

No. S144831

Third District Court of Appeal, Case No. C047734

**IN THE SUPREME COURT OF THE STATE OF
CALIFORNIA**

THOMAS METCALF, a minor, etc., et al.,
Plaintiff and Appellant,

vs.

COUNTY OF SAN JOAQUIN, et al.,
Defendants and Respondents,

APPELLANT'S OPENING BRIEF ON THE MERITS

On Appeal from the Superior Court of San Joaquin County
Case No. CV018106
Honorable Elizabeth Humphreys

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INTRODUCTION

It is bedrock California law that government agency tort liability is based solely on the statutes in the Tort Claims Act and not on common law negligence. (*Brown v. Poway Unified School District* (1993) 4 Cal.4th 820, 829 [*“Brown”*].) This does not mean, however, that the elements of common law negligence do not intersect and overlap the statutory scheme. The present case calls upon this Court to determine the nature and extent of the statutory/common law interface in the often-litigated area of government agency liability for dangerous conditions of public property. It raises two central issues:

- When the senior government employees responsible for a public highway deliberately design, create, and maintain a dangerous condition on the highway, are those employees per se “negligent” within the meaning of Government Code section 835(a)¹ so as to give rise to their public entity-employer’s tort liability for damages?
- In the circumstances described in the previous question, did the public entity have “actual” or “constructive” notice of the

¹ All statutory references are to the Government Code unless otherwise stated.

dangerous condition within the meaning of section 835(b) so as to satisfy that alternative element of liability?

Plaintiff and Appellant Tom Metcalf submits that these questions require affirmative answers because of the statutory language of the Tort Claims Act, its history, and its meaning as described by this Court in *Brown*, which observed that when a government agency ***“itself created the dangerous condition it is per se culpable and notice”*** and ***“knowledge and time for correction [] become false quantities in the problem of liability.”*** (*Brown, supra*, 4 Cal.4th at p. 834, citing *Pritchard v. Sully-Miller Contracting Co.* (1960) 178 Cal.App.2d 246, 256.)² As this Court added: ***“[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.”*** (*Id.*)

When the Court of Appeal answered these questions in the negative, it assumed that the words “negligence” and “notice” used in the statute carried the same meaning as in the common law of negligence giving rise to premises liability. According to the court, the jury was permitted to reject

² All emphasis in this brief, whether in bold, italics, or underlining, and whether in text or quotations, is added unless otherwise indicated.

Appellant Tom Metcalf's³ case, notwithstanding San Joaquin County's⁴ admitted creation of a dangerous condition on its property, because negligence and notice were inherent questions of fact imbedded in the statutory scheme. (Opinion, pp. 20-26.)

As Tom will show, the court committed three fundamental errors in reaching this conclusion. *First*, the Court disregarded plain language in the multi-statute scheme revealing that the statutory "negligence" and "notice" in section 835 were not equivalent to their common law counterparts, but carried special meanings. *Second*, it disregarded the legislative history of section 835, as described in part by the Court in *Brown* and revealed in other sources, disclosing that a government agency's knowing and deliberate creation and maintenance of a dangerous condition on its property is per se "negligent" and "wrongful" within the meaning of section 835. *Third*, the court misstated and ignored undisputed evidence in the record that the County's design and creation of a highway intersection violated federal standards, a state agency permit, and the County's own safety standards. Even at common law, this unrebutted and unchallenged evidence would have signified negligence.

³ Appellant Tom Metcalf will be referred to as "Appellant" or "Tom."

⁴ Respondent San Joaquin County will be referred to as "the County."

Tom Metcalf does not deny that there are issues of fact that must be resolved in his favor before he can recover from San Joaquin County on his claim that it created and maintained a dangerous condition on its property. But the material disputable issues were either resolved in his favor by the jury (i.e., control of property, a dangerous condition, and a reasonably foreseeable accident) or not reached at all (causation, balance of risk and benefit, comparative fault).⁵ The jury was not permitted to reject a case of deliberate creation of a dangerous condition on public property by the responsible senior public employee on the sole ground that he was not “negligent” and his government-agency employer did not have sufficient “notice” of the condition.

In upholding a judgment in the County’s favor notwithstanding its “negligent” and “wrongful” conduct and 60-years’ worth of notice of a dangerous condition in its highway intersection, the Court of Appeal prematurely terminated Tom’s case before key liability issues could be resolved. Its judgment should be reversed with instructions to grant Tom a limited new trial addressing the remaining issues.

⁵ See Judgment or Special Verdict, 3 CT 657-660; attached as Exhibit A to this brief. The record on appeal consists of a Reporter’s Transcript (“RT”) and a Clerk’s Transcript (“CT”). Each is preceded by the volume number and proceeded by the page number.

STATEMENT OF FACTS

As required by this Court's established policy, Tom brought to the Court of Appeal's attention in his Petition for Rehearing certain misstatements and omissions in the Court of Appeal's opinion. (Cal. Rules of Court, rule 8.500(c)(2).) Tom's petition was denied on June 8, 2006, without modification of the opinion. Therefore, he will continue to rely on his more complete and accurate statement of the facts as adduced by the evidence and the record on appeal, just as he did in his petition for review.

A. The Intersection and the Accident

On October 5, 2001, Tom Metcalf drove a fellow classmate, Raquel Rodriguez, home from a high school football game. He took the Arch Road exit off southbound Highway 99 and drove westbound on Sperry Avenue. (Opinion, p. 2; 1 RT 139:16-140:6; 140:19-143:11.)

Sperry Avenue ends at McKinley Avenue, forming a T-intersection that requires westbound drivers on Sperry to turn either right or left on McKinley. (1 RT 143:6-15.) Just before the intersection, Sperry rises in elevation to a stop sign and railroad crossing. It then immediately descends from the crossing into McKinley at a right angle without a stop, yield, or other warning sign. (1 RT 144-145; 164-165.) The speed limits on Sperry

and McKinley at the point of the intersection were both 55 miles per hour.
(1 RT 107:17-108:14.)

Before the railroad tracks, the road signs on the east side of Sperry Road include a stop ahead sign, a railroad crossing sign, cross bucks (a post with X's), a stop sign, and a stop bar (two white lines on the pavement where motorists are required to stop for the train). After the stop at the top of the grade, Sperry Road crosses the railroad tracks and descends *89 feet* into McKinley Avenue. At McKinley Avenue, there is a stop legend (the word STOP on the pavement) and a stop limit line (a white line on the pavement where motorists are required to stop). *There is no stop sign or other signal that would warn motorists of the requirement that they stop for cross-traffic on McKinley Avenue.* (Opinion, p. 3.)⁶

Tom made a complete stop at the stop sign *before* the railroad crossing – at the intended place behind the stop lines on the road. (1 RT 140-143; 145:11-28.) As Tom proceeded down the grade after the railroad crossing toward McKinley Avenue and began to make a left turn, his Toyota Corolla collided with the side of a semi-trailer, heading northbound on McKinley, that had traveled about seven feet into the T-intersection. (1

⁶ There was yellow sign showing cross-traffic, but giving no direction to the motorist of the need to come to a complete stop because of its course or speed. (Opinion, p. 3.)

RT 122:7-18; 146:23-147:13; 194:3-22.) Tom suffered closed head injuries in the accident and had no memory of it that would have permitted him to testify at trial. (1 RT 87:21-24.) Neither his passenger Racquel, nor apparently Tom himself, saw the second stop legend on the pavement at the T-intersection. (1 RT 148:24-28.)

CHP Officer Jason Bartlett investigated the accident. (1 RT 103-105.) He observed that there were no fresh skid marks on the pavement that would have revealed pre-impact attempts to stop by either Tom's Toyota Corolla or the big-rig truck. (1 RT 125:14-21.) Although he had regularly driven the route through the intersection of Sperry and McKinley, even Officer Bartlett had not noticed that there were two bars on the pavement at the T-intersection as opposed to a single stop bar just before the tracks. (1 RT 111:6-13; 116:9-117:11.) He confirmed, because of the steep grade of the road as it ascended to and descended from the tracks, that motorists in ordinary passenger vehicles – like Tom's Toyota – would not be able to see the stop legend painted on the pavement at the intersection of Sperry and McKinley when they were stopped at the stop sign. (1 RT 131:3-132:5.)

Tom filed suit against San Joaquin County alleging public entity liability for a dangerous condition of public property. (Opinion, p. 7; 1 CT

1-5.) His jury trial was bifurcated into liability and damages phases. The liability phase proceeded over seven court days, and included the testimony of the County's Traffic Engineer and two traffic engineering experts.

The County's engineer. Sukminder Chahal retired in 2002 from San Joaquin County service after 25 years as the Senior Civil Engineer in charge of the County's Traffic Division. (1 RT 248:6-28.) He then resumed employment for the County as a temporary employee to assist in the Traffic Division. (Opinion, pp. 3-4; 1 RT 247-248.)

According to Mr. Chahal, *stop signs* are the highest priority for safety in all types of signs, signals, and markings. (1 RT 249:1-18.) A stop sign tells a motorist to stop and where he must stop. (1 RT 254:16-255:2.) The stop sign's message should be comprehensible to average drivers of typical passenger vehicles, including Tom Metcalf. (1 RT 255:15-256:12.)

Mr. Chahal testified that there were four ingredients in a traffic control system: (1) a stop sign; (2) a stop-ahead sign warning of the upcoming stop sign; (3) a stop-ahead legend painted on the pavement warning of the upcoming stop sign; and (4) a painted stop-limit line with a bar telling the motorist precisely where to stop. (1 RT 250:17-251:1.)⁷

⁷ A stop sign is the familiar post with a red octagonal plate. A stop legend is the word STOP painted in large white letters on the pavement just before a stop is required. (1 RT 167:4-6; 250:5-251:21.) A stop limit line is a broad white line on the pavement at the place a motorist is required to come to a complete stop. (1

These ingredients tell the driver he must stop *somewhere* in the area of the *stop sign*, which is the most important ingredient. (1 RT 249:13-16; 250:5-14; 251:22-25; 252:2-12.)

As described by Mr. Chahal, San Joaquin County policy requires fully-controlled intersections with all four of the above ingredients. (1 RT 252:13-27.) The Sperry-McKinley intersection had only two of the four – and was missing the stop sign deemed by Mr. Chahal to be the most important. (1 RT 249:13-16; 250:5-14; 251:2-252:12.)

The County's safety guidelines demanded that the stop sign *and* the limit bar painted on the roadway be located in the vicinity of the intersection. (1 RT 268:12-20.) Yet the stop sign here had always been on the eastern side of the tracks 89 feet before the required stopping place. (Opinion, pp. 6-7; 1 RT 268:21-269:9.)

At the time of the accident, the San Joaquin County had owned and controlled the intersection of Sperry and McKinley for 60 years. (Opinion, p. 25, fn. 9; 1 RT 256-257.)⁸ The railroad had given permission for the County to cross the railroad tracks and right-of-way at Sperry and to

RT 168:9.)

⁸ Despite a partial annexation by the City in 1984, the County continued to control all the signs, legends, and markings at the Sperry and McKinley intersection. (Opinion, p. 3, 4; 1 RT 270:2-26; 271:22-26; 274:1-27; 275:4-5; 281:2-6; 282:1-283:28; 285:7-13.)

intersect with McKinley in 1941. (1 RT 257:2-13; Def.'s Ex. 115.) The County designed, and a County contractor built, the roadway between McKinley and the railroad tracks. (Opinion, p. 4; 1 RT 258:12-25.)

Mr. Chahal testified that he approved the design of the intersection at some time during his tenure as Senior Traffic Engineer. He personally and independently evaluated the signs and markings at the intersection and found them to be optimally safe and sound. (1 RT 274:19-27; 275:4-5; 285-287.) He disagreed with plaintiff's expert, Professor William Neuman, on the feasibility of placing a stop sign on the west side of the railroad tracks at the intersection, contending that such a stop sign might be knocked down by trucks. (Opinion, pp. 4-5; compare 1 RT 290:23-291:5 with 1 RT 178-180.)

Professor William Neuman. Plaintiff's expert Professor Neuman was a civil engineer and retired professor of engineering from California State University-Sacramento where he had taught for 35 years. (1 RT 153-155.) He testified that the T-intersection at Sperry and McKinley was dangerous because: (1) the sole stop sign controlling westbound traffic and a double-bar pavement marking were located on the east side of the railroad tracks some 89 feet from the place where motorists were required to stop; and (2) the stop legend on the pavement for that stop sign was located at the

bottom of a hill, such that it was not possible for drivers of passenger cars crossing the railroad tracks to see the legend before they encountered McKinley Avenue. (Opinion, pp. 6-7.)

Without contradiction from any other witness, Professor Neuman observed that the County's intersection transgressed both federal and state safety standards in two key respects:

First, the 89-foot distance from stop sign to the required stopping place at McKinley violated an established federal traffic Manual Traffic Control Devices standard (MUTD) requiring stop signs to be located *no more than 50 feet from the required stopping place*. (Opinion, pp. 6-7; 1 RT 170-171.)

Second, the 9% grade of the hill running from the railroad tracks to the intersection also violated a California Public Utilities Commission permit requiring no more than a 4% grade. (1 RT 165:9-16; Def's. Ex. 115, p. 3, ¶ 3.) The steepness of the grade prevented automobile drivers from seeing the stop legend and line on the pavement at the intersection as they were crossing the grade. (Opinion, p. 6; 1 RT 168:13-24.) Only a big-rig cab would be high enough to see the stop legend and line from the grade crossing. (*Id.*)⁹

⁹ The County's engineer did not know whether the road grade met the state's 4% standard. (Opinion, p. 4; 1 RT 259:3-6.)

The design of the intersection produced a driver tendency to stop only once at the stop sign *before* the railroad tracks, and then to continue rather than stop a second time at the T-intersection. Motorists were left to figure out for themselves that a second stop would be required immediately after their back wheels left the railroad tracks and before they completed their descent of the grade and merged onto McKinley Avenue. (Opinion, pp. 6-7; 1 RT 180:5-17; 181.)

The condition of the road surface at the intersection revealed its danger. Drivers who did not see the stop legend – and as a result had to stop at the last minute – had left skid marks on the road. (1 RT 183:1-3.) Skid marks were also made by large trucks who, although they saw the stop legend at the top of the grade, nonetheless had to apply their brakes too quickly and skid from the railroad crossing to the stop legend and line at the McKinley intersection. (Opinion, p. 7; 1 RT 216:21-217:1; 222:1-11.)

At least two prior accidents were attributable to the dangerous condition. In a 1995 accident, one vehicle rear-ended another when the second vehicle stopped suddenly at McKinley Avenue. In a 1993 case, one vehicle swerved to avoid a rear-end impact with another that was turning right onto McKinley. (1 RT 180-182.)

Professor Neuman summarized the dangerous condition of property at the Sperry-McKinley intersection and the role it played in the crash as follows:

“[P]eople are stopping in the wrong place. They make up their mind[s] to go. And they do go. . . [T]hen two things happen. If there’s a conflicting vehicle, they have to undo a decision. By the time you get your back wheels on the tracks, it’s too late to undo a decision, you’re [not] going to stop in the intersection even if you figure out to do it.

And so consequently people who use this in an ordinary way are exposed to the risk of grievous injury. They just don’t know where to stop, and you can’t see the stop limit line in plain old cars, and you can’t see the stop legend. That information of where further to stop is lost.”

Q. Do you believe that played role in this crash?

A. Yes.

Q. Why?

A. Well, because it’s my understanding the testimony about the witness is Mr. Metcalf did in fact stop at the limit line for the railroad, and that he proceeded from there and that’s the

problem. Once you do that, and if you haven't figured it out by the time that your back wheels are on those tracks, you're not going to be able to stop short of in the traveled way for northbound McKinley." (1 RT 180:5-26.)

In accordance with the federal standard, Professor Neuman found the 89-foot distance between the tracks and the T-intersection unacceptable. He emphasized that stop signs should be as close as possible to the place a motorist is required to stop. It should convey the message: "We want you to stop and this line tells you where to stop." (Opinion, p. 7; 1 RT 199:20-28.)

County Expert Arnold Johnson. Arnold Johnson, a professional consulting traffic engineer and expert witness who had given his deposition more than 200 times, was the County's designated expert. (Opinion, p. 5; 2 RT 301:13-19; 318:15-20.) Mr. Johnson testified that, in his view, the intersection was perfectly safe because the only feasible place to locate the stop sign was before the railroad crossing. (Opinion, pp. 5-6; 2 RT 310:2-25.) He acknowledged that the stop limit line was invisible to westbound traffic until 7-8 feet from Sperry/McKinley intersection. (2 RT 326.) He reviewed both of the accident reports that were reviewed by Professor Neuman and came to an opposing conclusion: "The accident history [wa]s

favorable’ and there was nothing in those accident reports attributing the cause of the accidents to the stop sign [or lack thereof.]” (Opinion, p. 6.)

B. The Jury Instructions and Special Verdict

Tom Metcalf’s case was submitted to the jury based on jury instructions largely borrowed from the Judicial Council of California Civil Jury Instructions (2003), CACI 1100-1104; 1120-1121. (3 CT 627-635.) The special verdict form used by the trial court was the Judicial Council Form with the addition of two questions dealing with Tom Metcalf’s alleged contributory negligence. (Compare CACI VF-1100 with 2 CT 567-569.)¹⁰

After listening to the Court’s jury instructions and the final arguments given by the parties, the jury deliberated and returned a verdict. (2 CT 567-569; 2 RT 425:21-430:2.) The special verdict included these findings:

1. *The County’s Ownership & Control of the Intersection.* San Joaquin County owned or controlled the intersection of Sperry and McKinley. (2 CT 567:16-17.) This finding was unanimous. (2 RT 427:13-16.)

¹⁰ A copy of the special verdict is attached to Tom’s brief as Exhibit A for the Court’s reference. Another copy is attached to the Court of Appeal’s Opinion.

2. *Dangerous Condition of the Intersection.* The intersection was in a dangerous condition at the time of Tom Metcalf's accident. (2 CT 567:20-21.) The jury made this finding by a 10-2 vote. (2 RT 427:17-20.)
3. *Foreseeable Risk of Accident.* The dangerous condition of the County's intersection created a reasonably foreseeable risk that the kind of accident that happened would occur. (2 CT 567:24-26.) The jury's vote on this issue was 9-3. (2 RT 427:21-24.)
4. *County Employee Negligence Creating a Dangerous Condition.* According to the jury, the dangerous condition of the intersection was *not* created by the "negligent or wrongful conduct of an employee of the County of San Joaquin acting within the scope of his or her employment." (2 CT 568:3-5.) The vote was 11-1. (2 RT 427:28-428:5.)
5. *Notice of the Dangerous Condition.* According to the jury, the County did *not* have actual or constructive notice of the dangerous condition for a long enough time to have protected against it. (2 CT 568:7-9.) The vote was 9-3.

Because the jury voted “no” on both the issue of negligent or wrongful employee conduct creating the dangerous condition and the issue of public entity notice of the dangerous condition, the jury was not called upon to answer the question whether the County acted “reasonably,” which appeared on the Special Verdict Form as question No. 6. (Opinion, Appendix, p. 2.) The trial court entered a judgment for the County because Tom had failed to prove either of the alternative pathways to dangerous condition liability set forth in Government Code section 835. (Opinion, p. 9; 3 CT 657.)

C. Post-Trial and Appeal

Plaintiff made a motion for new trial and a motion to vacate the judgment under Code of Civil Procedure Section 663, arguing in part that the County’s Traffic Engineer had testified that the County had created and maintained an intersection found by the jury to be a dangerous condition of public property, and citing Van Alstyne, *California Government Tort Liability Practice* (4th ed. 2004), section 12.42, including three cases cited by Van Alstyne, together with this Court’s decision in *Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 828-837, interpreting Government Code, section 835. (Opinion, p. 10.) The trial court denied Tom’s motions, stating among other things the following:

“Govt. Code section 835 requires a finding of either a negligent or wrongful act of an employee creating the dangerous condition or actual or constructive notice. The jury in [this] case did not make either required finding.” (3 CT 727:25-28.)

On Tom’s appeal, the Third District Court of Appeal upheld the judgment and the trial court’s denial of appellant’s motion for new trial. This Court granted Tom’s petition for review on September 20, 2006.

STANDARD OF REVIEW

1. The Meaning of the Statutes in the Tort Claims Act is Determined De Novo.

Questions of statutory interpretation are matters of law that are subject to de novo review on appeal. (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83; *Carpenter v. Superior Court* (2006) 141 Cal.App.4th 249, 259.)

2. Each of the Jury’s Special Verdict Findings is Subject to the Substantial Evidence Rule.

Tom is mindful of the substantial evidence standard of review applicable to the various jury findings of fact in his and the County’s favor. A party prevailing on a particular factual finding is entitled to a review of

the evidence that draws all inferences in his or her favor and assumes all questions of credibility on weight of the evidence were resolved in a manner consistent with the findings. (*White v. Inbound Aviation* (1999) 69 Cal.App.4th 910, 927; *Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635, 678.)

Tom succeeded in obtaining jury findings establishing County ownership and control of the intersection, its dangerous condition, and the foreseeability of injury from the condition. (Exhibit A, hereto, No. 1-3.) Yet the Court of Appeal's Opinion failed to acknowledge the significance of the jury's finding in Tom's favor that the County's signage was a dangerous condition on public property or to draw all inferences in his favor on this issue.¹¹ (Opinion, p. 6)

3. The Notice Aspect of Negligence is a Question of Law When Notice is Indisputably Present.

The issue of negligence is ordinarily a mixed question of law and fact, but may be determined as a matter of law “if reasonable [persons]

¹¹ For example, there was conflicting expert testimony as to whether the placement of the pavement markings and signs constituted a dangerous condition of public property. (2 RT 317:28-318:3 [County's Expert Arnold Johnson]; 180:1-181:14 [Plaintiff's Expert William Neuman].) Obviously crediting Mr. Neuman's testimony, the jury found there was a dangerous condition on public property owned or controlled by the County. But the Court of Appeal nonetheless restated and applied Arnold's presumably discredited conclusions. (Opinion, p. 7.)

following the law can draw but one conclusion from the evidence presented.”” (*Schmitt v. Henderson* (1970) 1 Cal.3d 460, 463, citing *Gray v. Brinkerhoff* (1953) 41 Cal.2d 180, 183.)

DISCUSSION

I. PLAINTIFF TOM METCALF MET HIS BURDEN OF ESTABLISHING BOTH ALTERNATIVE AVENUES OF LIABILITY UNDER GOVERNMENT CODE SECTION 835.

As the Court of Appeal viewed section 835, the reference to negligence clearly meant common law negligence. According to the court, the jury properly exercised its broad discretion to reject Tom’s case because it perceived that Tom failed to prove that the County acted unreasonably in the placement of its signs. (Opinion, pp. 20-24.)

The Court of Appeal’s original premise was wrong. Section 835 is not clear and does not refer to common law negligence. To the contrary, it is ambiguous and in need of construction. This follows for two reasons.

First, this Court expressly so held in *Brown*, describing in detail the basis of its holding. (*Brown, supra*, 4 Cal.4th at pp. 833-835.) The Court of Appeal apparently missed this holding. Indeed, it barely acknowledged *Brown* at all. (Opinion, pp. 20, 24.)

Second, the plain language of the statutes governing dangerous condition liability reveals that the “negligence” referred to in section 835(a) is not common law negligence, but a specialized form of statutory negligence. The statute divides what would be the concepts of common law negligence into different components, some of which are separate parts of plaintiff’s burden (which the jury here either found in Tom Metcalf’s favor or was required to do so by the undisputed evidence), and others of which are affirmative defenses that were the County’s burden to prove (and which were never reached by the jury).

The ambiguity in the meaning of “negligence” as used in section 835(a) must be resolved in light of the entire Tort Claims Act. Appellate courts do “not construe statutes in isolation, but rather read every statute ‘with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.’” (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83.)

In interpreting statutory language, the court begins “with the fundamental rule that our primary task is to determine the lawmakers’ intent.” (*MacIsaac v. Waste Management Collection and Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1082, citing *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798.) This judicial task proceeds in a “three-step

sequence as follows: ‘we [1] first look to the plain meaning of the statutory language, [2] then to its legislative history and [3] finally to the reasonableness of a proposed construction.’” (*Id.*)

When statutory language can support “multiple readings,” courts will “consult extrinsic sources, including but not limited to the legislative history and administrative interpretations of the language.” (*Microsoft Corp. v. Franchise Tax Bd.* (2006) 39 Cal.4th 750, 758.) “[C]onsideration must be given to the consequences that will flow from a particular interpretation.” (*Santa Clara County Local Transp. Authority v. Guardino* (1995) 11 Cal.4th 220, 235.) Sound construction requires “a reasonable and commonsense interpretation” that is “practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity.” (*In re Reeves* (2005) 35 Cal.4th 765, 771, fn. 9; see also *Maricela C. v. Superior Court* (1998) 66 Cal.App.4th 1138, 1146.)

As Tom will show in this section, he carried his burden of proving both statutory “negligence” under section 835(a) and, in the alternative, statutory “notice” under section 835(b).

A. Under Government Code Section 835(a), Tom Metcalf Bore the Burden of Proving Only the Notice Element of Common Law Negligence.

Government-entity liability for injuries sustained from dangerous conditions on public property do not exist at common law. It is purely statutory and governed by the elements and defenses defined by the Legislature. (*Brown, supra*, 4 Cal.4th at p. 829.)

Liability elements. Government Code section 835 states that a public entity can only be held liable for injuries caused by dangerous conditions on its property when five elements are satisfied:

1. The public entity owned or controlled the property (§§ 830(c), 835; CACI 1100, 1101; BAJI 11.55);¹²
2. The property was in a dangerous condition at the time of the injury (§§ 830(a), 835; CACI 1100, 1102; BAJI 11.54);
3. The injury was proximately caused by the dangerous condition (§ 835; CACI 430, 1100; BAJI 3.76, 11.53);
4. The dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred (§ 835; CACI 1100; BAJI 11.53); and
5. The negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created

¹² Under the prior BAJI jury instructions, the recommended special verdict form and instructions are virtually the same as the current CACI form and instructions. (BAJI 11.53-11.67 & 16.30, compare to CACI 1100-1123 & VF 1101.)

the dangerous condition *or* 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 (§§ 835(a) & (b), 835.2; CACI 1100, 1103; BAJI 11.53).

Affirmative Defenses. There are various affirmative defenses and exceptions to public entity liability under the Act. (§ 831.2, CACI 1110 [natural conditions]; § 835.4(a), CACI 1111 [reasonable act or omission]; § 835.4(b), CACI 1112 [reasonable act or omission to correct]; § 830.4, CACI 1120 [failure to provide traffic control signals]; § 830.8, CACI 1121 [failure to provide traffic warning signals, signs, or markings]; § 831, CACI 1122 [weather conditions affecting streets and highways]; and CACI 1123, *Cornette v. Dept. of Transportation* (2001) 26 Cal.4th 63 [design immunity].)

The jury here was instructed on two of these exceptions, one under section 830.4 and another under section 830.8. The general substance of these instructions provided that the mere lack of a stop ahead sign is not the basis for a dangerous condition. However, consideration of all the circumstances, including the lack of a stop ahead sign, can give rise to a dangerous condition if a reasonable person would not have noticed a

hazardous situation without the presence of a stop ahead sign or other such warning signal. (See 3 CT 602, 603, 633, 635.)

As an additional affirmative defense, the jury was asked in a special verdict question to determine the overall reasonableness of the County's act or omission that created the dangerous condition. (Exhibit A, Question No. 6.) The jury was not instructed on this "reasonableness" defense under section 835.4.

1. Section 835(a) Statutory Negligence Incorporates Only the Notice Element of Common Law Premises Liability.

The Court of Appeal found the model CACI Judicial Council form to be "problematic" because it invited the jury first to answer whether "the negligent or wrongful conduct of a public entity's employee created the dangerous condition and, if the answer to the question is yes, then ask[ed] whether the act or omission that created the dangerous condition was reasonable." (Opinion, p. 23.)

Although the Court of Appeal thus correctly identified an anomaly in the verdict form, it failed to perceive its source – a statutory scheme that splits what would be the elements of common law negligence into *four pieces* for separate jury consideration: (1) presence of a dangerous

condition on public property; (2) foreseeability that the dangerous condition will result in an accident; (3) knowledge or notice of the condition on the public entity's part; and (4) the overall reasonableness of the entity's conduct in the face of a known dangerous condition. Refusing to acknowledge the complexity of the scheme, the Court of Appeal ruled that the jury could collapse all these elements into one and simply find that Tom had not proven that a County employee was "negligent."

As Tom will show, the Court of Appeal's simplistic view of section 835(a) defeated the Legislature's design and ran roughshod over *Brown*, Van Alstyne and the Tort Claims Act history, the CACI, and prior appellate authority. (*Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 155-156 ["Liability of public entities is set by statute, not common law . . . [A] *contraction* in the scope of such liability must come from the Legislature."].) These flaws in the Court's opinion will be discussed in detail below.

The element of statutory negligence. The undefined species of statutory "negligence" created by the Legislature in section 835(a) corresponds in its principal features to common law premises liability, but with some special twists in the public liability context that subdivide the

elements of negligence and alter the burdens of proof. A comparison of the two types of negligence reveals their distinct characters.

An owner of property has a common law duty to exercise ordinary care in the management of the owner's premises so as to avoid exposing others to an unreasonable risk of harm. (*Alvarez v. Vece* (1997) 14 Cal.4th 1149, 1156, CACI 1001 [listing elements and factors].) Just as the owner is liable for failure to use reasonable care to discover and repair or warn of "unsafe conditions" so a public entity is similarly responsible for "dangerous conditions" giving rise to a substantial risk of injury. (Compare CACI 1001 with 1100.)

Both the common law and statutory schemes require that an unsafe or dangerous condition of property creates a foreseeable risk of injury. (Compare CACI 1001 ["likelihood of harm"] with 1100 ["reasonably foreseeable risk of the kind of injury incurred"].) Dangerous-condition liability calls for a separate jury finding of foreseeability, which the jury made in this case. (Exhibit A, Question No. 3.) While at common law foreseeability is a threshold element of duty to be assessed by the court, the jury also considers foreseeability in determining whether a "*particular* defendant's conduct was negligent in the first place." (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 629, fn. 6.)

In a premises liability suit a plaintiff has the burden of proving that the property owner had notice of the unsafe condition on the owner's property. (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1206 [“[W]here the plaintiff relies on the failure to correct a dangerous condition to prove the owner's negligence, the plaintiff has the burden of showing that the owner had notice of the defect in sufficient time to correct it.”].) In a dangerous condition action, plaintiff has the option of showing “negligent” public employee creation of the dangerous condition or “actual” or “constructive notice” to the public entity under section 835, both of which are designed to fulfill the element of sufficient notice that would allow correction of the unsafe or dangerous condition. (*Brown, supra*, 4 Cal.4th at p. 835.)

While the burden of proving all the elements of negligence in a private premises liability suit is on plaintiff (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1206), the Legislature has shifted that burden to a public entity that seeks to escape liability for a dangerous condition on its property by proving that the burden of taking precautions outweighs the public benefit to imposing liability. (§§ 835 & 835.4.)

In a fundamental misconception of the dangerous-condition statutory scheme, the Court of Appeal “disagree[d] with case law stating that section

835.4 lays out an affirmative defense. (See, e.g., *Hibbs v. Los Angeles County Flood Control Dist.* (1967) 252 Cal.App.2d 166, 172.)” (Opinion, p. 23.)

Based on the plain language of section 835.4, *Hibbs* was right and the Court of Appeal was wrong. The defensive character of an overall reasonableness showing by a public entity is clear on the face of the statute. The defense must be affirmatively “*established*” by the public entity, not anticipated and rebutted by the plaintiff.

Section 835.4(a) provides:

“A public entity is not liable under subdivision (a) of Section 835 for injury caused by a condition of its property *if the public entity establishes that the act or omission that created the condition was reasonable.*”

In parallel fashion section 835.4(b) states:

“A public entity is not liable under subdivision (b) of Section 835 for injury caused by a dangerous condition of its property *if the public entity establishes that the action it took to protect against the risk of injury created by the condition or its failure to take such action was reasonable.*”

In each part of section 835.4, the defense based on overall reasonableness of the entity's conduct is phrased much like the common law negligence definition. Section 835.4(a) states that when considering a public entity's reasonableness, the jury should weigh: (1) "the time and opportunity it had to take action;" and (2) "the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of protecting against the risk of such injury." Except for the shifted burden of proof, the latter consideration precisely parallels the common law standard, which requires the trier of fact to weigh "[t]he likelihood of harm; [t]he probable seriousness of such harm; . . . [and] [t]he difficulty of protecting against the risk of such harm." (CACI 1001.)¹³

The Court of Appeal's interpretation collapses the section 835.4 defense into one part of the plaintiff's required showing of "negligence" under section 835(a), thereby rendering section 835.4 superfluous in violation of established canons of construction. (*Kulshrestha v. First Union*

¹³ See also *Rowland v. Christian* (1968) 69 Cal.2d 108, 113 [negligence factors include "the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care"]; *Saratoga Fishing Co. v. Marco Seattle Inc.* (9th Cir. 1995) 69 F.3d 1432, 1439 [examining risk-utility balancing test]; *United States v. Carroll Towing Co.* (2d Cir. 1947) 159 F.2d 169, 173.

Commercial Corp. (2004) 33 Cal.4th 601, 611 [“[C]ourts may not excise words from statutes . . . [E]ach term has meaning and appears for a reason.”]; *City and County of San Francisco v. County of San Mateo* (1995) 10 Cal.4th 554, 563; *Fields v. Eu* (1976) 18 Cal.3d 322, 328.) It also defies the manifest intent of the Legislature as described in section 835’s incorporated Law Revision Comment, which identifies section 835 as a “defense” and explains how the section 835.4 defense comes into play regarding “reasonableness:”

“Even if the elements stated in the statute are established, a public entity may avoid liability if it shows that it acted reasonably in the light of the practicability and cost of pursuing alternative courses of action available to it. In addition to the defenses available to public entities under Section 835.4, a public entity also may use any other defense--such as contributory negligence or assumption of the risk--that is available under subdivision (b) of Section 815 to avoid liability under this section.”

The comment thus characterizes the section 835.4 defense as an affirmative defense akin to contributory negligence or assumption of the risk, as to

which the defendant clearly bears the burden of proof. (CACI 405; *Drust v. Drust* (1980) 113 Cal.App.3d 1, 6.)

The Court of Appeal's error in regarding the section 835.4 defense as part of plaintiff's burden caused it to misconstrue the expert testimony of Arnold Johnson that "the best location for the stop sign was before the railroad crossing and it was not feasible to place the stop sign on an island." (Opinion, p. 21.) That testimony was not pertinent to the jury's determination of knowledge or notice in question Nos. 4 and 5, but only to the overall reasonableness defense in question No. 6. (Opinion, Appendix, p. 2; Exhibit A, attached hereto.) The jury never considered that issue. Thus, it made no factual finding that the defense had been established, and Arnold's testimony could not support the verdict.¹⁴

In summary, the Court of Appeal erred in misconstruing statutory negligence under section 835(a) to allow the trier of fact to reject Tom's case because it presumably rejected his showing that the County acted unreasonably. As Tom will now show, the only aspect of common law negligence incorporated in section 835(a)'s statutory negligence was notice

¹⁴ The same is true of County Engineer Chahal's similar testimony that it was not feasible to locate a stop sign at the place motorists were supposed to stop. (1 RT 290:23-291:5.)

of the dangerous condition at a level sufficient to justify the conclusion that the public entity knew about it. That was readily established here.

2. Notice Under Section 835(a) is Established When a Senior-Level Public Employee Creates a Dangerous Condition on Government Public Property.

Under the Public Liability Act of 1923, public entities were liable for injuries proximately caused by dangerous conditions on their property, but only when the “legislative body, board, or person authorized to remedy the condition” had “knowledge or notice” and, “[f]or a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition . . .” (Former § 53051, Stats.1949, ch. 81, § 1, p. 285; *Brown, supra*, 4 Cal.4th at p. 833.)

Over time, California courts developed a rule that dangerous conditions that had been deliberately created by government employees did not require independent proof of notice because, under those circumstances, public entity knowledge was presumed. (*Brown, supra*, 4 Cal.4th at p. 833, citing *Pritchard v. Sully-Miller Contracting Co.* (1960) 178 Cal.App.2d 246.)

When this Court held in 1961 that the doctrine of sovereign immunity would no longer protect public entities from civil liability for

their torts (see *Muskopf v. Corning Hospital District* (1961) 55 Cal.2d 211), the Legislature responded by suspending the effect of the decision and directing the California Law Revision Commission to conduct a study addressing whether the doctrine of sovereign immunity should be abolished or revised. (Stats.1961, ch. 1404, pp. 3209-3210)

The Law Revision Commission appointed Professor Arvo Van Alstyne as its consultant on the subject of sovereign immunity. His research and analysis, as presented to the Commission, were published as: A Study Relating to Sovereign Immunity (Jan. 1963) 5 California Law Revision Commission Report. As a result of his work for the Commission, Professor Van Alstyne became the principal draftsman of the California Tort Claims Act (the "Act"). (See Van Alstyne, *California Government Tort Liability Practice* (CEB 4th ed. 2004), Preface and In Memoriam [explaining how Professor Van Alstyne personally supervised the drafting of the California Tort Claims Act of 1963].)

Following an extensive review, based almost entirely on Van Alstyne's study, the Commission published its Recommendation Relating to Sovereign Immunity, No. 1, Tort Liability of Public Entities and Public Employees, 4 Cal. Law Revision Com.Rep. (Jan. 1963) p. 801, which, after

legislative review and revision, became the Tort Claims Act (Stats.1963, ch. 1681, p. 3266).

With respect to liability for dangerous conditions on public property, the Act generally followed the predecessor 1923 statute, but adopted the common law rule that an employer is liable for the acts of its employees. (*Brown, supra*, 4 Cal.4th at p. 833.) The Act emphatically did not change the rule 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, supra*, 4 Cal.4th at p. 834, applying *Fackrell v. City of San Diego* (1945) 26 Cal.2d 196, 203 and *Pritchard v. Sully-Miller Contracting Co.* (1960) 178 Cal.App.2d 246, 254.) This presumption of knowledge had been the established rule for 18 years prior to the Act’s passage.

In *Brown*, this Court expressly reaffirmed the presumption of entity knowledge arising from employee creation of a dangerous condition. The plaintiff in *Brown*, a self-employed computer repair technician, slipped and fell while making a delivery to a school. The school employees who assisted Brown after his fall found a fresh slice of lunchmeat stuck to the sole of his shoe. (*Id.* at p. 824.) This Court reversed a decision of the Court of Appeal, and directed summary judgment in favor of the school

district dismissing plaintiff's claim based on a dangerous condition on the school district's property.

In moving for summary judgment in Brown's lawsuit, the school district contended that Brown could not prove either of the alternative conditions for liability laid down in Government Code section 835, i.e.: subdivision (a)'s condition of *a negligent or wrongful act of a public employee* within the scope of employment creating a dangerous condition, or subdivision (b)'s requirement of *actual or constructive notice* of the dangerous condition on the part of the public entity a sufficient time prior to injury to have taken protective measures. (*Id.* at pp. 824-825.)

In opposition to the school district's motion, Brown relied on the doctrine of *res ipsa loquitur* to establish a presumption of negligence. (*Id.* at pp. 825-826, quoting *Ybarra v. Spangard* (1944) 25 Cal.2d 486, 489.) In upholding summary judgment in the school district's favor, this Court rested its decision on two alternative holdings:

- That Plaintiff Brown's evidence was insufficient to raise a common law presumption of negligence under the doctrine of *res ipsa loquitur* because there was no evidence to show that an employee of the school district had created the allegedly dangerous condition; and

- That Plaintiff could not in any event use *res ipsa loquitur* to establish a *prima facie* case of statutory liability against the school district under section 835(a). (*Brown, supra*, 4 Cal.4th at pp. 829-830.)

In order to arrive at the second alternative holding just described, the Court analyzed the language and history of section 835(a), which allows a plaintiff to establish public entity liability by proving that: “A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition.”

Finding the statutory language ambiguous, the Court examined the legislative history, including the Senate Committee Comment accompanying section 835, which explained that the new statute recodified the 1923 Act, while for the first time allowing government entities to be held liable for their employee’s conduct under the “rules that govern the imputation of knowledge from employees to employers in ordinary civil cases.” (*Brown, supra*, 4 Cal.4th at p. 835.)

Explaining the Senate Committee’s reference to caselaw that was effectively codified in section 835, *Brown* noted that *Pritchard v. Sully-Miller Contracting Co.* (1960) 178 Cal.App.2d 246 (“*Pritchard*”), had dispensed with the requirement of notice to a public entity under the 1923

statute because “*the fact that the city itself deliberately created the dangerous condition [i.e., the timing sequence of traffic signals] dispensed with the necessity of the notice contemplated by [the former act] . . .*” (*Pritchard, supra*, 178 Cal.App.2d at p. 254.)

This Court’s characterization of the *Pritchard* case was supported by additional legislative history. A legal memorandum written by Law Revision Commission Executive Secretary John H. DeMouly was reviewed and relied on by the Commission in 1962 during the drafting of section 835. The memorandum explains section 835's codification of *Pritchard* as follows:

“Under existing law, liability of a public entity for a condition of property may be based upon either (1) notice and failure to exercise reasonable diligence to repair or (2) the negligent creation of a dangerous condition. Justice Ashburn stated the basis for this second ground of liability in *Pritchard v. Sully-Miller Contracting Co.*, 178 Cal.App.2d 246, 256 (1960), a case in which the City of Long Beach was urging that it had no authority to go on to State highway property to change the timing of a traffic signal it had negligently set to work as a trap . . . [T]he case held that where the condition is created

by the entity, neither notice nor an opportunity to correct are necessary for liability. Justice Ashburn indicated that the existing Public Liability Act is not worded so precisely as to necessarily eliminate this basis of liability, and since it would be unreasonable to construe it to eliminate this basis of liability the statute would not be so construed. [¶] Other cases, too, have imposed liability where it has been apparent that there has not been notice and an opportunity to correct.¹⁵” (Appellant’s First Request for Judicial Notice (RJN), Ex. A, pp. 18-19 [Memorandum No. 15 (1962), Subject: Study No. 52 Sovereign Immunity (Liability for Dangerous Conditions of Public Property)].)

¹⁵ “See, for example, *Fackrell v. City of San Diego*, 26 Cal.2d 196, 206 (1945) (‘where the dangerous condition is due to the negligent act or omission of the officers doing or directing the work it is unnecessary to prove as a condition to liability that they had notice of the condition, and the authority . . . to correct it’); *Duran v. Gibson*, 180 Cal.App.2d 753 (1960) (slippery condition caused by city truck washing debris from street, following semitrailer skidded and caused injuries involved); *Teilhet v. Co. of Santa Clara*, 149 Cal.App.2d 505 (1957) (smoke caused by weed burning crew created hazardous condition on adjoining road; Ass’t County Road Commissioner – a ‘person authorized to remedy the condition’ – was chargeable with notice because he authorized it); *Selby v. County of Sacramento*, 136 Cal.App.2d 94 (1956) (sewer line cut, exposing livestock in adjoining pasture to disease; ‘The work was conceived by and carried out in accordance with previous plans of the defendants, and, hence, . . . no further notice of the condition created thereby was needed . . .’); *Wood v. County of Santa Cruz*, 133 Cal.App.2d 713 (1955) (brush cutting crew left brush protruding into roadway where it pierced motorcyclist’s foot, notice given by fact crew negligently created the condition).”

As *Brown* observed, *Pritchard* had followed *Fackrell v. City of San Diego* (1945) 26 Cal.2d 196 (“*Fackrell*”), which held that “a city was presumed to know of the dangerous condition presented by a poorly designed sidewalk improvement” because the improvement was “planned by city officers and constructed in accordance with such plan” which, when carried out, gave rise to a “dangerous and defective condition.” As a result, no further proof was needed to charge the city with notice and to impose liability. (*Id.* at p. 203, cited in *Brown, supra*, 4 Cal.4th at p. 834.)

Brown observed that the prior decisions in *Fackrell* and *Pritchard* had merely applied the well-established rule 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, supra*, 4 Cal.4th at p. 834, citing four additional cases decided under the Act.)¹⁶

¹⁶ As further illustrations of the application of this principle, the Court cited four additional cases decided under the prior Act: *Watson v. City of Alameda* (1933) 219 Cal. 331, 334 [city employees marked a crosswalk with slippery paint]; *Bigelow v. City of Ontario* (1940) 37 Cal.App.2d 198, 204 [city employees created a dangerous roadway]; *Sandstoe v. Atchison, T. & S.F. Ry. Co.* (1938) 28 Cal.App.2d 215, 219 [city employees painted a misleading centerline on a road]; and *Wise v. City of Los Angeles* (1935) 9 Cal.App.2d 364, 367 [city employee dug and left a hole in the street]. (*Brown, supra*, 4 Cal.4th at p. 834, fn. 6.).

As this Court noted, none of these cases under the prior Act had required a plaintiff to prove any kind of knowledge or notice on the part of a public entity when he or she had shown that a dangerous condition was “created by an

The holding in *Pritchard*, as codified in the Tort Claims Act, is an apt illustration of a governmental agency's per se negligence liability for dangerous conditions on public property created and maintained by the agency's own employees. In *Pritchard*, the City of Long Beach had designed and set up a traffic signal in such a manner that it created a dangerous trap for motorists. In rejecting the City's attempt to escape liability, the Court of Appeal found it per se culpable and liable for its creation of the unsafe condition, stating that, *where a public entity "itself created the dangerous condition it is per se culpable and notice" and "knowledge and time for correction [] become false quantities in the problem of liability."* (*Pritchard, supra*, 178 Cal.App.2d at p. 256.)

To reinforce its conclusion that public entities were per se liable for employee-created dangerous conditions, the Court in *Brown* quoted Professor Arvo Van Alstyne's analysis of section 835(a) from his text Van Alstyne, *California Government Tort Liability Practice* (CEB 1980).¹⁷

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.)

¹⁷ As a result of his unique role in preparing and presenting the Tort Claims Act to the Legislature, the courts have traditionally accorded great weight to Professor Van Alstyne's views as expressed in the CEB text in construing the various provisions of the Act. (See, e.g., *Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710, 721-722 [calling Professor Van Alstyne "the principal architect of the California Tort Claims Act"]; see also *Mary M. v. City of Los Angeles* (1991)

Professor Van Alstyne’s comments, which the Court found crucial in *Brown* in interpreting section 835(a), were as follows:

“The creation by the public entity of a physical facility or condition that is ‘dangerous’ dispenses with the necessity of notice, for the entity presumably knows already that it has affirmatively created the condition, and thus has notice that it is dangerous.” (*Brown, supra*, 4 Cal.4th at p. 835, citing Van Alstyne; emphasis in original and emphasis added.)

Relying on Professor Van Alstyne’s analysis, the Court pointed out that subdivisions (a) and (b) of section 835 “obviously address two different types of cases,” which were distinguished in practice based on who had created the dangerous condition.

“Because an entity must act through its employees, virtually all suits brought on account of dangerous conditions created by the entity will be brought under subdivision (a). In contrast, subdivision (b) can *also* support suits based on dangerous conditions not created by the entity or its employees.” (*Id.* at p. 836.)

54 Cal.3d 202, 209; *Golden West Baseball Co. v. Talley* (1991) 232 Cal.App.3d 1294, 1304.)

The Court explained that liability under the former Public Liability Act depended upon whether the “governing board” of a public entity or a person “authorized to remedy the condition” had “knowledge or notice.” (*Id.* at p. 835.) The Legislature changed this rule to impose liability when a public entity has actual or constructive notice of a dangerous condition “a sufficient time prior to the injury to have taken measures to protect against [it].” (*Id.* at p. 836.) *However, when the public entity itself creates the physical facility or condition that is dangerous it “presumably knows already that it has affirmatively created the condition and thus has notice that it is dangerous.”* (*Id.* at p. 835, quoting Van Alstyne, §3.176, p. 208.)

To illustrate the latter point, the Court cited with approval several appellate 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.” (*Id.*) One of the cases cited involved “county employees [who] constructed a dangerous highway intersection by grading the intersecting roadways at differing elevations, by planting trees that obstructed vision, and by placing misleading signs and center lines.” (*Id.*, citing *Hilts v. County of Solano* (1968) 265 Cal.App.2d 161, 164-166.)¹⁸

¹⁸ See also *Warden v. City of Los Angeles* (1975) 13 Cal.3d 297, 300 [municipal employees placed a sewer pipe just below the surface of a navigable

Brown's construction of section 835 is reinforced by additional passages in Professor Van Alstyne's 1964 CEB treatise which was published on the heels of the Tort Claims Act and contained detailed descriptions by the author of the history and caselaw background of the Act. Van Alstyne's treatise, in turn, repeated and restated the voluminous study materials he supplied to the Law Revision Commission that served as the foundation for the Act. Because Van Alstyne addresses the precise issue before the Court in this case, his remarks justify verbatim quotation as a definitive construction of statutory "negligence" under section 835(a):

“[T]he negligent or wrongful quality of the employee’s act appears to be inherent in the very fact that the condition he created is, at least prima facie, dangerous. Plaintiff is not required to prove that the employee’s conduct was unreasonable (i.e., negligent or wrongful) in any other respect, for proof that he created a ‘dangerous condition,’ as that term is defined in Govt C §830(a), is itself evidence of negligent or wrongful act sufficient to

watercourse without adequate warnings]; *Teall v. City of Cudahy* (1963) 60 Cal.2d 431, 434 [seven-year-old child was hit by a car because the city “invited reliance on [misleading] signals”]; *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298, 303-304 [city employees neglected to repair a large pothole].

support liability. See §6.51. Thus, in the case cited by the Senate Judiciary Committee to indicate its intent (See Part V, Legislative Committee Comment, §835), liability was imposed on a city for deliberately changing the timing cycle in a traffic control signal so that the controlled intersection became dangerous under some circumstances; no other negligent or wrongful act was shown . . . [Citing *Pritchard, supra*, 178 Cal.App.2d 246, and also *Fackrell, supra*, 26 Cal.2d 196.]

* * *

The adjectives ‘negligent’ and ‘wrongful,’ as used in this requirement, appear to be redundant. If a public property condition attributable to a public employee is, in fact, dangerous under the statutory definition of that term (Govt C §830(a)), it seems that the employee’s act of creating it must have been negligent or wrongful within the meaning of §840.2(a).¹⁹ (RJN, Ex. F, pp. 172-173, 209-210)

¹⁹ In this first quoted passage, Van Alstyne refers to section 835, the statute at issue here. Although the second passage refers to section 840.2, which creates public employee liability for dangerous conditions of public property, section 840.2 is identical to section 835(a) in providing for tort liability based on a “negligent or wrongful act” of the employee. This identical language in two places of the same statutory scheme calls for the same interpretation in both. (See

[Excerpts from California Government Tort Liability, Practice Book No. 24 (CEB 1964) by Professor Van Alstyne].)’²⁰

Van Alstyne’s analysis anticipates – and undermines – the Court of Appeal’s conclusion that a public entity cannot be held liable, even if it indisputably creates a dangerous condition on its own property unless “a plaintiff . . . prove[s] that the public entity acted negligently or wrongfully” in the common law sense. (Opinion, p. 2.) As Van Alstyne says, an employee’s act is “negligent or wrongful” under what is now section 835(a) “only in the sense that it resulted in a dangerous condition.” Plaintiff is not required to prove that the defendant public entity acted “unreasonab[ly]” in “any other respect.” Rather, the burden of proving “reasonableness” is squarely on the public entity under section 835.4.

Copley Press, Inc. v. Superior Court (2006) 39 Cal.4th 1272, 1289.)

²⁰ See also RJN, Ex. A, pp. 19-21 [Memorandum No. 15 (1962), Subject: Study No. 52 – Sovereign Immunity (Liability for Dangerous Conditions of Public Property)]; Ex. B, p. 49 [Journal of the Senate, 1963 Regular Session – Report of the Senate Committee on Judiciary on SPECIAL BENEFIT 42]; Ex. C, p. 63 [Excerpts of California Law Revision Commission – Reports, Recommendations & Studies, December 1963, Prepared by Professor Arvo Van Alstyne]; Ex. D, pp. 81-82 [Excerpts of California Law Revision Commission – Reports, Recommendations & Studies, January 1963, Prepared by Professor Arvo Van Alstyne]; Ex. E, p. 106 [Excerpts of the California Law Revision Commission – Reports, Recommendations & Studies – Directions for Legislative Action: Policy Resolution in Specific Tort Situations].

Oblivious to *Brown*, Van Alstyne, and the Legislature’s Comments, the Court of Appeal found *Pritchard* to be inapplicable under section 835(a) “because there is no provision similar to subdivision (a) in the Public Liability Act of 1923.” (Opinion, p. 19.) But this observation disregards the fact that the Legislature was well aware of *Pritchard* and expressed its intent to adopt its holding in the “negligent or wrongful act or omission” language in section 835(a). (See *Brown*, *supra*, 4 Cal.4th at p. 833; quoting Senate Committee Comment, emphasis in original.)

Brown twice clearly stated that the Legislature intended to adopt the rule of *Pritchard* in section 835(a): “The Legislature’s reference to *Pritchard*, *supra*, 178 Cal.App.2d 246, can only mean that it intended to adopt the rule of that case, i.e., 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 . . . [T]here is . . . ample evidence that section 835, subdivision (a), was intended to incorporate the *Pritchard* rule.” (*Brown*, *supra*, 4 Cal.4th at pp. 834-835.)

In sum, having proved: (1) the County’s control of public property; (2) a dangerous condition on that property creating a substantial risk of injury; and (3) reasonable foreseeability of injury, Tom Metcalf was

entitled to proceed with his case upon showing that a County employee had created the condition under the statutory negligence alternative of section 835(a). As Tom will show in the next section, he so established by undisputed evidence.

3. The County's Traffic Engineer Acted Negligently Within the Meaning of Section 835(a) Because He Knowingly Designed, Created, Reconsidered, and Maintained a Dangerous Condition In Defiance of Federal, State, and Local Highway Safety Standards.

The only witness who testified at trial about creation of the signs and warnings at the intersection was Senior County Traffic Engineer Sukminder Chahal. Chahal had spent 25 years working as a County of San Joaquin employee between 1977 and 2002. For approximately 20 of those years, he served as Senior Civil Engineer in charge of the County's Traffic Division. (1 RT 248:6-28.) He held this position on October 6, 2001, when Tom Metcalf approached the intersection at Sperry and McKinley, struck the big-rig, and suffered injury. (*Id.*)

Chahal acknowledged that the County had controlled the intersection at Sperry and McKinley for 60 years as of the time of the

accident in 2001. (1 RT 256:13-26; 257:21-23.) He had never seen the stop sign at the Sperry-McKinley intersection anywhere but on the east side of the tracks. (1 RT 268:21-269:12.)

Although the Court of Appeal's opinion declines to so observe, Chahal admitted that a stop sign was a critical part of the County's own four-part traffic safety system for the intersection. (1 RT 250:17-251:1; 252:13-27; 268:12-20.) Nor did Chahal deny that: (1) the 89-foot distance from the sign before the tracks to the legend and bar violated federal standards; and (2) the grade of the road across the railroad tracks violated the CPUC permit. (1 RT 250:17-251:1; 270:2-4 & 18-22.)

Chahal would not concede that the County's signage at the intersection was dangerous, but he testified without equivocation that the County had created the signage at the Sperry-McKinley intersection and was 100% responsible for its design, construction, and ongoing maintenance:

“Q. Do you agree with me, Mr. Chahal, whether dangerous or not, the County is responsible for the construction of that section of the roadway, of Sperry between the tracks and McKinley as we see it now?

A. *County is responsible, yes.*

* * *

Q. Would you agree that the stop controls for this intersection of Sperry and McKinley and the ability of a motorist to see the stop sign and the stop legend with limit line, whether or not it's dangerous, would at least agree with me that the condition for those stop controls was created by the County?

A. *Was created by the County, but I don't agree with your word whether it's dangerous. It's not dangerous. It's a safe intersection.*" (1 RT 274:1-5; 19-27.)

Chahal further testified that, while he was not the traffic engineer who made the decision to place the stop sign on the east side of the tracks in 1941, he himself had independently evaluated the signage at the T-intersection and had personally determined that the sign was optimally located on that side. (1 RT 286:18-287:2.) Chahal had the following to say about his decision to maintain the sign where it was located:

"Q. Did you ever consider relocating the sign to some other place?"

A. I did not reconsider, but I evaluated and we found this is the best place.

Q. All right. And why do you say that this is the best place to put the stop sign?

A. [W]hen you are coming on Sperry Road towards the intersection . . . you can see the sign very clearly. And if you move to the right, it goes behind the PG&E pole, then you wouldn't be able to see as good. And if you move on the other side to the left, then stop sign will kind of obstruct the railroad sign, then you create another problem because railroad will not allow to put the sign there.” (1 RT 286:27-287:12.)²¹

It is an axiom of appellate law that each of a jury's factual findings are reviewed under the substantial evidence rule and upheld on appeal if there is any evidence supporting the finding that is reasonable, credible, and of solid value. (*Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 968; *Cochran v. Rubens* (1996) 42 Cal.App.4th 481, 486.) There is, however, a well-established common sense exception to the axiom which has been described by this Court as follows:

²¹ To the extent the railroad's permission was required to locate a sign, the County had no excuse for selecting a dangerous location unless the railroad's permission had been requested and refused. (*Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 147.)

“To these well settled [substantial evidence] rules there is a common sense limited exception which is aimed at preventing the trier of the facts from running away with the case. This limited exception is that the trier of the fact may not indulge in the inference when that 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. The trier of the facts may not believe impossibilities.” (*Hicks v. Reis* (1943) 21 Cal.2d 654, 660.)

The rule in *Hicks v. Reis* is well-settled in our state. (*Gaffney v. Downey Savings & Loan, Assn.* (1988) 200 Cal.App.3d 1154, 1168-1169 [reversing factual finding contrary to the undisputed evidence]; see also *Western Digital Corp. v. Superior Court* (1998) 60 Cal.App.4th 1471, 1487 [reversing factual finding when inference was unreasonable when viewed in light of the whole record]; *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651-656 [“A decision supported by a mere scintilla of evidence need not be affirmed on review.”]; *Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633 [same effect].)²²

²² See generally 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, §371, p. 422.

Here, there is only one inference that can be drawn from the evidence: The County deliberately designed, created, reevaluated, and maintained a dangerous condition on its property. It therefore had notice of the condition and was responsible for failing to correct it. Its engineer's self-serving opinions that what he did was safe do not change the indisputable facts, as found by the jury, that the condition was in fact dangerous and the undisputed evidence that the County's chief responsible employee deliberately maintained it. As a result, no further notice is required to establish liability under the statute, and the jury erred in rejecting Tom's case on this ground.

B. In the Alternative, the Only Substantial Evidence Revealed Actual and Constructive Notice of the Dangerous Condition Under Section 835(b).

Special verdict question Nos. 4 and 5 gave the jury two alternative ways to hold the County responsible, i.e., either under section 835(a) for creating a dangerous condition or 835(b) for having notice of a dangerous condition.

While Tom recognizes that subsection (b) was probably designed for third-party-created conditions (see *Brown, supra*, 4 Cal.4th at p. 835), that provision is an alternative means of establishing liability of which Tom

may take advantage under the plain meaning of the statute. As summarized in the previous section, the evidence revealed without contradiction or dispute that the County created the signage at the Sperry-McKinley intersection and maintained it from approximately 1941 to and including the date of Tom Metcalf's accident, a period of 60 years. Nothing in the record could support a reasonable inference that the County lacked notice in sufficient time to prevent Tom's injury by proper signage.

A public entity has *actual notice* of a dangerous condition on its property if it: (1) has "actual knowledge of the existence of the condition;" and (2) "knew or should have known of its dangerous character." (§ 835.2(a).) A public entity has *constructive notice* of dangerous condition if the condition has 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(b).)

Here the dangerous condition arose from the original design of an intersection's signs, legends, and signals. That design was apparently conceived and implemented sometime around 1941 and was deliberately reevaluated and approved by the County's Traffic Engineer, Sukminder Chahal, sometime during his 25-year-tenure as Senior Traffic Engineer, which ended in 2002, which was one year after the accident. (1 RT 248:2-

11.) At that time, Mr. Chahal made his own determination that the “best place” for the stop sign was on the east side of the railroad tracks 89 feet from the place motorists were supposed to stop. (1 RT 286-287.)

Tom respectfully submits that when *the* responsible senior-level employee – here, the top engineer in charge of the entire traffic division – becomes aware of a dangerous condition on public property, the entity has both actual and constructive notice.

Actual Notice. The County conceived the dangerous design, installed it at the intersection, and was at all times aware of its configuration and features. The involvement of senior County traffic personnel in the design and decision-making concerning the intersection establishes *actual notice*. (*Mathews v. State of California ex rel. Dept. of Transportation* (1978) 82 Cal.App.3d 116, 122; *Rodriguez v. City of Los Angeles* (1963) 215 Cal.App.2d 463, 468-469 [knowledge of dangerous street conditions on the part of street inspector imputed to city].)

Constructive Notice. While constructive notice is normally an issue of fact, it becomes an issue of law when reasonable minds could reach only one conclusion from the evidence. (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 842; *Van Kempen v. Hayward Area Park, Recreation and Park Dist.* (1972) 23 Cal.App.3d 822, 826-827.) The

County's engineers deliberately designed and installed the signage at the intersection and intentionally left it that way through the time of plaintiff's injury. These undisputed facts establish *constructive notice*. (See, e.g., *Carson v. Facilities Development Co.*, *supra*, 36 Cal.3d at pp. 837-838, 843-845 [obstructed sign erected by previous party seven months before accident made City's intersection dangerous]; *Nishihama v. City and County of San Francisco*, *supra*, 93 Cal.App.4th at p. 303 [large pothole should have been noticed by city employees]; *Erfurt v. State* (1983) 141 Cal.App.3d 837, 842, 844-845 [glare of rising sun reflected off surface of road created a dangerous condition for 20 days out of the year]; *Levine v. City of Los Angeles* (1977) 68 Cal.App.3d 481, 489 [abrupt roadway narrowing existing for several years resulted in constructive notice]; *Straughter v. State* (1976) 89 Cal.App.3d 102, 110-111 [city employees failed to continually inspect ice formation on road, allowing it to freeze and create a dangerous condition for several hours]; *Warden v. City of Los Angeles*, *supra*, 13 Cal.3d at p. 300 [three collisions in a several year period was sufficient time for city to have notice of dangerous condition of a submerged sewer pipe in offshore waters]; *Briggs v. State* (1971) 14 Cal.App.3d 489, 495 [mud deposits and flooding on roadway increasing over a 10-day period was sufficient constructive notice]; *Garber v. City of*

Los Angeles (1964) 226 Cal.App.2d 349, 352 [dangerous and defective condition of sidewalk existed for 5 years].)

Because both actual and constructive notice were established by the evidence, the jury was not permitted to reject Tom's case based on an unsustainable "finding" that no notice was given. The judgment cannot be upheld on this ground, and should be reversed.

II. ERRORS IN THE JURY'S VERDICT AND THE INSTRUCTIONS AND JUDGMENT REQUIRE A NEW TRIAL.

A. The Special Verdict Findings Contravened the Evidence and Cannot Support the Judgment.

In order to prevail against the County, Tom need establish only that the County created a dangerous condition under subdivision (a) *or* actual or constructive notice of a dangerous condition under subdivision (b). He need not prove both. (*Curtis v. State of California ex rel. Dept. of Transportation* (1982) 128 Cal.App.3d 668, 693.)

If this Court agrees with Tom's argument in either Section I(C) or (D), Tom becomes entitled to a new trial because the special verdict is no longer sufficient to support a judgment in the County's favor. (Code Civ. Proc., § 624 ["The special verdict must present the conclusions of fact as

established by the evidence . . . and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law.”].) For either or both of these reasons, reversal is called for.

B. Tom Metcalf Was Prejudiced By the Omission From the Instructions of A Negligence Definition and An Instruction on the County’s Burden of Proving Reasonableness.

This Court has held that, when an instruction is based on a statute, it is incumbent upon the trial court to “determine the meaning and scope of statutory language that is ambiguous,” “confusing, or couched in legal terms” and provide the jury with explanatory instructions. (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1004 [when statutory language is unclear it is trial court’s duty to provide instruction explaining meaning]; *Brown v. Smith* (1997) 55 Cal.App.4th 767, 784-785 [“Although instructions based on code sections should follow the language of the particular section at issue, the court should give explanatory instructions where the statutory working is confusing or couched in legal terms . . . It is incumbent upon the trial court to determine whether or not a code section should be explained.”].)

In special verdict Question No. 4, the jury voted against a finding of negligent or wrongful conduct of an employee who created the dangerous condition under section 835(a). But it was never instructed on the meaning of “negligence” in this or any other context. Nor was the jury told that the County had the burden of proving the “reasonableness” of its decision to maintain a dangerous intersection under section 835.4. The meanings of these key terms “could not have reasonably been known by the jury absent some statutory interpretation by the trial court in the form of jury instructions that go beyond the language of the statute.” (*Brown, supra*, 55 Cal.App.4th at p. 785.) Thus, even if some evidence supported the jury’s findings, those findings were based on ignorance of the law and should not be upheld.

Because of the fatal omission of any definition of the key concept of statutory negligence under section 835(a), the Court of Appeal’s assumption that the jury must have concluded the employee acted reasonably (Opinion, pp. 22-23) was unfounded. The jury was never told whether or how the reasonable behavior of an employee could be considered when deciding whether the employee acted negligently or wrongfully. Even if the jury thought it knew the meaning of the word

“negligence,” as derived from the statute, it is probable that interpretations by jury members differed. As this Court explained in *Torres*:

“An instruction in the language of a statute is proper only if the jury would have no difficulty in understanding the statute without guidance from the court . . . It is not proper if reasonable men might differ as to the construction of the statute, for it would delegate to the jury the function of statutory interpretation that belongs to the court.” (*Torres, supra*, 26 Cal.4th at p. 1004 [clarifying instruction is needed for “willful and unprovoked physical act of aggression” language of the statute to establish intent to injure element].)

Therefore, even if the Court of Appeal were right in its ruling that statutory negligence in section 835(a) means the same thing as common law negligence, Tom Metcalf was prejudiced by the absence from the jury’s charge of the essential definition of negligence and the definition and burden of proof instruction on reasonableness. The lack of guidance provided by the charge to the jury should result in a new trial for Tom Metcalf with a articulated and clarified instructions on the meaning of employee negligence under section 835(a) and reasonableness under section 835.4.

C. Following Reversal of the Judgment, this Court Should Direct a New Trial Limited to the Liability Issues That Were Not Resolved by the Jury and the Question of Damages.

When a reversible error affects only a single issue in a special verdict, the Court of Appeal can reverse judgment with directions to the trial court to conduct a limited retrial. (*Torres v. Automobile Club of So. Calif.* (1997) 15 Cal.4th 771, 776; *Springmeyer v. Ford Motor Co.* (1998) 60 Cal.App.4th 1541, 1574; see generally, J. Eisenberg, et al., *Cal. Practice Guide: Civil Appeals and Writs* (Rutter Group 2003) §11:71, pp. 11-22.)

As this Court stated in *Torres*:

“It is a firmly established principle of law that “[t]he appellate courts have power to order a retrial on a limited issue, if that issue can be separately tried without such confusion or uncertainty as would amount to a denial of a fair trial.” (*Torres, supra*, 15 Cal.4th at p. 776.)

The jury’s error in this instance was confined to its answers to Questions No. 4 dealing with creation of a dangerous condition and No. 5 dealing with notice of a dangerous condition. Its failure to recognize the undisputed evidence in plaintiff’s favor on those issues requires reversal.

However, the jury's findings on the remaining three issues of control, dangerous condition, and creation of a reasonably foreseeable risk are supported by substantial evidence and not infected by this or any other error. There is no need to retry any of those issues.

The County effectively conceded the issue of control in its final argument. (2 RT 395:27-396:3.) While the dangerous condition issue was a focal point of the trial, it was fully presented on both sides through the testimony of competing experts and percipient observations from Tom's passenger and the CHP officer who investigated the accident. The evidence overwhelmingly supports the verdict – the placement of the stop sign was in violation of federal, CPUC, and County standards. There is no reason to repeat the presentation of this evidence to another jury.

The same is true of Question No. 3 dealing with the reasonable foreseeability that this kind of accident would occur as a result of the dangerous condition. The County maintained the intersection was safe and there was no foreseeable risk. Through its expert, William Neuman, Tom showed that drivers were routinely confused about where they were required to stop in the County's intersection, giving rise to a reasonably foreseeable risk that a driver, late at night with no lighting and poor visibility, might stop in the wrong place and then fail to stop in the right

one. (1 RT 164-165; 180:5-17.) The jury resolved both questions with 10-2 votes and there is no reason to believe a repeat performance before a different jury, with the attendant costs and waste of time, is required to assure a fair trial to both sides.

Whether to grant a limited retrial is a matter lying within this Court's discretion. (Code Civ. Proc., §906 ["Upon an appeal . . . , the reviewing court may . . . affirm, reverse or modify any judgment . . . appealed from and may . . . , if necessary or proper, direct a new trial or further proceedings to be had."]; *Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467, 1476-1477 ["The appellate court may also order a retrial on a limited issue . . ."]; see also *Brewer v. Second Baptist Church* (1948) 32 Cal.2d 791, 801.) Given the County's concessions and the full exploration of the first three questions before the jury, it is not necessary to retry any of those issues to secure to either side a fair trial. Since it would be neither efficient nor expedient to do so, plaintiff respectfully requests that this court direct a retrial limited to the liability issues not reached by the jury that are presented in special verdict Question Nos. 6, 7, 8, 9, and 10.

CONCLUSION

The statutory scheme governing public entity liability for dangerous conditions of public property must be sensibly applied in accordance with its statutory language and history. This Court's decision in *Brown* points the way by recognizing that a public entity's notice of a dangerous condition gives rise to a duty to correct or warn of it unless the entity can prove it was reasonable to refrain from action. The decision in this case should complete the journey to a comprehensible blueprint for government liability. The Court of Appeal's judgment should be reversed.

Dated: April 11, 2007

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.204(c)(1))

The text of this brief consists of 13,625 words as counted by the Corel WordPerfect version 10 word-processing program used to generate the brief. The entire brief is double spaced. The font is 13 point Times New Roman.

Dated: April 11, 2007

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**PROOF OF SERVICE
STATE OF CALIFORNIA - COUNTY OF YOLO**

I am employed in the City of Davis, County of San Diego, State of California. I am over the age of 18 and not a party to this action; my business address is: 2050 Lyndell Terrace, Suite 240, Davis, California 95616.

On April 11, 2007 I served the document(s) described as:
APPELLANT'S OPENING BRIEF ON THE MERITS in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

- (BY MAIL)** I am "readily familiar" with the firm's practice for collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Davis, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
- (BY FAX)** I transmitted, pursuant to Rules 2001 et seq., the above-described document(s) by facsimile machine (which complied with Rule 2003(3)), to the above-listed facsimile number(s). The transmission originated from facsimile phone number (530) 758-4540 and was reported as complete and without error. The facsimile machine properly issued a transmission report, a copy of which is attached hereto.
- (BY PERSONAL SERVICE)** I caused to be delivered such envelope by hand to the offices of the addressee(s).
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Executed on April 11, 2007 at Davis, California

- (STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

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