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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF FRESNO

Paula Fletcher,

Plaintiff,

v.

Surinder Kumar; Karamjit Kaur Chaliwal; and Does 1 through 50, inclusive,

Defendants.

And consolidated cases.

Case No.: 18CECG00954 Lead Case;
Consolidated with 18CECG02996

Plaintiffs' Memorandum of Points & Authorities in Support of Joint Opposition to California Department of Transportation and County of Fresno's Joint Motion for Summary Judgment

Date: June 29, 2021
Time: 3:30 p.m.
Dept.: 503

Complaint filed: 8/10/2018
Trial Date: None set

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INTRODUCTION

This is a wrongful-death action arising out of a collision at the intersection between a rural road (Manning Avenue) and a state highway (Highway 33).

That intersection was among the deadliest in California, with a "fatality rate" **90-times** the state-wide average. But this intersection was perhaps most infamous for collisions caused by Manning Avenue who missed the stop sign at Highway 33. Between 2005 and 2017, there were **six** such collisions, resulting in a total of *six fatalities*.

Experts in civil engineering and human factors have concluded that the tendency for Manning Avenue drivers to miss the stop sign at Highway 33 was likely the byproduct of those drivers' experience leading up to the intersection: In either direction, the drive to Highway 33 on Manning Avenue entails at least 11 miles of straight, flat, featureless road with regular intersections but no stop signs. As a result, many Manning Avenue drivers will be conditioned not to expect—and thus, *will be less likely to see*—a stop sign at Highway 33.

If this theory is correct—and the collision history suggests it is—then the intersection was in a dangerous condition in the absence of adequate signals (e.g., rumble strips and flashing beacons) to warn drivers on Manning Avenue that they need to stop at Highway 33. But despite the collision history, a citizen complaint, and even a recommendation from the CHP to add a flashing red beacon to Manning Avenue ahead of Highway 33, the entities responsible for the warnings on Manning Avenue—Caltrans and the County of Fresno ("Defendants")—did nothing.

This lawsuit arose when, in September 2017, an SUV with five people inside heading east on Manning Avenue missed the stop sign at Highway 33 and smashed into an 18-wheeler semi-truck heading north on Highway 33. Six people died, including the truck driver. Within three months, Defendants installed rumble strips and flashing beacons on Manning Avenue.

Defendants now seek summary judgment on two theories: (1) that the intersection was not in a dangerous condition, and (2) that Defendants are entitled to immunity even if it was. But a reasonable jury could find that the intersection was in a dangerous condition without additional warnings about the impending stop at Highway 33. And no statutory immunities apply to Defendants' failure to warn.

Accordingly, this Court should **deny** Defendants' motion for summary judgment.

BACKGROUND

1. Defendants knew or should have known this intersection was a dangerous condition.

The intersection between Manning Avenue and Highway 33 was one of the most dangerous intersections in California. Vehicles tended to crash there far more frequently than at other intersections: The intersection's "collision rate" (i.e., collisions per million vehicles) was **seven-times** the state-wide average. (PCOE 260–261 [¶ 29.a.].)[1] And the crashes there tended to be far more *deadly* than normal: The intersection's "fatality rate" (i.e., fatal collisions per million vehicles) was a staggering **90-times** the state-wide average. (PAMF #4.)

But of the many crashes at the intersection, one particular cause stood out: Drivers on Manning Avenue frequently missed the stop sign at Highway 33, typically resulting in a high-speed, broadside collision involving an 18-wheel, big-rig truck, and fatal injuries:

- **December 20, 2005:** A tractor-trailer heading west on Manning Avenue missed the stop sign and broadsided a vehicle heading south on Highway 33. The collision resulted in *five fatalities*. (PAMF #5.)
- **July 12, 2006:** A car heading east on Manning Avenue missed the stop sign and broadsided a tractor-trailer heading south on Highway 33. The collision resulted in *one fatality*. (PAMF #5.)
- **June 11, 2012:** A car heading west on Manning Avenue missed the stop sign and nearly broadsided a truck heading south on Highway 33. (PCOE 033.) The southbound truck narrowly avoided the collision by abruptly swerving, causing the truck's trailer to overturn. (PAMF #5.)
- **June 26, 2012:** A car heading east on Manning Avenue missed the stop sign and broadsided a tractor-trailer heading south on Highway 33. (PCOE 033.) The collision resulted in *one fatality*. (PAMF #5.)
- **September 21, 2015:** A car heading east on Manning Avenue missed the stop sign and rear-ended a tractor-trailer heading east on Manning Avenue that was stopped at the intersection. That collision resulted in one injury. (PAMF #5.)
- **August 3, 2017:** A tractor-trailer heading west on Manning Avenue missed the stop sign and broadsided a tractor-trailer heading south on Highway 33, resulting in one injury. (PAMF #5.)

[1] Citations directly to Plaintiffs' "Compendium of Evidence" appear as **(PCOE XXX)**. Citations to Plaintiffs' "Additional Material Facts" in their separate statement appear as **(PAMF #X)**. Citations to Allied's memorandum of points and authorities appear as **(Defs.' P&As at p.X)**.

In 2011, a concerned citizen and the CHP complained to Caltrans about this exact issue. (PAMF #10.) Indeed, the CHP specifically requested that Caltrans install a flashing red light at the intersection to warn Manning Avenue drivers about the impending stop. (PAMF #11.)

Also in 2011, Caltrans conducted an investigation of the intersection in response to these complaints. And a reasonable investigator would have easily seen the need for additional signals on Manning Avenue to warn drivers of the need to stop at Highway 33.

First, there was the low-hanging fruit: Both Manning Avenue and Highway 33 had speed limits of 55 miles per hour and were popular truck routes. (PAMF #3.) This means that broadside collisions at the intersection would be major events with a high likelihood for fatal injuries.

(*Photo from PCOE 035*)

Second, there was a grizzly collision history: With "a handful of … keystrokes on a keyboard," any Caltrans investigator could have run a 10-year look-back in Caltrans' collision database "in less than a minute." (PCOE 268 [¶ 47a].) That would have revealed [1] the **December 2005** incident (in which five people died when a tractor-trailer heading west on Manning Avenue miss the stop sign and broadsided a vehicle heading south on Highway 33), *and* [2] the **July 2006 incident** (in which one person died when a car heading east on Manning Avenue missed the stop sign and broadsided a tractor-trailer heading south on Highway 33). (PAMF #5.)

Third, there was circumstantial evidence of a problem: Because "[t]he local community .... often has much more experience with and knowledge about specific intersections compared to Caltrans personnel," the citizen complaint and CHP request for a flashing red beacon on Manning Avenue were

strongly suggestive of "safety deficiencies" at the intersection. (PAMF #15–16.) Indeed, a reasonable investigator who inspected the intersection would have noted "numerous tire skid marks on both eastbound and westbound Manning Avenue approaching the Stop signs at State Route 33," circumstantial evidence that corroborates the citizen and CHP reports that many Manning Avenue drivers are missing the stop sign at Highway 33. (PCOE 256 [¶ 21].)

Fourth, a reasonable investigator would have considered the broader context of this intersection, and in particular, its location.

Here, it is notable that the 11-mile stretch of eastbound Manning Avenue from Interstate 5 to Highway 33 (like the 11-mile stretch of westbound Manning Avenue between San Joaquin and Highway 33) is hypnotically monotonous: Perfectly straight, perfectly flat, with perfectly repetitious surroundings. (PAMF #2.)

(*Image from PCOE 257*)

Making matters worse, drivers heading east on Manning Avenue from Interstate 5 (or west on Manning Avenue from San Joaquin) drive through several intersections at regular intervals without ever stopping during the 11 miles leading up to Highway 33. (PAMF #2.)

According to Jollene Gill (an expert in human factors) and Matthew Manjarrez (a civil engineer), the consistent characteristics of the 11-mile stretch of Manning Avenue leading up to Highway 33 would have fostered an "expectancy" in even careful drivers that they would not encounter a stop at Highway 33. (PAMF #2.) For drivers who succumb to Manning Avenue's tendency to induce a no-stop expectancy, it is as if the "Stop Ahead" and "Stop" signs at Highway 33 did not exist: their whispered warnings get lost in the blur of "inattentional blindness," a phenomenon in which even careful drivers fail to see peripheral objects they have been conditioned to not expect. (PAMF

#2.) Indeed, one of the Manning Avenue drivers who missed the stop at Highway 33 (but managed to survive) was *adamant* "that there 'was no sign warning of a stop ahead' in advance of the intersection." (PCOE 024.)

In short, to an investigator exercising due care, there was ample evidence that too many Manning Avenue drivers were not seeing the stop sign at Highway 33, and that the cause was likely due to expectancy conditioning from the drive on Manning Avenue leading up to Highway 33. (PAMF #2, 5, 16.) Thus, a reasonable investigator would have recommended additional warnings (e.g., rumble strips and flashing lights) to warn drivers on Manning Avenue that there is an impending stop at Highway 33. (PAMF #19.)

Indeed, as Caltrans' concedes, rumble strips force even "inattentive [drivers] or drivers that had fallen asleep" to focus their attention on the roadway (PAMF #20), and thus would have "certainly warn[ed] drivers who were approaching the intersection that something's happening" and that "[t]hey need to slow down." (PAMF #20.) From there, the flashing yellow beacon on the "Stop Ahead" sign would have drawn the driver's eye to the sign and warned them to exercise "caution." (PAMF #21.) And, for good measure, the flashing red beacon on the "Stop" sign would have drawn the driver's attention to the impending stop. (PAMF #21.)

2. Defendants unreasonably failed to warn drivers about the stop at Highway 33.

Unfortunately, the Caltrans employee who "investigated" the intersection in 2011 apparently took none of the foregoing into account.

For example, rather than a 10-year look-back at collision history, the investigator inexplicably chose to use only a *three-year* look-back, which deceptively suggested the intersection was clear. (PAMF #15.) And the investigator did not even bother to speak with either the concerned citizen or the CHP who complained about the intersection even though he had their contact information. (PAMF #15.) Because a cursory search revealed no prior incidents, and the intersection was not irregular or defective (when viewed in isolation), the investigator rejected CHP's request for a flashing beacon on Manning Avenue, closed his file, and then stuffed it in a filing cabinet at Caltrans. (PAMF #14.)

While the 2011 investigation sat in a filing cabinet at Caltrans, crumpled metal and mangled bodies continued to pile up at the intersection:

- **June 11, 2012:** A car heading west on Manning Avenue missed the stop sign and nearly broadsided a truck heading south on Highway 33. The southbound truck avoided the collision by abruptly swerving. (PAMF #5.)

- **June 26, 2012:** A car heading east on Manning Avenue missed the stop sign and broadsided a tractor-trailer heading south on Highway 33 resulting in *one fatality***.** (PAMF #5.)

- **September 21, 2015:** A car heading east on Manning Avenue missed the stop sign and rear-ended a tractor-trailer heading east on Manning Avenue that was stopped at the intersection resulting in *one injury*. (PAMF #5.)

- **August 3, 2017:** A tractor-trailer heading west on Manning Avenue missed the stop sign and broadsided a tractor-trailer heading south on Highway 33, resulting in *one injury*. (PAMF #5.)

Still, Caltrans did nothing to address the problem.

On **September 5, 2017**, Plaintiffs became the latest victims: As Plaintiffs were heading east on Manning Avenue, they also missed the stop at Highway 33 and broadsided a tractor-trailer heading north on Highway 33, killing six people including the truck driver. (PAMF #18.)

Three months and $150,000 later, Defendants installed rumble strips on Manning Avenue, and placed flashing yellow and red beacons on the "Stop Ahead" and "Stop" signs, respectively. (PAMF #22.)

STANDARD OF REVIEW

Summary judgment should be used "with caution" so it does not become a substitute for trial. (*Molko v. Holy Spirit Ass'n.* (1988) 46 Cal.3d 1092, 1107.) The party seeking summary judgment has the must make a prima facie showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) The moving party cannot make that showing simply by arguing "an absence of evidence to support" an element of the plaintiff's cause of action. (*Id.* at p. 854, n.23.) Instead, the moving party must affirmatively "present facts to establish a defense." (*Archdale v. American Intern. Specialty Lines Ins. Co.* (2007) 154 Cal.App.4th 449, 462.) Only if the moving party makes that showing does the burden shift to the nonmoving party to "demonstrate the existence of a triable, material issue of fact" as to that defense. (*Ibid*.)

A trial court must resolve any doubt in favor of the party opposing summary judgment. (*Zelda, Inc. v. Northland Ins. Co.* (1997) 56 Cal.App.4th 1252, 1259.) To that end, "the court must consider all of the evidence and all of the inferences reasonably drawn therefrom and must view such evidence in the light most favorable to the opposing party." (*Aguilar*, *supra*, 25 Cal.4th at 843.) A court must also strictly scrutinize the moving party's evidence (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 96–97), and liberally construe any evidence presented by the party opposing summary judgment. (*Garrett v. Howmedica Osteonics Corp.* (2013) 214 Cal.App.4th 173, 191.) In particular, the requirement that expert declarations must reflect a "detailed, reasoned explanation for expert opinions" only applies to the declarations *supporting* a motion for summary judgment, not those in *opposition to* summary judgment. (*Jennifer C. v. Los Angeles United School Dist.* (2008) 168 Cal.App.4th 1320, 1332–1333.)

Finally, a party seeking summary judgment may not rely on new facts or evidence in its reply papers. (*San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316.)

POINTS & AUTHORITIES

1. A reasonable jury could find that Defendants failed to warn about a dangerous condition.

Plaintiffs allege that the intersection between Manning Avenue and Highway 33 was in a dangerous condition. "[T]o establish liability of a public entity for a dangerous condition …, [a] plaintiff must establish by preponderance of the evidence the elements required by section 835 of the Government Code." (*Bakity v. County of Riverside* (1970) 12 Cal.App.3d 24, 29.)

Under Government Code section 835, "a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes" four elements: (1) "that the property was in a dangerous condition at the time of the injury," (2) "that the injury was proximately caused by the dangerous condition," (3) "that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred," and (4) either (a) "the public entity … created the dangerous condition," or (b) "[t]he public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition." (Gov. Code, § 835, subd. (a)–(b).)

As discussed below, there are triable issues on each element.

1.1 The subject intersection was a dangerous condition.

A "dangerous condition" is a "condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used." (Gov. Code, § 830. "[W]hether the given set of facts or circumstances creates a dangerous condition [is] a question of fact for the determination of the jury." (*Briggs v. State of California* (1971) 14 Cal.App.3d 489, 496.)

The classic example of a "dangerous condition" is a "circumstance[] where the failure to post warnings, in the form of signs or signals, creates a 'trap' for the unwary motorist." (*City of South Lake Tahoe v. Superior Court* (1998) 62 Cal.App.4th 971, 976.) So too here, Plaintiffs contend that the unique character of Manning Avenue leading up to Highway 33 (11-miles of straight, flat, featureless road with regular intersections but no stop signs) increased the risk that Manning Avenue drivers would miss the stop at Highway 33. As such, Plaintiffs contend the Manning Avenue/Highway 33

intersection was a "dangerous condition" (for users of *both roads*) in the absence of adequate signals on Manning Avenue to warn drivers of the impending stop (e.g., rumble strips and flashing beacons).

A reasonable jury could find that this dangerous condition existed.

Evidence of prior incidents at an intersection is gold-standard evidence of a dangerous condition. (E.g., *Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1072 ["[E]vidence of previous accidents may be admitted to prove the existence of a dangerous condition …."].) And here, the evidence showed at least **six** prior similar incidents where a driver on Manning Avenue failed to stop at the intersection with Highway 33. (PAMF #5.)

Defendants claim there were "no similar collisions" prior to Plaintiffs' incident. (Defs.' P&As at p. 18.) Here, Defendants emphasize that the prior incidents either "occurred at night," involved "a westbound vehicle on Manning Avenue," or "involved a non-broadside collision" (presumably a reference to the September 2015 incident). (*Ibid.*)

But the fact that some of the incidents involved *westbound* Manning Avenue drivers is not a relevant distinction: The same characteristics of eastbound Manning Avenue that increase the tendency for eastbound bound drivers to miss the stop at Highway 33 (11-miles of straight, flat, featureless road with regular intersections but no stop signs) apply equally to *westbound* Manning Avenue. (PCOE 255 [¶ 19].) Thus, rather than disprove the dangerous condition Plaintiffs allege, the involvement of westbound Manning Avenue actually confirms it.

Moreover, in so arguing, Defendants forget that "[t]he test is prior *similar* incidents, not prior *identical* incidents." (*Claxton v. Atlantic Richfield Co.* (2003) 108 Cal.App.4th 327, 330, italics original.) Thus, because the common denominator in all these incidents (including the one giving rise to this case) is a Manning Avenue driver who failed to see the stop sign at Highway 33, minor variations in their circumstances do not render the prior incidents any less probative of the problem with this intersection (i.e., inadequate warning of the stop at Highway 33).

In any event, "even an absence of accidents would not be dispositive on the issue of dangerousness" since other evidence may support an inference that an intersection was in a dangerous condition. " (*Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1068.)

And here there was other evidence that drivers were struggling to stop at the intersection beyond the collision history: Caltrans also received complaints from a concerned citizen and the CHP that people were not stopping at the intersection. (PAMF #10–11.) Indeed, the CHP requested a red flashing beacon at Manning Avenue to address this very issue. (PAMF #11.) Complaints of this exact nature are evidence of a dangerous condition. (See *Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 779.)

In addition, a site inspection shows "numerous tire skid marks on both eastbound and westbound Manning Avenue approaching the Stop signs at State Route 33," additional evidence that many Manning Avenue drivers were not seeing the stop sign at Highway 33. (PAMF #9.)

In short, a reasonable jury could find that the unique character of Manning Avenue surrounding the intersection (11-miles of straight, flat, featureless road with regular intersections but no stop signs) increased the risk that Manning Avenue drivers would miss the stop sign at Highway 33, and therefore that the intersection presented a dangerous condition without additional signals on Manning Avenue to warn drivers of the impending stop (e.g., rumble strips and flashing beacons).

Defendants' counter-arguments all fail.

First, Defendants argue there is no dangerous condition because there were no "irregularities" at the intersection itself. (Defs.' P&As at p. 16.) But it is well-settled "[t]hat the location of a public improvement or, more broadly, its relationship to its surroundings, may create dangers to users." (*Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 149.) Thus, the fact that an intersection may be safe and regular *in the abstract*, does not preclude a finding that the intersection was dangerous under "the totality of the circumstances" (*Castro v. City of Thousand Oaks* (2015) 239 Cal.App.4th 1451, 1460), including the "*location* of the improvement." (*Bonanno*, *supra*, 239 Cal.App.4th at p. 149.)

Second, Defendants argue there is no dangerous condition because the risk of injury was "trivial." (Defs.' P&As at p. 15.) Here, Defendants emphasize that among the 7 million vehicles traveled through the intersection in the 10 years before this incident, only two "involved a broadside collision with an eastbound driver on Manning Avenue," and thus that the intersection "only" carried a 0.0000259% chance of a broadside collision. (*Id.* at p. 18.)

But these sorts of comparisons are "not dispositive on the issue of dangerousness." (*Salas*, *supra*, 198 Cal.App.4th at p. 1071 ["[E]vidence that no other collisions involving pedestrians had occurred in a 10–year period, although over 30 million vehicles had passed through the intersection … is not dispositive on the issue of dangerousness …."].) This is probably because, as Mark Twain warned, these sorts of statistical comparisons are misleading: With 7 million cars traveling through the intersection between January 1, 2008 to September 5, 2017, even *one fatal broadside a month* (105 deaths total) would look trivial statistically speaking (0.0015%) even though it would represent a *staggering* death rate in the real world.

And Defendants' comparison is unfair: By including only the two incidents that "involved a broadside collision with an eastbound driver on Manning Avenue" (Defs.' P&As at p. 15), Defendants ignore the other incidents involving Manning Avenue drivers who missed the stop at Highway 33.

Moreover, even the relevant collision history significantly underrepresents the rate drivers on Manning Avenue are missing the stop sign at Highway 33. As Plaintiffs' engineering expert (Matthew Manjarrez) explains, because Manning Avenue and Highway 33 are "low volume roadways," most of the vehicles on Manning Avenue will "arrive at the intersection when no vehicles are traveling through the intersection on State Route 33." (PCOE 268 [¶ 47.a.].) As a result, "there is a high probability that any given driver who fails to stop at one of the Stop signs on Manning Avenue will not be involved in a resulting collision." (PAMF #8.)

Third, Defendants will argue that the intersection was not in a dangerous condition when used with "due care." Here, Defendants will emphasize that Plaintiffs' collision occurred because Plaintiffs' vehicle failed to heed the stop sign posted at Highway 33.

But a plaintiff's negligence "has no bearing upon the determination of a 'dangerous condition' in the first instance." (*Swaner v. City of Santa Monica* (1984) 150 Cal.App.3d 789, 799.)

Moreover, Plaintiffs' core premise is that the unique circumstances surrounding this particular intersection (11-miles of straight, flat, featureless road with regular intersections but no stop signs) induces even careful drivers to miss the stop at Highway 33. (PAMF #2; PCOE 241 ["[It is foreseeable that even a careful driver will fail to notice the Stop Ahead and Stop signs on eastbound Manning Avenue at the intersection with SR33."].)

But even the premise that the intersection was only dangerous in the presence of an unwary motorist would not justify summary judgment: Indeed, "[s]o long as a plaintiff-user can establish that a condition of the property creates a substantial risk to *any* foreseeable user of the public property who uses it with due care, he has successfully alleged the existence of a dangerous condition regardless of his personal lack of due care." (*Swaner*, *supra*, 150 Cal.App.3d at p. 799, italics original.) And as this very case shows, the risk that Manning Avenue drivers will miss the intersection exposes drivers on Highway 33 to a substantial risk of harm even though they may be exercising due care.

Moreover, public property constitutes a dangerous condition under section 835 where it *induces* or *fails to prevent* improper conduct. (See *Cole*, *supra*, 205 Cal.App.4th at p. 774 [dangerous condition where "the configuration of the road and the graveled area beside it induced [bullet car] to drive off the one while inducing plaintiff to park in the other"]; *Bonanno*, *supra*, 30 Cal.4th at p. 153 ["[A] public entity may … be liable under [section 835] if it maintains its property in a manner that fails 'to protect against harmful criminal conduct on its property.'" Quoting *Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 811].) Indeed, a classic dangerous condition is a "circumstance[] where the failure to post warnings, in the form of signs or signals," at an intersection "creates a 'trap' for the *unwary motorist*." (*City of South Lake Tahoe*, *supra*, 62 Cal.App.4th at p. 976, italics added.)

1.2 Plaintiffs' deaths were proximately caused by the dangerous condition.

A plaintiff must next show "that the[ir] injury was proximately caused by the dangerous condition." (Gov. Code, § 835.) "[P]roximate cause is a question of fact" for a jury. (*State Dept. of State Hospitals v. Superior Court* (2015) 61 Cal.4th 339, 353.)

Defendants do not discuss proximate causation except to argue that "[t]he position of the sun was not a proximate cause of the collision" (Defs.' P&As at p. 13, capitalization omitted), a premise that is immaterial to Plaintiffs' claims. "As the part[ies] moving for summary judgment, [Defendants] had the burden to show that [they were] entitled to judgment with respect to *all theories of liability* asserted by [Plaintiffs]." (*Lopez v. Superior Court* (1996) 45 Cal.App.4th 705, 717.) Because Defendants' do not address Plaintiffs' failure-to-warn theory, they have not carried their burden to show "that there are no triable issues of material fact." (*Aguilar*, *supra*, 25 Cal.4th at p. 850.)

In any event, a reasonable jury could infer that adequate warnings at the intersection (i.e., rumble strips and flashing lights) would most likely have prevented Plaintiffs' fatal injuries: A veteran Caltrans accident investigator who investigated the subject collision testified that he "really wanted" rumble-strips at the intersection because he believed they are very effective at "help[ing] inattentive [drivers] or drivers that had fallen asleep" bring their attention back to the roadway. (PCOE 189.) Accordingly, Caltrans' investigator conceded that rumble-strips would "certainly warn drivers who were approaching the intersection that something's happening" and that "[t]hey need to slow down." (PCOE 191.) This same investigator also agreed that flashing beacons—flashing yellow for the "Stop Ahead" sign, and flashing red for the "Stop" sign—would have increased the likelihood that Manning Avenue drivers would recognize the need to stop at the intersection. (PAMF #21.)

1.3 Plaintiffs' deaths were a reasonably foreseeable risk of the dangerous condition.

A plaintiff must next show that "the dangerous condition "created a reasonably foreseeable risk of the kind of injuries" the plaintiff incurred. (Gov. Code, § 835.) Whether a particular hazard was "reasonably foreseeable is ordinarily a question of fact." (*Herrera v. Southern Pacific Co.* (1957) 155 Cal.App.2d 781, 786.)

Of course, the gold standard for foreseeability is prior similar incidents. (E.g., *Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 245 ["Heightened foreseeability is satisfied by a showing of prior similar … incidents."].) And as discussed above, the evidence showed at least **six** prior similar incidents in a driver on Manning Avenue failed to stop at the intersection with Highway 33.

1.4 Defendants had notice of the dangerous condition.

Finally, plaintiffs pursuing a claim for a "failure to warn of a known dangerous condition under subdivision (b) of Government Code section 835" (*Anderson v. City of Thousand Oaks* (1976) 65 Cal.App.3d 82, 92), must show "[t]he public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition." (Gov. Code, § 835, subd. (b).)

Because Defendants did not even address this theory in their motion, they have failed to carry their initial burden to show "that there are no triable issues of material fact" regarding "notice." (*Aguilar*, *supra*, 25 Cal.4th at p. 850.)

Regardless, a reasonable jury could find that Defendants had constructive notice of the problem at the intersection. Constructive notice "may be imputed" where public employees, exercising "due care," would have been able to "discover and remedy the situation." (*Briggs v. State of California* (1971) 14 Cal.App.3d 489, 495.) Here, there was ample evidence of a long-standing problem with Manning Avenue drivers missing the stop sign at Highway 33 sufficient to put Defendants on notice of that hazard well before September 2017.

First, all six of the prior incidents involving Manning Avenue drivers who missed the stop at Highway 33 were in Caltrans' database. (PAMF #6.) Defendants' attempt to distinguish those incidents fails here for the same reasons it failed above. Indeed, "[t]he requirement of similarity of conditions is 'much relaxed' when the evidence is offered to show notice of the dangerous condition." (*Hilts v. Solano County* (1968) 265 Cal.App.2d 161, 174.)

Second, Caltrans also received a complaint from a concerned citizen and the CHP that drivers frequently failed to stop at the intersection. (PAMF #10–11.) This evidence may itself be sufficient to establish constructive notice at trial. (*Cole*, *supra*, 205 Cal.App.4th at p. 779.)

Third, the very fact that Caltrans *conducted an investigation* into blown stops by Manning Avenue drivers is *itself* sufficient to charge Defendants with "constructive notice" of that dangerous condition.

Anderson, *supra*, 65 Cal.App.3d 82, is instructive. There, a vehicle "failed to negotiate the curve of a road" and crashed, resulting in the death of a passenger. (*Id.* at p. 86.) The passenger's heirs sued the city, alleging that it created a dangerous condition when it failed to "set up any caution signs … to warn … of the upcoming curve." (*Ibid.*) On review, the Court of Appeal held that "[t]he very fact that [the city] through its Director of Public Works requested an investigation as to the necessity of posting a speed limit along the new section of [road]" was sufficient to charge the city with constructive knowledge "that there might be some necessity to [post warnings] to ensure that the curve be safely negotiated." (*Anderson*, *supra*, 65 Cal.App.3d at p. 92.)

Defendants cannot escape that conclusion simply because the Caltrans employee who conducted the 2011 investigation felt the intersection was safe. Because constructive notice may be inferred where a public employee would have discovered the danger had he or she been exercising

"due care" (Gov. Code, § 835.2, subd. (b)), a jury can charge Defendants with constructive notice if it believes the 2011 investigation was itself unreasonable. (*Anderson*, *supra*, 65 Cal.App.3d at p. 92 [in absence of evidence "that a [r]easonable inspection would not have revealed the dangerous condition" fact of investigation supports constructive knowledge of a hazard even though "the requested investigation conducted … failed to disclose any reason for [concern]"].)

Here, a jury viewing the evidence in a light most favorable to Plaintiffs could conclude that Caltrans' 2011 investigation was unreasonable.

When the investigator searched Caltrans' database for prior incidents in 2011, he inexplicably chose to use only a *three-year* look-back. (PAMF #15.) As a result, his search came up empty. But with a "handful of extra keystrokes on his keyboard," Caltrans' investigator could have run a *10-year* look-back in the Caltrans database "in less than a minute." (PAMF #6; PCOE 268.) That, of course, would have revealed the intersection's deadly history. (PAMF #6.)

Moreover, as discussed above, the collision history will inevitably significantly underrepresent the rate at which drivers on Manning Avenue are actually blowing through the intersection without stopping. (PAMF #8.) Thus, rather than rely exclusively on collision history, a reasonably diligent investigator would have employed "video data collection," a "cost-effective tool" in which "[v]ideo cameras could have been affixed to the highway lighting poles and left to record multiple days of footage," which "could then be reviewed at high speed to identify the frequency of stop sign violations," all "for a nominal fee." (PCOE 268 [¶ 47.b.].)

Finally, although the 2011 investigation was triggered by a citizen complaint and CHP report expressing concern that people were not stopping at the intersection, there is no evidence the Caltrans investigator attempted to speak with the concerned citizen *or* the CHP. (PAMF #15.) This was true even though the investigator had the concerned citizen's contact information. (PCOE 017.)

In short, a reasonable jury could easily find that an adequate investigation would have revealed the dangerous character of the intersection between Manning Avenue and Highway 33, and therefore that Defendants' can fairly be charged with constructive knowledge of that hazard.

2. Defendants are not immune for their failure to warn about this dangerous condition.

2.1 Section 830.4 does not immunize Defendants' failure to warn.

On reply, Defendants may argue that Government Code section 830.4 immunizes their failure to install rumble strips and flashing beacons. Section 830.4 states:

> A condition is not a dangerous condition with the meaning of this chapter merely because of the failure to provide regulatory traffic control signals, stop signs, yield right-of-way signs, or speed restriction signs, as described by the Vehicle Code, or distinctive roadway markings as described in Section 21460 of the Vehicle Code.

Section 830.4 does not apply here: It only immunizes a failure to provide [1] "regulatory traffic control signals" (i.e., traffic lights), [2] "stop signs," [3] "yield … signs," [4] "speed restriction signs" (i.e., speed-limit signs), or [5] lane striping under Vehicle Code section 21460. Because *rumble strips* and *flashing beacons* are not [1] traffic lights, [2] "Stop" signs, [3] "Yield" signs, [4] speed-limit signs, or [5] lane striping section, 830.4 immunity does not apply.

2.2 Section 830.8 does not immunize Defendants' failure to warn.

On reply, Defendants may argue that Government Code section 830.8 immunizes their failure to install rumble strips and flashing beacons. Section 830.8 states:

> Neither a public entity nor a public employee is liable under this chapter for an injury caused by the failure to provide traffic or warning signals, signs, markings or devices described in the Vehicle Code. Nothing in this section exonerates a public entity or public employee from liability for injury proximately caused by such failure if a signal, sign, marking or device (other than one described in Section 830.5) was necessary to warn of a dangerous condition which endangered the safe movement of traffic and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care.

This section does not justify summary judgment here because "[s]ection 830.8 of the Government Code does not exonerate a public entity for failure to post traffic signs [or signals] where they are necessary to warn motorists of the existence of a dangerous condition." (*Bakity v. County of Riverside* (1970) 12 Cal.App.3d 24, 31.)

To the contrary, "section 830.8 permits imposition of liability on public entities in circumstances where the failure to post warnings, in the form of signs or signals, of a dangerous condition creates a 'trap' for the unwary motorist." (*City of South Lake Tahoe*, *supra*, 62 Cal.App.4th

at p. 976.) Whether an intersection creates a "trap" for the unwary motorist is a question of fact for a jury. (*Hilts*, *supra*, 265 Cal.App.2d at p. 174.)

For all the reasons discussed above, a reasonable jury could find that the failure to install rumble strips and flashing beacons rendered the Manning Avenue/Highway 33 intersection "a 'trap' for the unwary motorist" because of the tendency for Manning Avenue drivers to miss the "Stop" sign at that intersection. (Cf. *Bakity*, *supra*, 12 Cal.App.3d at p. 31 ["Placing a stop sign in an unanticipated position could constitute a trap for an unwary motorist."].)

2.3 Section 830.6 does not immunize Defendants' failure to warn.

On reply, Defendants will argue that Government Code section 830.6 "design immunity" immunizes their failure to install rumble strips and flashing beacons, since those items were not part of the original, approved design.

Defendants are wrong: Even "where the state is immune from liability for injuries caused by a dangerous condition of its property … under section 830.6, the state may nevertheless be liable for failure to warn of this dangerous condition." (*Cameron v. State of California* (1972) 7 Cal.3d 318, 329.) Thus, as the Supreme Court confirmed in *Cameron*, "even if 'design immunity' applies to immunize the state for negligence *in the creation of* the dangerous condition, the concurrent negligence by the state in *failing to warn of* the dangerous condition provides an independent basis for recovery." (*Id.* at p. 308.)

The Court of Appeal's opinion in *Anderson*, *supra*, 65 Cal.App.3d 82, is particularly instructive. In *Anderson*, a vehicle "failed to negotiate the curve of a road" and crashed, killing a passenger. (*Id.* at p. 86.) The passenger's heirs sued the city, alleging that it created a dangerous condition when it failed to "set up any caution signs … to warn … of the upcoming curve." (*Ibid.*) The trial court granted summary judgment for the city, finding that was entitled to design immunity under section 830.6. The plaintiffs appealed.

The Court of Appeal agreed that the city had established "all the elements of design immunity" under section 830.6, and was therefore "immune from liability for the creation of a dangerous condition." (*Anderson*, *supra*, 65 Cal.App.3d at p. 90.) But citing *Cameron*, the *Anderson* court held that "a second independent ground of liability … exists for its failure to warn of the dangerous

condition if it had actual or constructive notice of such a condition." (*Anderson*, *supra*, 65 Cal.App.3d at p. 91.) Thus, even though the evidence showed that "forms of signing had been considered and rejected" and therefore that "the absence of warning signs prior to the [subject] curve was … an element of the design" (*id.* at p. 90), *Anderson* nonetheless held that the city "cannot exempt itself from liability for failure to warn of a known dangerous condition." (*Id*. at p. 93.)

Consistent with *Cameron* and *Anderson*, most decisions recognize that section 830.6 design immunity does *not* absolve a public entity of liability for failure to warn of a dangerous condition. (E.g., *Tansavatdi v. City of Rancho Palos Verdes* (Cal.App. 2021) 274 Cal.Rptr.3d 512, 526–527 ["[D]esign immunity does not, as a matter of law, preclude liability under a theory of failure to warn of a dangerous condition."]; *Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931, 945 ["The failure to warn of a trap can constitute independent negligence, regardless of design immunity."]; *Hefner v. County of Sacramento* (1988) 197 Cal.App.3d 1007, 1018 [evidence that "the entity failed to post adequate signs warning of a dangerous condition" will "override any immunity provided by section 830.6"], abrogated on other grounds by *Cornette v. Department of Transportation* (2001) 26 Cal.4th 63; *Thomson v. City of Glendale* (1976) 61 Cal.App.3d 378, 386–387 ["[S]ection 830.6 does not immunize respondent from liability caused by negligence independent of design" such as where "the public entity had … notice of the dangerous condition in sufficient time to … warn of its existence" but failed to do so].)

But there are contrary cases. (See *Weinstein v. Department of Transportation* (2006) 139 Cal.App.4th 52; *Compton v. City of Santee* (1993) 12 Cal.App.4th 591.) The Supreme Court recently granted review in *Tansavatdi*, *supra*, with the express purpose of resolving this split. (See *Tansavatdi v. City of Rancho Palos Verdes* (Cal. 2021) 277 Cal.Rptr.3d 323, 324 ["The only issue to be briefed and argued is the following [citation omitted]: Can a public entity be held liable under Government Code section 830.8 for failure to warn of an allegedly dangerous design of public property that is subject to Government Code section 830.6 design immunity?"].)

In the meantime, this Court must choose which cases to follow. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) This Court should follow the majority of decisions—and, thus, reject *Weinstein* and *Compton*—for two reasons.

First, *Weinstein* and *Compton* are directly contrary to the Supreme Court's decision in *Cameron*. This is reason enough to reject them. (See *Auto Equity*, *supra*, 57 Cal.2d at p. 455 ["The decisions of this court are binding upon and must be followed by all the state courts of California."].)

Indeed, *Compton*'s holding that "section 830.8 … in no way purports to create an exception to design immunity under section 830.6" for "failure to provide warning signs" (*Compton*, *supra*, 12 Cal.App.4th at p. 600), is directly at odds with *Cameron*: "[E]ven if 'design immunity' applies to immunize the state for negligence in the creation of the dangerous condition, the concurrent negligence by the state in failing to warn of the dangerous condition provides an independent basis for recovery under Government Code section 830.8." (*Cameron*, *supra*, 7 Cal.3d at p. 322.) Not coincidentally, *Compton* does not cite *Cameron*, much less attempt to distinguish it.

Weinstein did cite *Cameron*, but fundamentally misread it. According to *Weinstein*, "*Cameron* involved the failure to warn of a hidden dangerous condition that was not part of the approved design of the highway," and thus did not "obligate" public entities "to warn of conditions that *were* part of the approved design." (*Weinstein*, *supra*, 139 Cal.App.4th at p. 61.) While it's true that *Cameron* held that the dangerous condition (uneven superelevation) "did not result from the design or plan introduced into evidence" (*Cameron*, *supra*, 7 Cal.3d at p. 326), "[f]or the guidance of the trial court upon remand," *Cameron* confirmed that "even if design immunity is eventually found to be applicable"—that is, even if the dangerous condition resulted from the design or plan—"it would not immunize the state for its concurrent negligence in failing to warn of the dangerous condition." (*Id.* at pp. 326–327.)

Second, *Compton* and *Weinstein* fundamentally misunderstand the law.

Compton and *Weinstein* believed there is no "exception to design immunity under section 830.6" for a "failure to provide warning signs," because, in their view, "[i]t would be illogical to hold that a public entity immune from liability because the design was deemed reasonably adoptable, could then be held liable for failing to warn that the design was dangerous." (*Compton*, *supra*, 12 Cal.App.4th at p. 600; accord *Weinstein*, *supra*, 139 Cal.App.4th at p. 61.)

But it is not "illogical" to absolve a public entity for *initially creating a dangerous condition* (by adopting what proved to be a negligent design), but nonetheless hold that same public entity liable if it unreasonably withheld warnings that would have eliminated a known hazard of the design.

Flournoy v. State (1969) 275 Cal.App.2d 806—on which *Cameron* extensively relied—is instructive. There, a woman died when she lost control of her car while driving across an icy bridge. The trial court granted summary judgment for the state on design immunity under section 830.6 (*id.* at p. 809), but the Court of Appeal reversed. In doing so, the court emphasized that "the design immunity of section 830.6 is limited to a design-caused accident" and thus "does not immunize from liability caused by negligence independent of design." (*Flournoy*, *supra*, 275 Cal.App.2d at p. 811.) And *Flournoy* emphasized that "the creation of a dangerous condition" (by adopting a negligent design) "and the failure to post a warning of it," represent "separate, concurring causes." (*Ibid.*) Accordingly, *Flournoy* held that, "[r]egardless of the availability of the active negligence theory," i.e., "the creation of a dangerous condition," "plaintiffs were entitled to go before a jury on the passive negligence theory, i.e., an accident caused by the state's failure to warn the public against icy danger known to it but not apparent to a reasonably careful highway user." (*Ibid*.)

Indeed, apart from representing wholly distinct forms of negligence, a public entity who knows that its design presents an ongoing hazard to unsuspecting motorists and withholds an effective warning, is far less sympathetic than a public entity that merely adopted a seemingly reasonable design that later proved to be dangerous. (Cf. *Thomson*, *supra*, 61 Cal.App.3d at pp. 386–387.)

This case demonstrates that point: Whereas designing the Manning Avenue/Highway 33 intersection to eliminate any possibility for broadside collisions would be extremely costly if it were even possible, preventing broadside collisions through adequate warnings (rumble strips and flashing beacons) cost $150,000 and took three months. (PCOE 044; PCOE 192–193.)

Thus, even if this Court did not find *Cameron* controlling, it should nonetheless reject *Compton* and *Weinstein*, and instead follow *Anderson*, *Grenier*, *Hefner*, *Thomson*, and *Tansavatdi* in holding that section 830.6 design immunity does *not* absolve a public entity of liability for failure to warn of a dangerous condition. (See *Auto Equity*, *supra*, 57 Cal.2d at p. 456 ["[W]here there is more than one appellate court decision, and such appellate decisions are in conflict …, the court exercising inferior jurisdiction can and must make a choice between the conflicting decisions."].)

CONCLUSION

For the foregoing reasons, this Court should **deny** Defendants' motion for summary judgment.

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