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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

LIAN YING SHEN, an Incompetent  
Person, etc., et al.

Plaintiffs and Appellants,

v.

CITY OF SAN RAMON,

Defendant and Respondent.

A130561

(Contra Costa County  
Super. Ct. No. MSC0802137)

**INTRODUCTION**

In this action for personal injuries suffered when plaintiff Lian Ying Shen and her grandson Albert Yin Tsui were struck by an automobile while crossing in a marked crosswalk, the trial court granted a directed verdict in favor of defendant City of San Ramon on its defense of design immunity. (Gov. Code, § 830.6.)<sup>1</sup> We shall conclude that the court did not err in admitting evidence of a pavement management project (PMP) for the intersection and crosswalk on the design immunity question. However, the court did err in taking away from the jury the factual issue of whether the city engineer's approval of the PMP for the intersection and crosswalk constituted discretionary approval of the plan or design for the construction of, or an improvement to, the intersection and crosswalk prior to construction or improvement. Therefore, we shall reverse the judgment.

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<sup>1</sup> All statutory references are to the Government Code, unless otherwise indicated.

## FACTS AND PROCEDURAL BACKGROUND

### *The accident*

On January 9, 2008, Lian Ying Shen was crossing Alcosta Boulevard at Broadmoor Drive in a marked crosswalk, pulling a red wagon in which her two-year old grandson, Albert, was seated. While in the marked crosswalk, passing through the eastbound traffic lanes, more than midway through the intersection, Shen and Albert were hit by an automobile driven by Roberto Nodhal, Jr.

When Shen and Albert began to cross, conditions were such that it was safe to do so. Before entering the crosswalk, Shen looked slightly to her left and then to her right. Shen and Albert were struck by the car after they had crossed into the number two eastbound lane of Alcosta Boulevard (i.e., the right lane). Three independent witness to the accident testified that Shen did not stop or slow down when she came to the center median area. As she entered the eastbound lanes of Alcosta Boulevard, Shen did not look to her right or left, but continued to look down.

### *The complaint*

On August 28, 2008, plaintiffs Lin Kwok Tsui, the guardian ad litem for the now mentally incompetent Shen, Guo Feng Yin, the guardian ad litem for Albert, and Lian Guo Xu, Shen's husband, filed suit against the City of San Ramon and Nodahl, charging the city with liability for a dangerous condition of public property.

At trial, plaintiffs contended that this dangerous condition included that there was no place for a pedestrian to take refuge when making the 84-foot, 21-second journey through the crosswalk, because the median island did not intersect the crosswalk, but ended eight feet away from the crosswalk and that there were no adequate warning lights such as in-pavement crosswalk lights.<sup>2</sup>

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<sup>2</sup> In the area of the accident, Alcosta Boulevard runs east and west with two through travel lanes and a left-turn pocket in each direction. A crosswalk with zebra-striping is located across Alcosta Boulevard on the east side of the intersection "PED XING" markings are painted in both eastbound lanes approaching the crosswalk. There were "Pedestrian Crossing" signs facing eastbound traffic approaching the intersection. The crosswalk was 84 feet from curb to curb. It would take the average adult 21 seconds

### ***Summary judgment denied***

The city moved for summary judgment, claiming entitlement to design immunity based on a 1995 hand-drawn traffic order (Traffic Order No. 95-12) depicting the marked crosswalk, intersected at about its mid-way point by a median. The city informed the court that “[t]he design of the crosswalk was not conceived until April 14, 1995, in Traffic Order No. 95-12.” The Traffic Order was drafted by a city traffic technician, who was under the direct supervision of Philip Agostini, the city’s traffic engineer. Agostini reviewed the Traffic Order, determined it met applicable ordinances, rules and regulations, state design standards, guidelines and criteria for crosswalks. After his review and approval of the Traffic Order, Agostini submitted it to the city’s transportation services manager who reviewed and approved it on behalf of the city before its installation. City claimed the Traffic Order was a “conceptual sketch” and was not drawn to scale.

However, the crosswalk that was actually installed did not conform to the Traffic Order design, because it was not intersected by the median, which was eight feet away from the crosswalk, and not practically available for pedestrians as a place of refuge.

The trial court denied the city’s summary judgment motion.

### ***Discovery and admission of the PMP***

Plaintiffs had sought discovery of all documents relevant to the city’s design immunity defense and the emplacement of the crosswalk. After discovery had closed, the city produced documents showing that the intersection of Alcosta and Broadmoor had been repaved in 1996 after installation of the crosswalk as part of Capital Improvement Project 8147. The PMP called for repaving and rehabilitation of Alcosta Boulevard and included the intersection of Alcosta and Broadmoor as well as the striping of the crosswalk. City maintained that the PMP documents regarding this repaving and

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to cross from curb to curb. The speed limit was 35 miles per hour. There is a 16 foot wide median island with a median left turn lane. The distance from the median island to the edge of the eastbound number two traffic lane is approximately 24 feet. The median does not intersect the crosswalk, but is eight feet away from the crosswalk.

maintenance constituted design approval of the crosswalk and entitled them to design immunity under section 830.6. The city explained that it had conducted a thorough search of its records for documents related to the crosswalk during discovery. It had moved its engineering offices and there were three different office locations and many boxes had been moved offsite. The city engineering department had looked through the boxes to locate the as-built plans for the project, but the only document found during discovery was the Traffic Order. At the end of March 2010, the city made a last attempt to find the as-built plans before trial. All closed street project files kept in the city's offsite storage area were inspected and the PMP was unexpectedly discovered on March 30, 2010. The city copied the PMP and sent it to plaintiffs' counsel on April 13, 2010, six days before the mediation held April 19, 2010, and four months before trial. At the mediation, plaintiffs' counsel was allowed to question City Engineer Joye Fukuda about the contents of the PMP, specifically as the plans related to the subject crosswalk. Plaintiffs did not ask the court for relief to allow them to conduct further discovery, nor did they ask the city to stipulate to further discovery. Rather, plaintiffs moved to preclude defendants from using evidence not produced during pretrial discovery. The court allowed plaintiffs to take a short deposition of Fukuda regarding the PMP before opening statements.

Trial began on August 16, 2010, with testimony beginning on August 23d, and it concluded on September 7, 2010. At trial, over plaintiffs' objections and after an Evidence Code section 402 in limine examination of Fukuda regarding the PMP and her role in approving it, the court allowed her to testify in support of the design immunity defense. The court admitted the PMP into evidence.

### ***Fukuda's trial testimony***

In her testimony before the jury, Fukuda testified that she was the city's engineering services director (effectively the city engineer) for 18 years, until she retired in 2009. She was familiar with the 1995 plan to reconstruct the intersection at Alcosta and Broadmoor, but had nothing to do with the project, which was Agostini's project. She testified Agostini had authority from the engineering department to approve the 1995

crosswalk placement and construction on his own. She was familiar with the 1996 PMP, which provided for pavement maintenance and resurfacing at the intersection and that called for restriping the crosswalk on the east side of the intersection. Zumwalt Engineering Group drew the plans and the Michael Talley of the city was project manager, overseeing and maintaining quality control on the project. The PMP required city approval by Fukuda on behalf of the city. Fukuda approved and signed the PMP on May 15, 1996.

According to Fukuda, she had discretion to accept or reject the PMP. She reviewed the drawings and gave approval to move forward on behalf of the city to bid the project and go to construction. She acknowledged that no changes were made to the design of the intersection or crosswalk by the repaving project of the PMP and opined that it was sound engineering design to restripe the pavement markings where they previously had been located. Fukuda testified she reviewed the PMP and concluded the crosswalk striping plan was consistent with sound engineering principles. When she signed off on the project in May 1996, she reviewed it for reasons of safety and engineering design. That was something she typically did as part of her custom and practice. She reviewed the PMP design personally and although she considered others' input, she reviewed the PMP independently. In conducting her review, she considered the location of the median relative to the crosswalk and concluded it was consistent with sound engineering practice, because people could safely use the crosswalk, if they used due care. She was aware of the setback of the median. She believed it could be used as a refuge by pedestrians, but that it need not be. She also concluded there was sufficient distance between the previous intersection at Village Parkway relative to the crosswalk that there was sufficient time for a pedestrian exercising due care to cross in the crosswalk and to see vehicles eastbound on Alcosta.

On cross-examination, Fukuda again testified she had no role in the initial design, location or emplacement of the crosswalk in 1995. She acknowledged the city had an on-going pavement management project, repaving the road every few years and repainting the strips on the road annually in late August. She testified that the repavement plan is

simply preventative maintenance and that the majority of such pavement management involved either overlay of roadways that have deteriorated or slurry seal of the roadways to extend pavement life. The PMP at the Alcosta and Broadmoor intersection occurred in 1996 because it just so happened that in 1996 the area was scheduled for a repavement project. She did not know when the crosswalk was originally put in, and did not know when the repavement project actually took place or when it ended, beyond knowing it happened sometime in 1996. Fukuda again testified there were no modifications or changes after the original installation of the crosswalk. After reviewing the PMP, she changed nothing about the intersection or crosswalk, which was repaved and restriped exactly as it had previously been constructed.

Fukuda testified she had gone to observe the repaving project, but she did not recall when she did so. She admitted that in her deposition she testified she did not know if she went to the intersection to review the replacement of the crosswalk. When she signed the PMP documents, she assumed Talley had gone to the site, but she never asked him or found any records indicating that he had done so. Although she had testified that the median could be used as a refuge, she also testified it was not intended as a refuge. Asked whether, when she looked at the documents in 1996, it was her opinion that having the median seven to eight feet away from the marked crosswalk constituted sound engineering, she first replied, "There's no requirement." Asked again, she testified that it did constitute sound engineering. The front page of the PMP documents had a statement of purpose. According to Fukuda, "[i]t says that this is a pavement management project, 8147. And it cites the limits of the project which are section of Alcosta Boulevard and Village Parkway." It says nothing about changing the configuration or measurements for the dimensions of the crosswalk. Fukuda had not seen any of the original installation drawings for the emplacement of the crosswalk, other than the traffic work order, which she saw after initiation of the lawsuit. Fukuda testified she believed that the lights were synchronized at the intersections to create gaps in traffic for safe passage of pedestrians at the subject intersection, but she did not recall if anyone told her so and she did not know if they were synchronized and coordinated in 2008. When she signed the PMP, she did

not know how wide the street was at the subject intersection, and did not know how long it took a pedestrian to cross. She was aware of the intersection configuration, but did not know its measurements.

***Talley's trial testimony***

Michael Talley testified he was the senior traffic engineer for the city, replacing Agostini. He was the project manager who oversaw construction of the PMP designed by Zumwalt Engineering. He testified he approved the PMP after personally reviewing the design. After conducting a thorough review and looking for problems and issues, he found none. He came to the conclusion that it was safe for pedestrians using due care. On cross-examination, Talley acknowledged he was only "peripherally involved" in the repaving and striping project. He did not recall specifics of elements of the project and did not recall if emplacement of the crosswalk was part of the project. He did not recall whether he was involved in the restriping or emplacement of the crosswalk, but stated if he was added to this project, he would have been responsible for the restriping.

***Directed verdict***

After the close of evidence, the city moved for a directed verdict on the ground of design immunity. City's first motion sought design immunity on the bases of the 1995 Traffic Order and its second, separate motion sought design immunity based on the PMP signed off by Fukuda. Argument was deferred until just before closing arguments. The court took the motions under submission and closing arguments were made by the parties. Thereafter, on September 7, 2010, the court found design immunity based on the PMP. It first found that the city had failed to establish that the cutback of the nose of the median was approved before the construction, as required and so denied the city's request for design immunity based on the Traffic Order. However, it found design immunity based on the 1996 PMP that had been signed off by registered engineer Zumwalt and approved and signed off by Fukuda on May 15, 1996. Having found design immunity to apply, the court granted a directed verdict in favor of the city and against plaintiffs. The court also stated it believed there was no causal relationship between the city's conduct and the accident that occurred in this case and no notice to city of a dangerous condition.

Plaintiffs informed the court that they would accept the insurance policy limits settlement offer from defendant Nodhal and the case was settled as to him. Judgment was entered for the city and against plaintiffs on November 23, 2010, and this timely appeal followed.

## **DISCUSSION**

### **I.**

#### **The Court Did Not Abuse Its Discretion in Admitting the PMP**

Plaintiffs first contend the court abused its discretion in admitting the PMP and testimony related to it into evidence. We disagree. We review discovery sanctions (or the refusal to impose sanctions) for abuse of discretion. (*Bookout v. State ex rel. Dept. of Transportation* (2010) 186 Cal.App.4th 1478, 1485 (*Bookout*)). Although the trial court has “the power to exclude documents that a party has failed to produce in response to discovery requests” (*id.* at p. 1485, citing *Pate v. Channel Lumber Co.* (1997) 51 Cal.App.4th 1447, 1455), it need not do so where it finds that no bad faith was involved in the failure to produce documents. (*Bookout*, at p. 1485.) Here, city’s explanation for its belated discovery of the PMP was credible and the court could determine that no bad faith or game playing was involved. Any prejudice was minimized by the production of the PMP to plaintiffs four months before the beginning of trial. Further, any assertion of being blind-sided by the PMP and Fukuda’s testimony regarding it is undermined by plaintiffs’ failure to seek additional time within which to conduct additional discovery or to depose Fukuda or others. Finally, the court’s allowing a short deposition of Fukuda and the Evidence Code section 402 hearing, at which counsel conducted a thorough cross-examination, was a reasonable response to the belated discovery and production of the PMP and well within the court’s discretion.

Plaintiffs rely upon *Morfin v. State of California* (1993) 12 Cal.App.4th 812, in which the appellate court found it reversible error to deny the plaintiffs discovery of evidence that could have defeated the state’s design immunity defense. The Morfins were injured when a car crashed into a Department of Motor Vehicles (DMV) building in which they were sitting. The Morfins had sought to introduce evidence showing that the state was on notice of an unusually high risk of building-collision accidents at DMV

facilities and propounded interrogatories requesting information concerning vehicles that collided with the DMV buildings within 10 years before the plaintiffs' accident. (*Id.* at pp. 816-817.) The trial court refused to require the state to answer with respect to DMV facilities other than facilities at or near the Chula Vista location at which the accident had occurred. The appellate court concluded that the significance of vehicle-building collisions at other DMV facilities did not depend on their being close to Chula Vista, but on whether the state knew or should have known of the unusual risk associated with DMV parking lots. (*Id.* at p. 817.) Plaintiffs do not explain how *Morfin* assists them here, where the court did not deny them discovery or refuse to order further discovery, but exercised its discretion to allow defendants to introduce evidence found after the close of discovery, but supplied to plaintiffs four months before trial; where plaintiffs did not seek any further extension of discovery; and where the court took steps to mitigate any prejudice by allowing a special deposition and an Evidence Code section 402 examination of Fukuda before her trial testimony.

## II.

### The Court Erred in Granting a Directed Verdict

#### A. Review of a directed verdict

“A directed verdict in favor of a defendant will be reversed if ‘there is substantial evidence to support plaintiffs’ claim, *and* if the state of the law also supports that claim.’ (*Margolin v. Shemaria* (2000) 85 Cal.App.4th 891, 895; see *Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 629-630.)” (*Woods v. Union Pacific Railroad Co.* (2008) 162 Cal.App.4th 571, 576; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2012) ¶ 8:138, pp. 8-96 to 8-97.) We view the evidence in the light most favorable to the *plaintiff* and all conflicts must be resolved and inferences drawn in plaintiff’s favor. (*Margolin v. Shemaria* (2000) 85 Cal.App.4th 891, 895; Eisenberg et al., Civil Appeals and Writs, *supra*, ¶ 8:138, p. 8-96.) “ ‘This court decides de novo whether sufficient evidence was presented to withstand a directed verdict. [Citation.]’ [Citation.]” (*Magic Kitchen LLC v. Good Things Internat. Ltd.* (2007) 153 Cal.App.4th 1144, 1154.)

## **B. Design Immunity**

In *Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 68-69, footnote omitted (*Cornette*), the California Supreme Court explained the affirmative defense of design immunity: “Section 835, subdivision (b) provides that a public entity is liable for injury proximately caused by a dangerous condition of its property if the dangerous condition created a reasonably foreseeable risk of the kind of injury sustained, and the public entity had actual or constructive notice of the condition a sufficient time before the injury to have taken preventive measures. [Citation.] The state’s failure to erect median barriers to prevent cross-median accidents may result in such liability. [Citation.]

“However, under section 830.6, the public entity may escape such liability by raising the affirmative defense of ‘design immunity.’ Section 830.6 provides in relevant part: ‘Neither a public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of a construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved, if the trial or appellate court determines that there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor.’

“In other words, a public entity claiming design immunity must establish three elements: (1) a causal relationship between the plan or design and the accident; (2) discretionary approval of the plan or design prior to construction; and (3) substantial evidence supporting the reasonableness of the plan or design. (*Grenier v. City of Irwindale* (1997) 57 Cal.App.4th [931,] 939 [(*Grenier*)]; [citations].)

“The rationale for design immunity is to prevent a jury from second-guessing the decision of a public entity by reviewing the identical questions of risk that had previously been considered by the government officers who adopted or approved the plan or design.

[Citation.] “ “[T]o permit reexamination in tort litigation of particular discretionary decisions where reasonable men may differ as to how the discretion should be exercised would create too great a danger of impolitic interference with the freedom of decision-making by those public officials in whom the function of making such decisions has been vested.’ ” [Citation.]’ (*Cameron v. State of California* (1972) 7 Cal.3d 318, 326 (*Cameron*)).” (*Cornette, supra*, 26 Cal.4th at pp. 68-69.)<sup>3</sup>

“[O]f the three elements of design immunity, only one—the existence of substantial evidence supporting the reasonableness of the design—was expressly reserved by the Legislature for the court. [Citation.]<sup>[4]</sup>” (*Hernandez v. Department of Transportation* (2003) 114 Cal.App.4th 376, 387 (*Hernandez*), citing *Cornette, supra*, 26 Cal.4th at p. 73.)

In order to uphold the directed verdict in this case, the city must have *established as a matter of law* the first and second elements of the defense of design immunity contained in section 830.6. (See *Cornette, supra*, 26 Cal.4th at pp. 74-75; *Cameron, supra*, 7 Cal.3d at pp. 324-325; *Grenier, supra*, 57 Cal.App.4th at p. 940 [“The first two elements, causation and discretionary approval, may only be resolved as issues of law if the facts are undisputed.”].) Plaintiffs contend the city failed to establish the first and second of the three elements: (1) that there was a causal relationship between the plan or

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<sup>3</sup> *Cornette, supra*, 26 Cal.4th 63, also recognized that under section 830.6, design immunity may be lost where a plaintiff establishes: “(1) the plan or design has become dangerous because of a change in physical conditions; (2) the public entity had actual or constructive notice of the dangerous condition thus created; and (3) the public entity had a reasonable time to obtain the funds and carry out the necessary remedial work to bring the property back into conformity with a reasonable design or plan, or the public entity, unable to remedy the condition due to practical impossibility or lack of funds, had not reasonably attempted to provide adequate warnings.” (*Cornette*, at p. 72.) Loss of design immunity is not at issue here.

<sup>4</sup> “The Supreme Court’s opinion in *Cornette* also makes it clear that, in reserving the third element of design immunity for the court’s determination, Government Code section 830.6 does not make the question whether substantial evidence supports the reasonableness of the plan or design an ‘issue of law’ in all instances, but simply a question to be decided by the court itself, rather than the jury. (*Cornette, supra*, 26 Cal.4th at pp. 72-74.)” (*Hernandez, supra*, 114 Cal.App.4th at p. 387, fn. 8.)

design and the accident and (2) that there was no substantial evidence that Fukuda or other city employee authorized to exercise discretion to approve the crosswalk design, including the locations of the crosswalk and the median, approved the plan or design before the crosswalk was constructed or improved.

**1. Allegations that the design caused the injuries.** As to the first element of the design immunity defense, the trial court could well determine as a matter of law that plaintiffs were alleging the injuries they sustained were “caused by the plan or design of a construction of, or an improvement to, public property.” (§ 830.6.)

“The first element, a causal relationship between the plan and the accident, requires *proof that the alleged design defect was responsible for the accident, as opposed to some other cause.* (*Mozzetti v. City of Brisbane* (1977) 67 Cal.App.3d 565, 570, 575 [causation was negated by evidence showing poor maintenance and clogging of the drainage system, not merely the system’s design, caused the flooding].)” (*Grenier, supra*, 57 Cal.App.4th at p. 940, italics added.) “If the injury-producing element was not a part of the discretionarily approved design, immunity is defeated.” (*Id.* at p. 941, fn. 7.)

Plaintiffs’ dangerous-condition claim rests in major part on the theory that the intersection was not properly designed or planned. The complaint specifically alleges: “Said dangerous conditions include, but are not limited to, all the characteristics and conditions that existed at, near, and around the said intersection, including but not limited to the perception and observation of pedestrians in the said crosswalk, the control of traffic in or around the intersection and adjacent intersections, the control of pedestrians at the intersection, the deceptive, defective, and inadequate nature of the traffic signs, devices, warnings, markings, and signals at, near, and around the intersection, the configuration of adjacent and nearby intersections, and all such other unusual and unanticipated factors creating a dangerous condition and/or a deceptive roadway for motorists and/or pedestrians. [¶] Said dangerous conditions proximately caused the injuries sustained by plaintiffs . . . .” During trial and at closing argument, plaintiffs’ counsel focused on the design of the intersection and the placement of the crosswalk, the

absence of “in-roadway lights” or “in-pavement flashing crosswalk lights,” and most of all, the failure of the median to intersect the crosswalk.

It is apparent that the allegations of the complaint and the focus of plaintiffs’ case at trial was that their injuries occurred as a result of the plan or design of the intersection, including the lack of in-roadway lights and failure of the median to intersect the crosswalk so as to provide a place of refuge to pedestrians crossing the street.

**2. Advance approval of the plan or design.** The central question in this case is whether the second of the three elements was established by the city, such that the trial court could properly take the matter away from the jury by directing a verdict. That is, whether the court could properly determine that plaintiffs had failed to produce substantial evidence opposing defendants’ claim that the crosswalk and median placement plan or design had been “approved in advance of the construction or improvement by” Fukuda or by some other “body or employee exercising discretionary authority to give such approval . . . .” (§ 830.6) “[T]his question . . . requires a case-specific factual determination that must be left to the jury when there is conflicting evidence. [Citations.]” (*Hernandez, supra*, 114 Cal.App.4th at pp. 387-388.) “*Cornette, supra*, 26 Cal.4th 63 . . . recognized that the second element of the design immunity defense is a question of fact for the jury.” (*Id.* at p. 383.)

Conflicting evidence was presented as to whether the design and emplacement of the crosswalk and the median were knowingly approved by Fukuda or other authorized employee. Fukuda testified that when she signed off on the pavement maintenance and restriping project in May 1996, she reviewed it for safety and engineering design. She testified that she considered the location of the median relative to the crosswalk and concluded it was consistent with sound engineering practice, because people could safely use the crosswalk, if they used due care. She was aware of the setback of the median and she believed it could be used as a refuge by pedestrians, but that it need not be. She also concluded there was sufficient distance between the previous intersection at Village Parkway relative to the crosswalk that there was sufficient time for a pedestrian exercising due care to cross in the crosswalk and to see vehicles eastbound on Alcosta. If

her testimony is credited and uncontradicted, then it supports a finding on the second element of design immunity as a matter of law.

However, the issue of witness credibility is normally a question of fact for the trier of fact—in this case the jury. (Evid. Code, § 312, subd. (b).) “In determining [a directed verdict] motion, the trial court has no power to weigh the evidence, and may not consider the credibility of witnesses. It may not grant a directed verdict where there is *any* substantial conflict in the evidence.] [Citation.]” (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 629 [trial court properly denied plaintiff’s motion for directed verdict in a personal injury action, even though plaintiff presented expert testimony and defendant presented none; there was substantial evidence from which the jury could conclude plaintiff’s expert testimony either lacked foundation or was not credible].)

Here, plaintiffs presented substantial evidence that would have supported a jury finding that, contrary to her testimony, Fukuda *did not actually consider* the design of the intersection as it related to pedestrian safety, or the relative locations of the median and crosswalk as they relate to the safety of pedestrian’s trying to cross at the intersection before the repaving and restriping of the intersection and crosswalk. Fukuda had no role in the initial design, location or placement of the crosswalk and median in 1995. Evidence that the maintenance and repaving project embodied in the PMP was part of the city’s ongoing, routine maintenance program, that the restriping occurred annually, and that the purpose of the program was to overlay roadways that had deteriorated or to slurry seal the roadways to extend pavement life, support an inference that the focus of the PMP was not to revisit any question of the design or plan of the intersection, but routine maintenance. That the crosswalk and intersection was repaved and restriped exactly as it had been previously constructed with no modifications or changes, further supports that inference.

Fukuda’s testimony that she had gone out to observe the project and her admission on cross-examination that she had previously testified she did not recall having gone to the site also tend to raise questions about her credibility. So, too, her initial response that there was “no requirement,” when asked whether the median location seven to eight feet

from the crosswalk was good engineering, would also support an inference that she was justifying the design of the crosswalk and intersection *after* the fact, rather than that she made an informed judgment about the safety of the design *before* it was constructed or improved—assuming the repaving and restriping may be considered constructing or improving the intersection and crosswalk. Fukuda testified she believed that the lights were synchronized at neighboring intersections to create gaps, but admitted she did not know if they were synchronized and coordinated in 2008 when the accident occurred. She did not know how wide the street was at the subject intersection or how long it took a pedestrian to cross the intersection. Nor was she aware of the measurements of the intersection. These gaps in her knowledge do not necessarily make her testimony not credible. However, they raise questions and a jury could draw inferences from them that would support a finding that, when she signed the PMP, Fukuda did not consider the question of the *design* or *plan* of the intersection, but only the routine maintenance issues connected with repaving and restriping the intersection as it had been constructed originally.

Nor did the testimony of PMP project manager Michael Talley suffice to support the court's finding of design immunity as a matter of law. Although he testified he looked for problems with the PMP design, and found none, he also acknowledged he was only “peripherally involved” in the repaving and striping project, did not recall specific elements of the project and did not recall whether placement or striping of the crosswalk was part of the project. A jury could draw an inference that no one involved in the PMP really considered the actual design of the existing intersection, but rather considered only questions involved in repaving and restriping as it had originally been constructed.

It is well recognized that to establish the second element of the design immunity defense, “[a]n actual informed exercise of discretion is required. The defense does not exist to immunize decisions that have not been made.” (*Hernandez, supra*, 114 Cal.App.4th at pp. 385-386; *Bane v. State of California* (1989) 208 Cal.App.3d 860, 868.)

Viewing the evidence in the light most favorable to plaintiffs and drawing inferences in plaintiffs' favor, as we must, we conclude that substantial evidence would have supported a jury finding in plaintiffs' favor on the second element of the design immunity defense. Consequently, in finding city had established the existence of the second element of the design immunity defense as a matter of law, the court erred. It was for the jury and not the trial court to determine as a matter of fact whether the intersection design or plan was approved in advance of the construction or improvement by a city employee in the exercise of her discretionary approval authority.

***C. Other grounds noted by the court for directed verdict***

Defendants contend that even if the design immunity defense does not support the directed verdict, other grounds identified by the court did. They quote from *Saunders v. Taylor* (1996) 42 Cal.App.4th 1538, 1542, where in reviewing the trial court's grant of a nonsuit, the Court of Appeal stated: "[w]e may sustain the granting of the motion on any ground *specified in the motion*, whether or not it was the ground relied upon by the court. [Citations.]" (Italics added.)

Here, defendants moved for a directed verdict on the ground of design immunity. After finding design immunity based on the 1996 PMP, the trial court stated, "Since I am granting design immunity in this case, it's probably unnecessary to go on and review testimony relating to whether the alleged dangerous condition created a reasonably foreseeable risk of the kind of injury in question and whether the city had notice, and I don't believe the plaintiffs presented sufficient evidence on this issue." Nevertheless, the court explained its view of the evidence, and reiterated that it believed there was no causal relationship between the city's conduct and the accident that occurred in this case.

Because defendants did not move for a directed verdict on grounds other than design immunity, it is doubtful that other grounds should be considered. In *Lawless v. Calaway* (1944) 24 Cal.2d 81, the Supreme Court held that "grounds not specified in a motion for nonsuit will be considered by an appellate court *only if it is clear that the defect is one which could not have been remedied.*" (*Id.* at p. 94, italics added; see

7 Witkin, Cal. Procedure (5th ed. 2008) Trial, § 416, at pp. 489-490.)<sup>5</sup> The court repudiated the former rule that an order granting a nonsuit cannot be attacked on appeal because of reliance on an untenable ground, if any good ground appears in the record. Witkin has observed that the repudiation of the former rule with respect to nonsuits makes it unlikely that the rule will survive as to directed verdicts. (7 Witkin, *supra*, Trial, § 425, p. 498.)

In any event, we reject city's argument that the other grounds noted by the court for the grant of a directed verdict are supported by "substantial evidence." We point out that the standard of review for a directed verdict is not whether "substantial evidence" supports these other grounds. Rather, as we have stated, in reviewing a directed verdict *de novo*, we view the evidence in the light most favorable to plaintiffs and we determine whether when so viewed, there is substantial evidence to support plaintiffs' claim. In their brief, defendants identify the additional grounds supporting the directed verdict as (1) lack of causation between the alleged dangerous condition and the injury at issue and (2) lack of notice of a dangerous condition.

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<sup>5</sup> According to Witkin, only the grounds specified in the motion for nonsuit should be considered by the lower court in its ruling or by the appellate court on review. If these grounds are not sufficient, a nonsuit is improper, even though other good grounds exist, for the plaintiff was not alerted to them and did not have the opportunity to eliminate them. (7 Witkin, *supra*, Trial, § 416, p. 489.) In *Lawless v. Calaway*, *supra*, 24 Cal.2d 81, the Supreme Court stated: "[O]rdinarily the reviewing court will uphold the judgment or order of the trial court if it is right, although the reasons relied upon or assigned by the court are wrong. The doctrine is sound and salutary in most situations since it prevents a reversal on technical grounds where the cause was correctly decided on the merits. But this is not true as applied to nonsuits, for such a doctrine would frequently undermine the requirement that a party specify the ground upon which his motion for nonsuit is based in order to afford the opposing party an opportunity to remedy defects in proof. It seems obvious that the doctrine intended solely to uphold judgments correct on the merits should not be permitted to produce the opposite result. The correct rule is that grounds not specified in a motion for nonsuit will be considered by an appellate court *only if it is clear that the defect is one which could not have been remedied . . .*" (*Lawless v. Calaway*, at p. 94, italics added; see 7 Witkin, *supra*, Trial, § 416, pp. 489-490; but see *Woods v. Union Pacific Railroad Co.*, *supra*, 162 Cal.App.4th at p. 576.)

**1. Causation.** The court acknowledged that plaintiffs had presented expert testimony that the cutback of the nose of the median represented a dangerous condition that led to the injury. However the court stated that that was “insufficient to establish causation since Mrs. Shen was not struck in the crosswalk at the area of the cutback of the nose of the median, but more than 12 feet away. [¶] If Mrs. Shen had attempted to stop at the median, but couldn’t do so because of the cutback, and as a result was struck by Mr. Nodhal in the crosswalk and in the area of the median instead of more than 12 feet away, that contention might have some logic. But the uncontradicted evidence was that she never stopped, or tried to stop at the median, or elsewhere in the crosswalk, but instead kept a steady pace, whether fast or slow, never looked left or right. If she looked anywhere, it was either downward or toward Mr. Horn waiting to turn right onto Alcosta from the shopping center.”

To the extent the court would have based its directed verdict on its determination that the evidence of causation was insufficient to support a verdict in plaintiffs’ favor, the court erred. That Shen never stopped or tried to stop at the median does *not* contradict plaintiffs’ evidence that there was no median point of “refuge” going through the crosswalk and reasonable inferences that could be drawn from his testimony that such design contributed to the accident that occurred. The court implicitly seemed to criticize Shen for not stopping, without explaining where she was supposed to stop.

Plaintiffs’ traffic control expert Edward Ruzak testified that that the median did not extend to the crosswalk sufficiently to provide a place of refuge for a pedestrian to stop and shelter or wait, rather than “hav[ing] to go totally across in one fell swoop.” Ruzak testified that a median point of refuge was “definitely needed” at the intersection. He testified that refuge was needed because the intersection had many vehicles coming from all directions and that it was difficult to go all the way across, being exposed for a long time over a multi-lane collector with traffic and speeds in the 35 mile an hour range. The existing median afforded no protection and no refuge to pedestrians because it was eight feet away and would “[t]ake a person out of the path.” There was no indication to pedestrians that they were supposed to stand somewhere in the middle of the street across

from the end of the median. Ruzak testified it was foreseeable that someone would get struck at the intersection. Users of the crosswalk could be “trapped where they’re in a situation where they’re damned if they do [proceed ahead], they’re damned if they don’t.” It was not good engineering practice to anticipate that, given the 84-foot wide crossing, people would stop somewhere in the range of 40 feet into that crossing. Ruzak further opined that the accident of the type that occurred to Shen was predictable or to be anticipated at this intersection, because there was no point of refuge, the pedestrian was exposed for a long time, and there was nothing other than passive signs to alert the driver. In short, “[t]he pedestrian is exposed for a long period of time there and in danger, and by the grace of God no one got hit there before.”

The failure of Shen to try to stop at the median did not negate causation as a matter of law, where the existing median did not extend sufficiently to provide an actual stopping place, where plaintiffs presented evidence that refuge at that point did not practically exist, that a pedestrian would have been “caught” either way, and that it was predictable that an accident of the type that occurred to Shen would occur at this intersection. “Causation is generally a question of fact for the jury, unless reasonable minds could not dispute the absence of causation.” (*Lombardo v. Huysentruyt* (2001) 91 Cal.App.4th 656, 666; see, e.g., *Cardinal Health 301, Inc. v. Tyco Electronics Corp.* (2008) 169 Cal.App.4th 116, 146-147; *Vasquez v. Residential Investments, Inc.* (2004) 118 Cal.App.4th 269, 278.) The court erred in taking the highly fact dependent question of causation away from the jury in this case.

**2. Notice.** The court also erred in finding plaintiffs had not presented sufficient evidence that the city had notice of a dangerous condition at this intersection, acknowledging that there were “some nonspecific citizen complaints,” but that there had never been a pedestrian accident at the intersection until Shen was hit.

On cross-examination, Agostini acknowledged he had testified in his deposition that, after the crosswalk was put in, the city had received complaints that cars were not stopping for pedestrians at the intersection. He testified that any complaints likely would have been received by then city transportation specialist Gayle Studt and be logged.

Studt testified that she handled citizen complaints relating to traffic in San Ramon until 2001, but she did not keep a log of e-mail complaints she referred to the transportation department or of telephone complaints about traffic conditions. She first testified that she never received any complaints about the subject crosswalk, but was confronted with her deposition testimony that she did not remember whether she ever received a complaint about the difficulty getting across the intersection.

Agostini also testified that in 2000 he went before the transportation committee and made suggestions, including in-roadway lights to improve pedestrian safety at the crosswalk. He acknowledged his deposition testimony that he did so because there were “a number of [citizen] complaints” about the difficulty of getting across the street. He recommended that flashing lights be installed in the pavement at the subject crosswalk for improved pedestrian safety. The transportation safety advisory committee adopted the recommendations, but the flashing lights were not installed at that intersection.

Fukuda acknowledged that she had searched through records and found complaints that had been made by residents about the safety of the intersection. Kenneth Berner, an expert witness for defendant, was aware that Agostini had referred in his deposition to a number of complaints regarding this intersection. Plaintiffs’ expert Ruzak opined that from the documents he reviewed, the city knew about the problem at the crosswalk, or should have. He testified that based on the deposition of Agostini and other materials he had reviewed, between April 14, 1995, when the crosswalk was put in place and January of 2008, there were indications of complaints by people of the difficulty of getting across the street at this intersection.

Based on the foregoing, if the court based its directed verdict on a determination that there was no substantial evidence that the city had notice of a dangerous condition at the intersection, it erred.

**DISPOSITION**

The judgment in favor of defendants is reversed and the matter is remanded for further proceedings. Plaintiffs are awarded their costs in connection with this appeal.

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Kline, P.J.

We concur:

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Haerle, J.

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Lambden, J.