California Rules of Court, rule 8.1115, restricts citation of unpublished opinions in California courts.

Court of Appeal, Fourth District, Division 1, California.
Marco PAREDES et al., Plaintiffs and Appellants,
v.
STATE of California, Defendant and Respondent.

No. D049707.

2008 WL 384636

(Super.Ct.No. GIC853112).

Feb. 14, 2008.

APPEAL from a judgment and postjudgment order of the Superior Court of San Diego County, John S. Meyer, Judge. Affirmed.

Thomas F. Friedberg, Friedberg & Bunge, San Diego, CA, for Plaintiff and Appellant.
Richard Dwight Heinrich, CalTrans/Legal Div., San Diego, CA, for Defendant and Respondent.
O'ROURKE, J.
*1 Plaintiffs Marco Paredes and Cynthia Lizarraga appeal from a judgment in favor of defendant State of California, Department of Transportation (State or Caltrans) and postjudgment order denying them a new trial and judgment notwithstanding the verdict (JNOV) on plaintiffs' complaint for wrongful death and personal injury alleging a dangerous condition of public property (Gov.Code, § 835).FN1 Paredes was injured and his two daughters killed when Paredes lost control of his vehicle in heavy rain, after which the vehicle slid down an embankment and struck a eucalyptus tree. The jury returned a verdict finding the property was in dangerous condition at the time of the accident and was a substantial cause of Paredes's injury and the death of his children, but State did not have actual or constructive notice of the condition in sufficient time before the incident to protect against it. The jury also found the dangerous condition was not caused by a negligent or wrongful act or omission of a State employee acting within the scope of employment.

FN1. All statutory references are to the Government Code unless otherwise indicated.

Plaintiffs' sole contention on appeal is that the verdict is contrary to undisputed evidence that Caltrans employees affirmatively created the dangerous condition by creating the slope and planting eucalyptus trees

on the slope, demonstrating negligence per se, as well as notice. They assert the jury's findings as to creation of the dangerous condition as well as actual and constructive notice lack substantial evidence, requiring reversal and a new trial. We affirm the judgment and postjudgment order.

FACTUAL AND PROCEDURAL BACKGROUND

At about 11:00 a.m. on January 7, 2005, Paredes was driving in the number three lane southbound on Interstate 805 (I-805) in heavy rain, and was gradually merging into the number four lane when he suddenly lost control of his vehicle. At the time, he was traveling about 50 to 60 miles per hour similar to other cars in the road. His car spun onto the shoulder just north of the Main Street on-ramp and down an embankment, rotating counterclockwise so that the rear of the car hit a eucalyptus tree (the accident tree). Paredes was injured and his 9 and 6-year-old daughters, who were restrained in the front and back seats, died from their injuries. A California Highway Patrol officer who appeared at the accident scene described Paredes's right rear tire as “bald” with “minimal tread” and the left rear tire as “a little better.”

Paredes and his then estranged wife Lizarraga sued State alleging causes of action for “wrongful death” and “personal injury.” They alleged that State, through Caltrans and other governmental entities, owned, operated, maintained, possessed, repaired, and otherwise controlled the I-805 at or near the Main Street undercrossing, which was a dangerous condition of which State had actual and/or constructive notice. In particular, they alleged the referenced public property was in a dangerous condition due to (1) inadequate drainage on the roadway and lack of median inlets to collect drainage and (2) failure to place a guardrail as required by specified provisions of a Caltrans traffic manual in an area where there was a fixed object accessible to traffic within nine meters of the traveled way, and/or rows of trees with trunks 150 millimeters or greater in diameter and spaced less than 15 meters apart.

*2 The matter proceeded to a jury trial. Plaintiffs presented registered civil engineer Dale Dunlap, who testified that in bid specifications for the landscaping project at the site (referred to at trial as the “special provisions”), State instructed contractors that trees “shall not be planted within 30 feet of the traveled way except behind guardrailing.” According to Dunlap, the traveled way necessarily included freeway on-ramps because the speeds at the end of the ramp match freeway speeds. Dunlap testified the accident site in general and particularly the tree Paredes struck were not in conformance with the State's rule, which he interpreted as mandatory, because the accident tree was less than 30 feet from the on-ramp and the southernmost tree in the area (not the accident tree) was only just over 28 feet from the traveled way.FN2Dunlap interpreted site plans stamped in 1986 as telling him that whoever placed the stamp, whether a

Caltrans employee or otherwise, verified the site conditions in place as of 1986, including the location of trees placed closer than 30 feet from the traveled way. He testified that the accident tree and the southernmost tree in the area should never have been planted, and in his opinion, those trees were in direct violation of Caltrans's instructions to contractors. He also stated that Caltrans inspectors would have known of the violation if they had done their job, and that they also violated the requirements contained in the Caltrans traffic manual.

FN2. Dunlap testified that the accident tree was 31 feet, 11 inches from the edge of the traveled way of the main freeway line, and 24 feet, two inches from the edge of the traveled way of the on-ramp.

Dunlap described an accident that had occurred at the same location in March 2000, involving a Volkswagen that swerved to avoid a fallen wheelbarrow and went off the road, striking a tree 45 feet from the traveled way. That accident, as well as Paredes's accident, was logged in the Department of Transportation's accident data base (Traffic Accident Surveillance and Analysis System, or TASAS). The TASAS database showed neither accident involved speeding. Based on his inspection of the site, Dunlap concluded there was no drainage issue that may have caused the accident. According to Dunlap, the low incidence of accidents in the area in relation to the number of cars traveling that section of freeway did not matter from a sound engineering point of view, because professionals nevertheless had a duty to provide a safe facility for the motoring public.

On cross-examination, Dunlap agreed the 2000 accident did not present a problem with the 30-foot Caltrans rule because the remnants of the tree struck by the Volkswagen was about 42 feet from the traveled way, and between 31 and 32 feet from the on-ramp. However, he testified Caltrans would know “something happened there,” and it was his personal belief that the tree was within the reach of traffic. As for the accident tree, Dunlap conceded it was located 31 feet, 11 inches from the traveled way of the mainline for the I-805, and he agreed Paredes came from the main line of the I-805, not the on-ramp. He conceded there were no other accidents involving that tree. Dunlap also conceded that based on the slope of the embankment in the accident area, a guardrail would result in a more severe accident than a car traveling down the embankment.

*3 Erwin Gojuangco, a senior transportation engineer with Caltrans, testified about the concept of a clear zone, reflecting a principle that fixed immovable objects-including trees with trunks eight inches or greater-should not be within a clear recovery area. All of the trees along the slope in the accident area fell into the category of fixed, immovable objects. Although standards at the time of trial provided that a clear zone was measured nine meters (30 feet) from the traveled way of the on-ramp, those were not the standards at the time of the accident. Gojuangco testified there were

reasons why Caltrans might not remove existing trees along a freeway: if they were outside the clear recovery zone or a single tree within the zone that was planted before the standards changed. The engineers looked to accident history involving the trees to make that determination. He acknowledged the existence of a tree removal project that suggested trees should be removed from clear recovery zones, but the project had not been funded in his time and without funds, there was no way to feasibly remove trees. That project was not mandatory. Gojuangco testified that his staff advised him that three of the trees in the accident site, including the accident tree, were outside 30 feet of the traveled mainline of I-805.

Maurice Bronstad testified as a consulting engineer in the field of highway safety, research and development, including traffic barrier design and development. He explained that a non-recoverable slope was a slope having a steeper than one-to-four ratio, on which a car traveling down was not expected to recover before it reached the slope's bottom. According to Bronstad, all of the slopes along the tree line on the accident site were non-recoverable slopes. Bronstad interpreted the Caltrans traffic manual in effect at the time of Paredes's accident to state that a guardrail was required to be placed where fixed objects were located outside 30 feet of the traveled way when those objects occupy an otherwise clear recovery area and are reachable by traffic. He testified the concept of an “equal severity curve” (referenced in a Caltrans manual in effect at the time of Paredes's accident) had nothing to do with placing trees within the clear recovery zone, because that concept was based solely on embankment slope and height. According to Bronstad, the tree struck by Paredes was occupying an otherwise clear recovery area and reachable by traffic; absent the tree, the vehicle would have continued down the slope and had an opportunity to recover. Under federal standards put out by the American Association of State Highways and Transportation Officials (AASHTO), which Bronstad conceded were not mandatory on State in designing or maintaining the highway system, the clear zone in that specific area where the accident tree was planted was 100 feet.

In Bronstad's opinion, none of the trees on the slope should have been planted because as they grew, they exceeded the Caltrans fixed object criteria. Bronstad also opined that the eucalyptus tree struck by Paredes was a dangerous condition because it was a fixed object in a non-recoverable clear zone. The area of roadway could have been made safe by removing or shielding the trees. Also, a guardrail would have made a safer scenario for people going off the roadway, as opposed to heading down the embankment and hitting the trees. Bronstad admitted he had no facts indicating Caltrans had known the southernmost tree in the accident site was within 30 feet of the mainline and he did not believe Caltrans would have guardrailed the one tree had they known about it. He also admitted that according to Caltrans's equal

severity curve, no guardrailing was needed for the embankment. He agreed if all of the trees were more than 30 feet from the mainline on the traveled way, the site would comply with Caltrans's equal severity standard. Bronstad believed the accident site was a dangerous condition of the roadway notwithstanding the fact that the Caltrans traffic manual set out only guidelines.

*4 Landscape architect Tom Ham designed the planting and irrigation plan, and signed and stamped all of the plan sheets for the southbound I-805 project including the subject area. He chose two species of eucalyptus trees for the project, which were planted on the slope in approximately 1979 or 1980. The trees would likely have been in one to five gallon containers, with trunks of less than one-half in or three-quarters of an inch diameter. At maturity, those trees could have trunks between 18 and 30 inches in diameter, depending on the species. According to Ham, office engineers reviewed the specifications for the project and his signature meant everyone was satisfied and the project was ready to advertise for bidding. He deferred to Caltrans transportation and highway engineers to interpret the traffic manual. Ham understood that for purposes of the Caltrans provision, the 30-foot distance was measured from the solid white line on the outermost lane of the traveled way. Ham testified there were times he was asked generally whether trees should be removed for safety reasons, and he would authorize the removal. Ham also testified that the tree removal project was never funded and never implemented.

Plaintiffs presented experts to testify about different accident scenarios. Biomechanics engineer Peter Francis explained that had a guardrail been in place at the location, the collision would have resulted in a relatively trivial front end accident with a low degree of risk with respect to mortality. Accident reconstruction expert Ronald Carr testified similarly: if Paredes's car had hit a guardrail it would have hit at 13 to 16 miles per hour, and the presence of guardrail would have resulted in a less severe impact than hitting the tree. In Carr's opinion, the accident happened as a result of driver error and wet conditions; Paredes encountered a little more water in the number four lane, steered away from the resulting movement to his car and applied his brakes after he started to rotate, resulting in the car going down the embankment. Carr agreed on cross-examination that a car was more likely to hydroplane at a higher speed.

State presented licensed traffic and civil engineer Ed Nahabedian, who testified that the freeway was in excellent condition and did not create any substantial risk to motorists exercising due care. He explained that establishing a dangerous condition there required some showing of accident history, and there was only one accident at the subject location in the past ten years apart from the present accident. Nahabedian pointed out the TASAS database for the three or four tenth of a mile stretch

including the accident site showed only two accidents: the subject accident, which was the sole accident occurring during wet conditions, and the March 2000 accident, which occurred in dry conditions. That actual accident rate was “way below” the expected accident rate for an eight lane freeway in an urbanized area, and there was no indication that the location was on a high accident concentration location. Based on the magnitude of traffic traveled on the segment of roadway in five and ten years, he testified there was no problem for motorists to navigate through the highway under any conditions in a safe manner.

*5 Nahabedian reviewed the Caltrans traffic manual in effect at the time of the accident, explaining that the equal severity curve chart within it would be used by an engineer to determine whether a guardrail should be placed based upon accident history, traffic volume, road clearance zone and site review. At the time the trees were planted in 1980, however, Caltrans was using the clear zone concept, which required placing trees 30 feet beyond the traveled way of the mainline. Nahabedian testified the mainline was different from on-ramps, which the vehicle code classified as highways. The clear recovery zone for highways was 20 feet. Nahabedian testified that it was proper to place trees on an embankment slope as long as they were more than 30 feet from the traveled way of the mainline, and as long as it did not meet the warrants for guardrail installation. Based on the grade of the slope at the tree's location, the accident site did not meet the criteria for placement of a guardrail, because an accident with a guardrail present would be more severe than the car traveling down the embankment. Nor was there a row of trees at the accident site falling within the guardrail provisions of the Caltrans traffic manual, because the trees there (with the exception of one location) were planted more than 50 feet apart. Nahabedian opined, based on his experience and traffic data, as well as the guidelines in place at the time the freeway was built and the trees installed, that a guardrail was not needed at the accident location.

Accident reconstruction expert Clayton Campbell testified that the accident was caused by Paredes's speed, the rain, and the fact his right rear tire was only one thirty-second of an inch of tread. Although that tread depth complied with California law, Campbell testified it was extremely unsafe to drive with a tire in that condition, and when Paredes began his turn at approximately 51 miles per hour, that tire lost friction in the wet conditions, causing the vehicle to spin.

The jury returned a verdict with findings that the public property was in a dangerous condition at the time of the accident, and the dangerous condition was a substantial cause of injury to Paredes and the death of his daughters.FN3 However, the jury found State did not have actual or constructive notice of the dangerous condition, and the dangerous condition was not created by a negligent or wrongful act or omission of a State employee acting within the

scope of employment. Based upon these findings, the jury reached none of the remaining questions on the verdict form.

FN3. The questions answered by the jury appeared on the verdict form as follows:

“Question No. 1: Was the public property in question in a dangerous condition at the time of the accident in question?

“Answer ‘yes' or ‘no[.’]

“Answer: Yes

“If you answer Question No. 1 ‘no[,’] please sign and return this verdict. If you answer Question No. 1 ‘yes[,’] then answer Question No. 2.

“Question No. 2: Was the dangerous condition of the public property a substantial cause of injury to Marco Paredes and the death of Cynthia Paredes-Lizarraga and Ingrid Paredes-Lizarraga?

“Answer ‘yes' or ‘no[.’]

“Answer: Yes

“If you answer Question No. 2 ‘no[,’] please sign and return this verdict. If you answer Question No. 2 ‘yes[,’] then answer Question No. 3.

“Question No. 3: Did defendant have actual or constructive notice of the dangerous condition a sufficient time prior to the accident within which measures could have been taken to protect against the dangerous condition?

“Answer ‘yes' or ‘no[.’]

“Answer: No

“Question No. 4: Was the dangerous condition of the property created by a negligent or wrongful act or omission of an employee of defendant acting within the scope of employment?

“Answer ‘yes' or ‘no[.’]

“Answer: No

“If you answer both Questions 3 and 4 ‘no[,’] please sign and return this verdict.

“Dated: August 18, 2006 [Foreperson]”

Appellants moved for JNOV or alternatively for a new trial. They argued JNOV was warranted because there was no substantial evidence to support the jury's findings as to notice and the creation of the dangerous condition; that the evidence was “overwhelming” that Caltrans created the condition by designing and building a non-recoverable slope and later planting trees that would grow to become fixed immovable objects on the slope. They maintained the evidence showed Caltrans had actual notice of the dangerous condition by virtue of its conducting the actual planting in 1979, undertaking field surveys in 1986 and its knowledge of the March 2000 accident. Alternatively, they argued they were entitled to a new trial on grounds the jury's inconsistent findings on notice and creation of the dangerous condition constituted “irregularity in the proceedings,” and also that the verdict was “against law” as contrary to CACI No. 1100, the jury instruction enumerating the elements of liability under section 835. The trial court denied the motion.

*6 This appeal followed.

DISCUSSION

I. Standard of Review

Plaintiffs appeal from both the judgment and the trial court's order denying JNOV and a new trial. While this court generally reviews orders concerning new trials for abuse of discretion (Howard v. Thrifty Drug & Disc. Stores (1995) 10 Cal.4th 424, 443;People v. Davis (1995) 10 Cal.4th 463, 524), any determination underlying the order is scrutinized under the test appropriate for that determination. (City of San Diego v. D.R. Horton San Diego Holding Company, Inc. (2005) 126 Cal.App.4th 668, 678.)

As for the court's denial of plaintiffs' JNOV motion, "[w]ell-settled standards govern ...: 'When presented with a motion for JNOV, the trial court cannot weigh the evidence [citation], or judge the credibility of witnesses. [Citation.] If the evidence is conflicting or if several reasonable inferences may be drawn, the motion for judgment notwithstanding the verdict should be denied. [Citations.] A motion for [JNOV] of a jury may properly be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom in support of the verdict, the motion should be denied.' " (Osborn v. Irwin Mem'l Blood Bank (1992) 5 Cal.App.4th 234, 258-259;Ajaxo, Inc. v. E*Trade Group, Inc. (2005) 135 Cal.App.4th 21, 49.) The reviewing court applies a similar standard in reviewing the trial court's denial of a motion for JNOV: it determines whether "any substantial evidence-contradicted or uncontradicted-supports the jury's conclusion." (Sweatman v. Department of Veterans Affairs (2001) 25 Cal.4th 62, 68;Shapiro v. Prudential Property & Casualty Co. (1997) 52 Cal.App.4th 722, 730.) Thus, " ' "the power of an appellate court begins and ends with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact." [Citations.] [¶] "It is well established that a reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact." ' " (Ajaxo, at pp. 49-50, quoting Foreman & Clark Corp. v. Fallon (1971) 3 Cal.3d 875, 881.)

II. Contentions

Plaintiffs contend the evidence cannot support the jury's findings that State did not have notice of the dangerous condition and the dangerous condition was not created by a wrongful or negligent act of a State employee acting within the scope of his or her employment. They argue that under Brown v. Poway Unified School Dist. (1993) 4 Cal.4th 820(Brown) and Pritchard v. Sully-Miller Contracting Co. (1960) 178 Cal.App.2d 246(Pritchard), the creation of a dangerous condition by a public employee is negligent or wrongful per se under section 835. They further argue once it is established that a governmental entity has created a dangerous condition, there is no further need to prove that entity had notice of the condition to impose liability under section 835;

they point to Brown's holding that "a public agency [is] presumed to have notice of a dangerous condition of property that was the 'natural and probable consequence' of the entity's own work."(Brown, 4 Cal.4th at p. 834, quoting Fackrell v. City of San Diego (1945) 26 Cal.2d 196, 203, 206, italics added.) FN4

FN4. The issues raised by these arguments are the same as those presented in a case now pending before the California Supreme Court. (Metcalf v. County of San Joaquin, review granted September 20, 2006, S144831.)

*7 State responds that plaintiffs' argument is based on unfounded assumptions as to the jury's thought process and that, in any event, substantial evidence-including Nahabedian's testimony as to State's compliance with the guidelines of the Caltrans traffic manual and accident history at the site-supports the jury's findings. State further points out that plaintiffs agreed to the verdict form and jury instructions, which required the jury to find that a wrongful or negligent act by State created the dangerous condition and that the State had actual or constructive notice, thus inviting any error and preventing them from attacking the judgment.

As we explain, we decline to apply the doctrine of invited error where the record is silent as to plaintiffs' counsel's conduct in seeking certain jury instructions or preparing the special verdict form. Nevertheless, we reject plaintiffs' analysis of public entity liability under section 835 and conclude substantial evidence supports the jury's findings that State did not wrongfully or negligently create a dangerous condition or have actual or constructive notice thereof within the meaning of the statute.

III. Invited Error

The doctrine of invited error prevents a party from asserting an error as grounds for reversal when that party induced the commission of the error. (Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn. (1992) 4 Cal.App.4th 1538, 1555-1556; see also Mesecher v. County of San Diego (1992) 9 Cal.App.4th 1677, 1685-1686.) "At bottom, the doctrine rests on the purpose of the principle, which is to prevent a party from misleading the trial court and then profiting therefrom in the appellate court."(Norgart v. Upjohn Co. (1999) 21 Cal.4th 383, 403.) Under this doctrine, "[a]n appellant cannot submit a matter for determination by the lower court and then contend on appeal that the matter was beyond the scope of the issues."(Horsemen's, supra, 4 Cal.App .4th at p. 1555; see also Estate of Armstrong (1966) 241 Cal.App.2d 1, 7;9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 384, p. 436.) Similarly, "an appellant cannot complain of an erroneous instruction where he requested the instruction given or one substantially similar to it."(Horsemen's, at p. 1555.)

In urging us to reject plaintiffs' claims on the grounds of invited error, State asserts plaintiffs "agreed that the jury be instructed under CACI No. 1101

and CACI No. 1103 ... [and] further agreed to the form of special verdict that was submitted to the jury, a form that was entirely consistent with the allegations of [plaintiffs'] complaint, the agreed jury instructions, and established case law.” State does not cite to the record demonstrating plaintiffs' agreements, and absent a record reference to support its factual assertions, we may disregard them. (Kendall v. Barker (1988) 197 Cal.App.3d 619, 625 [“ ‘Statements of alleged fact in the briefs on appeal which are not contained in the record and were never called to the attention of the trial court will be disregarded by this court on appeal’ “].) However, our review of the record shows the sole indication is that State submitted the special verdict form, to which plaintiffs acquiesced.

*8 Under the circumstances, we cannot clearly attribute the form of the verdict to plaintiffs. Thus, we will not apply the invited error doctrine to bar them from arguing insufficient evidence supports the jury's verdicts as to notice and creation of the dangerous condition. (Accord, Lambert v. General Motors (1998) 67 Cal.App.4th 1179, 1183 [court declined to find invited error because record did not suggest defendant knowingly created or foresaw problem that might arise].)

IV. The Jury's Findings Are Supported by Substantial Evidence

A. Liability for Negligent or Wrongful Creation of Dangerous Condition of Public Property under Section 835, Subdivision (a)

We begin with plaintiffs' argument based on Brown, supra, 4 Cal.4th 820 and its analysis of section 835, subdivision (a), which serves as the premise for their sufficiency of the evidence challenge. We reject the assertion that Brown supports the proposition that evidence a senior level public employee created a dangerous condition is per se evidence of that employee's negligent or wrongful conduct requiring a jury to find liability under section 835, subdivision (a).

Section 835 states: “Except as provided by 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 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.”

In Brown, the plaintiff slipped on a fresh piece of lunchmeat on school district property. (Brown, supra, 4 Cal.4th at pp. 823-824.) The defendant school district moved for summary judgment on grounds there

was no evidence showing its employee had created an allegedly dangerous condition; the plaintiff opposed in part by arguing the res ipsa loquitur doctrine permitted a trier of fact to presume negligence. (Id. at pp. 824-825.)Following this court's reversal of the summary judgment in defendant's favor, the California Supreme Court reviewed the question of whether the plaintiff could use res ipsa loquitur to establish a prima facie case of negligence under section 835. (Brown, supra, 4 Cal.4th at pp. 828-829.) Doing so, it interpreted sections 835 and 830.5,FN5 which it found ambiguous on the question, and reviewed those statutes' legislative history. (Id. at p. 830.)

FN5.Section 830.5 provides in part: “Except where the doctrine of res ipsa loquitur is applicable, the happening of the accident which results in the injury is not in and of itself evidence that public property was in a dangerous condition.”(§ 830.5, subd. (a).)

Though the court concluded the res ipsa loquitur doctrine could be used to establish some of the conditions for liability, it rejected its use for holding a public entity liable under section 835, subdivision (a), requiring that the public employee's negligent or wrongful act or omission create the dangerous condition. (Brown, supra, 4 Cal.4th at pp. 832, 836.) It explained, “[t]he res ipsa loquitur presumption, under California law, is that ‘a proximate cause of the occurrence was some negligent conduct on the part of the defendant.... ‘[Citation.] Thus, if the Legislature had intended to hold a public entity liable for all types of negligent conduct by public employees, we would have little hesitation in holding that res ipsa loquitur satisfied the statutory conditions of liability. However, it appears that the Legislature intended to impose liability on public entities only in a narrow set of cases. The narrowing of liability is accomplished by the requirement that an employee of the public entity have ‘created’ the dangerous condition. (§ 835, subd. (a).) [¶] The intent of section 835 is set out in the legislative committee comment, which repeats the relevant comments of the [Law Revision] Commission. The comment explains that section 835 ‘is similar to the Public Liability Act of 1923, under which cities, counties and school districts [were] liable for injuries proximately caused by the dangerous conditions of their property [¶] Although there is no provision similar to subdivision (a) in [the former act], the courts have held that entities are liable under that act for dangerous conditions created by the negligence or wrongful acts of their employees. Pritchard [, supra, 178 Cal.App.2d 246]...’ “ (Brown, supra, 4 Cal.4th at p. 833, quoting Sen. committee com. to § 835, reprinted at 32 West's Ann. Gov.Code, supra, p. 301 and citing Recommendation Relating to Sovereign Immunity, No. 1, Tort Liability of Public Entities and Public Employees, 4 Cal. Law Revision Com. Rep. (Jan 1963) at p. 854.)The court in Brown concluded by this language that the Legislature expressly intended to codify the “ ‘well established’ “ rule discussed in Pritchard and other authority that “a public agency was presumed to have

notice of a dangerous condition of property that was the ‘natural and probable consequence’ of the entity's own work.” (Brown, at p. 834.)

*9 The court also found its conclusion supported by the commission's recommendation on governmental tort liability: “ ‘The dangerous conditions statute should provide specifically that a governmental entity is liable for dangerous conditions of property created by the negligent or wrongful act of an employee acting within the scope of his employment even if no showing is made that the entity had any other notice of the existence of the condition or an opportunity to make repairs or take precautions against injury. The courts have construed the existing Public Liability Law as making public entities liable for negligently created defects.’ 7D' (Brown, supra, 4 Cal.4th at p. 834, quoting Recommendation Relating to Sovereign Immunity, supra, 4 Cal. Law Revision Com. Rep. at p. 824.)

The Brown court explained that decisions applying section 835, subdivision (a), reflect “cases in which public employees actively created dangerous conditions under circumstances that would clearly justify a presumption of notice on the part of a public employer.... [¶] In cases such as these, a public employee's involvement in creating the dangerous condition provides a basis for presuming that the public entity has notice of the condition. This is because a public entity is presumed to have knowledge of a dangerous condition that is the ‘natural and probable consequence’ of its work.”(Brown, supra, 4 Cal.4th at p. 837, fn. omitted.)

In Pritchard, relied upon by Brown, the jury returned a verdict against the City of Long Beach in a case involving a lag in the timing of traffic signals created by city employees, resulting in a collision. (Pritchard, 178 Cal.App.2d at pp. 248-249.) The case was decided under the Public Liability Act of 1923 (then codified in section 53051),FN6 under which the “fact that the city had deliberately created the dangerous condition dispensed with the necessity of the notice contemplated by section 53051....”(Pritchard, at p. 254.)In upholding the verdict against the city, the court explained: “The elements of notice and failure to exercise reasonable diligence ordinarily are essential to show culpability on the part of the city but where it has itself created the dangerous condition it is per se culpable and notice, knowledge and time for correction have become false quantities in the problem of liability.”(Id. at p. 256.)

FN6.Pritchard quoted the pertinent provision of the Public Liability Act of 1923: “ ‘A local agency is liable for injuries to persons and property resulting from the dangerous or defective condition of public property if the legislative body, board or person authorized to remedy that condition: (a) Had knowledge or notice of the defective or dangerous condition. (b) For a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition.’ “

(Pritchard, supra, 178 Cal.App .2d at p. 249.)

We fail to see anything in Brown's holding dispensing with the express requirement in section 835, subdivision (a) that a public employee commit a “negligent or wrongful act or omission” in creating a dangerous condition. Indeed, Brown repeatedly references legislative commentary indicating that under that statute, negligence or wrongdoing on the part of the public employee is a prerequisite for holding that public entity liable. While Brown makes clear a public entity's negligent or wrongful creation of a dangerous condition dispenses with the requirement of proving notice under section 835, subdivision (b), it does not speak to the elements of subdivision (a) concerning the particular conduct creating the dangerous condition. Nor do we read Pritchard, decided under a predecessor statute, as supporting the per se rule advanced by plaintiffs. Applying Pritchard in this manner would compel a court interpreting 835, subdivision (a) to ignore its plain language, and would render the phrase “negligent or wrongful” surplusage. We decline to effect such a rewriting of the statute. (California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist. (1997) 14 Cal.4th 627, 633;Reno v. Baird (1998) 18 Cal.4th 640, 658 [courts should give meaning to every word in a statute and avoid a construction rendering words surplusage].)

*10 Thus, section 835, subdivision (a) plainly requires a finding that a public entity's negligent or wrongful acts created a dangerous condition; the statute does not impose liability for mere creation of a dangerous condition. The jury in this case was instructed accordingly without objection, i.e., plaintiffs had to establish that negligent or wrongful conduct by a State employee acting within the scope of employment created the dangerous condition.FN7 We conclude substantial evidence from State's expert Nahabedian, as well as plaintiffs' own experts, supports the jury's finding that State did not act negligently or wrongfully in planting the accident tree on the slope along the accident site. Nahabedian explained that the standard applicable at the time of the planting was Caltrans's clear zone principle, which required only that trees be planted 30 feet beyond the traveled way of the I-805 mainline and 20 feet from the on-ramp. Plaintiffs' expert Dunlap agreed the accident tree was 31 feet, 11 inches from the edge of the traveled way of the I-805, and 25 feet, two inches from the edge of the traveled way of the nearby on-ramp. Plaintiffs' expert Gojuangco further explained that a fixed immovable object under the Caltrans clear zone standard was a tree having a trunk with eight inch diameters or greater. Nahabedian testified that the equal severity curve was not being used at the time Caltrans planted the trees, but in any event, a guardrail would not be required at the site of the accident tree applying the equal severity curve concept. The testimony of a single witness may be sufficient to establish substantial evidence (Jensen v. BMW of North America, Inc. (1995) 35 Cal.App.4th 112, 134), and here, the jury as the exclusive judge of

credibility was entitled to believe defendant's witnesses. (Evje v. City Title Ins. Co. (1953) 120 Cal.App.2d 488, 492 [jury is exclusive judge of credibility].)

FN7. The jury was instructed with CACI Nos. 1100 and 1103 as to the factual elements necessary to prove a dangerous condition of public property and notice. CACI No. 1100 stated in part: “To establish [plaintiff's claim that they were harmed by a dangerous condition of the State's property, plaintiffs], must prove all of the following: [¶] 1. That the State ... owned the property; [¶] 2. That the property was in a dangerous condition at the time of the incident; [¶] 3. That the dangerous condition created a reasonably foreseeable risk of the kind of incident that occurred; [¶] 4. That negligent or wrongful conduct of the State ['s] ... employee acting within the scope of this [sic] or her employment created the dangerous condition [¶] or [¶] That the State ... had notice of the dangerous condition for a long enough time to have protected against it; [¶] 5. That [plaintiffs] were harmed; and [¶] 6. That the dangerous condition was a substantial factor in causing [plaintiffs'] harm.” CACI No. 1103 stated: “[Plaintiffs] must prove that the State ... had notice of a dangerous condition before the incident occurred. To prove that there was notice, [plaintiffs] must prove: [¶] That the State ... knew of the condition and knew or should have known that it was dangerous. A public entity knows of a dangerous condition if an employee knows of the condition and reasonably should have informed the entity about it. [¶] or [¶] That the condition had existed for enough time before the incident and was so obvious that the State ... reasonably should have discovered the condition and known that it was dangerous.”These instructions were attached as Exhibit A to State's points and authorities opposing plaintiffs' motion for JNOV or new trial. The full set of jury instructions are not contained in the record, and the trial court's reading of the instructions was not reported.

The jury's findings were that the public property in question was in a dangerous condition at the time of the accident, and that the dangerous condition was not created by a negligent or wrongful act or omission of a responsible State employee. Thus, even assuming the jury concluded that the existence of the eucalyptus tree on the embankment constituted a dangerous condition of public property at the time of the accident, nevertheless, the jury plainly adopted Nahabedian's testimony that the State did not violate any Caltrans requirement when it planted the tree on the embankment in 1979 or 1980, and it reasonably concluded based on this evidence the State did not otherwise act unreasonably in planting young immature trees along the embankment. The jury was free to reject the theories of negligence or wrongdoing advanced by plaintiffs' experts.

Plaintiffs maintain that because the evidence before the jury was undisputed that Caltrans created the dangerous condition by designing and building a non-recoverable slope and

later planting trees on the slope, we must reject the jury's findings under an exception to the substantial evidence rule set forth in Hicks v. Reis (1943) 21 Cal.2d 654, 660: that the jury cannot rely upon an inference when the inference is "rebutted by clear, positive and uncontradicted evidence of such a nature that it is not subject to doubt in the minds of reasonable men."However, plaintiffs' reliance on this principle presumes that mere creation of a dangerous condition requires a finding of liability under section 835, subdivision (a), a premise that we have already rejected based on Brown and the statute's plain language. Here, it is reasonable to conclude the jury rejected the theory of negligent or wrongful creation of any dangerous condition based not on any inference, but on Nahabedian's direct testimony that the planting of the accident tree on the slope in 1980 did not violate the Caltrans clear recovery zone standards applicable at the time.

B. Actual or Constructive Notice of Dangerous Condition

*11 We further conclude that substantial evidence supports the jury's finding that State did not have actual or constructive notice of the dangerous condition.

"A public entity had 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."(§ 835.2, subd. (a).) "A public entity had 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."(§ 835.2, subd. (b).) FN8 The public entity must have had actual or constructive notice of the condition a sufficient time before the injury to have taken preventive measures. (See Cornette v. Department of Transportation (2001) 26 Cal.4th 63, 68.)

FN8. Subdivision (b) continues: "On the issue of due care, admissible evidence includes but is not limited to evidence as to: [¶] (1) Whether the existence of the condition and its dangerous character would have been discovered by an inspection system that was reasonably adequate (considering the practicability and cost of inspection weighed against the likelihood and magnitude of the potential danger to which failure to inspect would give rise) to inform the public entity whether the property was safe for use or uses for which the public entity used or intended others to use the public property and for uses that public entity actually knew others were making of the public property or adjacent property" and "(2) Whether the public entity maintained and operated such an inspection system with due care and did not discover the condition."(§ 835.2, subd. (b).)

Here, it was undisputed that State employees planted the accident tree as well as other trees on the embankment. Brown makes clear that

“the notice requirements of [section 835.2,] subdivision (b) do not apply to cases brought under subdivision (a) [where the public entity is alleged to have created the condition].” (Brown, supra, 4 Cal.4th at pp. 835-836.) Plaintiffs concede that liability under subdivision (b) is normally reserved for third-party created conditions. Nevertheless, plaintiffs contend the notice requirements were met here in view of undisputed evidence that Caltrans conceived of the landscaping design and installed the trees, assertedly imparting actual notice, and “planted trees that it knew would become, and which in fact became, fixed immovable objects unshielded from errant vehicles,” assertedly imparting constructive notice of the dangerous condition.

We disagree. Plaintiffs' theory of absolute liability under section 835.2, subdivision (b) based on State's actions in planting the trees on the embankment finds no support in Brown or the other cases in which knowledge of a dangerous condition is presumed. Brown emphasized that in section 835, the Legislature intended to adopt Pritchard's rule that “a public entity is liable for a dangerous condition created by an employee under circumstances in which the employee's involvement makes it fair to presume that the entity had notice of the condition.” (Brown, supra, 4 Cal.4th at p. 834, italics added.) Brown refers to cases in which city employees marked a crosswalk with wet paint and failed to barricade or place warn signs on the area (Watson v. City of Alameda (1933) 219 Cal. 331), created a roadway with a steep descending grade (Bigelow v. City of Ontario (1940) 37 Cal.App.2d 198), painted a misleading center line on a road (Sandstoe v. Atchison, T. & S.F. Ry. Co.(1938) 28 Cal.App.2d 215), or dug and left a hole in a street (Wise v. City of Los Angeles (1935) 9 Cal.App.2d 364). (Brown, supra, 4 Cal.4th at p. 834, fn. 6.) In these cases, the condition was dangerous upon creation, and it was fair to presume the public entity had actual notice of the condition which was dangerous at that time.

*12 We decline to hold on this record that the jury's finding that the public property was in a dangerous condition at the time of the accident required it to also find the State had notice of that condition. On appeal, we are required to draw all inferences in favor of the judgment, ruling, order or verdict, and all intendments and presumptions are indulged to support the judgment on matters to which the record is silent. (Jonkey v. Carignan Const. Co. (2006) 139 Cal.App.4th 20, 25;Ketchum v. Moses (2001) 24 Cal.4th 1122, 1140.) Here, the jury did not specify its theory of dangerous condition of public property, and in this way, its finding was tantamount to a general verdict. (Accord, Jonkey v. Carignan Const. Co., at p. 26, [jury did not give special finding on what negligence was found by jury, and thus the jury's finding was tantamount to a general verdict causing the reviewing court to note, “As long as single theory of negligence is lawfully rebutted on a lack of causation theory, it matters not that another theory of negligence is not so rebutted”].) On the evidence here, the

jury could conclude that the planting of the young eucalyptus tree on the embankment was not dangerous in 1979 or 1980 when that project was completed, but became dangerous only when its trunk grew to a larger diameter. Thus, while State may have had notice of the physical condition it had created-the presence of trees on the slope-the jury was entitled to conclude it did not have notice that the condition was dangerous. Substantial evidence supports such a conclusion. Nahabedian confirmed that the incidence of accidents at the subject location was well below that expected given the huge traffic volume. The jury was entitled to conclude that the occurrence of one accident in ten years in which a car swerved off the road and hit a tree more than 40 feet down the slope would not alert the State of the need to remove the trees, or take any other measures to avoid accidents at the location.

DISPOSITION

The judgment and postjudgment order are affirmed.