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

REPLY BRIEF ON THE MERITS

Martin N. Buchanan (SBN 124193)
Law Offices of Martin N. Buchanan
655 West Broadway, Suite 1700
San Diego, CA 92101
Telephone: (619) 238-2426

John A. Girardi (SBN 54917)
Girardi | Keese
1126 Wilshire Boulevard
Los Angeles, CA 90017
Telephone: (213) 977-0211
Facsimile: (213) 481-1554

Attorneys for Petitioners
Antonio and Janis Cordova

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INTRODUCTION

The city claims that ordinary principles of concurrent causation do not apply to a public entity's liability for a dangerous condition of property under Government Code section 835. This argument defies decades of California case law, including prior decisions of this court not cited by the city. (See, e.g., *Baldwin v. State of California* (1972) 6 Cal.3d 424, 428, fn. 3; *Bosqui v. City of San Bernardino* (1935) 2 Cal.2d 747, 764.) Under these and numerous other California decisions, a public entity may be liable for a dangerous condition of property that contributes to or increases the injuries suffered by a plaintiff, but does not cause the third party conduct that sets the events in motion.

Even if this were still an open question, the plain language of the statute dictates the result. The statute imposes liability on a public entity if "*the injury* was proximately caused by the dangerous condition" of property. (Gov. Code, § 835, emphasis added.) Under the settled legal definition of proximate cause, a concurrent cause of an injury "is a substantial factor, and thus a legal cause, *if the injury or its full extent*, would not have occurred but for that" cause. (*In re Ethan C.* (2012) 54 Cal.4th 620, 640, emphasis added.) Here, the injuries or their full extent would not have occurred if the Cordovas' vehicle had not crashed into a tree planted dangerously close to the roadway in the center median. The

city points to nothing in the statute, legislative history, or case law that would support a more narrow definition of proximate cause under Government Code section 835.

Unless it expands the scope of review, this court need not and should not decide the other "dangerous condition" issues briefed by the city. These issues are not within the scope of the narrow causation question on which the court granted review, and they cannot be resolved without deciding the evidentiary issues on which this court denied review. Thus, the court should simply reverse the judgment due to the Court of Appeal's faulty causation analysis.

THE FACTS REVISITED

Before addressing the city's legal arguments, plaintiffs will clarify several of the claims made by the city regarding the facts and the evidentiary issues.

1. The city claims that plaintiffs have improperly relied on evidence that was excluded by the trial court, and that "this Court has intentionally left undisturbed the Court of Appeal's decision not to overturn any of the City of Los Angeles' sustained objections." (Answer Brief, pp. 4-5.) But the Court of Appeal did not make any "decision not to overturn" the city's objections. On the contrary, the Court of Appeal resolved the appeal on the *assumption* that these objections were wrongly sustained by the trial court.

Because this court has denied review of the evidentiary issues, plaintiffs have simply briefed the case based on the same assumption made by the Court of Appeal.

2. The city itself improperly relies on evidence that was excluded by the trial court in evidentiary rulings never challenged by the city on appeal. The inadmissible evidence cited by the city includes the following: (1) the BOE's Street Design Manual (Answer Brief, pp. 9-10); (2) the LADOT's 2001 Street Resurfacing Project Plans (Answer Brief, pp. 10-11); (3) the LADOT's 24-hour Count of Vehicle Traffic Volume (Answer Brief, p. 12); and (4) evidence that Cristyn Cordova supposedly did not possess a driver's license. (Answer Brief, p. 6.)

Plaintiffs objected to all of this evidence in the trial court, and the trial court sustained these objections. (3 AA 642 [sustaining objections to evidence that Cristyn purportedly did not possess a driver's license]; 3 AA 651 [sustaining objections to LADOT's 2001 Street Resurfacing Project Plans]; 3 AA 652 [sustaining objections to LADOT's 24-hour Count of Vehicle Traffic Volume]; 3 AA 658-659 [sustaining objections to BOE's Street Design Manual].)

In the appellate proceedings, the city has never made any claim that the trial court abused its discretion by sustaining these objections to its evidence. Accordingly, it is improper for the city to rely on this evidence.

(Code Civ. Proc., § 437c(c); *Gin v. Pennsylvania Life Ins. Co.* (2005) 134 Cal.App.4th 939, 946 [reviewing court does "not consider evidence to which objections have been made and sustained" on summary judgment].) Plaintiffs made this same point in their reply brief in the Court of Appeal, yet the city has offered no explanation why it continues to rely on this excluded evidence. (ARB 1-3.)

3. Even if the BOE's Street Design Manual had not been excluded, the BOE 5-foot standard relied on by the city does not apply to trees in center medians. It merely applies when "piers or abutments are to be located on the median strip." (1 AA 50.) A separate section of the BOE manual discusses landscaping. (1 AA 55.) The city presented no evidence that the 5-foot standard for piers or abutments applies to non-essential landscaping elements like large trees.

4. The city also claims that the tree complied with the AASHTO recommendation for urban areas because it "was located 7 feet or approximately 2.13 meters from the edge of the traveled way." (Answer Brief, p. 47.) There are two problems with this argument. First, one of the plaintiffs' experts measured a distance of approximately 6 feet from the tree to the curb face, which is less than 2 meters. (2 AA 298.) Second, the AASHTO recommendation merely states: "*In general*, in urban areas with *lower travel speeds*, large trees should be kept *at least* 2 to 3 meters from

the edge of the traveled way, *certainly outside of the clear zone*." (2 AA 530, emphasis added.) As the city itself acknowledges, the AASHTO recommendations "are flexible in urban environments and 'may need modification to fit local conditions.'" (Answer Brief, p. 47, citing 2 AA 433, 525.) According to Krueper, the tree should not have been planted so close to the roadway because of the large number of documented side-swipe accidents on this section of the highway, and the moderate to high vehicle speeds. (2 AA 238.) The AASHTO publications directly support Krueper's consideration of these site-specific conditions in determining whether the tree was planted dangerously close to the roadway.[1] (2 AA 433, 525.)

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[1]There are a variety of standards used throughout the United States for offset placement of large trees in urban areas. In 2008, the Transportation Research Board of the National Academies published an exhaustive report on urban roadside safety sponsored by AASHTO in cooperation with the Federal Highway Administration. (NCHRP Report 612, Safe and Aesthetic Design of Urban Roadside Treatments (2008), available online at www.trb.org.) The report stated that a clear zone should be created in urban areas where feasible, or if not feasible, measures should be taken to minimize the severity of potential impacts with fixed roadside objects, such as by shielding or cushioning them. (*Id.* at pp. 5-6, 12-13.) The report included an extensive discussion on "lateral offset placement of trees and landscaping" in urban areas, as well as an analysis of existing safety research on roadside trees. (*Id.* at pp. 20-24.) Two studies in particular bear mention here. First, a 1990 study of "urban tree safety" in Huntsville, Alabama "concluded that mature trees with diameters larger than 10 cm (4 in.) should not be permitted within a roadside clear zone region." (*Id.* at p. 23 [discussing Turner & Mansfield, *Urban Trees and Roadside Safety*, 116 J. Transportation Engineering (1990) pp. 90-104].) Second, researchers at California Polytechnic State University completed a three-phase study in 2004 "in which they evaluated the street tree application specifically for the urban median condition." (*Id.* at p. 24.) In the initial phases, the researchers found "that there are a variety of clearance

5. The city claims that it planted the magnolia tree "fifty years ago." (Answer Brief, p. 3.) But the city cites no evidence to support this assertion. There is no evidence in the record when the tree was planted.

ARGUMENT

I.

ORDINARY PRINCIPLES OF CONCURRENT CAUSATION APPLY TO A PUBLIC ENTITY'S LIABILITY FOR A DANGEROUS CONDITION OF PROPERTY UNDER GOVERNMENT CODE SECTION 835

The city claims that ordinary principles of concurrent causation do not apply under Government Code section 835. According to the city "[s]uch a rule, which is based on general negligence principles, rather than section 835, has already been expressly rejected." (Answer Brief at 33, citing *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1132.) The city also asserts that a contrary ruling would somehow expose public entities to strict liability for all accidents that occur on their property. The city is wrong on both points.

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standards used throughout the United States for recommended offset values to roadside hazards such as large trees ...." (*Ibid.*) In the Phase III Final Report, "[t]he researchers concluded that large trees located in medians are associated with more total crashes as well as more fatal and injury crashes." (*Ibid.* [discussing Safety of Median Trees with Narrow Clearances on Urban Conventional Highways, Phase III Final Report (March 2004), available online at <http://cdm16255.contentdm.oclc.org/cdm/singleitem/collection/p266401coll4/id/2684/rec/11>].)

A. This Court and Others Have Repeatedly Ruled That Ordinary Principles of Concurrent Causation Apply to a Public Entity's Liability for a Dangerous Condition of Property

Since at least 1935, this court has applied ordinary principles of concurrent causation to a public entity's liability for a dangerous condition of property. (*Bosqui v. City of San Bernardino* (1935) 2 Cal.2d 747, 764.) In *Bosqui*, the city argued that the predecessor statute to Government Code section 835[2] did "not apply where the defective condition of the street or highway concurs with some other efficient cause or act or a third person to cause the injury." (*Ibid.*) As in this case, the city claimed "that a strict construction of the statute leads to this conclusion." (*Ibid.*) But this court disagreed and ruled that where a "dangerous or defective condition" of property "proximately causes the injury, the City is liable under the clear meaning of the law *despite the existence of another and concurring cause*." (*Ibid.*, emphasis added.)

California courts have consistently followed *Bosqui*'s holding that basic principles of concurrent causation apply to a public entity's liability for a dangerous condition of property. (See, e.g., *Bauman v. City and*

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[2]Prior to 1963, a public entity's liability for a dangerous condition of its property was governed by the Public Liability Act of 1923 under former Government Code section 53051. (*Branzel v. City of Concord* (1966) 247 Cal.App.2d 68, 71.) The Public Liability Act of 1923 was repealed upon the enactment of the California Tort Claims Act of 1963. As a result, former Government Code section 53051 was supplanted by Government Code section 835. (*Id.* at p. 71, fn. 5.)

County of San Francisco (1940) 42 Cal.App.2d 144, 154-155 ["That this doctrine applies where the negligent act of a third person concurs with a dangerous or defective condition created by a city in causing an injury, so as to impose liability on the city under the Public Liability Act, was expressly held in *Bosqui* ...."]; accord *Plaza v. City of San Mateo* (1954) 123 Cal.App.2d 103, 108-109; see also *Eastlick v. City of Los Angeles* (1947) 29 Cal.2d 661, 672-673.)

In *Baldwin v. State of California* (1972) 6 Cal.3d 424, this court confirmed that principles of concurrent causation apply to cases arising under Government Code section 835. Ruling in a case where a driver was struck from behind by another negligent driver and alleged that the state was liable for maintaining a dangerous intersection, the court stated:

> Of course the fact that any negligence by the state would not have resulted in injury to the plaintiff without the additional negligence of the driver who struck him from the rear is no defense to plaintiff's claim against the state. 'If an injury is produced by the concurrent effect of two separate wrongful acts, each is a proximate cause of the injury, and neither can operate as an efficient intervening cause with regard to the other. (Citations.) The fact that neither party could reasonably anticipate the occurrence of the other concurrent cause will not shield him from liability so long as his own negligence was one of the causes of the injury. (Citations.)' (*Taylor v. Oakland Scavenger Co.* (1941) 17 Cal.2d 594, 602 ....) This principle has been applied even when one of the negligent parties is a governmental entity. (*Id.* at p. 428, fn. 3, citing *Callahan v. City and County of San Francisco* (1967) 249 Cal.App.2d 696, 701; *Chavez v. County of Merced* (1964) 229 Cal.App.2d 387, 395-396.)

Numerous other California appellate courts have applied ordinary principles of concurrent causation to Government Code section 835 and its predecessor statute. (See, e.g., *Hurley v. County of Sonoma* (1984) 158 Cal.App.3d 281, 288; *Morris v. State of California* (1979) 89 Cal.App.3d 962, 966; *Harland v. State of California* (1977) 75 Cal.App.3d 475, 485; *Bakity v. County of Riverside* (1970) 12 Cal.App.3d 24, 32; *Curreri v. City and County of San Francisco* (1968) 262 Cal.App.2d 603, 611-612; *Gardner v. City of San Jose* (1967) 248 Cal.App.2d 798, 805; *Irvin v. Padelford* (1954) 127 Cal.App.2d 135, 141; *Hinton v. State of California* (1954) 124 Cal.App.2d 622, 625-630.)

In sum, the law on this issue is settled: "Like a private defendant, a public entity may become liable when its negligence in maintaining dangerous property and the negligence of another party concur as proximate causes of the injury." (*Murrell v. State of California ex rel. Dep't Pub. Wks.* (1975) 47 Cal.App.3d 264, 267, citing *Hayes v. State of California* (1974) 11 Cal.3d 469, 472.)

B. The City's Contrary Arguments are Without Merit

Despite this longstanding case law, the city claims that principles of concurrent causation do not apply because "[t]he 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." (Answer Brief, pp. 34-35.) But this ignores the actual language of the statute. The Legislature chose to impose liability on a public entity if "the injury was *proximately caused* by the dangerous condition" of its property. (Gov. Code, § 835, emphasis added.) The city fails to give any logical reason why the statutory term "proximately caused" should be construed to exclude normal principles of concurrent causation.

When words used in a statute have a well-established legal meaning, they will be given that meaning in construing the statute. (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 19-20.) Thus, the statutory term "proximately caused" must be construed according to its normal legal meaning, which includes concurrent causes. (See *Bonner v. Workers' Comp. Appeals Bd.* (1990) 225 Cal.App.3d 1023, 1035 ["When the separate and distinct negligent acts of two parties together contribute to cause the injury, each is and both are the proximate cause"].) The city points to nothing in the case law or legislative history to support a more narrow definition.

The history of Government Code section 835 further demonstrates that the city's position is without merit. In 1963, when the Legislature enacted section 835 as part of the California Tort Claims Act, this court and others had already ruled that principles of concurrent causation applied to the predecessor statute. (*Bosqui*, *supra*, 2 Cal.2d at p. 764 [1935 decision applying former Gov. Code, § 53051 and citing other California cases on

concurrent causation].) Because the 1963 enactment of section 835 made no material changes in the law on this subject, pre-1963 case law is relevant in construing section 835. (*Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 150, fn. 3.) In the absence of any change, it must be presumed that the Legislature was aware of the judicial decisions construing the predecessor statute and approved of them. (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1156.)

Contrary to the city's brief, this court did not overrule this longstanding authority in *Zelig*. If anything, *Zelig* confirmed that liability *may* be imposed when the injury "'is created by a combination of defect in the property and acts of third parties.'" (*Zelig*, *supra*, 27 Cal.4th at p. 1135, quoting *Hayes*, *supra*, 11 Cal.3d at p. 472; see also *Zelig*, *supra*, 27 Cal.4th at p. 1137 [liability may be imposed if risk of injury from third party conduct is "'increased or intensified'" by any condition of public property].) *Zelig* also made clear that what is required is "a causal connection ... between the defect *and the injury*." (*Id.* at p. 1135, emphasis added.)

On the particular facts at issue in *Zelig*, the court found that there was *no* causal connection between the alleged defect and the courthouse shooting—not even as a concurrent cause. (*Zelig*, *supra*, 27 Cal.4th at p. 1137.) The court noted that "the risk of injury to Eileen at the hands of her ex-husband was at least as great outside the courthouse." (*Ibid.*) And the

plaintiff in *Zelig* made no claim that the condition of the courthouse somehow caused her to suffer greater injuries in the shooting than she otherwise would have. Thus, principles of concurrent causation did not assist the plaintiff because the condition of the property played *no* role in contributing to her injuries. In this case, by contrast, the dangerous condition of property played a direct role in causing the deaths of the Cordova children, and the deaths would not have occurred if the tree had not been planted dangerously close to the roadway.

The city also claims that, under *Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, a public entity "cannot be liable" on the theory that the dangerous condition of property was "a substantial factor in causing an injury." (Answer Brief, p. 34.) But nothing in *Eastburn* supports this contention. In *Eastburn*, this court merely held that "direct tort liability of public entities must be based on a specific statute declaring them to be liable, or at least creating some specific duty of care, and not on the general tort provisions of Civil Code section 1714." (*Id.* at p. 1183.)

Plaintiffs here are not suing under "the general tort provisions of Civil Code section 1714." (*Ibid.*) In this case, the "specific statute" imposing liability is Government Code section 835. (*Ibid.*) By its terms, section 835 makes a public entity liable if the "the injury was proximately caused" by a dangerous condition of public property. (Gov. Code, § 835.)

Thus, the usual substantial factor test of proximate cause applies to section 835. (*Milligan v. Golden Gate Bridge Highway & Transp. Dist.* (2004) 120 Cal.App.4th 1, 8-9 ["A plaintiff must show that the dangerous condition in question was a substantial factor in causing his or her harm"]; *Flournoy v. State* (1969) 275 Cal.App.2d 806, 813 [referring to "substantial factor" test of proximate cause in construing section 835]; see also CACI No. 1100 [stating that the dangerous condition of public property must be "a substantial factor in causing [*name of plaintiff*]'s harm"].) The city cites no contrary authority.

Under the normal legal definition of proximate cause, a concurrent cause of an injury "is a substantial factor, and thus a legal cause, if the injury *or its full extent*, would not have occurred but for that" cause. (*In re Ethan C.* (2012) 54 Cal.4th 620, 640, emphasis added.) Based on this standard, a public entity may be liable for a dangerous condition of property that causes or exacerbates the injuries suffered in an accident, but does not contribute to the third party conduct that led to the accident.

C. Applying Basic Principles of Concurrent Causation is Not a Form of Strict Liability or Insurance

Finally, the city is wrong in equating this theory of concurrent causation with a form of strict liability or insurance for all accidents that occur on public property. (Answer Brief, pp. 33-37.) Causation under the substantial factor test is only *one* element of liability under section 835. As

the standard CACI instructions state, the other elements include: (1) that the property was in a dangerous condition at the time of the incident, i.e., it created a substantial risk of injury to the general public when used with reasonable care; (2) that the dangerous condition created a reasonably foreseeable risk of the kind of incident that occurred; and (3) that the dangerous condition was created by negligent or wrongful conduct of the public entity's employee, or that the public entity had notice of the dangerous condition for a long enough time to have protected against it. (CACI Nos. 1100 & 1102.) Moreover, a public entity is not liable for a dangerous condition if it establishes that its conduct was reasonable. (Gov. Code, § 835.4; CACI Nos. 1111 & 1112.) Plainly, this is *not* a form of strict liability without fault.

II.

THE CITY MISSTATES THE HOLDINGS OF THE CASES CITED BY THE CORDOVAS

In the opening brief, the Cordovas relied on cases including *Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707; *Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749; and *Lane v. City of Sacramento* (2010) 183 Cal.App.4th 1337. In response, the city claims that in each of these three cases, "the dangerous condition was, in fact, *a cause* of the third party conduct." (Answer Brief, p. 2.)

The city's creative reconstruction of these cases disregards what the

courts actually held. In *Ducey*, this court ruled that the state *could* be held liable even if the dangerous condition of its property did *not* contribute to the negligent conduct of a third party driver who veered off the freeway and onto the center median. Although the absence of a median barrier did not play any role in causing the third party's negligent driving, 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, emphasis added.) Directly contrary to the holding of *Ducey*, the city is now claiming that it *cannot* be held liable solely because the negligent driving that led to the accident was not a danger of its "own creation."

In *Cole*, the Court of Appeal explicitly rejected the notion that the defect in the public property must have "'actually caused or contributed to *the third party conduct that injured [the plaintiff]*.'" (*Cole*, *supra*, 205 Cal.App.4th at p. 770.) The Court of Appeal held that this did not "accurately state the governing principles." (*Ibid.*) After a thorough review of the relevant legal principles and authorities (including the cases cited in the city's brief here), the court concluded that they did *not* support "a rule requiring a direct causal link between a dangerous condition and the conduct of the third party, *as distinct from the harm to the plaintiff.*" (*Id.* at p. 771, emphasis added.) The city's brief simply ignores the central holding

of *Cole*, which is incompatible with the position it is taking in this case.

Likewise, in *Lane*, the Court of Appeal rejected the city's argument that "the center divider was not the proximate cause of plaintiff's injuries in that the divider did not cause [the driver] to move his car to the left." (*Lane*, *supra*, 183 Cal.App.4th at p. 1341.) The court held that this argument "misapprehends the nature of the required causal connection" because the relevant question was not whether the divider caused the car to leave the road, but whether the plaintiffs could "establish a proximate causal connection between the divider *and their injuries from the collision with the divider*." (*Id.* at p. 1348, emphasis added.) Similarly, the relevant question here is not whether the tree caused the car to leave the road, but whether plaintiffs can establish a proximate causal connection between the tree and the deaths of the Cordova children from the collision with the tree.

The city's brief also fails to account for numerous other cases in which the dangerous condition of public property contributed to the plaintiff's injuries, but did not play any role in causing the negligent third party conduct that set the events in motion. (See, e.g., *Hurley*, *supra*, 158 Cal.App.3d 281 [concrete bridge abutment too close to roadway did not contribute to third party's negligent driving off the road]; *Morris*, *supra*, 89 Cal.App.3d 962 [unrepaired gap in median barrier did not contribute to third party's negligent driving off the road]; *Cureri*, *supra*, 262 Cal.App.2d

at 611-612 [low curb and absence of other protective measures did not contribute to third party's negligence in stepping on accelerator instead of brake]; *Plaza*, *supra*, 123 Cal.App.2d at pp. 105-109 [failure to provide fence of sufficient height did not contribute to third party's negligent conduct in driving golf ball that struck plaintiff in city parking lot]; *Bauman*, *supra*, 42 Cal.App.2d at pp. 153-154 [failure to provide barrier between baseball field and playground did not contribute to third party's negligent conduct in using prohibited hard ball equipment and causing baseball to hit child in sandbox].)

The lesson of all these cases is clear: A public entity may be held liable for a dangerous condition of property that proximately causes the injuries suffered by a plaintiff, even if it did not contribute to the third party conduct that set the events in motion. Under the plain language of the statute, the plaintiff need only demonstrate that "*the injury* was proximately caused by the dangerous condition." (Gov. Code, § 835, emphasis added.) "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, emphasis added.) Liability may be imposed if "a causal connection is established between the defect *and the injury*." (*Zelig*, *supra*, 27 Cal.4th at p. 1135, emphasis added.)

III.

THE CASES CITED BY THE CITY DO NOT SUPPORT ITS POSITION

The city contends that "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." (Answer Brief, p. 28.) In support of this assertion, the city cites three cases: *City of San Diego v. Superior Court* (2006) 137 Cal.App.4th 21; *Constance B. v. State of California* (1986) 178 Cal.App.3d 200; and *Song X. Sun v. City of Oakland* (2008) 166 Cal.App.4th 1177.

None of these cases supports the city's position. The Cordovas have already discussed *City of San Diego* in their opening brief. (Opening Brief, pp. 28-29.) Moreover, the court in *Cole* thoroughly explained why none of these cases established "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." (*Cole*, *supra*, 205 Cal.App.4th at pp. 771-772 [discussing *Constance B.*]; see also *id.* at p. 773-774 [discussing *Sun*]; *id.* at p. 774 [discussing *City of San Diego*].) The city does not even mention *Cole*'s extended discussion of these cases in its brief.

In *Constance B.*, the plaintiff alleged that the dangerous condition of a public restroom contributed to the commission of a rape in the restroom. The court acknowledged that a public entity may be liable for maintaining

public property in a manner that increases the risk of a criminal assault. (*Constance B.*, *supra*, 178 Cal.App.3d at p. 205.) "But far from requiring that the intervening third party conduct itself flow from the dangerous condition, the court went out of its way to acknowledge the potential for 'concurrent causes, including third party intervention.'" (*Cole*, *supra*, 205 Cal.App.4th at p. 772, quoting *Constance B.*, *supra*, 178 Cal.App.3d at p. 208.) "It then stated, '[T]he predicate for liability is a causal relation between *injuries of the kind which did occur* and the claimed dangerous condition.'" (*Ibid.*, quoting *Constance B.*, *supra*, 178 Cal.App.3d at p. 208 with emphasis added by *Cole*.) *Constance B.* ultimately "concluded that none of the physical characteristics cited by the plaintiff had actually contributed to her injuries." (*Cole*, *supra*, 205 Cal.App.4th at p. 772.)

As explained in *Cole*, the court in *Constance B.* merely held that there must be some causal relationship between the injuries suffered and the dangerous condition, and it found that there was none. "But this hardly means that in every case of intervening third-party conduct .... a public entity is excused from liability for a dangerous condition of its property unless the plaintiff shows that the dangerous condition caused the third party's conduct." (*Cole*, *supra*, 205 Cal.App.4th at p. 773.)

Nor does *Song X. Sun* support the city's position on causation. As noted in *Cole*, "the entire basis for the holding [in *Sun*] was that the

evidence did not raise a triable issue with respect to a dangerous condition of public property. Given that conclusion, the court declared, 'we do not reach the causation issue raised by City.'" (*Cole*, *supra*, 205 Cal.App.4th at pp. 773-774, quoting *Song X. Sun*, *supra*, 166 Cal.App.4th at p. 1193.) Moreover, *Song X. Sun* itself acknowledged that a public entity may be liable under section 835 if a feature of the public property "increased or intensified" the danger from third party conduct. (*Song X. Sun*, *supra*, 166 Cal.App.3d at p. 1187, quoting *Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1348.) Thus, *Song X. Sun* did not hold that the dangerous condition must *cause* the third party conduct.

Finally, *City of San Diego* is factually distinguishable. There, the alleged defect was the absence of lighting at an intersection where a driver was hit by an illegal street racer. The court held that: (1) the absence of lighting was not "a physical condition of property"; and (2) even if it was, "there is no evidence the racers were influenced by the absence of street lights." (*City of San Diego*, *supra*, 137 Cal.App.4th at p. 31.) Here, by contrast, the tree planted dangerously close to the roadway *was* a physical condition of the city's property, and the evidence establishes that the unshielded tree directly contributed to the deaths of the Cordova children, because the injuries would otherwise have been minimal. (2 AA 339.)

City of San Diego does contain broad language which might be read

to suggest that in all "cases involving third party conduct," *Zelig* requires a "causal relationship" between the dangerous condition and "the third party conduct that actually injured the plaintiff." (*City of San Diego*, *supra*, 137 Cal.App.4th at p. 29.) But *Zelig* itself stated that the "causal connection" must be "between the defect *and the injury*." (*Zelig*, *supra*, 27 Cal.4th at p. 1135, emphasis added.) Moreover, *Cole* persuasively rejected *City of San Diego*'s interpretation of *Zelig* and "decline[d] to follow" *City of San Diego* "insofar as it adopts a new and extremely restrictive rule" of causation for cases involving the conduct of a third party. (*Cole*, *supra*, 205 Cal.App.4th at p. 774.) The court explained: "We do not believe the Supreme Court had any intention of adopting such a rule in *Zelig* ...." (*Ibid.*)

As previously demonstrated, *Zelig* actually confirmed that a public entity may be liable under Government Code section 835 if the risk of injury from third party conduct is increased or intensified by the condition of the public entity's property. (*Zelig*, *supra*, 27 Cal.4th at p. 1137.) Here, the risk of injury from being run off the road was increased or intensified by the presence of a large tree planted dangerously close to the roadway on city property. There is a direct causal connection between the dangerous condition and the deaths, because any injuries sustained in the accident would have been minimal but for the tree. (2 AA 339.) None of the cases cited by the city preclude liability in these circumstances.

IV.

THE DANGEROUS CONDITION ISSUES RAISED BY THE CITY ARE BEYOND THE SCOPE OF REVIEW AND CANNOT BE DECIDED WITHOUT RULING ON THE EVIDENTIARY ISSUES

This court has granted review only on a narrow causation question: "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?" In the opening brief, the Cordovas addressed this causation issue and also explained why "the Court of Appeal's faulty causation analysis tainted its finding of no dangerous condition." (Opening Brief, p. 31.)

In response, the city raises a number of "dangerous condition" issues having nothing to do with the causation question on which this court granted review. These include: (1) the meaning of "condition of property" as used in Government Code section 830; (2) the meaning of "substantial risk of injury" as used in section 830; (3) the meaning of "due care" as used in section 830; (4) the requirement of actual or constructive notice of the dangerous condition; and (5) whether there are triable issues of material fact on the existence of a dangerous condition. (Answer Brief, pp. 38-50.)

These dangerous condition issues should not be decided unless this court issues an order expanding the scope of review. (Cal. Rules of Court,

rule 8.516(a)(2).) When this court specifies the issues to be briefed and argued, "the parties must limit their briefs and arguments to those issues and any issues fairly included in them." (Cal. Rules of Court, rule 8.516(a)(1); see also Cal. Rules of Court, rule 8.520(b)(3).) Because the dangerous condition issues are not within the limited scope of the causation question on which this court granted review, the court should only decide whether the Court of Appeal's erroneous causation analysis infected its finding of no dangerous condition. If so, the Court of Appeal's judgment should be reversed.

Moreover, the dangerous condition issue cannot be decided without addressing the evidentiary issues on which this court denied review. The Court of Appeal decided the appeal based on the *assumption* that plaintiffs' evidence was wrongly excluded, including the AASHTO publications and expert declarations on the existence of a dangerous condition. (See Opening Brief, pp. 8-12.) But these evidentiary issues were never actually decided by the Court of Appeal. Unless this court expands the scope of review to include the evidentiary and dangerous condition issues, it should only decide the narrow causation issue on which it granted review.

Because the rules prohibit briefing of issues beyond the causation issue specified in the order granting review, plaintiffs will not address the dangerous condition issues raised by the city. If necessary to the resolution

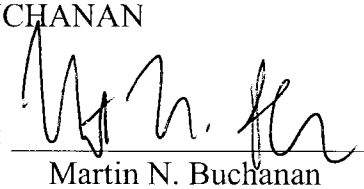
of this appeal, plaintiffs submit that the court should expand review to include the evidentiary and dangerous condition issues, and it should permit supplemental briefing of those additional issues.

CONCLUSION

A public 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: June 28, 2013

LAW OFFICES OF MARTIN N. BUCHANAN

By: 

Martin N. Buchanan
Attorney for Petitioners
Antonio and Janis Cordova

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.520(c) of the California Rules of Court, I certify that the foregoing Reply 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 5,850 words, exclusive of the matters that may be omitted under subdivision (c)(3).

Dated: June 28, 2013

LAW OFFICES OF MARTIN N. BUCHANAN

By: _____

Martin N. Buchanan
Attorney for Petitioners
Antonio and Janis Cordova

CERTIFICATE OF SERVICE

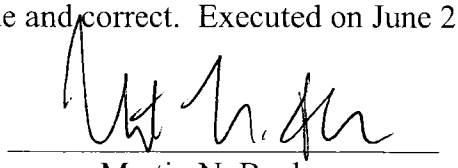
I, Martin N. Buchanan, am employed in the County of San Diego, California. I am over the age of 18 years and not a party to the within action. My business address is 655 West Broadway, Suite 1700, San Diego, California 92101. On June 28, 2013, I served the **REPLY BRIEF ON THE MERITS** by mailing a copy by first class mail in sealed envelopes with postage prepaid and addressed as follows:

Sara Ugaz
Office of the City Attorney
900 City Hall East
200 North Main Street
Los Angeles, CA 90012
(Attorneys for Respondent)

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

Clerk of Court
California Court of Appeal
Second Appellate District, Division One
300 S. Spring Street, N. Tower
Los Angeles, CA 90013

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on June 28, 2013, at San Diego, California.



Martin N. Buchanan