder. (1 AA 104.) The Cordovas alleged a single dangerous condition of public property cause of action against the City of Los Angeles. (1 AA 107.) They contended that the City was liable for the deaths of their children because the roadway was in a dangerous condition within the meaning of Government Code section 835 because, "the trees in the median were located too close to the travel[ed] portion of the roadway." (1 AA 108:22-23.) They further alleged that, "the roadway failed to provide for clear zones, that area of a road which must be left

unobstructed in order to allow any driver to remain on the roadway and in the travel lane." (1 AA 106:20-24.)

When specifically asked by the City to provide all facts that supported their contention that the roadway failed to provide for clear zones, the Cordovas responded: "the most authoritative document concerning roadside clear zones is the Roadside Design Guide published by the American Association of State Highway and Transportation Officials (AASHTO). A clear zone is defined as the total roadside border area, starting at the edge of the traveled way, available for safe use by errant vehicles...the desired width is dependent upon the traffic volumes and speeds on the roadside geometry." (1 AA 158; 1 AA 166.) The Cordovas further contended that, "consistent with the [Roadside Design Guide], the roadway [at issue here] had a 7-foot recovery zone which was inadequate...the large tree should have either been removed or shielded with a crashworthy device to minimize the roadside hazard of the location." (1 AA 166-167.)

5. The City's Motion for Summary Judgment.

The City of Los Angeles moved for summary judgment on the grounds that the roadway and the center median island were not in a dangerous condition as a matter of law because: (1) the roadway was safe when used in a reasonably foreseeable manner; (2) the roadway, including the center

median island, was in no way damaged, deteriorated, defective, or latently hazardous; and (3) the car accident was caused solely by Mr. Shnayder's criminally negligent driving and such a risk was in no way increased or intensified by any condition of the public property. (1 AA 002.)

In opposition, the Cordovas claimed that if the median island had been clear of fixed immovable objects (i.e. magnolia trees), then the Cordova children would not have died. (1 AA 217:6-8.) The Cordovas relied on four expert witnesses in support of their opposition: (1) Harry Krueper, a traffic safety engineer; (2) Kurt Weiss, a forensic engineer and collision reconstruction specialist; (3) Ronald Matranga, a certified arborist ; and (4) Jacqueline Paver, a biomechanical engineer. None of these experts claimed—nor could they—that anything about the magnolia trees caused the accident; at best, these experts opined that the tree increased the Cordova children's injuries simply because the tree was there—and thus presumably provided the car with something to crash into.

First, Mr. Krueper opined that, "it has long been known in the matter of roadway safety, that any fixed object, such as a pole or tree having a diameter from 4 inches to 6 inches in width, would create a penetrating effect if a vehicle were to strike that object." (2 AA 237.) Mr. Krueper cited to an AASHTO publication on "clear zones," which is the design concept of

removing and/or buffering fixed objects that are in close proximity to the travel lanes of the roadway. (2 AA 237.) Mr. Krueper also created a 17-page "extrapolation" of data from the Statewide Integrated Traffic Records System. (2 AA 260-276.) The document identified 142 accidents that occurred on Colorado Boulevard between Caspar Avenue and Townsend Avenue from January 1998 through April 2009. (2 AA 237, 260-276.) Mr. Krueper, however, made no showing that the car accidents identified in the extrapolation were substantially similar, or even near in time or location, to that of the Cordova children's accident.

Next, Mr. Weiss stated in his declaration that there were about 8 "potential impact scars" on the other magnolia trees planted in the center median islands on Colorado Boulevard. (2 AA 282:12-22.) Mr. Weiss provided no detailed descriptions or photographs of the alleged "impact scars," nor did he mention that anyone observed the collisions that allegedly caused the "impact scars." He also did not allude to any documentary evidence (i.e., police reports, written statements, incident reports, claims, etc.) that substantiated his belief that the alleged "impact scars" were caused by collisions, rather than by maintenance equipment, lawnmowers, vandalism, or disease. He also stated that a 1979 road safety study found that, "trees were the second most common frequently struck fixed

object...[although] this study pertains to conventional highways with speed limits greater than that [35 m.p.h.] posted on Colorado Boulevard..." (2 AA 283:4-17.) He also stated that, "the extreme structural deformation of the Nissan (tearing of the floor pan, removal of the right front seat assembly, and partial removal of the roof panel) due to the impact with the magnolia tree suggests a[n] impact speed likely above the posted 35 m.p.h. speed limit." (2 AA 283:25-27.)

Finally, Ms. Paver opined that, "epidemiological studies and full-scale crash testing" indicated that if guardrails or shrubs had been positioned in a median island, rather than a fixed object, then the "occupants of the Nissan" would have only suffered minimal injuries. (2 AA 338-339.) Ms. Paver further opined that, "a lateral crash involving 35 to 42 mph vehicle impact speed into a tree will, more likely than not, result in a serious-to-fatal injury." (2 AA 339.) The Cordovas experts' were silent on the speeds of the Cordova and Shnayder vehicles even though enough physical evidence existed to formulate such estimations. The City defers to the Cordovas' Opening Brief on what evidence of theirs was excluded by the trial court.

The City, on the other hand, relied on two experts: (1) Rock Miller, a traffic safety expert; and (2) Michael Varat, an accident reconstructionist. Mr. Miller stated that, "the AASHTO guidelines for the provision of a clear

zone cited by the Cordova Plaintiffs do not apply here. AASHTO guidelines were developed to apply to state highways and to high-speed generally rural roadways with limited access. This segment of Colorado Boulevard has a low-speed limit (35 m.p.h.), high access function (local streets regularly intersect it and parallel parking is provided along the curbs), and is in a quasi-residential area where pedestrians abound." (1 AA 062:12-18.)

Mr. Miller further opined that, "no widely accepted design guideline which is applicable to low-speed roadways, indicates that it is inappropriate to position fixed, immovable objects adjacent to the roadway. In fact, it would be impractical, if not impossible, to apply such a rule regarding clear zones in urban settings. To provide such a "clear zone," parked cars, utility poles, bridge columns, buildings, public transit structures, bus benches, signs, among other things, would have to be eliminated from center medians and sidewalk areas." (1 AA 062:19-26.)

Mr. Varat opined that, "at the moment that her vehicle climbed the median, [Cristyn] is in a loss of control situation and has likely lost the ability to regain directional control of her vehicle. Her yaw rotation rate (counter-clockwise) is sufficiently high, combined with her entry into the [grassy] median that she would have not been able to self-correct and drive her car back onto westbound Colorado Boulevard." (1 AA 072:21-26;

AA085.)

Despite this expert testimony, the City primarily relied on the undisputed fact that it did not cause the underlying side-swipe collision to establish its entitlement to summary judgment in its favor. Furthermore, while the Cordovas' experts seemed to propose that all median island trees should be chopped and cleared to make it safer for drivers who speed down streets, they failed to consider whether such an empty median – which would then lead drivers such as Cristyn to careen into oncoming traffic – would actually make the street safer for anyone.

6. The Trial Court's Order Granting Summary Judgment in Favor of the City of Los Angeles.

The Court granted the City's Motion for Summary Judgment on August 25, 2011. (3 AA 690.) The Court ruled that, "[t]here are no material issues of material fact. As a matter of law, the City cannot be held liable in this [dangerous condition of public property] case. (*See Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1348. *Milligan v. Golden Gate Bridge* (2004) 120 Cal.App.4th 1, 7.) Plaintiffs primarily attempt to dispute this clear law by improperly citing to the depublished case of *Bonano v. Central Contra Costa Transit Agency*." (3 AA 690.)

7. The Court of Appeal Decision.

The Court of Appeal affirmed the trial court's decision. "The issue [before the Court of Appeal] [was] 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, [the Court of Appeal] concluded as a matter of law the magnolia tree in the median strip does not constitute a dangerous condition." (*Cordova v. City of Los Angeles* (2012) 212 Cal.App.4th 243, 256.) The Court of Appeal reasoned that the Cordovas "cannot show that the magnolia tree contributed to Shnayder's criminally negligent driving" and such a showing is required under the theory of concurrent liability. (*Id.* at 253.)

8. The Petition for Review.

The Cordovas sought review of the Court of Appeal's decision on two grounds: (1) proximate causation, and (2) the exclusion of the Cordovas' expert testimony. This Court granted review only on the first ground. The Court declined to address the Cordovas' challenges to the trial court's evidentiary rulings. Therefore, the trial court's decision to exclude most of the opinions of the Cordovas' experts remains undisturbed.

ARGUMENT

A public entity can only be concurrently liable where the alleged dangerous condition on its property caused or led to the third party conduct resulting in the accident. (See sections A and B below that describe the genesis of this rule from the statute and case law.) Applying that rule to the facts of this case, the City cannot be liable. Even more so, the City can have no liability where there exists no dangerous condition as a matter of law. (See sections C and D below that demonstrate that the undisputed facts of this case support affirming the Court of Appeal's decision in favor of the City of Los Angeles.)

A. The City of Los Angeles is Not Concurrently Liable for the Deaths of the Cordova Children Because a Dangerous Condition of Public Property Did Not Cause nor Contribute to the Side-Swipe Collision.

Public policy supports restricting the government's liability for the acts of third parties. The government is not statutorily liable for all accidents that occur on its property, nor is it statutorily liable for all crimes that are committed on its property. (See *Constance B. v. State of California* (1986) 178 Cal.App.3d 200, 212, stating that, "If liability may be premised solely on [the spurious] notion [that an assailant's psychological propensity for crime is affected by the quantity of light], proprietors will become the

insurers of the safety of persons on their premises, subject only to the caprice of particular juries. If we are unwilling as a matter of policy to insure against losses occasioned by crimes, we ought not foist that burden haphazardly on persons not at fault for criminal misbehavior.") "It is well established that public entities generally are not liable for failing to protect individuals against crime." (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126, citing *Williams v. State of California* (1983) 34 Cal.3d 18, 23–24 & fn. 3.)

First, the undisputed evidence does not support the Cordovas' premise that the tree was "dangerously close" to the roadway. The tree was 7 feet from Colorado Boulevard; the AASHTO standards that the Cordovas cite require 6 feet of clearance, so the tree is compliant.

But, even assuming the Cordovas were able to establish that the tree was "dangerously close" to the traveled way, that does not necessarily render the City of Los Angeles concurrently liable for the deaths of their children. It is true, as the Cordovas argue, that the plaintiff does not have to establish that the alleged dangerous condition was the sole or exclusive cause of the accident. But, the plaintiff must establish that it was *a cause*. The concept of "concurrent liability" comes into play when the plaintiff's injuries are caused by a combination of third party conduct and a dangerous

condition of public property. "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. But it is insufficient to show ***only*** harmful third party conduct, like the conduct of a motorist. Third 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. There 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. [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." (*Sun v. City of Oakland* (2008) 166 Cal.App.4th 1177, 1187 citing *Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1348.)

1. In Cases Finding the Public Entity Concurrently Liable, the Alleged Dangerous Condition Caused the Third Party Conduct.

The Cordovas pretend that this case is similar to other concurrent liability cases where the public entity was found liable even though third party conduct was the primary cause of the accident. The Cordovas cite to

Ducey v. Argo Sales Co. (1979) 25 Cal.3d 707 ("*Ducey*"); *Cole v. Town of Los Gatos* (2012) 205 Cal.App4th 749 ("*Cole*"); and *Lane v. City of Sacramento* (2010) 183 Cal.App.4th 1337 ("*Lane*"). Notably, the Cordovas skip over the crucial facts in these cases that demonstrate the public properties constitute a dangerous condition under the statute. **In all of these cases, however, the car accident was a result of an antiquated or defectively designed street or highway in combination with third party conduct**. These cases do not support the Cordovas' theory of liability against the City of Los Angeles because the alleged dangerous condition here—the tree in the median strip—did not cause the third party conduct. In other words, no causal relationship exists between the tree and the side-swipe collision. The tree only provided the Cordova vehicle with something to crash into which is not enough to impose liability on the City of Los Angeles for a dangerous condition of public property.

Ducey involved a cross-median car accident that occurred on a state highway. A driver lost control of her car, crossed the median into oncoming traffic, and then collided with the plaintiffs' car. (25 Cal. App.3d at 712.) Plaintiffs' claim against the state rested upon the state's failure to provide a median barrier on the heavily traveled highway where the accident in occurred. (*Id.*) The highway, which was built in the 1950's, had four lanes

(two northbound and two southbound) and its traffic volume increased 40% in the years leading up to the accident, however opposing traffic was separated by a dirt mound with bushes. (*Id.* at 713.) Under the state's Department of Transportation guidelines, a median barrier should have been installed. (*Id.*) A state report recommended the installation of a cable barrier and the state sought funding from the state highway commission. (*Id.*) The plaintiffs' evidence revealed that in three years, 18 cross-median accidents occurred in a 8.44-mile stretch of highway which included the accident site. (*Id.* at 713.) Those accidents killed 4 people and hurt approximately 42 others. (*Id.*) The state cited to this "unusually high" rate of cross-median accidents in its request for funds to build the proposed barrier. (*Id.*)

For various reasons, however, the state chose to leave this section of highway without a needed barrier for three years and during that time the plaintiffs' accident occurred. (*Id.* at 714.) A state employee testified that the barrier would have prevented the plaintiffs' injuries. (*Id.*) The Court ruled that the state had "actual and constructive notice of a dangerous condition on a public highway, [therefore] the state bears an affirmative obligation to take reasonable steps to protect the public against the danger." (*Id.* at 715.) The Court reasoned that if the state fails to take such reasonable

protective measures and its failure proximately causes plaintiff's injuries, the state may be held liable for the resulting damages. (*Id.*)

Cole involved a plaintiff who was struck by a drunk driver as she was standing near the back of her car that was parked diagonally in a graveled parking strip. (205 Cal.App.4th at 726.) The plaintiff alleged that the configuration of the roadway and the adjacent parking strip constituted a dangerous condition of public property. (*Id.* at 727.) The plaintiff presented "ample" evidence that the configuration induced conflicting and unsafe behavior--visitors of the nearby recreational area parked diagonally in a graveled parking strip while motorists, including the drunk driver, regularly bypassed stalled traffic by driving through the strip. (*Id.* at 731.) The plaintiff also presented evidence that the Town of Los Gatos knew that such bypass maneuvers through the parking strip were common, but it did not take any measures to remedy the dangerous situation, such as barricading the parking strip from bypassing traffic. (*Id.* at 727-728.) The Court found that the Town of Los Gatos was liable under section 835 because a feature of the public property increased or intensified the danger to users from the third party conduct. (*Id.* at 774.) The Court reasoned that there was evidence from which a trier of fact could conclude that the third party conduct—at the least the immediately injurious conduct, which was the act of driving off the

road—was "caused" by the characteristics of the roadway plaintiff cites as dangerous conditions. (*Id.*)

Lane involved a single car collision with a concrete center divider on a city street. (183 Cal.App.4th at 1339.) The plaintiff was traveling in the number one lane and was nearly side-swiped by a car in the number two lane. (*Id.* at 1339-1340.) As a result, the plaintiff moved his car to the left and struck the center divider. (*Id.* at 1340.) The plaintiff alleged that the City of Sacramento's design of the roadway and the center median caused the collision and constituted a dangerous condition. (*Id.*) The plaintiff's expert testified that the width of the number one lane did not meet the City of Sacramento's lane width standards—the lane was only eight feet seven inches wide even though the standard width is 11 feet wide. (*Id.* at 1341.) The expert also testified that center median had no offset from the traveled way. (*Id.*) The narrow lane width coupled with the lack of offset between the traveled way and the center divider made it highly likely that any deviation to the left would cause a collision with the concrete center divider. (*Id.*) Furthermore, photographs of the concrete divider show that it was scuffed and pitted which suggested that cars were repeatedly colliding with it. (*Id.* at 1342.) Although the center divider did not cause the plaintiff to swerve left, the Court ruled that the alleged dangerous condition (the

concrete divider without any offset from the traveled way of an already narrow lane) proximately caused the plaintiff's injuries. (*Id.* at 1348.) Notably, there is no discussion of the concurrent liability concept or legal analysis regarding the culpability of the third party who nearly side-swiped the plaintiff. In fact, the third party was not identified in the decision.

In all of these cases involving third party conduct, the alleged dangerous condition (the lack of the median barrier, the unsafe configuration of a gravel parking strip near stalled traffic, the unusually narrow travel lane) was *a cause* of the third party conduct (a car crossing the median into opposing traffic, the motorist traveling through the gravel parking strip to bypass traffic, the inchoate side-swipe). In their opening brief, the Cordovas skip over the facts of the cases and how the alleged defects qualified as a dangerous condition in order to misstate the ultimate holdings. The physical characteristics of the roadways at issue in *Ducey, Lane*, and *Cole* made the third party conduct more likely to occur.

Furthermore, in all the cases, the government entity knew or should have known that the roadway was antiquated or defective, but did nothing to remediate the situation.

2. In Cases Where the Public Entity Was Absolved of Liability, the Alleged Dangerous Condition Did Not Cause the Third Party Conduct.

In a consistent fashion, other cases demonstrate that there must be a causal link between the third party conduct and the alleged dangerous condition for a public entity to be concurrently liable. Courts have upheld the grant of summary judgment in favor of the public entity in circumstances similar to that of Cordova.

City of San Diego involved an illegal street race between two cars at dusk along Imperial Avenue. (*City of San Diego v. Superior Court* (2006) 137 Cal.App.4th 21, 24.) Imperial Avenue had a posted speed limit of 50 m.p.h. and was a level straightaway with few intersections and no sight obstructions. (*Id.* at 26.) As the race was underway, one of racing cars, which did not have its headlights on, broadsided a car driven by nonrace participant Shanna Jump. (*Id.*) The racing cars were travelling at over 85 m.p.h. (*Id.* at 26.) The plaintiffs alleged that drivers attempting to turn across Imperial Avenue, as Ms. Jump was, are in danger because, given the poor illumination, they cannot see or gauge the speed of approaching racers. (*Id.* at 24.) The Court concluded that there was no physical defect in the City of San Diego's roadway and, in any event, there was no evidence connecting the absence of lighting to the third party conduct. (*Id.* at 31.) The Court reasoned that even if the features of the roadway encouraged racing that does not establish a dangerous condition of public property because that

would render every level straightaway a dangerous condition. (*Id.*) The Court further reasoned that it could not discern how much lighting of the roadway at dusk would have improved Ms. Jump's ability to see the oncoming racers. (*Id.*) Finally, even if the court concluded that a defective physical condition existed for failure to install lighting, there is no evidence the racers were influenced by the absence of street lights. (*Id.*) The physical condition of the property must also have *some causal relationship to the third party conduct that actually injures the plaintiff.* (*Id.* at 30, citing *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1136.)

Constance B. involved a plaintiff who was sexually assaulted by a third party in a state-owned roadside restroom stall. (*Constance B. v. State of California* (1986) 178 Cal.App.3d 200, 204.) The plaintiff alleged that the rest stop was in a dangerous condition because of improper patrolling, lighting, maintenance, and visibility. (*Id.*) The Court reasoned that the plaintiff essentially alleged that "certain physical features made a difference in whether the rape would occur. That is another way of saying that the physical conditions were *a* cause of sexual assault. (This allows for concurrent causes...) Thus, the predicate for liability is a causal relationship between injuries of the kind which did occur and the claimed dangerous condition." (*Id.* at 208 (emphasis in original).) The Court concluded that no

reasonable fact finder could have concluded that the location or design of the restroom were causal factors in the assault. (*Id.* at 210.) "Liability could not be reasonably predicated upon [these conditions] because it could not reasonably be found to increase the risk of criminal conduct." (*Id.*) The Court conducted a deeper analysis with respect to the allegation that the placement of the lights and trees produced heavy shadows at night near the women's restroom which could conceal a wrongdoer. (*Id.* at 210.) The Court concluded that "there is no basis in the facts presented to infer that the assailant [who raped the plaintiff] made use of the shadows." (*Id.* at 211.) In fact, based on the plaintiff's testimony, the opposite was true—the assailant stood in the light. (*Id.*) Therefore, the lighting condition was not the proximate cause of the assault and summary judgment was properly granted in the state's favor. (*Id.*)

Sun involved a pedestrian who was struck and killed by car while she was crossing International Boulevard in an unmarked crosswalk. (*Sun v. City of Oakland* (2008)166 Cal.App.4th 1177, 1180.) The driver who struck the pedestrian claimed that he had not seen her until it was too late to stop. (*Id.* at 1181.) The plaintiffs alleged that the City of Oakland was also liable for the pedestrian's death because the intersection was in a dangerous condition. (*Id.* at 1180.) The plaintiff alleged that the intersection where the

pedestrian was killed used to have a painted crosswalk, however the street was repaved and the crosswalk was never repainted. (*Id.* at 1181.) The Court ruled in favor of the City of Oakland because the driver testified that pedestrians were visible from a block away and there were no physical impediments associated with the intersection that would prevent a driver from seeing and stopping for pedestrians (e.g., poor illumination, excess foliage, etc.). (*Id.* at 1186, 1190.) As such, no defect in the physical condition of the roadway caused the pedestrian to be struck and killed. (*Id.* at 1187.) The only risk of harm was from a motorist who failed to exercise due care by not obeying the Vehicle Code provisions requiring him both to yield to a pedestrian and to refrain from passing around a vehicle that had stopped for a pedestrian. (*Id.* at 1190.)

These cases demonstrate that the plaintiff must show more than a defect (e.g., poor illumination, excess foliage, missing painted crosswalk). The plaintiff must show that the defect was one of the causes of the immediately injurious conduct (e.g., the racing, the assault, the pedestrian being struck in an unmarked crosswalk). None of the cases cited by the Cordovas stand for the proposition that the public entity is liable simply because its property caused the injury a plaintiff suffered in an accident. Rather, these cases stand for the proposition that a public entity is liable for a

dangerous condition if a characteristic of its property increased or facilitated the immediately injurious third party conduct. In other words, there must be something dangerous about the public property that caused the third party conduct to occur in the first place.

In fact, in this case a median barrier might have helped save someone traveling eastbound on Colorado Boulevard, but it would not have prevented the deaths of the Cordova children. While the Cordovas theorize that their children's injuries would have been less severe if the median was empty, they never address the foundational gap in their argument: nothing about the tree caused the crash to occur in the first instance. While the public property need not be the only cause, it must be at least a cause of the accident for the City of Los Angeles to be liable. The acts of third parties *alone* cannot constitute a dangerous condition of public property. (*Hayes v. State of California* (1974) 11 Cal.3d 469 (emphasis added).) It is undisputed that no characteristic of the street caused the car accident and therefore summary judgment was appropriately granted in favor of the City of Los Angeles.

While we agree that Shnayder's criminally negligent conduct would not necessarily absolve the City from liability for creating a dangerous condition, were one to have existed, it is also true that Shnayder's conduct, standing alone, does not prove that the intersection itself posed a substantial

risk of injury to motorists generally. This is not a case where the evidence supports a finding that both the negligent driver and the tree were causes. While we know that the negligent driving caused the accident, the Cordovas have not established that there was any wrongdoing whatsoever regarding the planting of the tree.

B. The Concurrent Liability Rule that the Cordovas Propose is Not Supported by Case Law and Would Hold Public Entities Strictly Liable for All Accidents that Occur on Their Extensive Property.

The Cordovas propose the following concurrent liability rule to govern this case: "the city may be liable so long as the magnolia tree was a substantial factor in contributing to the deaths of the Cordova children." (Opening Brief at p. 16.) Such a rule, which is based on general negligence principles, rather than section 835, has already been expressly rejected. (See *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1132.) Furthermore, if such a rule were applied to public entities, it would be tantamount to holding public entities strictly liable for all accidents that occur on their extensive public property regardless of causation.

As ostensible support for their "rule," the Cordovas cite to *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, an asbestos-related personal injury case between the heirs of a person who died of lung cancer and the

asbestos manufacturer, and *In re Ethan C.* (2012) 54 Cal.4th 610, a child dependency case regarding whether a father caused his daughter's death by failing to secure her in a child safety seat. (Opening Brief at p. 16.) The Cordovas claim that these two cases, which have nothing to do with dangerous conditions of public property or municipal liability, prove that "California has definitively adopted the substantial factor test of legal and proximate cause." (Opening Brief at p. 16.) The Cordovas are misstating the law that applies to this case. These two cases involve the negligence of a private entity and individual and accordingly involve the principle that a defendant may be liable if his negligence is a substantial factor in causing an injury. A public entity cannot be liable under such a theory. (*Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1180, ruling that "no similar provision makes public agencies liable for their own negligent conduct or omission to the same extent as a private person or entity," citing *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1127–1128.) Section 835 is the sole provision that addresses the circumstances under which the government may be held liable for maintaining a dangerous condition of public property. (*Zelig*, 27 Cal.4th at 1132.) The Legislature intentionally codified section 835 to circumscribe the circumstances where a public entity, as opposed to a private entity, can be liable for accidents that

occur on its property.

> In structuring Government Code section 835 to define the circumstances in which a public entity properly may be held liable for an injury caused by a dangerous condition of public property, the Legislature took into account the special policy considerations affecting public entities in their development and control of public property and made a variety of policy judgments as to when a public entity should or should not be liable in monetary damages for injuries that may occur on public property. These policy judgments would be undermined if an injured person could ignore the limitations embodied in Government Code section 835 and invoke the very general [negligence] provisions of section 1714 of the Civil Code which deals with a person's responsibility for their actions to impose liability on a public entity in circumstances in which such liability would not be permitted under section 835. (*Id.*)

Ironically, in attempting to advance their own rule, the Cordovas demonstrate its unwieldy and untenable application. The Cordovas further posit that, "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 a 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 third party negligence. This

makes no sense." (Opening Brief at p. 30.) To illustrate their point, the Cordovas cite to mechanical failures, tire blowouts, mechanical emergencies, and road kill as instances of when they would attribute liability to the city. Their absurd examples underscore how they are trying to transform public entities into insurance companies.

Actually, it is the Cordovas' interpretation of dangerous condition liability that makes no sense. Section 835 does not render the City of Los Angeles liable for such accidents if nothing about the public property posed a hazard to careful, foreseeable users or caused the accident to occur in the first instance. The Cordovas ignore the elements of section 835 and seek to transform public entities into insurance carriers to all drivers who use their streets, becoming financially responsible for any and all accidents that occur on their property regardless of the physical characteristics of the property or the cause of the accident.

Furthermore, in *Zelig*, the seminal case on concurrent liability, the Supreme Court does not use the phrase "substantial factor," nor does it support the rule the Cordovas propose. The rule in *Zelig* is: "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. Such liability can arise only when third party conduct is coupled with a defective condition of property." (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1137.)

The Court in *Zelig* found that the sole cause of the decedent's injuries – the fatal shooting of a woman at a courthouse – was her deranged ex-husband. (*Id.*) The physical characteristics of the courthouse, its lack of security screening, long corridors, hidden escalators, and maze-like design, did not have a causal relationship to the shooting. (*Id.*) The risk of the decedent being shot by her ex-husband was not increased by a characteristic of the courthouse and "was at least as great outside the courthouse." (*Id.*) Likewise, here, Shnayder was the sole cause of the Cordova children's accident and his decision to side-swipe the Cordova vehicle was not influenced by the presence of trees in the median or any other aspect of the street. In both cases, there was no concurrent liability because the plaintiffs could point to no aspect of the public property that played any role in the third party's conduct. As such, the Court of Appeal decided this case correctly. Furthermore, the court should reject the concurrent liability rule the Cordovas propose because it creates a new definition of a dangerous condition of public property that is belied by case law and Section 835 itself.

C. The Tree Does Not Meet the Carefully-Tailored Statutory Definition of A Dangerous Condition of Public Property.

Under the Tort Claims Act, all governmental tort liability is governed by statute. (Gov. Code, § 810, et seq.) The intent of the Tort Claims Act is not to expand the rights of plaintiffs in suits against governmental entities, but to confine potential governmental liability to rigidly delineated circumstances. (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 829.) In California, governmental immunity is the rule and liability is the exception. (*Trinkle v. California State Lottery* (1999) 71 Cal.App.4th 1198, 1202.) Although common law principles may be helpful in performing the analysis, they may not be used to create a nonstatutory basis of liability. (*Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, 942 (concurring opinion of Mosk, J.).)

Government Code section 835 provides one such rigidly delineated circumstance when a governmental entity may be liable for injuries caused by dangerous conditions of public property. A dangerous condition of public property is defined in Government Code section 830 as "a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it

will be used." A public entity is liable for injuries caused by a dangerous condition of public property if the plaintiff is able to establish that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:

> (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
>
> (b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

Gov. Code section 835. To establish a qualifying dangerous condition, the plaintiff must identify at least one "physical characteristic" of the property. (*Sun v. City of Oakland* (2008) 166 Cal.App.4th 1177, 1187.)

Clear public policy considerations warrant such a carefully tailored statutory provision, especially with respect to roadways. Public entities are not the insurance companies for motorists using its public streets. (*Mittenhuber v. City of Redondo Beach* (1983) 142 Cal.App.3d 1, 6.) The

dangerous condition statute recognizes that *any property can be dangerous if used in a sufficiently abnormal manner.* (*Fredette v. City of Long Beach* (1986) 187 Cal. App. 3d 122, 132, citing 4 Cal. Law Revision Com. Rep. (1963) p. 822, italics added.) 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. (*Id.*, citing *Fuller v. State of California* (1975) 51 Cal.App.3d 926, 939.) In other words, the government is not statutorily required to construct fail-safe highways and streets. Indeed, even the safest roadways become dangerous when used by drunk drivers, racers, and defective vehicles.

1. "Condition of Property" Means that the Property is Physically Damaged, Latently Hazardous, or Defectively Designed.

A dangerous condition of public property can come in several forms and may be based on an "amalgam" of factors. (*Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1069, citing *Constantinescu v. Conejo Valley Unified School Dist.* (1993) 16 Cal.App.4th 1466, 1476.) A dangerous condition of public property may arise from its damaged or deteriorated condition, from "the interrelationship of its structural or natural features, or the presence of latent hazards associated with its normal use." (*Id.*, citing *Bonanno v. Central Contra Costa Transit Authority* (2003) 30

Cal.4th 139, 149.)

For example, a sidewalk panel that is raised three inches above its adjoining panel could constitute property that is physically damaged within the meaning of section 835. (*Childs v. County of Santa Barbara* (2004) 115 Cal.App.4th 64.) A submerged pipe that is near the surface of a bay, but hidden from the view of boaters and swimmers could constitute a trap or a latent hazard to those using the bay with due care. (*Warden v. City of Los Angeles* (1975) 13 Cal. 3d 297, 298.) A highway could be defectively designed within the meaning of the statute if it has, without warning, a sudden super-elevated curve that makes it very difficult to determine the proper speed to negotiate the curve. (*Cameron v. State of California* (1972) 7 Cal.3d 318.)

Under a theory of concurrent liability, 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 negligence but only if some physical characteristic of the property exposes its users to increased danger from third party negligence. (*Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1069-1070, citing *Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1348.)

"But it is insufficient to show only harmful third

> party conduct, like the conduct of a motorist. [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. There 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." (*Id.*)

2. "Substantial Risk of Injury" Means the Likelihood an Injury Will Occur, Not the Severity of the Resulting Injury.

"The condition of the property involved should create a 'substantial risk' of injury, for an undue burden would be placed upon public entities if they were responsible for the repair of all conditions creating any possibility of injury however remote that possibility might be." (*Fredette v. City of Long Beach* (1986) 187 Cal. App. 3d 122, 130 n.5, citing Recommendation Relating to Sovereign Immunity, 4 Cal. Law Revision Com. Rep. (1963) p. 822, "The Legislature was apparently concerned not with the extent of injury, but with the probability that an injury would occur." (internal citations omitted).) In other words, the plaintiff must establish that a substantial, as opposed to possible, risk is involved. The absence of prior substantially similar accidents tends to prove that there is no substantial risk of injury. (*Sambrano v. City of San Diego* (Cal. App. 4th Dist. 2001) 94 Cal. App. 4th 225, 243.)

3. "Due Care" Means Foreseeable, Careful Use.

"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." (*Fuller v. State of California* (1975) 51 Cal.App.3d 926, 939.) "The dangerous condition of the property should be defined in terms of the manner in which it is foreseeable that the property will be used by persons exercising due care in recognition that any property can be dangerous if used in a sufficiently abnormal manner." (*Id.* at 940.) As a result, a public entity should not be liable for injuries resulting from the use of a highway -- safe for use at 65 -- at 90 miles an hour, even though it may be foreseeable that persons will drive that fast. The public entity should only be required to provide a highway that is safe for reasonably foreseeable careful use. (*Id.*)

4. Actual or Constructive Notice.

Under Government Code section 835(b), the plaintiff has the burden of proving that the public entity had actual or constructive notice of the dangerous condition and that such notice was received in sufficient time before the injury to allow the public entity to take measures to protect the

plaintiff. (*Briggs v. State of California* (1971) 14 Cal.App.3d 489, 494.) The plaintiff's failure to establish either actual or constructive notice is fatal to recovery. (*Van Kempen v. Hayward Area Park Etc. Dist.* (1972) 23 Cal.App.3d 822, 827.)

The Cordovas' Opening Brief assumes that the tree in the median strip constitutes a dangerous condition under section 835. The Cordovas do not even attempt to apply the elements of the statute to the physical characteristics of the street and the circumstances surrounding the car accident. Once such an analysis is performed, however, it becomes abundantly clear that in this case third party criminal conduct exists, but a defective condition of public property does not. The Cordovas argue the magnolia tree in the median island is "dangerously close" to the street, but this proposition is wholly unsupported by evidence.

First, the median island is indisputably located on a quasi-residential street with a posted speed limit of 35 m.p.h., not a highway that may require extensive clear zones. (1 AA 039:13-25; 1 AA 039:24-25; 1 AA 061:2-3; 3 AA 538.) The photographs of the surrounding area show sidewalks, stores, bus stops, and a bike lane along this segment of Colorado Boulevard. (1 AA 048; 1 AA 090-099.) The photographs further demonstrate that the center median island is located on a level straightaway without any sight

obstructions. (1 AA 048; 1 AA 090-099.) Second, 7 feet of clearance exists from the subject magnolia tree and the closest traffic lane (i.e., the lane in which the cars collided). (3 AA 541; 1 AA 041:24-28; 1 AA 042:1-8; 1 AA 057.) This 7 feet clearance abundantly complies with the City's Bureau of Engineering street design manual, which calls for at least 5 feet of clearance in such situations. (1 AA 41-42.) Third, the roadway and the median island are clearly delineated with striping and a six-inch curb. (1 AA 024-025:28-2; 1 AA 090-099; 1 AA 025:4-5; 4 AA 210; 1 AA 041:9-10; 1 AA 092.) In no way are the physical characteristics of the street and the median island unusual, irregular, or latently hazardous.

Next, the tree in a median strip does not present a substantial risk of injury when the street is used with due care or in a reasonably, foreseeable manner. The record is devoid of any evidence to support an inference that similar accidents (i.e., side-swipe collisions or other accidents that may result in striking the median island trees) are likely in the course of foreseeable, careful use. In fact, the Cordovas have no admissible evidence to establish a history of prior similar accidents because their expert's testimony on this subject was excluded as lacking foundation, among other reasons. (3 AA 627-629.) Therefore, the Cordovas have failed to meet their burden with respect to this essential element.

Furthermore, the Cordovas have failed to establish that the City of Los Angeles knew or should have known that the trees in the median strip were dangerous. All they have on this subject is the testimony of a single expert, Kurt Weiss, who testified that "four stump remnants of larger trees...were removed [from the center median islands along Colorado Boulevard] for unknown reasons." (2 AA 282.) Such a vague statement does not establish that the City realized that the median island trees were dangerous. Even if it is true that the City is removing trees in the center median islands, Mr. Weiss admitted that he does not know the City's true motivations—it is equally likely that the City is removing large (old) magnolia trees that are diseased or dying, irrespective of the Cordova children's accident.

While the City never argued that it should be relieved of liability simply because Shnayder (and Cristyn) were negligent, the City urges that it should be liable only if some aspect of its property was defective in at least some way that contributed to the third party conduct. But here, it is undisputed that no characteristic of the street caused the side-swipe collision. The only transgression by the City of Los Angele is having a piece of property upon which the Cordova vehicle crashed into. That is not a legally recognizable dangerous condition under section 835. That is just life in the big city, which is full of bus benches, electric poles, and the like.

D. Even if the Court Considered the Cordovas' Excluded Evidence, It Would Still Not Establish that the Tree Was A Dangerous Condition.

The Cordovas' Opening Brief is almost entirely premised on the faulty notion that their excluded evidence establishes a dangerous condition. Even with the benefit of their excluded evidence, as a matter of law, the Cordovas have failed to raise a triable issue of material fact as to whether the tree in the median strip was a dangerous condition of public property. The Cordovas' excluded evidence is unhelpful in determining whether the median trees presented a substantial risk of injury to motorists using the street in a reasonable, foreseeable manner. First, the Cordovas rely on a guideline of the AASHTO handbook that calls for a "clear zone" of "at least 2 to 3 meters from the edge of the traveled way." (Opening Brief at p. 10.) The AASHTO recommendations were deemed inadmissible by the trial court because they apply to highways, not streets, such as Colorado Boulevard. (3 AA 627-629, 637-638.) Nonetheless, the public property at issue here meets this guideline because the tree was located 7 feet or approximately 2.13 meters from the edge of the traveled way. In fact, these recommendations are flexible in urban environments and "may need modification to fit local conditions." (2 AA 433, 525.)

Second, the Cordova's safety expert, Harry Krueper, created a 17-

page traffic accident summary that identified 142 various car accidents that occurred on Colorado Boulevard between Caspar Avenue and Townsend Avenue from January 1998 through April 2009. (2 AA 237, 260-276.) The trial court sustained the City's objections to this summary because, among other reasons, Mr. Krueper did not explain why such an extensive and overly inclusive accident history was relevant. (3 AA 627-628.) This summary does not assist the Cordovas in establishing that the street was in a dangerous condition. The traffic accident summary captured all sorts of car accidents (i.e., unsafe backing, rear-end collisions, improper turns, auto vs. pedestrian, etc.) that occurred during a timeframe of 11 years and 3 months on a 0.7 mile segment of Colorado Boulevard. (2 AA 260-276.) Such a document does not show the occurrence of substantially similar car accidents, or even car accidents that are near in time or location to that of the Cordova children's accident. Nor does Mr. Krueper explain whether 142 car accidents are appropriate in light of the high traffic volume for this 0.7 mile segment of Colorado Boulevard. Indeed, it is undisputed that approximately 14 million vehicles traversed this segment of roadway during the time period of the accident history summary. (1 AA 025:12-18; 1 AA 037; 1 AA 063:25-26.)

Based on the traffic accident summary, only 32 side-swipe collisions

occurred on this heavily traveled 0.7 mile segment of Colorado Boulevard in an 11 year and 3 month time period. (1 AA 276.) Such scant data does not lead to a conclusion that a large number of side-swipe collisions occurred on this segment of Colorado Boulevard or that the City should have foreseen that a catastrophic collision, such as the one involving Cordova children, would occur. (2 AA 237-238, 260-276.) A quick review of the traffic accident summary shows that 19 of these 32 side-swipe collisions involved vehicles side-swiping other vehicles that were parked along the curb of Colorado Boulevard. (1 AA 260-276.) The remaining 13 side-swipe collisions are of a seemingly aberrant nature and Mr. Krueper does not draw any factual comparisons between them and that of the Cordova children's accident. Ultimately, Mr. Krueper's conclusions and his 17-page summary do not show that the City had actual or constructive notice that the street, including the median trees, was unsafe when used in a reasonable, foreseeable manner.

The sweeping conclusions of the Cordovas' mechanical and biomechanical experts, Mr. Weiss and Ms. Paver, respectively, are also very unhelpful in establishing a dangerous condition as a matter of law. These experts ignored the facts surrounding the Cordova children's accident, including the crucial fact that the side-swipe collision occurred while both

cars were speeding excessively. Accordingly, these experts' testimony neglected to consider the critical relationship between the speed of a vehicle and the likelihood of injury when that vehicle strikes a fixed object. While fatal car accidents can occur under a wide variety of circumstances, it is obvious that a fatal collision is more likely to occur when a vehicle collides with a fixed object at a high speed. On the other hand, it is very unlikely that motorists driving at or near the 35 m.p.h. speed limit for Colorado Boulevard would suffer catastrophic injuries when colliding with a fixed object. Essentially, they both failed to establish whether the magnolia tree posed any reasonably foreseeable safety risk to motorists exercising due care or using the street in a foreseeable manner.

CONCLUSION

The Court should affirm the Court of Appeal's decision in this matter because no dangerous condition of public property exists as a matter of law because, among other reasons, the alleged defect did not cause the third party conduct.

DATED: June 19, 2013

Carmen A. Trutanich, City Attorney
Amy Jo Field, Supervising City Attorney
Blithe Smith Bock, Deputy City Attorney

By: _____
Sara Ugaz, Deputy City Attorney
Attorneys for Defendant and Respondent
City of Los Angeles

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.520(c) of the California Rules of Court, I certify that the foregoing Answer Brief on the Merits was produced on a computer in 14-point font. The word count, including footnotes, as calculated by a work processing program used to generate the brief is 11,458 words, exclusive of the matters that may be omitted under subdivision (c)(3).

Dated: June 19, 2013

By:_____
Sara Ugaz,
Attorney for Defendant and
Respondent City of Los Angeles

PROOF OF SERVICE BY MAIL

Re: Cordova, et al v. City of Los Angeles
Case No. B236195

At the time of service, I was over 18 years of age and not a party to this action. My business address is 200 North Main Street – Room 916, City Hall East, Los Angeles, California 90012, which is the County and State where this mailing occurred.

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ANSWER BRIEF ON THE MERITS

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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 June 19, 2013, at Los Angeles, California.

IRENE M. PEREZ

SERVICE LIST

Martin N. Buchanan
Law Offices of Martin N. Buchanan
655 West Broadway, Suite 1700
San Diego, CA 92101

John A. Girardi
Girardi & Keese
1126 Wilshire Boulevard
Los Angeles, CA 90017

Hon. William F. Fahey
Stanley Mosk Courthouse, Dept. 78
111 N. Hill Street
Los Angeles, CA 90012

Clerk of Court
California Court of Appeal
Second Appellate District, Division One
300 S. Spring Street, North Tower
Los Angeles, CA 90012