Case No. B184025

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 8

DAVID PROKOP,

Plaintiff/Appellant,

vs.

CITY OF LOS ANGELES,

Defendant/Respondent.

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES

SUPERIOR COURT CASE NO. BC 305 404

HONORABLE ROLF M. TREU

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

STATE STATUTES

<u>MISCELLANEOUS</u>

I. INTRODUCTION

The "outrage" expressed by Plaintiff/Appellant, DAVID PROKOP ("PROKOP") in his Appellant's Opening Brief ("AOB") is entirely justified. It **is** outrageous for Defendant/Respondent, the CITY OF LOS ANGELES ("CITY") to argue, as it does in its Respondent's Brief ("RB"), that it is privileged to simply "ignore" its mandatory statutory duties and to do so with impunity because "that is just the nature of immunity." [See RB at p. 11.] It is likewise outrageous to suggest that it is in the **public interest** to **excuse compliance** with mandatory safety standards established for bikeways. [See RB at p. 2-3.]

As explained in the AOB, this Court cannot reach the conclusion urged by the CITY unless it improperly disregards: (I) express language contained in *Government Code* Section 831.4 ("Section 831.4"), and particularly in subsection (c) thereof ("Subsection (c)"); (ii) the comprehensive statutory scheme of which Section 831.4 is a part - - *i.e.* the Tort Claims Act (codified in *Government Code* Sections 810 *et seq.*); and, (iii) the Bicycle Transportation Act (codified at *Streets and Highways Code* Sections

890 *et seq.*), which is part of the larger sphere of California Law in which the Tort Claims Act operates. Moreover, further support for PROKOP's position is found in the recent First District Court of Appeal case of *Amberger-Warren v. City of Piedmont* (2006) 143 Cal.App.4th 1074, 49 Cal.Rptr.3d 631.

Shockingly, the CITY does not even acknowledge - - let alone rebut - - most of the arguments made by PROKOP. There is no discussion in the RB, for example, of how the opinion of the court in the case of *Carroll v. County of Los Angeles* (1997) 60 Cal.App.4th 606 that the terms "path" and "trail" are necessarily synonymous,[1] comports with the language of subsection (c) of Section 831.4, which strongly suggests that the Legislature intended to differentiate between a "path" and a "trail."

The CITY also ignores PROKOP's criticism of the *Farnham* court's conclusion that the CITY may disregard sections of the *Streets and Highways Code* which establish safety standards because, using

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[1] *Carroll*'s conclusion in this regard was subsequently adopted without much discussion by the court in *Farnham v. City of Los Angeles* (1998) 68 Cal.App.4th 1097 and, in turn, by the trial court in this matter.

definitions from the *Vehicle Code*, a Class I bikeway is not a "street" or a "highway." PROKOP argued, first, that there is no requirement that a bikeway be a "street" or a "highway" for the Bicycle Transportation Act standards to apply thereto; and second, that using definitions in the *Streets and Highways Code* the LA River Bikeway[2] **does** qualify as a "street" and/or "highway" in any event. [See AOB at pp. 46-49.] The CITY never explains why the definitions of "street" or "highway" are relevant and, if they are, why the *Vehicle Code* definitions should be used instead of those in the *Streets and Highways Code*.

Similarly overlooked by the CITY, is PROKOP's contention that, at a minimum, the CITY had (and breached) a duty to warn bicyclists of the dangerous condition on the LA River Bikeway which caused PROKOP's accident ("Accident"), as well as PROKOP's observation that - - at least according to the CITY - - the Accident did not even occur on a Class I bikeway (but, instead, took place just

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[2] The bikeway on which PROKOP was riding immediately before his accident is referred to herein as the "LA River Bikeway."

outside of it).[3]

The absence of any meaningful response by the CITY to these and other significant arguments in PROKOP's AOB speaks miles about the strength (or lack thereof) of the CITY's position in this appeal. Obviously, the CITY has no good answer to the questions raised by PROKOP, and cannot justify the decision made by the court below. In fact, the trial court's decision is unsustainable, and should be reversed.

II. SUMMARY OF PROKOP'S REPLY ARGUMENT

The LA River Bikeway was built by the CITY pursuant to California's "Bicycle Transportation Act", which mandates the development of safety standards and design criteria ("Safety/Design Standards") for government-sponsored bikeways (*S&H Code* §890.6) and requires such bikeways (including the LA River Bikeway) to be designed and built in accordance therewith (*S&H Code* §891). Prior to PROKOP's Accident, the CITY publicized its purported adherence to the Safety/Design Standards when designing and building the LA

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[3] See Clerk's Transcript, page 132, line 21 through page 133, line 3 ["CT0132:21-0133:3"].

River Bikeway. Afterward, the CITY disclaimed any responsibility for PROKOP's injuries, and argued that it is immune from liability, even if a jury might have found that those injuries were proximately caused by the CITY's non-compliance with the Safety/Design Standards or by the CITY's failure, without justification, to warn bicyclists of a known danger **created by the CITY** on the LA River Bikeway.

The CITY's position is based on the erroneous premise that a public entity enjoys **absolute** immunity, pursuant to *Government Code* Section 831.4, from liability for **any** injury that occurs on (or, apparently, near[4]) a Class I bikeway, and is dependent on the illusion of such immunity that the CITY hopes to create by instructing this Court to "look no further than . . . section 831.4(b) and the cases interpreting it." [RB at p. 1.] However, Section 831.4(b) ("Subsection (b)") is part of Section 831.4, which is part of the Tort Claims Act, which is part of the statutory law of California (as is the Bicycle Transportation Act). Proper interpretation of Section 831.4(b) therefore requires harmonization: (i) with the remainder of Section

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[4] See footnote 3, above.

831.4; (ii) with the Tort Claims Act; and (iii) with relevant portions of the Bicycle Transportation Act.

The CITY makes no attempt to harmonize its (self-serving) version of the statute with either itself or any other law, however. Among other things, it completely ignores critical fact-bound questions such as:

- **Is the LA River Bikeway a "trail" within the meaning of Section 831.4 ("Section 831.4 Trail")?**
- **If the LA River Bikeway is a Section 831.4 Trail, is it also a "paved trail . . . on an easement of way which has been granted to a public entity, which easement provides access to any unimproved property" within the meaning of Subsection (c) ("Subsection C Trail")?**
- **If the LA River Bikeway is a Subsection C Trail, did the CITY fail to adequately warn PROKOP of a known danger, as required by Subsection (c)?**
- **If the LA River Bikeway is a Section 831.4 Trail, but not a Subsection C Trail, is it a "trail" used for "fishing, hunting, camping, hiking . . . [or] water**

sports" or to "provide access" thereto or to "recreational or scenic areas," within the meaning of Subsection (b) ("Subsection B Trail")?

The CITY's analysis is also erroneous because it is inconsistent with Section 831.4's legislative history. If correct, it would render the otherwise rational statutory scheme of the Tort Claims Act arbitrary and capricious and would eviscerate important provisions of the Bicycle Transportation Act. Among other things, the CITY should have been required to prove:

- **That the CITY complied with the Safety/Design Standards or, if it did not, that the non-compliance was not the proximate cause of PROKOP's injuries; and,**
- **None of many provisions of the Tort Claims Act that creates duties to warn was implicated by the facts of this case or, if such provision(s) was/were implicated, that the CITY discharged that duty or that any failure to discharge that duty did not damage PROKOP.**

In summary, PROKOP submits that the Tort Claims Act is considerably more complex than the CITY suggests, and that Section 831.4(b) should be considered in context, not in isolation, as it is in the CITY's Respondent's Brief. Either way, however, the absolute blanket immunity described by the CITY, simply does not exist. Whether (as the CITY argues) this case "begins and ends with [the] single issue" of whether the CITY "is immune, pursuant to *Government Code* Section 831.4, subd. (b), from suits arising from injuries that occur on a paved bikeway,"[5] or whether the issues raised by this appeal are (as they should be) considered as part of a bigger picture, there were at least questions of fact raised at the trial court level which should have precluded a grant of summary judgment in favor of the CITY.

III. THE CITY'S INTERPRETATION OF SECTION 831.4 IS

[5] Interestingly, the CITY admits that PROKOP's Accident did not "occur on" the LA River Bikeway. [See footnote 3, *supra*.]

ERRONEOUS AND DOES NOT SUPPORT A GRANT OF SUMMARY JUDGMENT TO THE CITY

A. Rules Of Statutory Construction

A court's "primary task in construing a statute is to determine the Legislature's intent." (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.#d. 711, 724.) Toward this end, "[t]he court turns first to the words [of a statute] themselves for the answer" to an interpretive question such as the one at bar. (*Alford v. Department of Motor Vehicles* (2000) 79 Cal.App.4th 560, 565-566.) The language should be examined "[not] in isolation, but in the context of the statutory framework as a whole in order to determine its scope," and "to give it sense and to guard against an application not contemplated by the Legislature." (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737; *Nelson*, citing 58 Cal.Jur.3d, Statutes, s 90, p. 444.) Moreover the Legislature is presumed to have "intended every word, phrase and provision . . . in a statute . . . to have meaning and to perform a useful function." ((*Gonzalez v. County of Tulare* (1998) 65 Cal.App.4th 777, 786-787; See also, *In re Young* (2004) 32 Cal.4th 900, 907.)

> **"Interpretive constructions which render some words surplusage, defy common sense, or lead to mischief or absurdity, are to be avoided."** (*California Mfrs. Assn v. Public Utilities Com* (1979) 24 Cal.3d 836, 844; see also, *Hunt v. Superior Court* (1999) 21 Cal.4th 984, 1002; *People v. Aguilar* (1997) 16 Cal.4th 1023.)

Moreover, "[w]ords must be construed in context, and statutes must be harmonized, both internally and with each other" such that "the whole body of law . . . retain[s] its effectiveness." (*Mautner v. Peralta* (1989) 215 Cal.App.3d 796, 804.) "[A]ll acts relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law;" "statutes and codes blend into each other, and should be regarded as constituting but a single statute." (*Id.*; see also, *Clean Air Constituency v. California State Air Resources Bd.* (1974) 11 Cal.3d 801, 814.)

The CITY ignores virtually all of the foregoing guidelines. It interprets Section 831.4 in a manner that renders various provisions of

the statute itself, the Tort Claims Act, and the Bicycle Transportation Act superfluous and/or contradictory. For example, by insisting that Subsection (b) extends **absolute** blanket immunity for **all** injuries resulting from the condition of **all** trails, the CITY ignores express statutory language extending only qualified immunity where an injury is caused by the condition of a specific sub-group of "trails" - - *to wit*, Subsection C Trails. If the CITY were correct, and absolute trail immunity was **always** the rule, a significant portion of Subsection (c) would be rendered meaningless and superfluous. Likewise, the CITY refuses to even attempt to harmonize its interpretation of Section 831.4 with the remainder of the Tort Claims Act or with the Bicycle Transportation Act, even though the CITY's construction of Section 831.4 emasculates significant portions of statutory schemes.

The reasons for the CITY's refusal to acknowledge recognized rules of statutory construction and its insistence that this Court basically put on blinders to review this case, are not difficult to ascertain; the CITY cannot prevail on this appeal if proper analysis (reiterated herein) is utilized.

B. <u>When Proper Statutory Construction Is Utilized, The</u>

CITY's Analysis Fails On Multiple Levels

A threshold question raised by this appeal is whether the LA river Bikeway is properly classified as a "trail." If it is, then the secondary question of whether it is one of the types of trails governed by Section 831.4 (i.e. a Section 831.4 Trail) arises. If that question can be answered in the affirmative, then a determination must be made as to whether it is a Subsection B Trail or a Subsection C Trail. If it is a Subsection C Trail, then inquiry must be made into whether the conditions for qualified immunity were satisfied; if they were not, the City is not shielded from liability. Finally, if the LA River Bikeway is determined to be a Subsection C Trail and the conditions for qualified immunity satisfied, or if the LA River Bikeway is found to be a Subsection B Trail, then the apparent tension between potentially applicable statutes that expressly create governmental liability and potentially applicable statutes that create governmental immunity must be examined and reconciled.

PROKOP submits that:

- **Even if the LA River Bikeway could fall within a**

broad, generic definition of "trail," its is not a Section 831.4 Trail as a matter of law;

- **If the LA River Bikeway is deemed to be a Section 831.4 Trail, then a trier of fact could find that it is a Subsection C Trail and that the CITY did not establish a prima facie right to qualified immunity, and hence had no immunity;**
- **Even if the LA River is a Subsection B Trail or if it is a Subsection C Trail and the CITY is found to have satisfied the conditions for qualified immunity, there is still at least a question of fact as to whether the CITY is liable for breaching a mandatory duty, failure to warn, or defectively designing the LA River Bikeway.**

The bases for PROKOP's position are reiterated below.

1. <u>The LA River Bikeway Is Not Necessarily A Section 831.4 Trail</u>

Whether a property is a Section 831.4 Trail "depends on a number of considerations." (*Amberger-Warren* at 634.) The first is "accepted definitions of the property." (*Id.*, citing *Carroll*, supra, at 609; and *Treweek v. City of Napa* (2000) 85 Cal.App.4th 221, 231.) Second is "the purposes for which the property is designed and used, and third is the purpose of the immunity statute. (*Amberger-Warren* at 634, citing *Farnham, supra* at 1103.)

a. Definitions Of "Trail" And "Class I Bikeway"

The definition of a bikeway is any "facility that provides primary for bicycle travel." (*S&H Code* § 890.4). A Class I bikeway, like the LA River Bikeway, is statutorily defined as a bikeway "such as a 'bike path' which provide[s] a completely separated right-of-way designed for the exclusive use of bicycles and pedestrians with cross-flows by motorists minimized." (*Id.*)[6]

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[6] "Class II bikeways" are public ways "such as a 'bike lane,' which provide a restricted right- of-way designated for the exclusive or semiexclusive use of bicycles with through travel by motor vehicles or pedestrians prohibited, but with vehicle parking and crossflows by pedestrians and motorists permitted;" and, "Class III bikeways" are public ways "such as an onstreet or offstreet 'bike route,' which provide a right-of-way designated by signs or permanent markings

According to the *Carroll* court, an appropriate dictionary definition of the word "trail" to use in the instant analysis, is that found in Webster's Collegiate Dictionary (10th ed. 1995) at p. 1251. That definition is:

> **"(1) a track made by passage esp. through a wilderness; (2) a marked or established path or route esp. through a forest or mountainous region."** (*Treweek* at 230-231.)

By selectively quoting from the above definition and relying on a "synonym finder" which equated the terms "trail" and "path", the *Carroll* court found that South Bay Bicycle Path was both a "trail" and a Section 831.4 Trail. (Specifically a Subsection B Trail).[7]

Thereafter, the *Farnham* court, relying exclusively on *Carroll*, held that the Sepulveda Basin Bikeway was likewise a "trail," a

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and shared with pedestrians or motorists." (*S&H* Code §890.4.)

[7] The reported decisions discussed herein do not use the terms "Section 831.4 Trail," Subsection B Trial," and "Subsection C Trial," (which terms are defined and used herein for ease of reference), but use different terminology to articulate the same concepts.

Section 831.4 Trail, and a Subsection B Trail. In this appeal, in this regard, by ruling that the LA River Bikeway is a Subsection B Trail simply because it is "a marked or established path or route" and/or because it may sometimes be referred to colloquially as a "bike path."

A post-*Farnham* decision has articulated bases for rejecting the CITY's argument, however, and has established precedent for refusing to characterize property as a trail even if it is "a marked or established path or route." Specifically, in *Treweek*, *supra*, it was held that a property which did not "seem . . . to reasonably fall within the commonly understood meaning of the term "trail," was not a trail, even if it was an "established . . . route" connecting land to a dock. (*Treweek* at 231.) *Treweek* held that a "ramp" - - defined as "a way or passageway connecting two different levels on an incline plane" - - was not a trail. (*Id*. At 232.) The *Treweek* court's reasoning was that the "elastic definition" of "trail" used by the *Carroll* and *Farnham* courts was so expansive that it could "cover . . . the ramp [there] at issue . . . perhaps the parking lot . . . [and also] could include a sidewalk or even an elevator." (*Treweek* at 232.) Thus, *Treweek* stands for the proposition that although a "ramp," a "parking lot," a

"sidewalk" and/or an "elevator" might be a "marked or established route" between two or more places, none of those locations is properly classified as a "trail" because doing so would "stretch the definition [of trail] too far." (*Id.*) This court could, and should, use the same reasoning to conclude that the "completely separated right-of-way designed for the exclusive use of bicycles and pedestrians"[8] here at issue is likewise not a trail. To do otherwise would be to open the door to claims of immunity on sidewalks, public roads, and even the hallways and corridors of publicly built and/or owned structures, since all such locations might reasonably be considered a "marked or established route[s]."

b. <u>Design And Use Of Trails And Class I Bikeways</u>

The second factor to be considered in connection with the typically factual inquiry of whether a Class I bikeway constitutes a trail, is "the purpose for which [the bikeway] is designed and used." (*Amberger-Warren* at 634.) To be a "trail," a public way must be

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[8] See *Streets and Highways Code* Section 890.4, defining "Class I bikeway."

"designed and used for a recreational purpose" (*Amberger-Warren* at 634.) The stated intent of the Legislature in building bikeways, however, is not to create recreational opportunities, but "to establish a bicycle transportation system . . . designed and developed to achieve the functional commuting needs of the employee, student, business person, and shopper as the foremost consideration in route selection, to have the physical safety of the bicyclist and bicyclist's property as a major planning component, and to have the capacity to accommodate bicyclists of all ages and skills. (*S&H Code* § 890.) Thus, it is clear that the LA River Bikeway was **designed** for the functional purpose of providing transportation - - not for recreation.[9]

Moreover, even if the LA River Bikeway does have recreation as one of its purposes, it cannot be said, as a matter of law, that the LA River Bikeway was not also **used** for transportation.

"The design and use will control what an

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[9] Moreover, even if the bikeway is also used by some citizens for recreation, liability nevertheless attaches since it is well established that "where liability attaches in favor of the non-recreational user, it will also attach in favor of an injured party going to the property for a recreational purpose." (*Delta Farms Recreational District No. 2028 v. Superior Court* (1983) 33 Cal.3d 699,709.)

object is, not the name." (*Farnham*, *supra* at 1103; *Amberger-Warren* at 635.)

Therefore, although a Class I bikeway may sometimes be called a "bike path," it is actually neither a "path" nor (assuming the terms "path" and "trail" are synonymous) a "trail." It is a transportation facility, both by design and use.

c. <u>Purpose of the Immunity Statute</u>

The legislative comment Section 831.4 cross-references to the comment to Section 831.2, which explains that "under [Section 831.2] and 831.4, the State has an absolute immunity from liability for injuries resulting from natural conditions of a state park area where the only improvements are recreational access roads (as defined in Section 831.4) and hiking, riding, fishing and hunting trails." The legislature further elaborated:

> **"[Section 831.2] and Section 831.4 continue and extend an existing policy adopted by the Legislature in former *Government Code* Section 54002. It is desirable to permit the members of the**

public to use public property in its natural condition and to provide trails for hikers and riders and roads for campers into the primitive regions of the State. But the burden and expense of putting such property in a safe condition and the expense of defending claims for injuries would probably cause many public entities to close such areas to public use. In view of the limited funds available for the acquisition and improvement of property for recreational purposes, it is not unreasonable to expect persons who voluntarily use unimproved public property in its natural condition to assume the risk of injuries arising therefrom as a part of the price to be paid for benefits received."

The immunity created by Section 831.4 thus is designed to

relieve a public entities of "the burden and expense" of "putting unimproved or minimally improved property in a safe condition." However, nothing suggests that Legislature intended to immunize municipalities who, in a manner totally inconsistent with statutory mandates, drastically modify public property used for functional transportation purposes

Immunizing public entities from liability for injuries caused by the condition of a Subsection B Trail and for injuries caused by the condition of a Subsection C Trail, so long as adequate warnings are given, serves the public policy of keeping unimproved and minimally improved property open for public use. Immunizing public entities from liability for injuries caused by the sub-standard, non-compliant design and/or construction of bikeways (whether Class I, Class II or Class III) would be akin to immunizing public entities for faulty design and construction of public roads and sidewalks. No such immunity exists with regard to roads and sidewalks, however, and none should exist with regard to Class I bikeways (or, for that matter, Class II bikeways or Class II bikeways).

2. <u>Even If The LA River Bikeway Is A Section</u>

831.4 Trail, There Is Not Necessarily Absolute Immunity, As It Might Well Be A Subsection C Trail (Not A Subsection B Trail)

a. Section 831.4 Does Not Always Absolutely Immunize The CITY From Liability For Injuries Caused By The Condition Of A Subsection C Trail

i. The Plain Language Of Section 831.4 Reveals The Fallacy Of The CITY's Absolute Immunity Theory

The CITY brashly claims that it must prevail on appeal because it is cloaked with "absolute immunity for injuries arising on any trail." [RB at p. 5.] This is obviously a false statement. Even the CITY cannot deny that the statute, by its own terms, does not extend **absolute** immunity for injuries caused by the condition of **any and all trails**. Specifically, subsection (c) of the statute which, when read in conjunction with subsection (b), provides, in pertinent part:

> **"A public entity . . . is not liable for an injury caused by a condition of . . .**

(b) Any trail used for [certain[10]] purposes.

(c) Any paved trail, walkway, path, or sidewalk on an easement of way which has been granted to a public entity, which easement provides access to any unimproved property, so long as such public entity shall reasonably attempt to provide adequate warnings of the existence of any condition of the paved trail, walkway, path, or sidewalk which constitutes a hazard to health or safety."

The foregoing language clearly creates a distinction between a Subsection B Trail, on one hand, and a Subsection C Trail, on the

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The subsection reads, in its entirety: "Any trail used for the above purposes." The language "the above purposes," has been interpreted to mean different things by different courts. That meaning is not relevant to the discussion in this Reply, however, and hence is not analyzed in any depth at this point.

other hand.[11] Where an injury is caused by the condition of a Subsection B Trail, then the statute provides, simply, that "[a] public entity . . . is not liable" therefore; where an injury is caused by the condition of a Subsection C Trail, then the statute provides more limited protection - - *to wit*, "[a] public entity . . . is not liable . . . **so long as**" certain conditions have been met.[12]

In light of the undeniable existence of this **qualified** immunity pursuant to subsection (c) for at least some types of trails, it is clearly erroneous for the CITY to declare: "Subdivision (b) . . . provide[s] absolute immunity for injuries arising on 'any trail.'" [RB at p. 5.] To the contrary, the plain language of section 831.4 itself provides that the CITY is **not** absolutely immunized from liability for (among other

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[11] Interestingly, Subsection (c) also introduces the term "pathway" into the statute by way of the last sentence thereof, which provides: "Warnings required by this subdivision shall only be required where pathways are paved, and such requirement shall not be construed to be a standard of care for any unpaved pathways or roads."

[12] Specifically, "so long as such public entity [has] reasonably attempt[ed] to provide adequate warnings of the existence of any condition of the paved trail, walkway, path, or sidewalk which constitutes a hazard to health or safety."

things) injuries caused by the condition of a Subsection C Trail; in that case, only qualified immunity is available.[13]

ii. The Legislative History Of Section 831.4 Supports PROKOP

Further support for PROKOP's position is found in the recent First District Court of Appeal case of *Amberger-Warren*, *supra*, and the recitation of legislative history set forth therein. If, as the CITY claims, Subsection (b) absolutely immunizes **all** trails, then Subsection (c), which extends only qualified immunity to **certain** trails, would have had the effect of narrowing the scope of Section 831.4's grant of immunity. According to *Amberger-Warren*, however, the "[l]egislative history indicates . . . that Subdivision (c) . . . was not intended to limit existing immunity in any way, but to expand it." (*Amberger-Warren* at 636.) Therefore, at a minimum, Subsection C Trails (and the other types of public ways described in Subsection (c)) could **not** have been immunized prior to the 1979

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[13] Likewise, only qualified immunity is available for injuries caused by the condition of certain paths, walkways and sidewalks located on easements and, significantly, **no** immunity is expressly provided by Section 831.4 for many other types of paths, walkways and sidewalks.

amendment which extended immunity - - but still only qualified immunity- - to Subsection C Trails.

The *Amberger-Warren* court also acknowledged that before the 1979 amendment, the "law granting immunity from liability [did] not cover improved easements." (*Amberger-Warren* at 637.) This statement is significant for two reasons. First, it discredits further the CITY's claim that Subsection (b) immunizes **all** trails since, if that were the case, then trails on improved easements **would** have been immunized at least since 1970 when Subsection (b) was enacted in its present form, and there would have been no need for Subsection (c). Second, the statement corroborates PROKOP's contention that the definition of "trail" should turn, to some extent, on the question of whether the passage way in question has been substantially improved or not.

Although the relevance of the *Amberger-Warren* opinion to this case is limited by the fact that the pathway there at issue **was** (unlike the LA River Bikeway) both a Section 831.4 Trail and a Subsection B Trail, the decision in no way detracts from the arguments made by PROKOP herein. In fact, the case is entirely consistent with - - and

actually bolsters - - PROKOP's position in this case, for the reasons set forth above.

b. <u>There Were At Least Questions Of Fact Regarding Whether The LA River Bikeway Is A Subsection C Trail And, If So, Whether The CITY Complied With Its Duty To Warn</u>

As explained in more detail in PROKOP'S Opening Brief, there is evidence in the record that the LA River Bikeway is located on a recreational easement and is designed, at least in part, to connect regional open spaces to each other. [CT0031:19-21, 0070:03-04; 0096:26-28].[14] There was therefore clearly a question regarding whether the LA River Bikeway is a Subsection C Trail. If it was, then the existence of immunity will depend on whether there was a "condition" on the LA River Bikeway "which constituted a hazard to health or safety" and, if so, whether the CITY "reasonably attempt[ed] to provide adequate warnings of the existence" of such condition. (See *Gov. Code* §831.4(c).) All of these inquiries raise issues of fact

[14]See PROKOP's Opening Brief at pp. 9, 10, 55.

which should have precluded an award of summary judgment in favor of the CITY.

It is also important to note that the *Carroll v. County of Los Angeles*, *supra*, and *Farnham*, *supra*, cases are distinguishable on this point. In neither case was there a question of fact raised regarding whether or not the pubic ways there at issue fell within the scope of Subsection (c). In *Carroll*,"the record [was] devoid of any facts to show that an easement [was] involved [t]here" (*Carroll* at 609); and in *Farnham*, "Appellant d[id] not contend that the bikeway [was] the subject of . . . an easement" (*Farnham* at 1100).

3. Even If The LA River Bikeway Is A Subsection B Trail, Absolute Immunity Does Not Attach As A Matter of Law

a. Precedent Does Not Support The CITY's Claim Of Absolute Immunity

The CITY's Respondent's Brief erroneously declares that, "[u]niformly, the cases have all found that [Subsection (b)] applies to a public bikepath and immunizes a city from liability arising from any injury occurring on it." [Rb at p. 5.] In support of this statement, the

CITY cites four cases: *Armenio v. County of San Mateo* (1994) 28 Cal.App.4th 413; *State of California v. Superior Court of Sonoma County* (1995) 32 Cal.App.4th 325, 328; *Carroll v. County of Los Angeles*, *supra*; and *Farnham v. City of Los Angeles* (1998) 68 Cal.App.4th 1097.

In fact, no published decision has addressed the specific issues raised by this appeal - - let alone decided them adversely to PROKOP. Of these cases, one - - *State of California* - - had nothing to do with a "public bikepath" (by the CITY's own admission, it involved an "unpaved horse trail in a state park") and hence is irrelevant. Another - - *Armenio* - - "held" only that subsection (b) of Section 831.4 extends immunity for injuries that occur on a trail (whether paved or unpaved) which is **itself** used for one of the recreational purposes enumerated in subsection (a) of the statute, rather than on a trail used to access such recreation; the "trail" there at issue was never once referred to as a "bike path" and its designation as a "trail" was in no way contested as it is here. (Accord, *Gianuzzi v. State of California* (1993) 17 Cal.App.4th 462, 467.)

Carroll and *Farnham*, although somewhat more on point, are

(in addition to being distinguishable from the case at bar)[15] poorly reasoned. In *Carroll*, the court concluded that a "paved bicycle path" is necessarily a Section 831.4 Trail because "[t]he words 'trail' and 'path' are synonymous." (*Carroll* at 609.) Obviously, however, the legislature could not have intended the two terms, as used in Section 831.4, to be interchangeable; if it had, there would have been no reason to differentiate between a "trail" and a "path" in subsection (c) of the statute. The *Farnham* case simply follows the *Carroll* court's erroneous reasoning, without discussion or explanation, and therefore does nothing to legitimize it. Accordingly, neither *Carroll* nor *Farnham* should be read as sound precedent for concluding that every path - - let alone every Class I Bikeway - - is a Section 831.4 Trail or a Subsection B Trail.

b. <u>Proper Interpretation Of The Relevant</u>

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15 Among other things plaintiff could not point to a breach of a mandatory duty in either case, and in neither was there a possibility raised that the public way at issue was located on an easement. [See discussion under heading III.A.2. above.]

Statutes Contradicts The CITY's Position

One of the fundamental questions raised by this dispute is how to interpret seemingly conflicting statutes within the Tort Claims Act - - such as Sections 815.6 and 831.4 - - which, on one hand, create potential liability on the part of the CITY for injuries occurring under certain circumstances and, on the other, purport to provide qualified or even absolute immunity under similar circumstances. The CITY's Respondent's Brief barely even acknowledges this tension, let alone engages in the complex analysis necessary to resolve it. Instead, the CITY simply concludes that immunity will prevail over liability every time and that Section 831.4 therefore renders Section 815.6 and other statutory mandates meaningless and irrelevant under the facts at bar. This theory defies common sense and ignores settled rules of statutory construction.

The California Supreme Court has admonished courts not to "casually decree governmental immunity" because, "[unless the Legislature has clearly provided for immunity, the important societal goal of compensating injured parties for damages caused by willful or negligent acts must prevail." (*Ramos v. County of Madeira* (1971) 4

Cal.3d 685, 692; See also, *Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 792-793; *Millibar v. City of Laguna Beach* (1983) 34 Cal.3d 829, 832, fn. 2.) Therefore:

> **"[W]here it is unclear whether the immunity statute is applicable the parties injured by negligent acts are entitled to the benefit of the doubt."** (*Baldwin v. State of California* (1972) 6 Cal.3d 424, 435-436.)

Here, it cannot be said that "the Legislature has clearly provided . . . immunity" to the CITY for injuries suffered by PROKOP as a proximate result of the CITY's dangerous design of the LA River Bikeway and failure to warn bicyclists of its perils. Indeed, there are statutes specifically recognizing potential governmental liability in tort for failure to adhere to regulations such as the Safety/Design Standards, and for neglecting to post adequate warning signs. Pursuant thereto, the CITY is potentially liable to PROKOP, who therefore was entitled to his day in court.

i. <u>Non-Compliance With the Safety/Design Standards Strips The</u>

CITY Of Immunity To Which It Otherwise Might Have Been Entitled

(A) The City Had A Duty To Design And Build The LA River Bikeway Per The Safety/Design Standards

The CITY does not deny that it had a duty to comply with the Safety/Design Standards, nor does it suggest that summary judgment was the proper vehicle for ascertaining whether there was any non-compliance that proximately caused PROKOP's damage. Instead, the CITY asks this Court to simply dispense with any "duty, breach, causation" analysis, and insists that "this Court need look no further than the language of section 831.4(b)" because the CITY would like the Court to believe that the question raised by this appeal "begins and - - and ends - - with section 831.4." [RB 1, 13-14.]

Immunity questions cannot be analyzed in a vacuum, however. They are inextricably intertwined with predicate and foundational

questions which cannot be ignored. Foundational to the inquiry is an examination of the existence, nature and scope of a duty:

> **"Conceptually, the question of the applicability of a statutory immunity does not even arise until it is determined that a defendant otherwise owes a duty of care to the plaintiff."** (*Walt Rankin & Associates, Inc. v. City of Murietta* (2000) 84 Cal.App.4th 605, quoting *Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 201-202.)

Therefore, notwithstanding the CITY's reluctance to even discuss the nature of the duty on which PROKOP's claims are based, any sound analysis of an immunity defense starts with identifying the "duty" element of the plaintiff's *prima facie* case. (*Id.*; See also, *Reason v. Department of Health Services* (1998) 18 Cal.4th 623, 630.)

The "duty" here at issue derives from the Bicycle

Transportation Act (codified at *Streets and Highways Code*, Sections 890 *et seq.*) One of the provisions the California Legislature saw fit to include therein, is:

> **"The [California] [Department [of Transportation] . . . shall establish minimum safety design criteria for the planning and construction of bikeways . . . The criteria shall include, but not be limited to, the design speed of the facility, minimum widths and clearances, grade, radius of curvature, pavement surface, actuation of automatic traffic control devices, drainage and general safety. The criteria shall be updated biennially or more often, as needed."** (*S&H Code* §890.6.)

More importantly, for purposes of this appeal, the Legislature also included in the Bicycle Transportation Act, an unequivocal mandate for compliance with those Safety Standards:

> **"All city . . . agencies responsible for the development or operation of bikeways . . . shall utilize all minimum safety design criteria . . . established pursuant to Section 890.6 . . ."**(*S&H Code* §891.)

The existence of a statutory duty on the part of the city to "utilize all minimum safety design criteria" when "developing or operating . . . bikeways," therefore can hardly be disputed. Whether the CITY breached that duty and, if so, whether the breach proximately caused PROKOP's damage, are not questions that were even raised by way of the CITY's motion for summary judgment - - let alone adjudicated in the CITY's favor. Therefore, the trial court could properly have granted summary judgment only if the CITY established as a matter of law and based on undisputed facts, that the CITY's affirmative defense of immunity necessarily had merit. The CITY did not meet this burden, however; it was not necessarily destined to prevail at trial on the grounds of immunity. At a minimum,[16] questions of fact regarding the defense remained to be

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[16] In fact (although the issue is not raised by this appeal), had PROKOP

resolved by trial.

(B) A Public Entity That Breaches A Mandatory Duty *IS* Statutorily Liable For An Injury Caused Thereby

Pursuant to Section 815.6, civil liability may be imposed on a pubic entity that fails to comply with an enactment that is intended to impose an "obligatory duty to take specified official action" if the entity thereby proximately causes the "particular foreseeable injuries" the statute was designed to prevent. (*Fredette v. City of Long Beach* (1986) 187 Cal.App.3d 122, 135, citing *Morris v. County of Marin* (1977) 18 Cal.3d 901, 910 and fn. 6.[17]

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brought a summary judgment motion on the immunity issue, his motion probably could have been granted on the grounds that undisputed facts establish that there was **no immunity** as a matter of law.

[17] Section 815.6 operates in a manner analogous to the doctrine of negligence *per se* in private litigation (codified in *Evidence Code* Section 669). In both cases, "violation of a statute without justification constitutes presumptive failure to exercise due care . . . if the violation proximately caused the injury and the person injured was one of the class of persons for whose benefit the statute was adopted." (*Fredette*, *supra* at 134-135, citing *Hargrave v. Winquist* (1982) 134 Cal.App.3d 916, 925.) Moreover, in such cases, "[w]hether the party

The CITY admits that, pursuant to "[t]he statutory scheme of the Act," a public entity is liable under "certain circumstances specified in the Act" and that therefore, the CITY (at least theoretically)[18] could be liable under . . [S]ection 815.6" in the absence of an immunity defense. [RB at p. 2.] The CITY declines to discuss Section 815.6 further, however, based on its conviction that Section 831.4 renders all other statutory provisions of the act superfluous and irrelevant. PROKOP, on the other hand, submits that Section 831.4 is best understood and interpreted in the larger context of the Act as a whole, and that there is no reason not to at least consider the effect of Section 815.6 on this case, as well as the effect of Section 831.4 on the Section 815.6 analysis.

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to an action has violated a statute is generally a question of fact," as is "the question of whether the violation has proximately caused or contributed to the plaintiff's injury." (*Id.*, citing *Alarid v. Vanier* (1958) 50 Cal.2d 617, 624 and *Michael R. v. Jeffrey B.* (1984) 158 Cal.App.3d 1059, 1066.)

[18] The CITY acknowledges only that "in [PROKOP's] opinion, the CITY could be liable under . . . [S]ection 815.6." The CITY makes no attempt, however, to explain why PROKOP's "opinion" is wrong - - i.e. why, leaving aside the immunity defense, Section 815.6 could not give rise to *prima facie* liability. Instead the CITY argues that "even if [it] could otherwise be liable under Section 815.6 . . . the CITY is nevertheless immune." [RB at p. 3.]

Pursuant to the plain language of Section 815.6, a"public entity is liable for injury . . . proximately caused by its failure to discharge a duty" that is: (I) "mandatory;" and (ii) (a) is imposed by an "enactment" which is (b) "designed to protect against the risk of the particular kind of injury" sustained. (*Becerra v. County of Santa Cruz* (1998) 68 Cal.App.4 1450, 1458.) A presumption of negligence (and hence, liability) "arises when the prerequisites of the statute are satisfied." (*Braman v. State of California* (1994) 28 Cal.App.4th 344, 349; *Brenneman v. State of California* (1989) 208 Cal.App.3d 812, 816-817, fn. 2.) The presumption may be rebutted with a showing that the "public entity . . . exercised reasonable diligence to discharge the duty." (*Gov. Code* §815.6.)[19]

The CITY ignores the fact that Section 815.6 creates a specific statutory duty, refuses to even acknowledge the language in Section 815.6 which expressly carves out liability for breach of that duty[20]

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[19] The CITY made no effort in this case to escape liability by demonstrating that it exercised reasonable diligence to discharge that mandatory duty created by *S&H* Section 891.

[20] Section 815.6 provides: "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity **is liable**

from any immunity grant in the Tort Claims Act.[21] It is nevertheless inescapable that the plain language of Section 815.6 provides that the CITY **may be liable** for damage resulting from a breach of a "mandatory duty." Accordingly, in order to establish that, as a matter of law, its immunity defense would have prevailed, the CITY must be able to explain why Section 815.6 would not have precluded that result. This, the CITY cannot do. The only argument the CITY could concoct in response to the foregoing is that, because the Legislative Comment to Section 815.6 refers to "some immunities" stated "[i]n the sections that follow" Section 815.6, and because

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for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." (Emphasis added.) Pursuant to relevant case law: "An enactment creates a mandatory duty if it requires a public agency to take a particular action. [Citation.] An enactment does not create a mandatory duty if it merely recites legislative goals and policies that must be implemented through a public agency's exercise of discretion" or if it grants only a "permissive power which a governmental entity may exercise or not as it chooses." (*County of Los Angeles v. Superior Court (Terrell R.)* (2002) 102 Cal.App.4th 627, 639; *Morris, supra*, at p. 908.)

[21] As the CITY admits that "**liability** of . . . public entit[ies]" is "established" by the Tort Claims Act, which therefore is more than simply a mechanism to confer immunity. [RB at p. 13, citing *Gov. Code* §815 (Emphasis added).]

Section 831.4 is a section that follows Section 815.6, Section 831.4 "innoculates the CITY from any liability here." [RB at p. 13.] This logic is facially absurd, however, and is inconsistent with precedent and settled principles of statutory interpretation. As a proper analysis reveals, under the facts of this case, immunity is simply not available as a matter of law, and the viability of the defense therefore cannot be decided in the CITY's favor by way of summary judgment.

(C) Section 815.6 Liability Takes Precedence Over Section 831.4 Immunity

The CITY contends that it enjoys absolute immunity from lawsuits for injuries arising on or near any paved Class I bikeway, even if the injury was caused by conduct which the Legislature specifically provided **would** give rise to liability (such as defective design or breach of a mandatory duty). [See, e.g., RB at p. 2.] The rationale for this position is that, where there is an apparent conflict between a statute providing for liability and one providing immunity, the tension should be resolved by choosing immunity over liability every time. Doing so not only defies common sense, however, it also

ignores settled rules of statutory construction and is not supported by sound precedent.

Although the tension between Section 815.6 and 831.4 has not been analyzed in any reported decision, there is substantial precedent harmonizing Section 815.6 with other immunity provisions in the Act. The rule that has emerged is that:

> **"[T]he liability imposed by *Government Code* section 815.6 . . . takes precedence over . . . immunity provisions."** (*Slagle Constr. Co. v. County of Contra Costa County* (1977) 67 Cal.App.3d 559, 562 (Emphasis added).

Specifically, *Slagle* holds that "judicial construction and the legislative history underlying the Tort Claims Act confirm" that the liability that attaches pursuant to Section 815.6 overrides the immunity afforded public entities by Section 818.4[22] for injuries

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[22] Government Code section 818.4 provides: "A public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization where the public entity or an employee of the public

caused by licensing decisions made by the government.

The court in the case of *Walt Rankin & Associates, Inc., supra*, likewise concluded that it would be error to interpret the immunity provision of Section 818.4 as superseding the liability provision of Section 815.6, as doing so would "completely eviscerate" Section 815.6. (*Walt Rankin* at 629.) *Walt Rankin* applied the same analysis to defeat the defense of immunity under Section 818.2 (immunizing public entities from liability for adopting or failing to adopt an enactment),[23] commenting "mandatory duties . . . cannot be ignored." (*Walt Rankin* at 628.)[24]

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entity is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked."

[23] Government Code section 818.2 provides: "A public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law."

[24] In support of its conclusion, the *Walt Rankin* court cited at least five other cases for the proposition that neither Section 818.2 nor Section 818.4 provides immunity in the face of a violation of a mandatory duty. One such case is the California Supreme Court case of *Morris, supra*, at pp. 911- 917, which held that no immunity was afforded the county by Section 818.2 or Section 818.4 where it had violated a mandatory duty established by *Labor Code* Section 3800 to issue building permits only to companies that carried workers' compensation insurance. (See also, *Trewin v. State of California* (1984) 150 Cal.App.3d 975 [no immunity under Gov. Code, § 818.4

As evidenced by the foregoing authorities, there is substantial legal basis for PROKOP's position.[25] There is no support, on the other hand, for the CITY's erroneous assertion that:

"[E]ven if this Court were to agree with PROKOP's analysis regarding the

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where Department of Motor Vehicles violated mandatory duty to refrain from issuing or renewing driver's license to person who department has determined cannot safely operate vehicle]; *Young v. City of Inglewood* (1979) 92 Cal.App.3d 437 [no immunity under Gov. Code, § 818.4 where city violated mandatory duty to ensure that recipient of building permit was duly licensed contractor]; *Elson v. Public Utilities Commission* (1975) 51 Cal.App.3d 577, 580-582 [no immunity under Gov. Code, §818.4 where commission violated mandatory duty to revoke license of bus company that did not maintain liability insurance]; *Elton v. County of Orange* (1970) 3 Cal.App.3d 1053 [no immunity under Gov. Code, §§818.2 and 818.4 where county violated mandatory duty under state regulations to inspect conditions in foster home].)

[25] See also, *Osgood v. County of Shasta* (1975) 50 Cal.App.3d 586, 590 [**if** the plaintiff could have pointed to a mandatory duty imposed on the defendant county by an enactment, then the liability created thereby would not have been defeated by the immunity in Section 831.2 for injuries caused by the natural condition of unimproved public property]; *Wood v. County of San Joaquin* (2003) 111 Cal.App.4th 960, 974-975 [had the defendant violated a mandatory duty, the immunity for injuries resulting from hazardous recreational activities would not have protected it from responsibility for the drowning death of plaintiff's decedent].

> **CITY's duty to maintain[26] the [LA River Bikeway] and even if the Court were to agree that the alleged defects in the design caused PROKOP's injuries, there would still be no liability because of the immunity in Section 831.4."** [RB at pp. 11-12.]

As discussed above and in the AOB, the *Walt Rankin* case (which the CITY inexplicably cites as support for **its** position) held exactly the opposite; the court found that the CITY's breach of a

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[26] The CITY has no basis for characterizing PROKOP's claim as one for violation of a duty to "maintain" the LA River Bikeway. It is clear from PROKOP's Complaint, that he contends the CITY violated the duty to **design** the bikeway in accordance with published standards. In this important respect, this case is distinguishable from the precedent on which the CITY relies. Accordingly, the question at bar is **not** whether the CITY breached an unidentified or ambiguous duty to maintain the LA River Bikeway; it is about whether the CITY breached Section 891's express, unambiguous, and specific mandate that "all city . . . agencies responsible for the development . . . of bikeway . . . **shall utilize** all minimum safety design criteria . . . established pursuant to Sections 890.6 and 890.8" (i.e. the Safety Standards).

mandatory duty proximately caused plaintiff's injuries, and therefore there **was** liability, **notwithstanding** immunities that might apply in the absence of a breach of mandatory duty. Moreover, the *dicta* quoted by the CITY from the case of *Astenius v. State of California* (2005) 126 Cal.App.4th 472 (although somewhat more on point) is neither binding authority, nor particularly persuasive. Although the *Astenius* court assumed the existence of some sort of general "mandatory duty to maintain . . . trails," its hypothetical was far removed from this case, where there **is actually** an unambiguous and definitive statutory mandate to design and build public facilities in accordance with the clearly and specifically identified Safety Standards.[27]

ii. <u>Here, The "Trap Exception" To Any Immunity Defense Is Also At</u>

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[27] It is hard to believe that the *Astenius* court would have reached the same result if, for example, there had been a potential violation of statute or regulation that provided: "Any hill within a State Vehicular Recreation area with a grade of more than 5%, shall be enclosed by a fence of sufficient height, circumference and durability to prevent off road vehicles from traveling down the hill."

Least Potentially Implicated

The CITY vastly oversimplifies the Tort Claims Act, and refuses to recognize that the Act does not alter the "basic premise in governmental tort cases that 'the rule is liability, immunity is the exception.'" (*Johnson v. State of California* (1968) 69 Cal.2d 782, 798; *McCauley v. City of San Diego* (1987) 190 Cal.App.3d 981, 991.) The scope of that "exception" is defined by the Tort Claims Act, which "specif[ies] the parameters of governmental liability." (*Delta Farms Reclamation Dist. v. Superior Court* (1983) 33 Cal.3d 699, 706; *Schmidt v. Southern Cal. Rapid Transit Dist.*, (1993) 14 Cal.App.4th 23, 28.) Pursuant thereto, governmental entities are potentially liable under certain (albeit "rigidly delineated") circumstances, and are granted immunity from monetary tort liability[28] in many other cases. (*Williams v. Horvath* (1976) 16 Cal.3d 834, 838.)

For example, as a general rule, a public entity is immune from liability for even a reasonably foreseeable injury proximately caused

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[28] Significantly, "[n]othing in [the Act] affects liability based on contract or the right to obtain relief other than money or damages against a public entity or public employee." (*Gov. Code* §810.)

by a dangerous condition on its property if the entity was unaware of the condition and/or was not in a position to correct it in time to prevent the injury; immunity is waived, however, if " [t]he 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." (*Gov. Code* §835.) Likewise, the government enjoys immunity for injuries caused by "the . . . design of a construction of, or an improvement to, public property"so long as the "constructed or improved public property [is] in conformity with a plan or design or a standard which reasonably could be approved by [a] legislative body or other body or employee;" if, however, a governmental entity has notice of non-conformity (and has had "a reasonable period of time . . . to obtain funds for and carry out remedial work necessary to allow such public property to be [brought into] conformity"), the immunity is waived. (*Gov. Code* §830.6.)

Immunity is also waived - - pursuant to the so-called "trap exception" - - where an otherwise immune public entity can be shown to have failed to take reasonable steps "as necessary to warn of a

dangerous condition which endangered the safe movement of traffic and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care." For example, even where a public entity is protected by the design immunity of section 830.6 (which, significantly, the CITY was not - - at least not as a matter of law), the public entity may still be liable for failure to warn of a concealed trap where that failure is negligent and is "an independent, separate concurring cause of the accident." (*Cameron v. State of California* (1972) 7 Cal.3d 318, 327.)

As illustrated by Sections 835 and 830.6, as well as the "trap exception," the Act is not, as Respondent's Brief suggests, a short list of exceptions to a general, almost universal, rule of non-liability for public entities.[29] In fact, it is a "carefully structured, comprehensive, statutory framework" of laws designed to achieve justice. (*Delta Farms*, *supra* at 706.) "Public entities may be held liable" for

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[29] The CITY additionally suggests that the Act also contains exceptions to the exceptions, pursuant to which certain acts and/or injuries on the "liability" list are re-immunized. This premise defies logic; it would make little sense to create liability that would not otherwise exist for certain injuries caused by certain types of conduct in one portion of the Act, only to restore immunity for some of the very same injuries in another part of the Act.

damages if "a statute . . . declar[es] them to be liable;" (*Gov. Code* § 815, Legislative Committee Comment (Senate)); "immunity is waived" where the "various requirements of the [A]ct are satisfied." (*Williams, supra* at 838.)

Summary judgment is therefore only appropriate where, based on undisputed facts, and as a matter of law, a public entity's conduct falls within the scope of a grant of statutory immunity, is not waived by virtue of another statutory provision, and is not subject to the "trap exception." Under no theory were all such pre-requisites met by the CITY in the trial court. It is thus inconceivable that summary judgment could have been properly granted.

IV. CONCLUSION

The trial court's ruling infringes on "an important right affecting the public interest" - - to wit, the right to reasonably safe bicycle travel on public ways specifically designed and built by pubic entities for that purpose. (*CCP* §1021.5.)[30] PROKOP is asking that

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PROKOP recognizes that it is premature to seek attorneys fees pursuant to Section 1021.5 and does not purport to do so hereby. Nevertheless, he submits that it is appropriate at this stage of the proceedings, to at least acknowledge that the public interest would be served by reversal of the lower court's ruling.

this Court confer a "significant benefit . . . on the general public" by reversing the erroneous trial court ruling below, thereby restoring to the public, the important right the legislature intended to bestow upon it. (*Id.*)

Date: October 27, 2006 NEMECEK & COLE

By:_____
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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 14(c)(1))

I certify that the text of this brief, exclusive of covers, table of contents, table of authorities and certificate of compliance, consists of 9,389 words as counted by the Corel WordPerfect version 12 word-processing program used to generate the brief.

Respectfully submitted,

NEMECEK & COLE

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 15260 Ventura Blvd., Suite 920, Sherman Oaks, California.

On October 27, 2006, I served the foregoing document(s) described as **APPELLANT'S REPLY BRIEF** on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED LIST SERVICE LIST

☐ **By Overnight Mail:** I served the foregoing document(s) on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as listed above. I am readily familiar with the firm's practice of collection and processing correspondence for OVERNIGHT DELIVERY. Under that practice it would be deposited with FEDERAL EXPRESS on that same date at Sherman Oaks, California in the ordinary course of business.

☒ **By Mail:** I served the foregoing document(s) on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as listed above. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same date with postage thereon fully prepaid at Sherman Oaks, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this affidavit.

☐ **By Personal Service:** I served the foregoing document(s) on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as listed above. I delivered such envelope by hand to the offices of the addressee.

Executed on October 27, 2006, at Sherman Oaks, California.

☒ **State:** I declare under penalty of perjury under the laws of the State of California that the Above is true and correct.

☐ **Federal:** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

DEBBIE GONZALES

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