Filed 8/30/10 Tovar v. Los Angeles County MTA CA2/3

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| JERRY TOVAR et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY et al.,<br><br>Defendants and Respondents | B207117<br><br>(Los Angeles County Super. Ct. No. TC018015) |

APPEAL from a judgment and an order of the Superior Court of Los Angeles County, Rose Hom, Judge. Judgment is reversed. Order is affirmed in part and reversed in part.

Law Office of Gerald Philip Peters and Gerald P. Peters; Oscar E. Toscano for Plaintiffs and Appellants.

Carmen A. Trutanich, City Attorney, Amy Jo Field, Deputy City Attorney, for Defendants and Respondents the City of Los Angeles.

Reiss & Johnson and James V. Reiss; Greines, Martin, Stein & Richland, Martin Stein, Carolyn Oill and Lillie Hsu for Defendants and Respondents Los Angeles County Metropolitan Transportation Authority.

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## INTRODUCTION

This appeal arises from a collision between an automobile driven by Abraham Tovar and carrying passengers, his wife Sara and son Steven, and a Blue Line train operated by the Los Angeles County Metropolitan Transportation Authority (MTA) where the Blue Line train crossed Wilmington near Willowbrook. The collision killed Sara Tovar, seriously injured Abraham, and caused Steven to suffer minor injuries. The trial court granted the MTA's motion for nonsuit as to causes of action for negligence and for dangerous condition of property, and at the conclusion of a jury trial, the jury found that property of the City of Los Angeles (City) was not in dangerous condition and judgment was entered in favor of the City. Plaintiffs appeal.

With regard to the grant of the MTA's motion for nonsuit as to negligence, we conclude that the trial court should not have excluded expert witness testimony concerning the speed limit applicable to the Blue Line train. The improperly excluded evidence could have enabled plaintiffs to overcome the motion for nonsuit, and the order for nonsuit as to the negligence cause of action is reversed.

With regard to the grant of the MTA's motion for nonsuit as to dangerous condition of public property, we conclude that plaintiffs did not meet their burden of providing evidence that the train tracks at the Wilmington grade crossing owned by MTA were a dangerous condition, and did not show that the MTA had actual or constructive notice of a dangerous condition of its property, or of a dangerous condition of adjacent property owned by the City. We affirm the order granting nonsuit to the MTA as to dangerous condition of public property.

In the appeal from the judgment for the City, we conclude that plaintiffs' proffered evidence of videotapes of motorists making left turns at the Willowbrook-Wilmington intersection should have been admitted; that the trial court erroneously struck the testimony of plaintiffs' expert witness that the Willowbrook-Wilmington intersection was the second most-dangerous intersection of the 500 cases he had worked on involving intersections; and that the trial court should have allowed a witness who lived near the Willowbrook-Wilmington intersection to testify to the number of left turns he witnessed

drivers making from Willowbrook onto Wilmington. These evidentiary rulings prevented plaintiffs from presenting evidence important to their cause of action for dangerous condition of public property as to the City, and we reverse the judgment in favor of the City.

## PROCEDURAL HISTORY

Plaintiffs sued the MTA for negligence and for a dangerous condition of public property. At trial, at the conclusion of plaintiffs' case the trial court granted the MTA's motion for nonsuit as to the causes of action for negligence and for dangerous condition. On January 2, 2008, an order granting the motion for nonsuit in favor of the MTA was filed.[1]

Plaintiffs also sued the City for negligence and a dangerous condition of public property. The trial court granted the City's motion for summary adjudication on the causes of action for negligent maintenance and negligent design; plaintiffs do not dispute this ruling on appeal. After a jury trial, the jury by special verdict found that although the City owned or controlled the intersection of Wilmington Avenue and Willowbrook Street, that property was not in a dangerous condition at the time of the incident. Judgment that plaintiffs take nothing from the City was entered on November 29, 2007. The City served notice of entry of judgment on January 23, 2008.

Plaintiffs filed a timely notice of appeal on March 21, 2008.

## FACTS

*The Intersection at Wilmington Avenue and Willowbrook Avenue East*: Wilmington Avenue is a large street, with two traffic lanes going north and two lanes going south. Willowbrook Avenue is a more narrow street that intersects with Wilmington at an angle from the southeast. Two railroad tracks of the MTA Blue line, and a third railroad track of the Union Pacific, cross Wilmington at approximately the same angle as Willowbrook Avenue East. There are cantilever gates, with flashing lights

[1] A written order granting nonsuit, signed by the trial court and filed in the action, has the legal effect of a judgment and is an appealable order. (*Santa Barbara Pistachio Ranch v. Chowchilla Water Dist.* (2001) 88 Cal.App.4th 439, 448, fn. 1.)

and gongs for pedestrians, north of the tracks for traffic southbound on Wilmington, and south of the tracks for traffic northbound on Wilmington. When the gates are down, lights on the gate flash and gongs ring. The gates and flashing lamps are pointed to traffic northbound and southbound on Wilmington, but a driver at the limit line of the intersection of Willowbrook and Wilmington will see the cantilever gate and flashing lights for southbound Wilmington, even though they are of low intensity and are not directly in the driver's line of vision and are "off axis." The cantilever gates are more noticeable to such a driver as they come down, and are less noticeable when they are already down.

The corner of Willowbrook and Wilmington has a stop sign to the right of the limit line for traffic on Willowbrook arriving at Wilmington. On Willowbrook 76 feet before the limit line, a "no left turn" sign is posted on an electric light pole. Immediately before the limit line, a right-turn arrow is painted on the pavement. Plaintiff's expert witness testified that a motorist who travels northbound on Willowbrook and arrives at the intersection of Willowbrook at Wilmington has a view of railroad tracks on the left, running by at an angle. The motorist would most likely perceive that if he goes left, he will be crossing the railroad tracks.

A driver at the limit line at Willowbrook and Wilmington faces a raised median or center divider, which separates cars southbound on Wilmington turning left onto Willowbrook from the train tracks. It also prevents a car at the limit line of Willowbrook from going straight ahead to cross Wilmington onto the train tracks. That car must turn left to go southbound on Wilmington, against traffic, in a northbound lane—which is an unlawful turn—or right, which is the lawful turn to go northbound on Wilmington. Two sets of double yellow lines continue the raised center divider across the train tracks, and this visual barrier indicates that motorists are not supposed to cross those two sets of double yellow lines.

Ronald Pierson, a Los Angeles Police Department traffic enforcement officer, testified that a driver who turned left from Willowbrook and crossed the train tracks on Wilmington would violate the Vehicle Code by: (1) making an illegal left turn; (2) traveling southbound on Wilmington in a northbound lane, against traffic; (3) crossing the double yellow lines of the painted center divider; (4) riding on a center median; (5) driving on the wrong side of a double yellow median; (6) driving on the wrong side of the raised median; and (7) entering a grade crossing when gates on Wilmington were down, bells were ringing, and lights were flashing.

*Plaintiffs' Evidence*: Abraham Tovar drove plaintiffs' vehicle. Sara Tovar and Steven Tovar were passengers. Abraham Tovar was driving the vehicle to Martin Luther King Hospital. After leaving the 105 freeway and traveling on Willowbrook to the intersection at Wilmington, Tovar stopped at the stop sign for 18 or 19 seconds. Railroad tracks were on the left. When the car was stopped, Steven Tovar, in the back seat, did not see gates down and did not hear bells ringing or see flashing lights on the gate. Steven "barely" heard the train's horn. Tovar turned left, moving slowly. Shortly before the collision Steven heard the train horn and saw the approaching train. The collision killed Sara Tovar, seriously injured Abraham Tovar, and caused minor injuries to Steven Tovar.

The collision between the southbound MTA Blue Line train and plaintiffs' vehicle occurred at 8:00 a.m. on March 1, 2004, at the Wilmington grade crossing[2] between the 103rd Street and Imperial stations. South of the 103rd Street station, the train tracks curve slightly to the left in an easterly direction, and then straighten 600 to 700 feet north of the grade crossing of Wilmington and Willowbrook. Before the tracks straighten, the train operator cannot see the intersection of Wilmington and Willowbrook. As the train approaches that intersection going southbound, on the left side of track one are fences, buildings, and an electrical box. The electrical box, which controls the crossing arms, obstructs the view for about a second. The fence is five or six feet high, and becomes

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[2] A "grade crossing" is any crossing where vehicles or pedestrians cross a railroad track.

lower as the train approaches the grade crossing. The fence does not obstruct the visibility of the intersection, and the train operator's view of the right of way is unobstructed. Once the tracks straighten out, the train operator can see the intersection of Willowbrook and Wilmington, and using normal braking (as distinct from emergency braking) can stop the train before it reaches that intersection and can avoid hitting anything in that intersection.

Larry Lee Jarman was the train operator of the Blue Line train. Employed by the MTA, Jarman had been a Blue Line train operator for many years and used the route across Wilmington/Willowbrook 20 times a week. He had crossed that intersection at least 5,000 times, possibly more.

Six to seven hundred feet from where the train crosses Wilmington Avenue is a "horn" sign, which instructs the train operator to begin a horn pattern before entering the intersection at the grade crossing. The train operator operates the horn by pushing a button. The horn sequence—two longs, one short, one long—begins at the horn sign and continues until the train enters the grade crossing. Jarman operated the horn in this manner on March 1, 2004.

Jarman testified that as the train approached the Wilmington grade crossing it was travelling at 55 miles per hour, which is the maximum speed the train could travel in this area at that time under normal conditions. Jarman engaged the train horn at the horn board. He saw the southern cantilever gate down in the locked position, with lights, on the west side of the train tracks. His horn pattern ended at the beginning of the crossing. As he approached the crossing and finished the last horn, a silver car (driven by Abraham Tovar) came from the left, and created an emergency. Jarman applied emergency braking and pushed the horn button. The Tovars' vehicle was moving at 10 to 15 miles an hour. The Tovars' vehicle had crossed the number one track when Jarman saw it for the first time from a distance of 40 or 45 feet, and was approximately five feet from entering track two's right-of-way. At 55 miles per hour it would take at least 300 feet for emergency braking to stop the train. Despite the emergency braking, the train collided

with the Tovar vehicle. The Tovar vehicle was still moving when the train collided with it.

After the accident, Jarman told an MTA supervisor that he had seen the Tovar vehicle at the very last minute before hitting the vehicle. The report stated that Jarman said he did not see the Tovar vehicle until the left front of the train made contact with it, and had no chance to apply the brakes before impact.

Jarman was familiar with a 1998 fatal accident at the Wilmington grade crossing involving a tow truck. In the 15 years he had operated Blue Line trains, Jarman had seen half a dozen vehicles come from the same area where the Tovar vehicle came from, but had seen those vehicles at a much greater distance. He had seen trucks crossing the Wilmington/Willowbrook grade crossing in the same direction that the Tovar vehicle crossed that intersection on March 1, 2004, but had not seen them use that portion of the crossing, unprotected by gates and lights, that the Tovar vehicle used.

The City of Los Angeles must comply with the rules and regulations of the California Department of Transportation (Caltrans) that govern California highways. Regulatory signs must be installed within a reasonable distance of where they apply. At the intersection of Willowbrook Avenue East and Wilmington Avenue, there should have been at least one right-turn-lane sign. City of Los Angeles plans called for a no-left-turn sign on the "pork chop" median, the small raised island in the middle of Willowbrook. Those signs were missing on the day of the accident. A no-left-turn sign was attached to a street light pole on Willowbrook 76 feet before the intersection with Wilmington. Plaintiff's expert James Sobek testified to his opinion that the no-left-turn sign on the street pole was too far back from where drivers stopped at Wilmington. He testified that drivers on Willowbrook would interpret the no-left-turn sign that distance from the intersection as prohibiting a left turn into a lane used by northbound traffic turning right onto Willowbrook. A no-left-turn sign should have been placed in a position in front of a motorist contemplating a left turn when stopped on Willowbrook at Wilmington, or should have been placed below the stop sign at that intersection. No signs at the

intersection told the motorist to make only a right turn onto Wilmington from Willowbrook.

Plaintiffs' expert Robert Foster Douglas, a highway safety expert, testified that the intersection of Willowbrook and Wilmington was more dangerous than the average intersection, and had approximately 10 times more collisions than expected. The inadequate signage at the intersection created an extremely dangerous condition. Where the pavement had yellow pavement lines and a right turn arrow as existed at the intersection, and where the island did not have a no-left-turn sign and there was no right-turn-only sign on the post holding up the stop sign, Douglas testified that this configuration was confusing and invited persons to turn left from Willowbrook onto Wilmington. The striping should have been aimed to preclude a driver from considering a left turn from Willowbrook onto Wilmington. At the limit line, moreover, the lane was wide enough for two vehicles. For a vehicle stopped at the limit line, there were no signs requiring a right turn only or prohibiting a left turn and no signs providing guidance about what turn to make. An area resident testified that he had observed people making left turns at the intersection of Willowbrook and Wilmington.

When right or left turns are prohibited at an intersection, Vehicle Code section 22101, subdivision (c) requires a sign prohibiting those turns. An expert witness testified that the white arrow on the pavement indicating a right turn did not say right turn only and did not prohibit a left turn. According to Caltrans, pavement markings are not a substitute for the required signs; they are supplements. Caltrans requires an arrow marking, accompanied by a regulatory sign, where a turning movement is mandatory, but also states that when an additional, clearly marked lane is provided, a sign is not required. The intersection of Willowbrook and Wilmington did not comply with that mandate.

Plaintiffs' expert testified that the center divider on Wilmington, a six-inch high raised island, prevents a motorist from Willowbrook from going forward across Wilmington. It does not, however, prevent a motorist from turning left.

Plaintiffs' expert testified that an accident which occurred in 1998 at the intersection of Willowbrook and Wilmington would provide notice that the intersection was dangerous.

Martha Stephenson, the Central District Engineer employed by the City of Los Angeles, supervises engineers who investigate to determine whether traffic control devices should be installed or maintained. Stephenson agreed that Caltrans required regulatory signs normally to be erected where the regulation applies. A right-turn-only sign should have been placed under the stop sign so that the driver would see it approaching the intersection. Stephenson agreed that a motorist reaching an abnormal intersection could be confused.

*The City's Evidence:* Rock Miller, a professional traffic engineer called by the City as an expert witness, testified that the intersection of Wilmington and Willowbrook was not a dangerous condition of public property. The no-left-turn sign on the electric light pole 76 feet before the intersection, combined with the right-turn pavement arrow, which is a supplemental traffic control, met the minimum standard for this intersection. Miller stated that a no-left-turn sign on the pork-chop island to the left of the intersection would also be a supplemental sign. Miller testified that he saw no reason why a motorist would not understand the intended movements for the Wilmington-Willowbrook intersection, and there were plenty of signs and markings indicating that the motorist should make a right turn and should not make a left turn at that location. This included yellow striping that indicated motorists were to turn right, not left, at the intersection. Miller found nothing at the intersection to be confusing.

Miller testified that the accident involving the Tovars was the only accident involving trains and vehicles that occurred at the intersection in the 17 years that the Blue Line has operated.

In 2004, a traffic count of vehicles northbound on Willowbrook, moving in the same direction as the Tovar vehicle, was an average 3,065 vehicles per day, making a little more than one million vehicles per year. There were no traffic figures for years before 2004.

## ISSUES

The City claims that plaintiffs' notice of appeal was untimely filed and that this court lacks jurisdiction to hear the appeal as to the City.

Plaintiffs claim on appeal that:

1. The trial court erroneously excluded plaintiffs' evidence that the train operator should have reduced the speed of the train and erroneously granted the MTA's motion for nonsuit because there is no evidence that the MTA did not have discretion to operate its trains at a lower speed;

2. Prior accidents were admissible to prove dangerous condition, notice, and for impeachment;

3. The trial court erroneously permitted Officer Pierson's testimony that he would have cited Abraham Tovar for five vehicle code violations, which defense counsel then used as the basis to question other witnesses and repeatedly referred to in final argument;

4. The trial court erroneously required the Tovars' videos of other motorists making the same left turn to be so reduced as to render them meaningless and by precluding witness Juan Merida from testifying about the number of vehicles he saw turn left at the intersection;

5. The trial court erroneously refused to allow plaintiffs to present evidence that a signal gate was needed at Willowbrook.

## DISCUSSION

I. *The Appeal as to the City*

A. *Plaintiffs' Notice of Appeal as to the City Was Timely Filed*

The City claims that plaintiffs' notice of appeal was untimely filed.

The relevant events are as follows:

November 29, 2007: judgment on jury verdict filed. Exhibit 3 of the motion to dismiss has a proof of service dated November 7, 2007. Exhibit 2 of the motion to dismiss has a proof of service dated December 7, 2007. Plaintiffs' attorney claims he received a copy of the judgment on December 10, 2007, accompanied by the November

7, 2007, proof of service, but he did not receive the December 7, 2007, proof of service, which was never filed with the trial court.

December 19, 2007: Plaintiffs file a motion for new trial. The motion states that plaintiffs move for an order setting aside the November 29, 2007, judgment, "a copy of which was mailed by Defendant to Plaintiffs on 12/07/07 and received by plaintiff's counsel on 12/10/07 . . . ." (Exhibit 4, p. 1.)

January 23, 2008: City serves notice of entry of the November 29, 2007, judgment, with proof of service dated January 23, 2008, and attaches a copy of the November 29, 2007, judgment with a proof of service dated November 7, 2007. Thus the proof of service of the November 29, 2007, judgment is again dated before that judgment was actually entered.

February 19, 2008: Trial court denies plaintiffs' motions for new trial and for judgment notwithstanding verdict as to City.

March 21, 2008: Plaintiffs file notice of appeal.

California Rules of Court, Rule 8.104(a) states:

"Unless a statute or rule 8.108 provides otherwise, a notice of appeal must be filed on or before the earliest of:

"[¶] . . . [¶]

"(2) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled 'Notice of Entry' of judgment or a file-stamped copy of the judgment, accompanied by proof of service[.]"

The November 7, 2007, proof of service of the November 29, 2007, judgment is invalid because the date of the proof of service precedes the date judgment was entered. The proof of service on which the City relies is taken from its litigation files. It does not appear in the Clerk's Transcript and is not in the superior court file. As such it is not part of the record and this court is entitled to disregard it. Twice the proof of service of the copy of the file-stamped judgment is dated November 7, 2007: on the proof of service of the November 29, 2007, judgment and on the proof of service of that judgment attached to the January 23, 2008, notice of entry of judgment. That supports plaintiffs' attorney's

claim that he received a proof of service dated November 7, 2007, when he received the copy of the judgment on December 10, 2007.

Strict compliance with the provisions of rule 8.104(a)(2) is required. (*Thiara v. Pacific Coast Khalsa Diwan Society* (2010) 182 Cal.App.4th 51, 58; see also *Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894, 902.) An incorrect date on the proof of service makes that proof of service invalid. November 7, 2007, service of a judgment that was not filed until November 29, 2007, was invalid[3] and did not strictly comply with rule 8.104(a)(2). The purpose of the requirement that a proof of service accompany the notice of entry of judgment or a file stamped copy of the judgment is to establish the date that the 60-day period begins to run. (Advisory Com. com., 23 pt. 2 West's Ann. Codes, Rules (2006 ed.) foll. rule 8.104, p. 449.) November 7, 2007, service of a judgment which was not yet filed was ineffective to achieve this purpose.

Consequently the notice of entry of judgment served on January 23, 2008, initiated the 60-day period within which rule 8.104(a)(2) required plaintiffs to file a notice of appeal. Thus plaintiffs' notice of appeal filed on March 21, 2008, was timely filed.

B. *Evidentiary Rulings as to Dangerous Condition*

Plaintiffs claim on appeal that the trial court erroneously excluded evidence of prior accidents to show the existence of a dangerous condition, notice of a dangerous condition, and for impeachment.

1. *Dangerous Condition*

Government Code section 835 provides the sole statutory basis for imposing liability on public entities as property owners. (*Brenner v. City of El Cajon* (2003) 113 Cal.App.4th 434, 438.) Government Code section 835 states: "[A] public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes

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[3] See also Code of Civil Procedure section 1013a, subdivision (3): " . . . Service made pursuant to this paragraph, upon motion of a party served, shall be presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing contained in the affidavit." A proof of service dated November 7, 2007, and received in an envelope postmarked December 7, 2007, made service invalid under Code of Civil Procedure section 1013a, subdivision (3).

that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and either:

"(a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or

"(b) The 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."

" 'Dangerous condition' means 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, subd. a.)

" '[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 previous accidents occurred were the same or substantially similar to the one in question. (*Ibid; Goebel v. City of Santa Barbara* (2001) 92 Cal.App.4th 549, 557.) If the proponent of previous accident evidence fails to make this showing, it is proper for the trial court to refuse to admit it. (*Fuller v. State of California* (1975) 51 Cal.App.3d 926, 943-944.) The admissibility of evidence of prior accidents is confined to the trial court's sound discretion. (*Genrich v. State of California, supra,* at p. 233.)

2. *Exclusion of Evidence of Prior and Subsequent Accidents*

a. *Plaintiffs Have Forfeited Any Claim of Error as to Whether Prior Accidents Showed the Existence of a Dangerous Condition of the City's Property*

Plaintiffs claim that evidence of prior accidents was relevant to whether there was a dangerous condition of property owned by the City. Plaintiffs fail to identify which

accidents they claim were erroneously excluded. Plaintiffs do not explain how any prior accidents occurred in conditions which were the same or substantially similar to the accidents involving the Tovar plaintiffs. Plaintiffs do not identify the trial court's ruling which excluded this evidence. Plaintiffs' failure to provide citations to the record and analysis of whether the prior accidents occurred in similar circumstances and were not too remote in time forfeits any claim of error from the trial court's evidentiary ruling. (*Sporn v. Home Depot USA, Inc*. (2005) 126 Cal.App.4th 1294, 1303.)

b. *The Trial Court Properly Exercised Its Discretion to Exclude Evidence of Prior Accidents Which Were Not Substantially the Same or Similar to the Accident Involving the Plaintiffs*

Although plaintiff has not provided record references of proffered evidence of prior accidents, the City has provided those record references.

The City made motions in limine to exclude evidence of all non-train, dissimilar, and unrelated auto-versus-auto accidents at or near the subject intersection, and to exclude evidence of accidents at other intersections or locations other than at the subject intersection. The City argued that the seven-year accident history reflected only six accidents for the Wilmington-Willowbrook intersection, and none involved automobile-versus-train accidents. Only one accident involved an automobile and a train, but in that accident a vehicle rear-ended a train in the southbound lanes, on the opposite side of the street, north of the intersection. The City also moved to exclude proffered evidence of accidents at other streets which intersect Wilmington, including 114th Street, 115th Street, a 114th Street/115th Street merge across the railroad tracks and 270 feet south of the Wilmington-Willowbrook intersection, and Imperial Highway. The City argued that none of these other intersections were similar or relevant to the Willowbrook-Wilmington intersection where the Tovar accident occurred. Plaintiffs' opposition did not show that the other accidents that the City's motion sought to exclude were the same or substantially similar to the accident involving the Tovar plaintiffs at the Willowbrook-Wilmington intersection.

The trial court properly excluded proffered evidence of prior accidents as not the same or substantially similar to the accident involving the Tovar plaintiffs. Four prior accidents involved pedestrians and trains. The trial court properly excluded these accidents as not involving the same or similar accidents. Seven accidents involved trains and automobiles.[4] The trial court properly excluded a 1992 accident as too remote in time from the 2004 accident involving the Tovar plaintiffs and because there was insufficient information about the accident to make a finding that it was similar. The trial court properly excluded a 1994 accident in which a vehicle illegally went around a down cantilever gate and was struck by a southbound train. The trial court properly excluded a 1999 accident in which a motorist traveling southbound on Wilmington went around the crossing gates by going in the left-turn pocket, made an S-turn and entered the grade crossing against the warning devices, and was struck by a southbound train. The trial court properly excluded a 2003 accident in which a vehicle was pushed through the gate, the driver opened the door, and the train hit the door. The trial court properly excluded a 2000 accident in which a Union Pacific freight train travelling northbound at two miles-an-hour struck a parked or abandoned vehicle near the track in a location south of the grade crossing. The exclusion of this evidence was within the trial court's discretion.

c. *Plaintiffs Have Forfeited Their Claim of Error as to the Exclusion of Evidence of a Subsequent Train Accident*

Plaintiffs briefly argue that the trial court erroneously excluded evidence of a subsequent train accident. Plaintiffs' citation to the record for this ruling, however, concerns the exclusion of evidence of subsequent remedial measures by the City to the Willowbrook-Wilmington intersection. The failure to provide citations to the record and analysis of the issue forfeits the claim of error on appeal. (*Sporn v. Home Depot USA, Inc., supra,* 126 Cal.App.4th at p. 1303.)

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[4] The parties stipulated to exclude evidence of a 1995 accident involving a northbound train and a vehicle at 119th Street at Willowbrook. The trial court admitted evidence of a sixth accident in 1998.

d. *Plaintiffs Have Not Shown Error Because the Trial Court Excluded Testimony About Post-Accident Repairs to the Accident Site or Rejected the Jury's Request to Visit That Site*

Plaintiffs claim that the trial court erroneously excluded evidence of remedial measures and erroneously rejected the jury's request for a visit to the Willowbrook-Wilmington intersection accident site.

i.) *The Trial Court Properly Excluded Testimony About Repairs to the Accident Site Made After the Accident Occurred*

The trial court ordered plaintiffs' highway safety expert witness, Robert Foster Douglas, not to testify regarding anything that was changed at the Willowbrook-Wilmington accident site after the March 1, 2004, accident. Plaintiffs argue that the trial court erroneously refused to allow plaintiffs to demonstrate how easily the dangerous condition could have been fixed.

Government Code section 830.5, subdivision (b), however, states: "The fact that action was taken after an injury occurred to protect against a condition of public property is not evidence that the public property was in a dangerous condition at the time of the injury." Thus the trial court's ruling was not erroneous.

ii.) *Plaintiffs Have Forfeited Any Claim of Error Concerning the Trial Court's Rejection of the Jury's Request for a Visit to the Accident Site*

Plaintiffs claim that the trial court erroneously rejected the jury's request for a visit to the Willowbrook-Wilmington intersection accident site, but make no further argument, discussion, or analysis of this issue. The claim of error is therefore forfeited. (*Berger v. California Ins. Guarantee Assn.* (2005) 128 Cal.App.4th 989, 1007; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.)

C. *The Trial Court Did Not Erroneously Admit Officer Pierson's Testimony of Vehicle Code Violations*

Plaintiffs claim that the trial court erroneously denied plaintiffs' motions in limine 11 (to preclude the City and MTA from claiming that Abraham Tovar made an illegal left turn), 12 (to preclude City and MTA from claiming that signs restricted left turns at the

Wilmington-Willowbrook intersection), and 14 (to preclude City and MTA from claiming that Tovar violated five Vehicle Code statutes). Although the record appears to contain the trial judge's ruling only as to motion in limine 12, we assume that the trial court denied all three of these motions.

During trial, the trial court overruled plaintiffs' objection, based on improper foundation, to a question whether Los Angeles Police Department Officer Pierson would cite a person turning left from Willowbrook onto Wilmington. Pierson testified that a driver who turned left and travelled south on Wilmington in a northbound lane against traffic violated the Vehicle Code. Pierson testified that he would cite a driver who continued southbound into the grade crossing and crossed a double-yellow painted line. The trial judge overruled plaintiffs' objection to this questioning as improper direct questioning conducted during cross-examination. Pierson also testified that he would cite a driver who crossed a double line onto the railroad track for riding on a center median, and would cite someone for entering a grade crossing when there were gates down with bells ringing and lights flashing. On redirect by plaintiff's attorney, Pierson stated that he had not read the Caltrans manual that controls California highways and that he would defer to engineers as to the proper location of signage. The trial court sustained a defense objection to a question whether the Caltrans manual required regulatory signs to be at the location where the prohibition applied. The trial court also sustained a defense objection for lack of relevance to a question whether Pierson would defer to traffic engineers as to whether the no-left-turn sign on the electric light pole on Willowbrook applied to the corner at the intersection with Wilmington.

Plaintiffs claim Pierson's testimony had no foundation and that objections to that testimony were erroneously sustained because to establish the existence of a dangerous condition, a plaintiff does not need to establish that he was using due care, citing *Alexander v. State of California ex rel Dept. of Transportation* (1984) 159 Cal.App.3d 890, 899 (*Alexander)*. *Alexander* states that the term "use(d) with due care" in the definition of "dangerous condition" in Government Code section 830, subdivision (a) does not as a matter of law include obeying traffic laws. Instead, the existence of a

dangerous condition and use with due care are factual questions. (*Alexander*, at p. 901.) *Alexander* concludes: "so long as a plaintiff-user can establish a condition of the property creates a substantial risk to any foreseeable user of public property who uses it with due care, he has successfully established the existence of a dangerous condition. Although the public entity may assert the negligence of a plaintiff-user as a defense, it has no bearing on the determination of a dangerous condition in the first instance." (*Id*. at p. 902.)

However, "[p]roperty 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." (*Brenner v. City of El Cajon, supra,* 113 Cal.App.4th at p. 439.) " 'If [] it can be shown that the property is safe when used with due care and that a risk of harm is created only when foreseeable users fail to exercise due care, then such property is not "dangerous" within the meaning of section 830, subdivision (a).' [Citation.]" (*Chowdhury v. City of Los Angeles* (1995) 38 Cal.App.4th 1187, 1196 (*Chowdhury*).) 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 within the meaning of this chapter 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*., quoting Cal. Law Revision Com. com., 32 West's Ann. Gov. Code (1995 ed.) foll. § 830, p. 299.) As *Chowdhury* states, "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." (*Chowdhury*, at p. 1196.) Consequently Officer Pierson's testimony was relevant to show that the Willowbrook-Wilmington intersection was safe for drivers using due care and that the risk of harm from that intersection arose for drivers who did not use due care. It was also relevant on the question of whether plaintiffs were negligent, which is a

defense under Government Code section 830.2, subdivision (b). (*Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, 239.)

D. *The Trial Court's Evidentiary Rulings Excluding Evidence Prevented Plaintiffs From Presenting Probative Evidence of Left Turns by Other Motorists*

Plaintiffs claim they were prevented from presenting probative evidence that numerous other motorists made the same fatal turn that Abraham Tovar made. Plaintiffs claim that the trial court erroneously prevented them from presenting testimony and photographic and video evidence that numerous motorists turned left at the Willowbrook-Wilmington intersection. Plaintiffs argue that the evidence that other motorists made the same turn shows that a person using due care could be confused at that intersection and could drive onto the railroad tracks.

1. *The Proffered Videotape of Motorists Making Left Turns Should Have Been Admitted*

First, plaintiffs allege that the trial court erroneously excluded evidence of videos, shot after the accident, showing cars turning left from Willowbrook onto Wilmington without those cars having accidents. As stated, plaintiffs' theory is that evidence that other motorists made the same turn showed that a person using due care could be confused at the unusual intersection and end up on the railroad tracks. As plaintiffs' argued to the trial court, the evidence of these left turns went to the issue of the dangerousness of the intersection. The trial court, however, stated that the law did not provide for evidence of subsequent left turns that did not result in accidents, and ruled to exclude evidence of left turns which did not result in accidents with a train.

Section 830, subdivision (a) defines a dangerous condition of public property as one creating a substantial risk of injury when such property is used with due care in a reasonably foreseeable manner. (*Murrell v. State of California ex rel. Dept. Pub. Wks.* (1975) 47 Cal.App.3d 264, 267.) "[T]he statute means that the condition is dangerous if it creates a substantial risk of harm when used with due care by the public generally, as distinguished from the particular person charged as concurrent tortfeasor." (*Ibid*.) Where no physical feature of public property is shown to increase the risk to motorists or to

cause motorists to drive hazardously where they should not drive, the evidence is insufficient to establish that the public property created substantial danger when due care was used. (*Ducey v. Argo Sales Co*. (1979) 25 Cal.3d 707, 728.) The issue to be determined is whether in the abstract the factual situation confronting drivers at the Willowbrook-Wilmington intersection created a dangerous condition without regard to the specific conduct of the plaintiff on this particular occasion. (*Mathews v. State of California ex rel. Dept. of Transportation* (1978) 82 Cal.App.3d 116, 121.) Plaintiffs proffered videotaped evidence of motorists turning left at the Willowbrook-Wilmington intersection which showed that the condition of public property at that intersection increased the risk of such turns or permitted motorists to make such turns. That the turns on the videotape did not result in accidents did not make the evidence of such turns irrelevant to the determination of whether the intersection was a dangerous condition of public property. That videotaped evidence should have been admitted.

2. *The Trial Court Erroneously Struck Sobek's Testimony That the Willowbrook-Wilmington Intersection Was the Second-Most-Dangerous Intersection*

Plaintiffs allege that the trial court struck testimony by plaintiffs' expert witness James Sobek. Sobek was an accident investigator whose analysis was devoted to visibility and visual information presented to drivers as they approach on Willowbrook and stop at Wilmington, whether signs provided sufficient guidance to drivers, and whether signs that were missing would have provided drivers with additional guidance that might have prevented plaintiffs' accident. At the conclusion of Sobek's testimony, plaintiff's counsel asked whether he had formed an opinion regarding the dangerousness of the intersection at Willowbrook and Wilmington. Sobek testified that because of the angles of the two streets and the limited sightlines, it was an extremely dangerous intersection, and that of the more than 500 cases he had worked on involving intersections, he knew of only one that was more dangerous. Counsel for the City objected to the comparison of this intersection to the other intersections as being made without foundation and as prejudicial. The trial court stated that there were other variables characteristic of the other intersections, and it would cause undue consumption

of time to have defense counsel question the witness about the other 499 intersections and to compare them to the Wilmington-Willowbrook intersection. The trial court ordered Sobek's answer that this was the second-most dangerous intersection to be stricken.

Although the trial court has discretion to determine whether the possible prejudicial effect of evidence or undue consumption of time necessary to admit it outweighs its probative value (*Rosener v. Sears, Roebuck & Co*. (1980) 110 Cal.App.3d 740, 756), we are not persuaded that it would be necessary to examine Sobek to determine the characteristics of 499 other intersections as a foundation for comparing them to the Willowbrook-Wilmington intersection, so as to cause an undue consumption of time. The relevance of Sobek's testimony that the Willowbrook-Wilmington intersection was the second-most-dangerous intersection he had investigated was to show that intersection was a dangerous condition of public property. Examination and cross-examination about the reasons why the Willowbrook-Wilmington intersection was dangerous, in relation to other intersections, was relevant to this issue. The trial court should not have ordered Sobek's testimony that the Willowbrook-Wilmington intersection was the second-most-dangerous intersection in his experience be stricken.

3. *Merida Should Have Been Allowed to Testify to the Number of Left Turns He Witnessed Drivers Making from Willowbrook Onto Wilmington*

Plaintiffs allege that the trial court erroneously excluded testimony of plaintiffs' witness Juan Merida, who lived on Wilmington three houses from the Willowbrook-Wilmington intersection, that he saw people make eight left turns per day at that intersection. Plaintiffs sought to introduce Merida's testimony that he witnessed people making left turns from Willowbrook onto Wilmington. Defense counsel objected to Merida's testimony about people making left turns at Willowbrook onto Wilmington on the basis that Merida had no driver's license and did not drive, and thus could not lend his own experience from driving. Regarding Merida's proposed testimony that eight cars turned left per day, defense counsel objected that Merida was not there 24 hours a day and his testimony was only an estimate which was speculation and lacked foundation. The trial court permitted Merida to testify that people made left turns, without stating the

number of those left turns. The trial court stated: "He can testify that people made left turns without going into the numbers. It's not the left turn that's the dangerous condition, because people can make left turns and that's not dangerous, although that obviously violates the law."

Merida should have been allowed to testify as to the number of left turns that he saw drivers make. This testimony would not be an estimate of the left turns drivers made in each 24-hour period, but instead those left turns that Merida himself witnessed. The evidence was relevant to whether a dangerous condition of public property existed at the Willowbrook-Wilmington intersection, and specifically the effect of missing signs at the intersection and whether those missing signs created confusion that allowed drivers to believe that they were permitted to turn left from Willowbrook onto Wilmington, which could expose them to injury from southbound Blue Line trains.

3. *Conclusion*

We conclude that the evidentiary rulings prevented plaintiffs from presenting evidence important to their cause of action for dangerous condition of public property as to the City, and we reverse the judgment in favor of the City.

II. *The Appeal as to the MTA*

The trial court also made evidentiary rulings in the causes of action for negligence and for dangerous condition of public property as to the MTA, and granted the MTA's motion for nonsuit as to these causes of action.

A. *The Ruling Excluding Evidence of the Need for a Signal Gate on Willowbrook Was Not an Abuse of Discretion*

Plaintiffs claim that the trial court erroneously excluded their evidence that a signal gate was needed on Willowbrook.

Plaintiffs' counsel informed the court that he would raise the issue of "quad gates" in testimony of Yadi Hashemi, a City traffic engineer for roadway design, and his supervisor, Joe Kennedy. The trial court excluded the testimony of these City employees as not relevant. On appeal, plaintiffs make no argument that this ruling was erroneous,

and therefore forfeit any claim of error on appeal. (*Golden Drugs Co., Inc. v. Maxwell-Jolly* (2009) 179 Cal.App.4th 1455, 1468.)

Plaintiffs cite the trial court's ruling precluding plaintiffs' counsel from mentioning quad gates in his opening statement. This ruling did not prevent the presentation of evidence, and because plaintiffs make no argument that it was erroneous, they forfeit any claim of error on appeal. (*Ibid*.)

The court held an Evidence Code section 402 hearing of plaintiffs' expert witness Robert Foster Douglas. Douglas testified that his opinion of this case was that quad gates would be something that could be implemented, although several other things could be done to resolve the injuries occurring at the Wilmington train crossing. The trial court ruled to exclude testimony concerning quad gates, stating: "Counsel also brought up the fact that [the Public Utilities Commission] does not require quad gates, so I am not going to allow the testimony as to quad gates as to this intersection; because I'm sure you can argue that quad gates for not only vehicles, but for pedestrians, should be instituted at every grade crossing. And yet we know of instances where people and cars ignore those warnings."

Plaintiffs did not establish that property owned or controlled by the MTA had a dangerous condition or that the MTA had notice that its property was dangerous because of a defect on adjacent property owned by the City. Without that foundational showing, evidence that the installation of quad gates would prevent vehicles from turning into Wilmington Avenue from Willowbrook is not relevant. (*Brenner v. City of El Cajon, supra,* 113 Cal.App.4th at p. 442-443.) That property could be made safer by some other means is not relevant to determining the existence of a dangerous condition of property. (*Dole Citrus v. State of California* (1997) 60 Cal.App.4th 486, 494.) Thus the trial court did not abuse its discretion in ruling to exclude Douglas's testimony concerning the construction of quad gates.

B. *The Trial Court's Should Not Have Excluded Expert Witness Testimony Concerning The Speed Limit Applicable to the Blue Line Train*

The trial court made rulings excluding evidence in the negligence cause of action against the MTA. Plaintiffs claim that the trial court erroneously prevented them from presenting evidence that the train operator should have reduced the speed of the train, and erroneously granted nonsuit because the 55 miles-per-hour speed limit established by the Public Utilities Commission (PUC) is a maximum allowed speed and there is no evidence that the MTA did not have discretion to operate its trains at a lower speed.

1. *Plaintiffs Contend That the MTA Falsely and Repeatedly Claimed that the PUC Required MTA Trains to Travel at 55 Miles Per Hour*

Plaintiffs contend that the MTA falsely and repeatedly claimed that the PUC mandated that the MTA train must travel at 55 miles per hour.

This claim is based on the following instances. In the opening statement, the MTA's counsel stated that "[t]he train speed code coming in from 103rd Street, as you leave 103rd Street station, is 55 miles an hour. That's approved, it's been that way since 1990, and it specifically was that way on March 1st, 2004." Referring to the train operator, "[h]e has the right of way. He's coming southbound at 55 miles an hour, as prescribed by the P.U.C."

On September 20, 2007, MTA counsel, Mr. Reiss, stated to the trial court: "We don't need more markings within the grade crossing, and we don't have to slow that train down one bit; because it's all been approved by the P.U.C[.]" Reiss also stated: "And the speed of the train has already been approved by the P.U.C., so you can't even say too much speed." "That grade crossing is controlled by the California Public Utilities Commission. The grade speed code is 55 miles an hour. Whether he likes it or not, whether I like it or not, whether it should be lower or higher, that's what it is, that's what's been approved, been in the system since 1990."

On September 27, 2007, Mr. Reiss stated: "This is a 55-mile-an-hour approved speed code. They have not one bit of evidence that he was over 55 miles an hour. So to allege that he has to slow down is absolutely improper, because that speed, the train's . . .

operation level, was all approved by the P.U.C. for years and has never been changed now 14 years before the accident and three years post-accident." Mr. Reiss also stated: "And if he wants to allege that the operator was unsafe for conditions, that's one thing. But I don't want him to intimate under any circumstances that that speed limit should be lower than 55, because there's no evidence, and there's no expert, there's no P.U.C. requirement. That's a critical issue with us that the vehicle speed was within its speed code, and I don't want an intimation in opening statement that that speed code is improper."

Plaintiffs' theory on appeal is that the MTA's argument was fallacious, and that based on that fallacious argument the trial court precluded plaintiffs from presenting evidence that the train operator should have reduced speed.

The trial court has discretion to rule on foundational matters forming the basis of an expert witness's testimony (*City of San Diego v. Sobke* (1998) 65 Cal.App.4th 379, 395), to determine the relevance of evidence (*Neptune Society Corp. v. Longanecker* (1987) 194 Cal.App.3d 1233, 1241), and to exclude evidence under Evidence Code section 352 if its probative value is outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, confusing the issues, or misleading the jury (*Ghadrdan v. Gorabi* (2010) 182 Cal.App.4th 416, 420). The appellant claiming error because of an evidentiary ruling must spell out exactly how the error caused a miscarriage of justice. (*In re Marriage of Dellaria* & *Blickman-Dellaria* (2009) 172 Cal.App.4th 196, 205.)

2. *Testimony of Expert Witness Sobek*

Plaintiffs claim that the trial court erroneously precluded them from presenting evidence that the train operator should have reduced speed.

James Sobek, a registered professional engineer, testified as an expert witness in an Evidence Code section 402 hearing. His work since 1988 has involved accident reconstruction in motor vehicle collisions. Much of his work has specialized in lighting and visibility, what could or could not be seen from various points. His testimony and professional opinions would concern the vision of the Blue Line train operator travelling

southbound toward the grade crossing and visibility of motorists in the same position as the Tovar vehicle. Sobek stated that he would testify that the train operator should have slowed down because the grade crossing at Wilmington is a "very blind crossing."

Plaintiffs' theory was that train operators were not able to see the intersection until it was too late, and should have slowed the train because fences, an electrical box, and the angle of the tracks did not give the train operator a clear view of the grade crossing. Defense counsel argued that the train operator could see the right of way, and any angle of the track did not require a lower speed or the PUC would have lowered the speed limit, but the PUC had not done so. The trial court precluded plaintiff from eliciting testimony that the train operator should have slowed the train below what the PUC required.

PUC regulation 7.01 is part of PUC General Order 143-B, the purpose of whose rules and regulations "is to establish safety requirements governing the design, construction, operation and maintenance of light-rail transit systems in the State of California." (PUC Reg. 1.03.) PUC regulation 7.01, the "basic speed rule," states: "The other provisions of this part notwithstanding, the operator of an LRV[5] shall at all times operate at a safe speed that is consistent with weather, visibility, track conditions, traffic, traffic signal indications, and the indications of ATP[6] systems where used." A maximum speed limit is not a license, or requirement, to travel at that maximum speed under all circumstances. (*Walters v. Du Four* (1933) 132 Cal.App. 72, 83.) The rate of speed at which a train is operated is not alone determinative of whether it is being operated at a careful and prudent speed. (See *Musante v. Guerrini* (1932) 125 Cal.App. 556, 560.) Negligence may occur because a train operator drives too fast under the circumstances, even though not exceeding the maximum speed limit. Where conditions and

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[5] "Light-Rail Vehicles (LRV). A wheeled vehicle, for the conveyance of passengers, which is electrically propelled and operates upon a track or rails on the alignment classifications described in this General Order." (PUC Reg. 2.09.)

[6] "Automatic Train Protection (ATP): A system for assuring safe train movement by a combination of train detection, separation of trains running on the same track or over interlocked routes, overspeed prevention, and route interlocking." (PUC Reg. 2.02.)

circumstances and the safety of persons and property require a speed less than the maximum speed limit, it is the duty of the train operator to slow the speed of the train. (See *Dam v. Bond* (1926) 80 Cal.App. 342, 350.)

The trial court erroneously precluded plaintiffs from presenting evidence that the conditions of the Blue Line track—the curvature of the tracks north of the Wilmington grade crossing, fencing, and an electrical box—reduced the train operator's visibility of the right of way and required the train operator to reduce speed below the PUC maximum speed limit. The trial court also erroneously precluded Sobek's testimony concerning obstructions to the train operator's visibility .

3. *Testimony of Expert Witness Douglas*

Robert Douglas, a registered professional engineer in civil engineering, testified as an expert witness in an Evidence Code section 402 hearing. Plaintiff retained Douglas to render opinions as to traffic transportation engineering. Douglas testified that the PUC approved a maximum speed of 55 miles per hour, but that was a speed limit, and pursuant to PUC regulation 7.01 the train operator must travel at a speed taking into consideration visibility and must provide for safe operation. Douglas agreed that the PUC reviewed each segment of the Blue Line for configuration, layout, and speed, and approved the specific speed for each segment of the line and each grade crossing. Douglas testified that an operator should operate the speed of the train consistent with what he sees is around him. Plaintiffs' counsel cited PUC regulation 7.01, and argued that excluding Douglas's testimony as to the speed of the train would be inconsistent with this PUC regulation. The trial court ruled that the fact of PUC section 7.01 was admissible, but that Douglas could not say anything further on that regulation and could not testify that because of section 7.01 the train operator was going too fast. The trial court further ruled that Douglas was precluded from testifying as to what train operator Jarman should have done, whether he should have slowed down, and whether every railroad driver should slow down at every intersection or at this specific intersection. The trial court also ruled that Douglas could not recite PUC section 7.01 because he could not render an opinion as to how it was relevant to this case.

Although expert witness opinion evidence on the meaning of a statute, ordinance or safety regulation is inadmissible (*California Shoppers, Inc. v. Royal Globe Ins. Co*. (1985) 175 Cal.App.3d 1, 67; *People v. Torres* (1995) 33 Cal.App.4th 37, 46), here the opinion evidence was not testimony about the meaning of PUC regulation 7.01. Instead it concerned whether conditions on the train track and right-of-way required a speed lower than the 55 miles-per-hour maximum. The trial court should have permitted this testimony.

C. *The Trial Court Properly Granted Nonsuit as to the MTA as to Dangerous Condition, But the Grant of Nonsuit as to the MTA as to Negligence Is Reversed*

Plaintiffs claim the trial court erroneously granted nonsuit in favor of the MTA.

1. *Standard of Review of an Order Granting Motion for Nonsuit*

A defendant is entitled to a nonsuit if the trial court determines that, as a matter of law, the evidence presented by plaintiff is not sufficient to permit a jury to find in his favor. In determining whether plaintiff's evidence is sufficient, the trial court may not weigh the evidence or consider witnesses' credibility. Instead, the court must accept evidence most favorable to plaintiff as true and must disregard conflicting evidence. The court must give to plaintiff's evidence all the value to which it is legally entitled, indulging every legitimate inference which may be drawn from the evidence in plaintiff's favor. A mere scintilla of evidence does not create a conflict for the jury's resolution; there must be substantial evidence to create the necessary conflict.

The same rule requiring evaluation of the evidence in the light most favorable to the plaintiff guides this court's review of a grant of nonsuit. We will not sustain the judgment unless interpreting the evidence most favorably to plaintiff's case and most strongly against the defendant and resolving all presumptions, inferences and doubts in favor of the plaintiff, a judgment for the defendant is required as a matter of law. (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291.)

" 'Where there is no evidence to review because the trial court excluded it, we review the trial court's evidentiary rulings to determine if the evidence was properly excluded. If relevant and material evidence was excluded which would have allowed the

plaintiff to overcome a nonsuit, the judgment must be reversed. [Citation.]' " (*Stonegate Homeowners Assn. v. Staben* (2006) 144 Cal.App.4th 740, 746.)

2. *The Order Granting Nonsuit to the MTA as to Negligence Is Reversed*

"To prevail on their negligence claim, plaintiffs must show that [defendant] owed them a legal duty, that it breached that duty, and that the breach was a proximate or legal cause of their injuries." (*Merrill v. Navegar, Inc*. (2001) 26 Cal.4th 465, 477.)

The erroneous exclusion of plaintiffs' evidence that circumstances and conditions required the train operator to operate the Blue Line train at a speed lower than the 55 miles-per-hour maximum speed limit prevented the jury from hearing evidence that the train operator breached the duty of care by operating the train at the maximum speed limit. Because the improperly excluded evidence could have enabled plaintiffs to overcome the nonsuit, the order granting nonsuit to the MTA as to negligence must be reversed as to negligence. (See *Stonegate Homeowners Assn. v. Staben, supra*, 144 Cal.App.4th at p. 746; *Hirano v. Hirano* (2007) 158 Cal.App.4th 1, 8.)

3. *The Order Granting Nonsuit to the MTA as to Dangerous Condition of Public Property Is Affirmed*

As we have stated, Government Code section 835 provides the sole statutory basis for imposing liability on public entities as property owners. (*Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1346-1347.) Under that statute, a public entity is " 'liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either: [¶] (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or [¶] (b) The public entity had actual or constructive notice of the dangerous condition . . . a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.' " (*Id.* at p. 1347.) A "dangerous condition" means "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." (Gov. Code, § 830, subd. (a).)

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, supra,* 94 Cal.App.4th at p. 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.)

The trial court found that although the MTA owned or controlled the property at the grade crossing where train tracks crossed Wilmington Avenue, plaintiffs had not provided evidence that the grade crossing was a dangerous condition. The defects alleged by plaintiffs were poorly placed or missing signs, ambiguous or inconspicuous striping on street pavements, a center median that did not physically prevent a left-turning driver from crossing the tracks, and a failure to provide closing gates at the intersection of Wilmington and Willowbrook, all of which alleged defects were on property owned by the City, not by the MTA. Plaintiffs cited no evidence that the grade crossing was a dangerous condition. In the trial court plaintiffs argued that the MTA had presented no evidence that the intersection was not dangerous or that it was safe. However, as stated it is plaintiff's burden to establish that the condition is dangerous. (*Brenner v. City of El Cajon, supra,* 113 Cal.App.4th at p. 439.) Plaintiff did not meet that burden.

We have affirmed, *ante*, the trial court's rulings excluding 11 prior accidents as occurring in circumstances that were not the same or substantially similar to the accident involving the Tovar plaintiffs. Thus those accidents were not evidence of a dangerous condition of MTA's tracks or that the MTA had notice of a dangerous condition of its property. Government Code section 835, subdivision (b) requires the public entity to have actual or constructive notice of the dangerous condition under section 835.2. (*Brenner v. City of El Cajon, supra,* 113 Cal.App.4th at p. 439.) Section 835.2,

subdivision (a) states that a public entity has actual notice of a dangerous condition "if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character." A public entity has constructive notice of a dangerous condition "only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character." (Gov. Code, § 835.2, subd. (b).) Plaintiff provided no evidence that the MTA knew of poorly placed or missing signs, ambiguous or inconspicuous striping on street pavements, a center median that did not physically prevent a left-turning driver from crossing the tracks, of a failure to provide closing gates at the Wilmington-Willowbrook intersection, or that the MTA was responsible for causing or repairing those defects, which were on City property.

As we have stated, " '[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, supra,* 202 Cal.App.3d at p. 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 previous accidents occurred were the same or substantially similar to the one in question. (*Ibid*; *Goebel v. City of Santa Barbara, supra,* 92 Cal.App.4th at p. 557.) Although plaintiff's expert testified that the fact that an accident occurred in 1998 at the intersection of Willowbrook and Wilmington would provide notice that the intersection was dangerous, that accident occurred at an intersection on the other side of Wilmington at 114th Street, where the defective signs, striping, and median and absence of crossing gate at Willowbrook did not apply. Defendant MTA also provided evidence that the 1998 accident involved a tow-truck, whose driver was drunk, on the other side of Wilmington, which went across the double yellow line and entered Wilmington through a right-turn-only exit, against traffic, saw and tried to outrun the train, and was hit by a southbound train. Thus the 1998 accident was not the same or substantially similar to the one

involving the Tovar plaintiffs. The trial court excluded evidence of other accidents as not similar to the accident involving the Tovar plaintiffs. Thus plaintiffs' evidence did not show that the MTA had notice of a dangerous condition of its property.

In its reply brief,[7] plaintiffs argue that the MTA's tracks were dangerous because a dangerous condition existed on adjacent property owned by the City, citing *Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139 (*Bonanno*).

In *Bonanno*, plaintiff was crossing a busy street in a crosswalk to reach a bus stop on the other side of the street. Motorists were stopped in both directions, but another driver's car rear-ended a stopped car, causing it to lurch forward, hit, and seriously injure plaintiff. (*Bonanno, supra,* 30 Cal.4th at p. 145.) Plaintiff sued the County, the driver of the car which rear-ended the car that hit her, the County, Kaiser Foundation Hospitals, and the Central Contra Costa Transit Authority (CCCTA). All defendants settled before trial except CCCTA, and the jury returned a verdict for plaintiff finding that the bus stop was a dangerous condition of public property. The Court of Appeal affirmed that judgment, holding that the location of the bus stop created a dangerous condition because it required pedestrian bus patrons to cross, and cars to stop, at the crosswalk without traffic lights or pedestrian-activated signals. The California Supreme court granted review of CCCTA's petition on " 'whether the location of a bus stop may constitute a dangerous condition of public property under Government Code section 830 because bus patrons will be enticed to cross a dangerous crosswalk to reach the bus stop.' " (*Id*. at p. 146.)

The Supreme Court assumed that the crosswalk was dangerous, and addressed whether the bus stop was dangerous because bus users had to cross the dangerous crosswalk to reach the stop. (*Bonanno, supra,* 30 Cal.4th at p. 147.) The property of a public entity may be considered dangerous if a condition on adjacent property exposes those using the public property to a substantial risk of injury. (*Id*. at p. 148.) "[P]ublic

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[7] "Points raised for the first time in a reply brief will generally not be considered." (*Medill v. Westport Ins. Corp*. (2006) 143 Cal.App.4th 819, 836.)

entities are subject to potential liability [under sections 830 and 835] when their facilities are located in physical situations that unnecessarily increase the danger to those who, exercising due care themselves, use the facilities in a reasonably foreseeable manner." (*Id*. at p. 151, fn. 3.) The Supreme Court found that CCCTA was liable because the physical situation of the CCCTA's bus stop caused users of that stop to be at risk from the immediately adjacent property. (*Id*. at p. 151.) Unlike plaintiff Bonanno, the Tovar plaintiffs were not users of the MTA property or of MTA facilities. Neither is the degree of control the MTA had over the location of its facilities comparable to that of the CCCTA, which could control the location of its bus stop and could move or eliminate it so as not to expose users to hazards on adjacent property. (*Id*. at pp. 152, 154.) *Bonanno* relied on a second principle, "that a physical condition of the public property that increases the risk of injury from third party conduct may be a 'dangerous condition' under the statutes." (*Id*. at p. 154, italics omitted.) No feature of the MTA's property increased or intensified the danger to users of its property from third party conduct. (*Id*. at p. 155.) *Bonanno* does not establish that the MTA's tracks were dangerous because a dangerous condition existed on adjacent property owned by the City.

The trial court properly granted nonsuit as to the cause of action for dangerous condition of public property.

D. *Conclusion*

The order granting the MTA's motion for nonsuit as to negligence is reversed. The order granting the MTA's motion for nonsuit as to dangerous condition of public property is affirmed.

## DISPOSITION

The judgment as to the City of Los Angeles is reversed. The order granting nonsuit to the MTA for negligence is reversed. The order granting nonsuit to the MTA for dangerous condition of public property is affirmed. The parties are ordered to bear their own costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.