

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ROUVENIE ROBIANES and RODEL)	B 174256
ROBIANES,)	
)	Superior Court Case No.
Plaintiffs and)	MC 013949
Appellants,)	Los Angeles County
)	
vs.)	
)	
COUNTY OF LOS ANGELES,)	
)	
Defendant and)	
Respondent.)	
)	
)	
)	

FROM THE SUPERIOR COURT FOR THE COUNTY OF LOS ANGELES
HON. FRANK Y. JACKSON, JUDGE

APPELLANTS' REPLY BRIEF

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OVERVIEW OF RESPONDENT'S ARGUMENT

In order to appreciate the lack of merit in the argument in Respondent's Brief, it is appropriate to summarize its premises and conclusions in a logical fashion. Appellants respectfully contend that Respondent presented its argument in reverse order, placing the major premise near the end of its Brief, rather than at the beginning. Perhaps this was done to deemphasize its importance, because, respectfully, it would appear that Respondent is, or should be, well-aware of its invalidity.

Since the argument in Respondent's Brief seeks to negate the argument in Appellants' Opening Brief, a brief overview of Appellants' argument is the logical starting point to analysis the deficiencies in Respondent's argument.

Summary of Appellants' Argument

Pursuant to the statutory scheme of dangerous condition of public property liability, with respect to liability founded upon Government Code § 835(b),¹ if an injured plaintiff establishes that a dangerous condition existed at a particular roadway location, of which the public entity had actual or constructive knowledge (normally proved by the accident history at the location) a sufficient time prior to the plaintiff's injury to have taken measures to protect against the dangerous condition, the entity can avoid liability for an injury caused by the condition only if it establishes, pursuant to § 835.4(b), that it took reasonable

¹ All statutory references are to the sections of the Government Code.

remedial action to protect against the dangerous condition, or that its failure to take such action was reasonable.²

The entity cannot avoid liability merely by establishing that it took some manner of action in an attempt to protect against the dangerous condition, and then contend that from the date it completed that action until the date of plaintiff's injury, there was no accident history at the location which gave it actual or constructive notice of the dangerous condition. Rather, the public entity must establish that its attempted remedial action was reasonable. Unless it establishes the reasonableness of such action, its prior actual or constructive notice of the dangerous condition, which prompted it to attempt the remedial action, remains binding upon it.

Summary of Respondent's Argument

Following is a good faith summary of Respondent's Argument:

Pursuant to the proper construction of the interplay between §§ 835 and 835.4, the burden is clearly on the public entity to show that actions it took with the intent to mitigate a dangerous condition were reasonable. If, and only if, County had intended the June 2001 roadway reconfiguration to be a remedial measure to protect against the then-existing dangerous condition of the curve, County would have the burden of establishing that its attempted remediation was reasonable. Under such circumstance, if Robianes met the burden of producing evidence to the effect that the attempted remediation was not reasonable, the issue of

² The second alternative of establishing the reasonableness of a failure to take remedial action is not relevant in this case.

reasonableness would be a triable issue of fact. Hence, summary judgment would be improper. In support of County's motion for summary judgment, County did not offer evidence that the 2001 reconfiguration was reasonable, because it did not argue that the 2001 reconfiguration constituted reasonable remediation to protect against the dangerous condition in order to avoid liability under § 835.4. Respondent's Brief, pp. 21-22.

Although County contended in its motion for summary judgment that it was "immune"³ under § 835.4, it did not base this contention on the 2001 reconfiguration. Rather, County based its § 835.4 reasonable remediation defense on the installation of "appropriate traffic control evidences and warning signs, including the [speed advisory sign]." Neither County nor Robianes offered any evidence nor argued that the 2001 reconfiguration was intended to remediate the condition of the curve. The issue of whether the 2001 reconfiguration was a reasonable action taken by County to remediate the condition of the curve "was manufactured by ROBIANES and is irrelevant to this case." Respondent's Brief, p. 14.

Although not explicitly argued, the implicit conclusion from the above premises is that since the 2001 roadway configuration was not presented as a remedial remediation defense under § 835.4, in granting the summary judgment, the Court below did not abrogate § 835.4, but rather found that it was irrelevant to its legal

³ Although Respondent referred to the defense of "immunity" under § 835.4, that section does not speak in terms of immunity. Rather, § 835 provides the circumstances under which a public entity is "liable" for an injury related to the dangerous condition of its property, and § 835.4 sets forth the circumstances under which it is not "liable" because of the dangerous condition.

analysis, which focussed solely on the liability factors set forth in § 835.

Because the 2001 reconfiguration was not presented as a § 835.4 defense, its only relevance is that it constituted a significant change in the character of the roadway, whether the change resulted in flattening the curve by 23% (as contended by Respondent) or sharpening the curve by 23% (as contended by Appellants). Respondent's Brief, pp. 19-20. In order to be relevant to put a governmental entity on notice of the dangerousness of a condition of its roadway, the accident history referred to with respect to notice must have occurred under substantially similar circumstances to the plaintiff's accident. Because the 2001 reconfiguration significantly changed the condition of the roadway, even if it sharpened the curve by 23%, the prior accident history was not relevant, since it occurred under substantially dissimilar circumstances compared to those of the subject accident. Common sense dictates that the notice period must end when a significant change to the roadway occurs. Respondent's Brief, pp. 4, 15, 19-20.

Appellants' lawsuit was not based on dangerous condition liability under § 835(a) (imposition of liability for a dangerous condition created by a negligent or wrongful act or omission of an employee of the public entity, wherein actual or constructive notice is not required), but under § 835(b) (which requires that the public entity had prior actual or constructive notice of the dangerous condition). In oral argument on the motion for summary judgment, Appellants' counsel conceded that § 835(a) did not apply;

and therefore, Appellants are estopped from asserting that § 835(a) liability does apply. Even if Appellants could contend for liability under § 835(a), "then the notice issue would start when COUNTY allegedly created the dangerous condition, i.e., in June 2001 . . . when the reconfiguration was completed, and not at an earlier date."

In contending for liability under § 835(b) Appellants were required to prove that County had actual or constructive notice of the dangerous condition. Appellants alleged that County had actual or constructive notice of the same based on evidence of numerous cross-median accidents at the location of the subject accident which occurred before the June 2001 reconfiguration. It was undisputed that there were no cross-median accidents at the location in the period between the reconfiguration and the subject accident. The only relevant issue before this Court of Appeal is whether the reconfiguration date of June 2001 initiates a new historical period for the purposes of notice. The answer to that question must be in the affirmative. Respondents' Brief, pp. 15-18.

ARGUMENT

I. RESPONDENT'S ARGUMENT IS WITHOUT MERIT SINCE ITS PRIMARY PREMISE, THAT THE 2001 ROADWAY RECONFIGURATION WAS NOT INTENDED AS REASONABLE REMEDIATION OF THE DANGEROUS CONDITION OF THE CURVE, IS SPECIOUS.

Respondents' contention that it did not intend the 2001 roadway configuration to be reasonable remediation of the dangerous condition of the curve is soundly contradicted by Respondent's

presentation of this issue in its Motion for Summary Judgment. AA 11, et seq. This position was reconfirmed in County's Reply to Opposition to County's Motion for Summary Judgment. AA 279, et seq.

The title of Argument VII of Respondent's Memorandum of Points and Authorities in support of its Motion for Summary Judgment is: "THE CURVATURE OF THE ROAD IS THE PURPORTED DANGEROUS CONDITION." In supporting this argument, Respondent pointed out that the allegations of the complaint and Appellants' responses to interrogatories both state that the subject roadway location was purportedly in a dangerous condition at the time of the accident because of the "curvature" of the road. In particular, Respondent set forth verbatim Appellants' answer to Respondent's Special Interrogatory No. 7 which asked for a description of what constituted the alleged dangerous condition, wherein Appellants answered:

"[T]he highway at and/or near the point of the subject accident was curved in such a way that there was a substantial risk of vehicles travelling in one direction crossing the center double-line and colliding with vehicles traveling in the opposition direction, resulting in severe injuries and property damage; and the defendants obtained actual or constructive notice that there were numerous cross-median accidents at/or near the point of the subject accident, but defendants failed to carry out necessary remedial work to rectify the dangerous condition, such as installing a cross-median barrier." AA 22.

Respondent's next argument heading, VIII, was entitled: "THE CURVE DOES NOT EXPOSE MOTORISTS TO AN UNREASONABLE RISK OF INJURY OR ACCIDENT." In support of this argument, Respondent made the following points, in the following order:

First: The 2001 roadway reconfiguration (completed six months before the subject accident) increased the striped center line radius for the subject curve by approximately 23%, resulting in an increase in the comfortable speed for both northbound and southbound traffic in traversing the curve "to such an extent that an advisory speed sign is no longer needed for southbound traffic [the direction of Plyley's vehicle at the time of the subject accident]." Support for this argument is contained in the Declaration of Seltzer, in which he opined that the radius of a curve is a measure of the sharpness of the curve; the larger the radius, the flatter (i.e, less sharp) the curve is. Declaration of Seltzer, ¶ 18, AA 36.

Second: County provided appropriate positive guidance for motorists to safely drive the curve, consisting of curve warning signs, chevron signs, slippery when wet signs, and a 50 MPH speed advisory sign for southbound traffic. This traffic signage was reasonable and appropriate.

Third: The lack of cross-median accidents, post improvement, is further support for a determination that the subject location was and is not a dangerous condition.

Respondent's Argument XI was entitled: "THE COUNTY TOOK REASONABLE ACTIONS TO PROVIDE SAFE PASSAGE OF VEHICULAR TRAFFIC THROUGH THE SUBJECT CURVE." In support of this argument,

Respondent contended that it took all appropriate and reasonable actions to protect the public against risks to vehicular traffic in driving on the subject curve, and based thereon, asserted immunity from liability pursuant to Government Code § 835.4. In this regard, Respondent contended:

"COUNTY has demonstrated use of all appropriate traffic control devices and warning signs, including the 50 MPH speed advisory for southbound traffic on the subject curve (which post improvement is no longer even necessary)." (Emphasis added).

The emphasized portion of the above-quoted sentence from Respondent's Motion for Summary Judgment Memorandum of Points and Authorities echoed Respondent's statement under Argument VIII, wherein it contended:

"Additionally, the 50 MPH speed advisory for this curve for southbound traffic posted in 48 inch wide warning signs, although no longer necessary after the roadway improvement in June 2001, as explained above, nonetheless provides a prudent driver a speed to comfortably and safely traverse the curve." (Emphasis supplied).

Clearly, Respondent's Memorandum of Points and Authorities argued that the 2001 roadway reconfiguration was intended as, and accomplished, reasonable remediation of the dangerous condition of the curve, since it flattened the curve by 23%, which resulted in increasing the comfortable speed for both northbound and southbound traffic in traversing the curve "to such an extent that an advisory speed sign was no longer needed for southbound traffic."

As noted above, this was Respondent's first contention as to why the curve was not dangerous at the time of the subject accident! Its second contention in this regard related to its installation of traffic signage.

Furthermore, Argument V in County's Reply to Opposition to County's Motion for Summary Judgment definitively confirms that Respondent argued below that the 2001 roadway reconfiguration constituted reasonable remediation for the dangerous condition of the curve, wherein Respondent argued:

"The substance of plaintiffs opposition is that the roadway improvement in 2001 was not the appropriate remedial measure. Whether or not pre-improvement traffic engineers would differ in their evaluation as to the most reasonable or prudent response to traffic or roadway conditions before June 2001, is not the issue before the court.

"The accident history post-improvement confirms that whatever risks of injury to motorists which Plaintiffs claim to have existed pre-improvement was appropriately addressed by roadway improvements in June 2001." (Emphasis added).

As noted above in Summary of Respondent's Argument, Respondent's primary premise on appeal is that if County presented evidence or argumentation that County's 2001 roadway reconfiguration was intended as reasonable remediation for the dangerous condition of the curve, Appellants' contention with respect to the applicability of Government Code § 835.4 would be valid; and a summary judgment would be improper, because Appellants presented evidence that the reconfiguration was not reasonable

remediation, since that project made the curve more dangerous, rather than less dangerous, thereby establishing a triable issue of fact on the question of reasonableness. Respectfully, as noted above, Respondent's contention that it presented no evidence or argument below that it intended the 2001 roadway reconfiguration as remedial remediation of the dangerous condition is invalid.⁴

Without any further argumentation required in this Reply, this Court should reverse the summary judgment. However, in an abundance of caution, Appellants will address other arguments of Respondent that lack merit.

II. ASSUMING FOR THE SAKE OF ARGUMENT THAT THE RULING OF THE COURT BELOW WAS NOT IMPROPER WITH RESPECT TO DANGEROUS CONDITION LIABILITY UNDER § 835(b), LIABILITY MAY BE IMPOSED UNDER § 835(a); AND APPELLANTS ARE ENTITLED TO ARGUE LIABILITY UNDER § 835(a).

Under § 835(a), a public entity is liable for a dangerous condition of its property if it was created by a negligent or wrongful act or omission of an employee of the public entity within the scope of his employment. Under § 835(b), a public entity is liable for a dangerous condition of its property not created by

⁴ Appellants would like to point out, respectfully, two other instances in which Respondent engaged in less than candid recitation of the case. In the very opening of its Introduction, Respondent stated: "On December 8, 2001, a drunk driver crossed over the centerline on a curved section of Sierra Highway, a winding mountain road in the unincorporated area of Los Angeles County." (Emphasis added). In truth, the evidence supplied by the Supplemental Traffic Collision Report as to Plyley's sobriety was: "HBD [had been drinking]--not under the influence" AA 52. Furthermore, the place where the subject accident occurred was not a "winding mountain road," but was on a portion of roadway that was slightly rising for southbound traffic in an area that at most could be denominated as rolling hills, not mountainous. See photos at AA 250-254.

such a negligent or wrongful act or omission of its employee, if the public entity had actual or constructive notice of the dangerous condition a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

At pp. 15-16 of its Brief, Respondent argues that Appellants are estopped from arguing that Respondent is liable under § 835(a), because Appellants stated during oral argument on the Motion for Summary Judgment that § 835(a) did not apply. Respondent further contends that even if Appellants were permitted to contend for Respondent's liability under § 835(a), "then the notice issue would start when COUNTY allegedly created the dangerous condition, i.e., in June 2001."

Appellants concede that they opposed the Motion for Summary Judgment based upon Respondent's being liable pursuant to § 835(b), which required Appellants to establish actual or constructive notice on the part of Respondent. They did so for two reasons.

1. Prior to the filing of Respondent's Motion for Summary Judgment, although Appellants had been made aware by Respondent that there was a County-City of Palmdale joint improvement project which encompassed the subject portion of roadway, they were unaware of what work was done within that project at the subject location. That information was first furnished in the subject Motion for Summary Judgment, or another motion for summary judgment filed by the City of Palmdale in close proximity to the filing of County's Motion.

2. As noted above under Argument II, the clear purport of County's Motion for Summary Judgment was that the 2001

reconfiguration was intended as reasonable remediation of the dangerous condition of the curve. As such, Appellants did not have to rely on § 835(a) liability (which does not require proof of prior actual or constructive notice), but could continue to rely on their original theory of liability under § 835(b). As conceded by Respondent, if there were evidence or argumentation by it that the 2001 reconfiguration was intended as such remediation, a summary judgment would be improper because Appellants created a triable issue of fact as to whether the attempted remediation was reasonable.

Assuming for the sake of argument that this Court disagrees with Appellants' Argument II, above, under the circumstances of this case, Appellants are entitled to contend for liability under § 835(a), which does not require proof of prior actual or constructive notice on the part of the public entity. In this regard, Respondent's contention that under § 835(a) the notice issue would start when County allegedly created the dangerous condition, i.e., in June 2001, is incorrect. As already noted, liability under § 835(a) does not require proof of prior actual or constructive notice.

Frankly, it is hard for Appellants to imagine that this Court would conclude that in support of its Motion for Summary Judgment, Respondent did not present evidence or argument to the effect that the 2001 reconfiguration was intended as reasonable remediation of the dangerous condition of the curve. However, at a minimum, this Court should reasonably conclude that an attorney reviewing Respondent's moving and reply papers in support of its Motion for

Summary Judgment could reasonably conclude that County contended that the 2001 reconfiguration constituted such intended remediation.

If it were clear from Respondent's papers below that the reconfiguration did not constitute such intended remediation, Appellants would have opposed the Motion for Summary Judgment on the ground that County was liable under Government Code § 835(a). The 2001 roadway project was performed on County's property, and was a joint County-City of Palmdale public works project. As such, it can reasonably be inferred that a building permit would have to be issued by personnel of County pursuant to building plans reviewed by such personnel, and that upon completion of the physical work on the project, County personnel would be required to inspect and approve the work as being done in compliance with the previously-approved permit. In this regard, it bears repeating that in reviewing a Motion for Summary Judgment on appeal, the Court presumes the truth of the evidence favorable to the appellant, strictly construing the moving party's papers, and liberally construing the opposing papers; the moving papers are viewed in the light most favorable to the appellant, and all doubts about the propriety of granting the motion are resolved in favor of its denial. Stratton v. First National Life Insurance Co. (1989) 210 C.A.3d 1071, 1083, 258 C.R. 721, 727, Heredia v. Farmer's Insurance Exchange (1991) 228 C.A.3d 1345, 1353-1354, 279 C.R. 511, 515.

Appellants' evidence submitted in opposition to the Motion for Summary Judgment established that by reason of the accident history

at the subject roadway location, the curve constituted a dangerous condition because it was too sharp, resulting in 10 times the number of cross-median accidents per year that would warrant consideration of the installation of a median barrier. Appellants' evidence further established that rather than protecting against this dangerous condition by making the curve less sharp, the 2001 reconfiguration created a compound curve (a curve that did not have a constant radius), which at approximately the point that Plyley traversed the centerline median, was 23% sharper than it had been prior to the reconfiguration. Therefore, the reconfiguration made the curve more dangerous, rather than less dangerous. Under the rule that the Court must presume the truth of the evidence presented by the party opposing a motion for summary judgment, Appellants' evidence must be deemed to be true.

Therefore, the condition of the curve at the time of the subject accident was more dangerous than it had been during the 10 year period during which that location experienced a grossly aberrant cross-median accident rate. Furthermore, under the rule that the moving papers are to be viewed in the light most favorable to the party opposing a motion for summary judgment, it is reasonably inferable that the increase in the dangerousness of the curve resulting from the 2001 reconfiguration was created by a negligent or wrongful act or omission of an employee of County. Under this circumstance, County would be liable pursuant to Government Code 835(a), without the necessity of establishing County's prior actual or constructive notice of the dangerous condition.

In its Brief, Respondent has argued that because Appellants took the position below that § 835(b) was the applicable liability section, they are estopped from contending for liability under § 835(a). Apparently, Respondent makes reference to the doctrine of judicial estoppel. The purpose, elements and application of this doctrine were thoroughly explained in Jackson v. County of Los Angeles (1997) 60 Cal. App. 4th 171, 70 Cal. Rptr. 2d 96:

"'Judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding. The doctrine serves a clear purpose: to protect the integrity of the judicial process.' [Citation]. 'This obviously contemplates something other than the permissible practice . . . of simultaneously advancing in the same action inconsistent claims or defenses which can then, under appropriate judicial control, be evaluated as such by the same tribunal, thus allowing an internally consistent final decision to be reached.' [Citations]. Consequently, judicial estoppel is especially appropriate where a party has taken inconsistent positions in separate proceedings. [Citations]. 'The doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, is invoked to prevent a party from changing its position over the course of judicial proceedings when such position changes have an adverse impact on the judicial process. . . . The policies underlying preclusion of inconsistent positions are general consideration[s] of the orderly administration of justice and

regard for the dignity of judicial proceedings. . . . Judicial estoppel is intended to protect against a litigant playing fast and loose with the courts.' [Citation]. 'It seems patently wrong to allow a person to abuse the judicial process by first [advocating] one position, and later, if it becomes beneficial, to assert the opposite.' [at page 181].

". . .

"In accordance with the purpose of judicial estoppel, we conclude that the doctrine should apply when: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." [at page 183]. (Emphasis added).

Pursuant to the above authority, the doctrine of judicial estoppel does not bar Appellants from asserting liability under § 835(a), since they were not successful below in asserting liability under § 835(b).

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III. IN A SITUATION, SUCH AS THE INSTANT CASE, IN WHICH THE INTENDED REMEDIATION BY A PUBLIC ENTITY RESULTS IN MAKING THE CONDITION MORE DANGEROUS, RATHER THAN LESS DANGEROUS, THE ISSUE OF PRIOR ACTUAL OR CONSTRUCTIVE NOTICE OF A DANGEROUS CONDITION IS NOT RELEVANT, BECAUSE THE PUBLIC ENTITY WOULD BE LIABLE FOR INJURY CAUSED BY THE INCREASED DANGER OF THE CONDITION WITHOUT PRIOR NOTICE, SINCE THE INCREASED DANGER WOULD BE DEEMED TO HAVE BEEN CAUSED BY A WRONGFUL ACT OR OMISSION OF ITS OWN EMPLOYEE.

Government Code § 835(b) provides in relevant part:

"A public entity is not liable under subdivision (b) of Section 835 for injury caused by a dangerous condition of its property if the public entity establishes that the action it took to protect against the risk of injury created by the condition . . . was reasonable." (Emphasis supplied).

Section 835(b) expressly contemplates that the remediation action will be taken by the public entity that owns and controls the public property upon which the dangerous condition exists. This is so because any public works project that would relate to the safety of public property would be under the permission, supervision and inspection regulations of the public entity that owns and controls the property. Therefore, if the remediation project made the property more dangerous, rather than less dangerous, not only would the public entity be precluded from avoiding liability under § 835.4, but it would further be liable for any injury resulting from the increased dangerousness under § 835(a), since the increased danger would have been caused by a negligent or wrongful act or omission of an employee of the public

entity. As noted several times above, liability under § 835(a) does not require prior actual or constructive notice of the dangerous condition by the public entity. For the same reason, the issue of prior actual or constructive notice is not relevant to a determination of whether the public entity is entitled to avoid liability under § 835.4(b), because such remediation would be the action "it took" to protect against the dangerous condition.

IV. RESPONDENT'S ARGUMENT THAT COUNTY WAS ENTITLED TO SUMMARY JUDGMENT ON THE REMAINING GROUNDS IS WITHOUT MERIT.

As noted in Appellants' Opening Brief, Respondent's Motion for Summary Judgment contended that there was no triable issue of fact as to four separate issues: (1) a dangerous condition of public property did not exist at the subject accident location; (2) if it did exist, Respondent lacked actual or constructive notice of the same; (3) Respondent is immune from liability because it took reasonable action to protect against the dangerous condition; and (4) the dangerous condition was not a cause of the subject accident.

The argumentation contained in Appellants' Opening Brief and above in the instant Reply Brief specifically addresses issue (2), above. In passing, it also addresses the remaining issues.

Respondent's Contention That a Dangerous Condition of Public Property Did Not Exist at the Subject Accident Location Is Without Merit.

As noted above, Appellants' Opposition to the Motion for Summary Judgment contained evidence that prior to the 2001 reconfiguration, the subject curve constituted a dangerous

condition; and that the 2001 reconfiguration made the curve more dangerous, rather than less dangerous. This creates a triable issue of fact.

Respondent's Contention That it Was Immune From Liability Because it Took Reasonable Action to Protect Against the Dangerous Condition is Without Merit.

As previously set forth, there is a triable issue of fact as to whether the 2001 reconfiguration constituted reasonable action to protect against the dangerous condition. Moreover, as pointed out in Appellants' Opening Brief, the traffic signage (curve warning, advisory speed, etc.) was all installed in 1994. There is a triable issue of fact as to whether the signage constituted reasonable remediation, since subsequent to its installation, the accident rate at the location remained more than 10 times the aforesaid median barrier warrant rate. Declaration of Krueper, ¶ 28, AA 143.

Respondent's Contention That the Dangerous Condition Was Not a Proximate Cause of the Subject Accident Is Without Merit.

In this contention, Respondent apparently argues that the sole proximate cause of the accident was Plyley's negligent driving. The Court's attention is respectfully invited to Plaintiffs' Opposition to Defendant County's Motion for Summary Judgment, Argument II (AA 152), in which Appellants demonstrate that there are triable issues of fact in regard to this contention. Furthermore, it is well-established that the negligence of an automobile driver in causing a traffic accident does not necessarily preclude a finding that a dangerous condition of public

property was a concurring proximate cause of the injury so as to permit recovery by the injured person against the public entity. See, e.g., Curreri v. City and County of San Francisco (1968) 262 C.A.2d 603, 612, 69 C.R. 20; Callahan v. City and County of San Francisco (1967) 249 C.A.2d 696, 701, 57 C.R. 639.

Respondent's Contention That Increased Traffic Volume Cannot Form the Basis For a Dangerous Condition Is Premised Upon a Mischaracterization of Appellants' Contention.

On page 23 of Respondent's Brief, it argues that Appellants contended that the dangerous condition was created by an increase in traffic usage. This is a mischaracterization of Appellants' contention. Rather, in their Complaint, appellants alleged that assuming the plan or design of the roadway did not create a dangerous condition at the time it was planned, designed and constructed, thereafter, it became dangerous because of a change in physical conditions, including without limitation, a substantial increase in the traffic usage of the highway at the point of the subject accident, and County's notice of an aberrant cross-median accident history at the location. Complaint, ¶ 11.e., AA 4-5. It is well-established that a particular portion of roadway may come to constitute a dangerous condition if increased traffic at the site, coupled with an aberrant accident history, indicates its dangerousness. Wykoff v. State (2001) 90 C.A.4th 45, 62, 108 C.R.2d 198.

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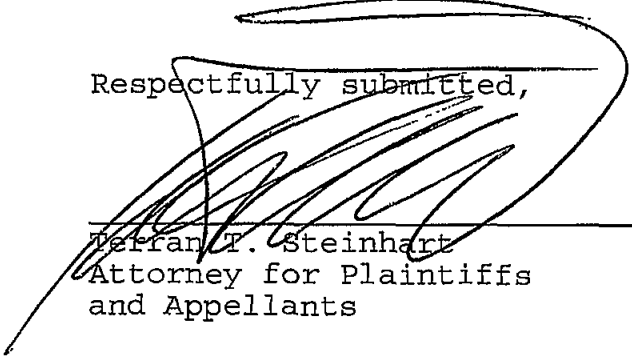
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CONCLUSION

For all of the reasons set forth in Appellant's Opening Brief and the instant Reply Brief, the Summary Judgment should be reversed.

Respectfully submitted,

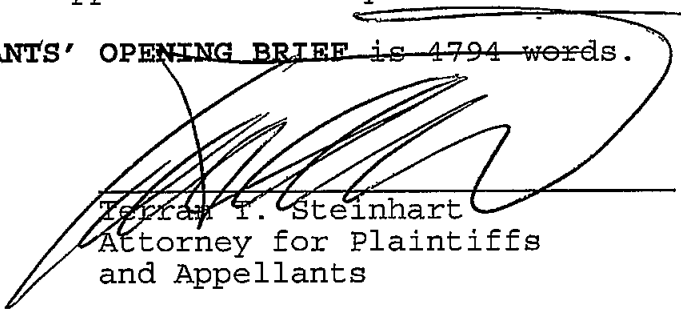


Terran T. Steinhart
Attorney for Plaintiffs
and Appellants

ATTORNEY'S CERTIFICATE OF COMPLIANCE WITH CRC 14(c)

Counsel for plaintiffs and appellants hereby certifies that
the number of words in **APPELLANTS' OPENING BRIEF** is ~~4794~~ words.

Dated: November 19, 2004



Ferran T. Steinhart
Attorney for Plaintiffs
and Appellants

PROOF OF SERVICE BY MAIL

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 4311 Wilshire Boulevard, Suite 415, Los Angeles, California 90010-3713, which is located in the county where the mailing described below took place.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

On the date set forth below, at the aforesaid place of business, a copy of the document described as **APPELLANTS' REPLY BRIEF** was placed for deposit in the United States Postal Service in a sealed envelope, with postage fully pre-paid, addressed as set forth in the attached Service List to opposing counsel and the Superior Court judge care of the court clerk, and five copies to the California Supreme Court per said Service List; and that envelope was placed for collection and mailing on said date following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that foregoing is true and correct.

Executed on November 22, 2004.



Terran T. Steinhart

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