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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ANTONIO CORDOVA et al., Plaintiffs and Appellants, v. CITY OF LOS ANGELES, Defendant and Respondent.	B236195 (Los Angeles County Super. Ct. Nos. BC442048, BC444004, BC443948)

APPEAL from a judgment of the Superior Court of Los Angeles County, William F. Fahey, Judge. Affirmed.

Law Offices of Martin N. Buchanan, Martin N. Buchanan; Girardi/Keese and John A. Girardi for Plaintiffs and Appellants.

Carmen A. Trutanich, City Attorney, Amy Jo Field, Supervising City Attorney, and Sara Ugaz, Deputy City Attorney for Defendant and Respondent.

Plaintiffs Antonio Cordova and Janis Cordova appeal judgment in their wrongful death action against the City of Los Angeles (City) based on the dangerous condition of the roadway. The Cordova's children Cristyn, Toni, and Andrew Cordova were killed in an automobile accident on Colorado Boulevard in Eagle Rock, and claim that the City's design of the roadway, with trees in a center median, was in violation of principles of roadway design and maintenance which call for a clear zone. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Colorado Boulevard in Eagle Rock is three lanes wide in either direction, and has grassy center medians planted with magnolia trees in the stretch immediately east of Eagle Rock Boulevard. Some of the medians have left-turn pockets, and are generally 15.5 feet wide. The posted speed limit is 35 miles per hour.

On August 27, 2008, at approximately 10:30 p.m., Cristyn Cordova was driving westbound on Colorado Boulevard in Eagle Rock in the inside lane in her 2006 Nissan Maxima. Cristyn had four passengers—her sister Toni, her brother Andrew, her boyfriend Carlos Campos, and her friend Jason Gomez.[1] Everyone in the car was wearing their seatbelts. Driving next to Cristyn in another vehicle was Rostislav Shnayder. As Cristyn approached Hermosa Avenue, Shnayder's car veered into Cristyn's car, pushing her into the grassy median where her car hit a magnolia tree and crumpled. Cristyn and her unborn baby, Toni, Andrew, and Gomez were killed by the collision; Campos was seriously injured. Shnayder was arrested at the scene and later convicted of vehicular manslaughter. (Pen. Code, § 192, subd. (c)(2).)

On July 22, 2010, the Cordovas commenced this action for wrongful death against the City based on a dangerous condition of public property.[2] The Cordovas asserted that

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[1] To avoid confusion, we refer to the Cordovas by their first names.

[2] The complaint also named as defendants Shnayder and Irina Krichenko, and asserted claims against them based on negligence. They are not parties to this appeal. The parents of Jason Gomez and Carlos Campos commenced separate actions against the City and Shnayder and Krichenko that were settled.

Colorado Boulevard was in a dangerous condition because, among other things, it did not have "clear zones"—that area of the roadway that must be left unobstructed and allow drivers to remain on the roadway. They alleged the magnolia tree on the median, the height of the curb, and other design features of Colorado Boulevard were in contravention of sound safety and engineering principles. They asserted that "the roadway had a 7-foot recovery zone which was inadequate" and "a large tree was . . . maintained with the minimum clear zone width, thereby presenting a non-crashworthy severe hazard to encroaching vehicles."

1. The City's Motion for Summary Judgment

On June 3, 2011, the City filed a motion for summary judgment based on its assertion that the subject center median of Colorado Boulevard was safe when used in a reasonably foreseeable manner; the median was not damaged, deteriorated, defective or latently hazardous in any fashion; and the accident that killed the Cordovas' children and Gomez and injured Campos was the result of third-party criminal conduct.

The City's evidence in support of its motion asserted that the speed limit on Colorado Boulevard is 35 miles per hour. At the time of the collision, Cristyn's car was travelling 68 miles per hour and Shnayder was traveling 66 miles per hour. The City's expert calculated this speed using accident reconstruction techniques, tire marks, and vehicle geometry. After Cristyn's car was sideswiped by Shnayder, she missed the first tree on the median and then began to rotate counter-clockwise and collided with the magnolia tree on the west end of the median. The magnolia tree had a 17-inch diameter. Cristyn did not have a valid driver's license, nor had she ever had one.

The segment of Colorado Boulevard between Hermosa Avenue and Highland View avenue where the accident occurred runs east/west, and Hermosa Avenue and Highland View Avenue run north/south. The speed limit was calculated by a speed study that determined 85 percent of vehicles traversing the area go between 35 and 40 miles per hour. The City's Department of Transportation (LADOT) designated Colorado Boulevard as a major scenic highway, but the designation did not determine the speed

limit. The design of the relevant stretch of Colorado Boulevard from Townsend Avenue to Eagle Rock Boulevard was approved in July 1948.

According to the City's Bureau of Engineering (BOE) Street Design Manual, medians "serve as buffers between opposing traffic, provide refuge for pedestrians, and are strategic locations for traffic signs, traffic, signals, and landscaping." The inner two westbound lanes and inner three eastbound lanes of Colorado Boulevard are ten feet wide, and the left turn pocket is ten feet wide. The third lane is 19 feet wide to allow for parking. The center median between Hermosa Avenue and Highland View Avenue is 270 feet long and 15.5 feet wide before the left turn pocket begins. When the left turn pocket begins, the width of the median gradually decreases to about 5.5 feet. The City's expert found the construction of the median complied with the BOE's plans.

A minimum width of 14 feet is required where piers or abutments are located on medians. Under the Street Design Manual, center medians are suitable for fixed, immovable objects as long as there is five feet of clearance from the face of the structure to the inner edge of the painted traffic lane. The center median has a standard six-inch curb face, and there is seven feet of clearance from the magnolia tree to the inner edge of the painted traffic lane. Thus, the center median island and the positioning of the magnolia tree complied with the BOE's Street Design Manual.

Landscaping elements were not included in BOE and LADOT plans because those matters are under the authority of other departments, such as the Bureau of Street Services or the Department of Recreation and Parks. Nonetheless, the median island and the magnolia trees are easily visible and readily apparent to motorists exercising due care and paying attention to their surroundings. The City's expert was aware of "[n]o widely accepted design guideline which is applicable to low-speed roadways" that indicates "it is inappropriate to position fixed, immovable objects adjacent to the roadway." On the contrary, "it would be impractical, if not impossible to apply such a rule regarding clear zones in urban settings. To provide such a 'clear zone,' items such as parked cars, utility

poles, bridge columns, buildings, public transit structures, bus benches, and signs would have to be eliminated from center medians and sidewalk areas."

The City contended under the American Association of State Highway and Transportation Officials (AASHTO)[3] "guidelines for the provision of a clear zone [did] not apply [because those] guidelines were developed to apply to state highways and to high-speed generally rural roadways with limited access." The relevant segment of Colorado Boulevard was low speed and high access with local streets regularly intersecting it. According to AASHTO, immovable objects may be positioned in low speed roadways as long as they are at least 18 inches from the face of the curb. The City's expert did not believe the magnolia tree was hazardous to drivers traveling at or near the speed limit; further, the magnolia tree was at least seven feet from the face of the curb for westbound traffic.

On the other hand, trees provide shade, pollution reduction and speed reduction because drivers drive more slowly under a tree; thus, they are removed only when a specific safety hazard has been identified. The LADOT's collision history report indicated that none of the accidents involved the median trees; thus, nothing in the accident record would provide notice to the City of anything dangerous or latently hazardous about the median. The traffic volume on the relevant segment of Colorado Boulevard was 32,500 vehicles per day, meaning that as of June 2011, since the date of the accident, more than 26 million vehicle trips had been safely made through the intersection.

The LADOT's traffic collision history for the intersection of Colorado Boulevard and Highland View Avenue disclosed 12 accidents for the period August 27, 2003 to

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[3] "AASHTO is an organization of state and federal transportation officials, established in 1914, to foster the development of a nationwide integrated transportation system. [Its] active membership consists of the heads of the various state departments of transportation." The organization is funded by annual dues payments of its members. (*Center for Auto Safety v. Cox* (D.C. Cir. 1978) 580 F.2d 689, 690.)

August 27, 2008, excluding the Cordova accident. None of the accidents involved a fatality.

2. Plaintiffs' Opposition to Summary Judgment

Plaintiffs asserted that triable issues of fact existed whether the location, size and condition of the magnolia tree constituted a dangerous condition within the meaning of Government Code sections 830 and 835, whether the tree created a reasonably foreseeable risk of injury to the public, whether the City had notice of the dangerous condition, and whether the location and size of the tree exposed motorists to increased risk of danger from third party negligence or criminality.

Plaintiff's evidence in support established that of the magnolia trees on Colorado Boulevard, there were eight "scars" indicating impacts with cars, and two tree stumps had scars indicating impact. Plaintiffs asserted the magnolia tree Cristyn hit had a trunk diameter exceeding 24 inches and there was no barrier protection around the tree. Even if a car was traveling at a speed of 35 miles per hour, the six-inch curbs would not redirect an out-of-control vehicle to prevent it from striking the magnolia trees.

The tree at the accident site was over 50 years old; the City had no records indicating whether anyone who was alive at the time the tree was planted or the landscaping was put in would have knowledge of any assessment of the safety concerns regarding the tree's location to the traffic. Trees are the second most commonly hit fixed objects on roadways according to the U.S. Department of Transportation's study ("Conventional Road Safety, Phase 1") published in August 1979.

According to plaintiffs, the California Highway Patrol reported that there had been 142 accidents between Casper Avenue and Townsend Avenue on Colorado Boulevard (where the median is located) from January 1998 through April 2009; of these, 32 were sideswipe collisions, and 139 persons were either injured or killed.[4]

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[4] Plaintiffs' data actually indicates that aside from the accident at issue, with four fatalities, there was only one other fatality, on August 27, 2006, when a pedestrian was hit near Maywood Avenue.

In 1967, an earlier organization, American Association of State Highway Officials (AASHO) developed the concept of recovery areas and clear zones, and determined such zones were necessary where potential impact with trees or poles existed. AASHTO's 1996 "Roadside Design Guide," provided guidelines for the placement of guardrails and fixed objects within close proximity to travel lanes of a roadway. Objects which have a diameter of even four to six inches have the ability to penetrate a vehicle and cause injuries and death. As a result, plaintiffs contend the danger of a large tree at the accident site was foreseeable to the City, and the City should either have removed the tree or provided protection in the form of a barrier.

In constructing a median, City arborists and landscapers give consideration to visibility so that traffic control devices, such as signals, can be seen. Before planting trees, the City does a site inspection, considers what type of tree is suitable for the location given the visibility issues and the size of the parkway. However, the City does not consider the effect of a car hitting a tree in determining whether the tree is appropriate for a median; trees are generally planted in the middle of the median. The City does not consider the amount of traffic on the roadway, nor does it consider the speed of traffic on the street or the distance of the tree from the roadway. Trees are removed if they are dead, or if the tree is in conflict with existing infrastructure or for street widening.

According to plaintiffs, the City was aware of the presence of the large tree in the area, as well as the large number of sideswipe accidents in the area, presented the hazard of injury and fatalities from sideswipe accidents hitting the trees. The numerous "out-of-control" accidents on the roadway made it foreseeable a catastrophic collision would occur if appropriate safety measures were not taken. If the tree had not been there, it is likely the Nissan would have struck the median, slowed to a stop over a longer distance, and there would not have been serious or fatal injury.

3. The City's Reply

In reply, the City asserted that the accident was caused solely by Shnayder's criminal negligence and plaintiffs had not raised a triable issue of fact that the alleged

defect, the magnolia tree, was a concurrent cause of the accident, or that it facilitated or encouraged Shnayder's negligent driving.

4. Trial Court's Evidentiary Rulings

The trial court sustained evidentiary objections to much of plaintiffs' evidence, including the Highway Patrol Summary of accidents between 1998 and 2009; AASHO's 1967 development of "clear zones;" a U.S. Department of Transportation study entitled "Conventional Road Safety, Phase 1" published in August 1979; and AASHO's February 1967 report of its Traffic Safety Committee; as well as the conclusions of plaintiffs' experts that the City was on notice of the dangers of large trees placed on medians, that such a tree constituted a dangerous condition of public property, and the curbs were insufficient to stop a vehicle from traveling into the median.

The trial court also sustained evidentiary objections to the City's evidence, including its evidence that Cristyn did not have a valid driver's license; evidence based on the City's studies concerning the 35 miles per hour speed limit, the LADOT traffic collision reports; and the City's experts' conclusions that the median's design was suitable for trees.

5. Hearing on Motion; Trial Court Ruling

The trial court announced its tentative ruling was to grant the motion because the tree did not constitute a dangerous condition, and there was a lack of causation because of Shnayder's conduct. Plaintiffs argued that even at 35 miles per hour, the tree posed a danger without a guardrail in the case of a sideswipe accident. The court noted that boulders, mailboxes, and other items by the side of the road would all have to be removed under plaintiffs' theory. The court did not find it good policy to extend liability to all fixed objects that happened to cause injury; further, it did not find any causal connection between the tree and the accident, and denied the motion. The court entered judgment in the City's favor.

DISCUSSION

I. Standard of Review

"[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850.) "Once the [movant] has met that burden, the burden shifts to the [other party] to show that a triable issue of one or more material facts exists as to that cause of action." (Code Civ. Proc., § 437c, subd. (p)(1); *Aguilar*, at p. 850.) A triable issue of material fact exists where "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar*, at p. 850.) Where summary judgment has been granted, "[w]e review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports." (*Merrill v. Navegar, Inc*. (2001) 26 Cal.4th 465, 476.)

"'A different analysis is required for our review of the trial court's . . . rulings on evidentiary objections. Although it is often said that an appellate court reviews a summary judgment motion "de novo," the weight of authority holds that an appellate court reviews a court's final rulings on evidentiary objections by applying an abuse of discretion standard. [Citations.]' [Citation.]" (*Miranda v. Bomel Construction Co., Inc.* (2010) 187 Cal.App.4th 1326, 1335.)

II. The Magnolia Tree in the Center Median Did Not Constitute a Dangerous Condition of Public Property as a Matter of Law

Plaintiffs contend that it was foreseeable a sideswiped vehicle would be forced off the roadway and collide with one of the magnolia trees planted near the curb, causing serious injury or death: Their experts established that serious or fatal injuries would occur even if a motorist were traveling at the posted speed limit of 35 miles per hour; an appropriate barrier on the median would have prevented the fatalities and injuries here;

and the other magnolia trees on the median supported the conclusion that drivers were leaving the road and hitting the trees; further, plaintiffs contend the trial court erred in sustaining the City's evidentiary objections to their evidence. The City contends that there is no evidence the magnolia tree caused Shnayder to drive in a criminally negligent fashion and sideswipe the plaintiffs' decedents' vehicle. We conclude that even assuming plaintiffs' evidence was wrongly excluded, they cannot show that the magnolia tree contributed to Shnayder's criminally negligent driving, and affirm the trial court.

A public entity is not liable for an injury arising out of the alleged act or omission of the entity except as provided by statute. (Gov. Code, § 815.)[5] Section 835 is the sole statutory basis for a claim imposing liability on a public entity based on the condition of public property. (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 829.) Under section 835, a public entity may be liable if it creates an injury-producing dangerous condition on its property or if it fails to remedy a dangerous condition despite having notice and sufficient time to protect against it. (*Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931, 939.)

To recover in an action against a public entity under section 835, a plaintiff must plead and prove: "(1) a dangerous condition existed on the public property at the time of the injury; (2) the condition proximately caused the injury; (3) the condition created a reasonably foreseeable risk of the kind of injury sustained; and (4) the public entity had actual or constructive notice of the dangerous condition of the property in sufficient time to have taken measures to protect against it." (*Brenner v. City of El Cajon* (2003) 113 Cal.App.4th 434, 439; § 835.)

Section 830 defines a "'[d]angerous condition'" as "a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property is used with due care in a manner in which it is reasonably foreseeable that it will be used." Section 830.2 explains further that "[a] condition is not

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[5] All statutory references herein are to the Government Code unless otherwise noted.

a dangerous condition within the meaning of this chapter if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines as a matter of law that the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used."

Property is not "dangerous" within the meaning of the statutory scheme if the property is safe when used with due care and the risk of harm is created only when foreseeable users fail to exercise due care. (*Chowdhury v. City of Los Angeles* (1995) 38 Cal.App.4th 1187, 1196 (*Chowdhury*).) As *Chowdhury* explained, "any property can be dangerous if used in a sufficiently improper manner. For this reason, a public entity is only required to provide roads that are safe for reasonably foreseeable careful use." (*Ibid.*) A public entity's liability for a dangerous condition of property "may ensue only if the property creates a substantial risk of injury when it is used with due care." (*Schonfeldt v. State of California* (1998) 61 Cal.App.4th 1462, 1466.) "'A condition is not dangerous . . . unless it creates a hazard to those who foreseeably will use the property or adjacent property with due care. Thus, even though it is foreseeable that persons may use public property without due care, a public entity may not be held liable for failing to take precautions to protect such persons.'" (*Ibid*.)

The plaintiff has the burden of establishing that the condition existed on property owned by the public entity at the time of the injury, and that the condition was dangerous, i.e., that it created a hazard to persons who foreseeably would use the property with due care. (*Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, 239.) Plaintiff also has the burden of showing that the public entity had actual or constructive notice of the dangerous condition of its property in sufficient time to have taken measures to protect against that dangerous condition. (*Brenner v. City of El Cajon*, *supra*, 113 Cal.App.4th at p. 439.)

Whether property is in a dangerous condition ordinarily is a question of fact, but if "no reasonable person would conclude the condition [of the property] created a substantial risk of injury when such property is used with due care in a manner in which it is reasonably foreseeable that it would be used," then the question is one of law. (*Lane v. City of Sacramento* (2010) 183 Cal.App.4th 1337, 1344.)

"'[W]here the circumstances are similar, and the happenings are not too remote in time, other accidents may be proved to show a defective or dangerous condition, knowledge or notice thereof, or to establish the cause of an accident.'" (*Genrich v. State of California* (1988) 202 Cal.App.3d 221, 227.) Before evidence of previous injuries can be admitted on the issue of whether the condition was a dangerous one, """it must first be shown that the conditions under which the alleged previous accidents occurred were the same or substantially similar to the one in question."" (*Goebel v. City of Santa Barbara* (2001) 92 Cal.App.4th 549, 557.) The admissibility of evidence of prior accidents is confined to the trial court's sound discretion. (*Genrich,* at p. 233.)

With regard to third party conduct, "[a] public entity may be liable for a dangerous condition of public property even where the immediate cause of a plaintiff's injury is a third party's negligent or illegal act . . . if some physical characteristic of the property exposes its users to increased danger from third party negligence or criminality." However, """[t]hird party conduct by itself, unrelated to the condition of the property, does not constitute a 'dangerous condition' for which a public entity may be held liable."" Rather, "[t]here must be a defect in the physical condition of the property and that defect must have some causal relationship to the third party conduct that injures the plaintiff." As a result, "'[p]ublic liability lies under [Government Code] section 835 only when a feature of the public property has "increased or intensified" the danger to users from third party conduct.' [Citation.]" (*Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1348.) As a result, in order for there to be a dangerous condition where third party conduct is involved, the condition of the property must increase or intensify the risk of injury. (*City of San Diego v. Superior Court* (2006) 137 Cal.App.4th

21, 30.) In other words, the alleged "defect in the physical condition of the property must have some *causal relationship* to the third party conduct that actually injures the plaintiff." (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1136.) "'If the risk of injury from third parties is in no way increased or intensified by any condition of the public property . . . courts ordinarily decline to ascribe the resulting injury to a dangerous condition of the property. In other words, there is no liability for injuries caused solely by acts of third parties. [Citations.] Such liability can arise only when third party conduct is coupled with a defective condition of property.' [Citations.]" (*Id*. at p. 1137.)

In *Sun v. City of Oakland* (2008) 166 Cal.App.4th 1177, the plaintiff attempted to cross a four-lane thoroughfare in an unmarked crosswalk. A driver saw the plaintiff step into the crosswalk and stopped for her, but the car travelling next to that driver failed to stop and hit the plaintiff when she walked pass the first car. (*Id.* at p. 1181.) Plaintiff sought to show a dangerous condition of public property based upon the City's failure to repaint the crosswalk markings after it repaved the street and installed bulb-out sidewalk extensions to make the intersection more "'pedestrian friendly.'" (*Id.* at p. 1184.) Plaintiffs contended the bulb-outs, which invited persons to cross the street, along with the traffic pattern on the street, contributed to the danger the intersection posed to pedestrians using it with due care. (*Id.* at p. 1189.) Relying on *Chowdhury*, *supra*, 38 Cal.App.4th 1187, the court found that there was no unusual physical characteristic of the crosswalk where the plaintiff was killed, such as visual obstructions, which would establish a dangerous condition. "Here, the only risk of harm was from a motorist who failed to exercise due care" by not obeying the traffic laws requiring him to yield to a pedestrian. (*Sun*, at p. 1190.)

In *Milligan v. Golden Gate Bridge Highway & Transportation Dist.* (2004) 120 Cal.App.4th 1, a 14-year-old girl jumped to her death from the Golden Gate Bridge. (*Id.* at p. 24.) The plaintiff sought to establish a dangerous condition of public property because it lacked a suicide barrier in addition to the existing three and one-half foot high safety railing. "By definition, persons who use the bridge to commit suicide *are not* using

the bridge in a manner used by the general public exercising ordinary care." *Milligan* held the defendant was not liable for failing to provide a suicide barrier for those who would intentionally use the bridge without due care. (*Id.* at p. 7.)

The issue here is whether a large tree in a median that is at least seven feet away from the street's traffic lanes could constitute a dangerous condition of public property even when persons driving on the street are exercising due care. Even considering plaintiff's excluded evidence, we conclude as a matter of law the magnolia tree in the median strip does not constitute a dangerous condition. There is nothing about Colorado Boulevard that would cause a person driving at or near the speed limit to suddenly veer into the magnolia trees. Plaintiffs do not contend the view of the median was in any way obscured such that the tree was a surprise obstacle in the roadway, or that the median and trees caused cars to travel at unsafe speed (including the freeway speeds the plaintiffs' decedents were traveling here) such that persons using the roadway with due care would be hit by such vehicles. (See *Zelig v County of Los Angeles*, *supra*, 27 Cal.4th at p. 1136; *City of San Diego v. Superior Court*, *supra*, 137 Cal.App.4th at pp. 30–31.) In *City of San Diego*, the passengers in a car were hit by street racers that frequented a stretch of Imperial Avenue located in the city. The speed limit on the four-lane road was 50 miles an hour; the street racers, one of whom did not have the car's lights on, were traveling 85 miles per hour. (*City of San Diego*, at p. 26.) The plaintiffs contended poor street lighting prevented them from seeing the car that did not have its lights on. (*Id.* at p. 24.) *City of San Diego* rejected the contention the poorly lit condition of the street was a dangerous condition: relying on *Zelig*, the court concluded the road was otherwise safe when used as intended by the public, and there was an insufficient nexus of causation between the condition and the accident. (*Zelig*, at p. 30–31.)

DISPOSITION

The judgment is affirmed. Respondent is to recover its costs on appeal.

CERTIFIED FOR PUBLICATION.

JOHNSON, J.

We concur:

ROTHSCHILD, Acting P. J.

CHANEY, J.