ORIGINAL

No. S165549

IN THE SUPREME COURT OF CALIFORNIA

ALAN RICHARD KLEIN; et al.

Plaintiff and Appellant,

vs.

UNITED STATES OF AMERICA; et al.

Defendant and Appellee.

On Certification from the United States Court of Appeals
for the Ninth Circuit
Ninth Circuit Court of Appeals No. 06-55510
United States District Court No. CV 05-5526-PA

APPELLANTS' OPENING BRIEF ON THE MERITS

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ISSUE CERTIFIED TO THIS COURT

Does California Civil Code § 846, California's recreational land use statute, immunize a landowner from liability for acts of vehicular negligence committed by the landowner's employee in the course and scope of his employment that cause personal injury to a recreational user of that land?[1]

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[1] This Court granted the request of the United States Court of Appeals for the Ninth Circuit to decide the certified question presented, pursuant to California Rules of Court, rule 8.548. When framing the question, the Ninth Circuit Court of Appeals noted the "phrasing of the question set forth above should not restrict the California Supreme Court's consideration of the issues involved, and that court may reformulate the question."

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal stems from a tragic injury sustained by Appellant Alan Klein while riding his bicycle within the Angeles National Forest. After summary judgment was granted by the federal district court, the Ninth Circuit Court of Appeals certified a question of law to this Court concerning the applicability of California Civil Code section 846.

For three reasons, this Court should determine that the immunity created by California Civil Code section 846 does not apply to the active vehicular negligence of a landowner employee within the course and scope of employment.

The first and most compelling reason is the express words of the statute. When the words of the statute are read, considering their plain meaning and legal usage, there can be no question that the statute was intended to cover only premises liability claims, and that the immunity is inapplicable to the factual scenario presented herein. Further, when interpreted in light of fundamental canons of statutory construction, only one reading is possible: the immunity cannot be read to apply to an act of vehicular negligence by a landowner employee in the course and scope of his duty.

The second reason is that this Court has strongly suggested, and courts from nearly every other jurisdiction directly addressing the issue,[2] have found that active landowner negligence unrelated to a dangerous condition is not subject to recreational use statute immunity. Only one California appellate court has addressed the issue of whether active vehicular negligence is subject to the California Recreational Use Statute, codified as California Civil Code section 846. See *Shipman v. Boething Treeland Farms*, (2000) 77 Cal.App.4th 1424 [92 Cal.Rptr.2d 566]. Because the Court of Appeal in *Shipman* relied solely upon the generalized policy based proclamations of the California Supreme Court in exclusively premises liability cases, without critical analysis, its foundation is faulty. *Shipman v. Boething Treeland Farms*, supra, 77 Cal.App.4th at 1431-32.[3] Further, this Court in *Avila v. Citrus*

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[2] These other jurisdictions include Supreme Courts of Utah, Iowa and Wisconsin, as well as appellate courts in New York and Arizona.

[3] The *Shipman* case, decided in the year 2000, remains an island unto itself, not cited by any court, state or federal, for the proposition upon which Respondent relies. It therefore cannot constitute reliable authority upon which the Court may rely. As evidence of its tenuous status as authority, it should be noted that in the nearly nine years since its publication, *Shipman* has yet to be cited in any published decision in the United States.

Community College District,(2006) 38 Cal.4th 148 [41 Cal.Rptr.3d 299], called into serious question the ongoing viability of *Shipman*. *Avila* recognized the distinction between premises based duties of care and independent duties of care governing individual conduct, a finding which strongly suggests that *Shipman* did not state California law correctly. Thus, the weight of reasoned authority strongly suggests a finding of inapplicability of Section 846 to the case at hand.

The third reason involves the serious public policy implications raised by a contrary decision. Section 846 immunizes landowners for their failure to "keep the premises safe" for recreational users. Because injury resulting from the active negligence of the landowner is vastly different from injury resulting from the condition of the land, logic dictates that the words "keep the premises safe" could never encompass the active negligence of the landowner. In analyzing the purpose of the statute, in light of the legislative history, there can be no reasonable explanation why the Legislature would have allowed an absurd consequence of injury without remedy when the injury was not caused by the condition of the land, or by acts of the recreational user causing injury to himself or herself.

To authorize a blanket or absolute immunity covering all injuries of any kind sustained by recreational users on the land of another, despite the nature of the negligent conduct causing the injury, would lead to unacceptable policy results, including implicitly authorizing landowners and their employees to act irresponsibly, potentially causing unnecessary injuries to recreational users. This is not a logical or palatable outcome, given the language and legislative history of the statute. Further, the fiction of immunity for negligent behavior should be reserved for the specific situations which the Legislature intended. Otherwise, the legislative goal of balancing the protections for landowners allowing recreational access against the right to certain injured recreational users to seek compensation for injuries will not be achieved, as the immunity will extend far beyond that likely contemplated by the Legislature.

SUMMARY OF NINTH CIRCUIT ORDER

CERTIFYING QUESTION OF STATE LAW

The Ninth Circuit rendered an opinion certifying the question of whether Civil Code section 846, California's recreational land use statute immunized a landowner from liability of acts of vehicular negligence committed by the landowner's employee in the course and scope of his employment. *Klein v. United States* (9th Cir. 2008) 537 F.3d 1027.

Despite the appellate court decision in *Shipman v. Boething Treeland Farms*, the Ninth Circuit Court of Appeals expressed its doubt concerning the applicability of immunity of a landowner for its employee's negligent vehicle operation on its land harming a recreational user of such land. *Klein v. United States*, supra, 537 F.3d at 1032.

In contemplating the holding in the *Shipman* case, the court stated:

> "Here, we have grave concern that Shipman did not state California law correctly, and there is "convincing evidence" that leads us to believe that the California

Supreme Court likely would not follow Shipman. That evidence makes us hesitant to follow it as well. We are particularly reluctant to follow Shipman in light of the harsh result that granting immunity here would create, where Klein's injuries were so severe and where he would have been able to seek recovery for those injuries from Anderberg's employer if that employer had been anyone but the federal government." *Klein v. United States*, supra, 537 F.3d at 1032.

Further, it appears that the Ninth Circuit adopted the position of the Kleins in construing the immunity conferred by Civil Code section 846 narrowly, contrary to the *Shipman* case:

"There is nothing in the language of California Civil Code § 846, or the circumstances surrounding its enactment, that would lead us to view it as anything more than a premises liability exemption statute. Stated another way, nothing in its language or history would lead us to think that the legislature aimed to give landowners an immunity from liability for negligent driving of their agents on their land

when that negligence proximately caused damage to a recreational user of such land. Moreover, serious questions about Shipman's continuing vitality and validity arise from the 2006 California Supreme Court decision in Avila v. Citrus Community College District . . . .

. . . .

Both the repeated categorization of Civil Code § 846 as a 'premises liability statute' affecting only 'property-based duties' and the parallel drawn between that statute and a provision explicitly held not to limit the immunized group's 'liability arising from other '[non-premises-related] duties' raise a probability that the California Supreme Court, if faced with the question of immunity from claims of employee negligence presented in Shipman or in this case, would construe § 846 more narrowly than did the California Court of Appeal in Shipman and more consistently with the premises liability interpretation advocated by the Kleins." *Klein v. United States*, supra, 537 F.3d at 1032.

And lastly, the Ninth Circuit alluded to the possible repercussions and negative effects of following the *Shipman* decision:

> "Finally, while the United States is placed in the same position as a private individual for purposes of the Federal Tort Claims Act, it is of no small moment that the federal government owns millions of acres of National Park and National Forest land within the state of California. Shielding the United States from liability for the negligent driving, and possibly for other negligent acts, of its employees on all of these lands may have substantial and negative consequences for the many residents of and visitors to California who make use of federal lands for recreational purposes." *Klein v. United States*, supra, 537 F.3d at 1033.

The Ninth Circuit opinion certifying the question of state law to this Court is extremely well reasoned and is instructive in terms of the appropriate analysis to be undertaken in this matter.

FACTUAL STATEMENT

On August 29, 2004, Appellant Alan Klein was riding a bicycle, traveling in the northbound lane of a mountainous paved road named Bear Divide Road, in the Angeles National Forest north of Sunland, California.

The Angeles National Forest roads in question are open to the public and are subject to state and/or federal regulation and traffic laws.[4] Additionally, this fully paved and federally maintained road is regularly traveled by a sporadic group of vehicles which includes recreationists, firefighters, and United States government employees. These Angeles National Forest roads are characteristic of many mountainous roads throughout the state and require those driving upon them to use ordinary care, whether they be governed by state or federal traffic regulations.

Bear Divide Road is a two-lane road in the Angeles National Forest between a Los Angeles County Fire Station and a Forest Ranger Station.

On August 29, 2004, at approximately 8:55 a.m., Respondent David Anderberg was traveling southbound in an automobile on Bear

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[4] See 16 U.S.C. § 3; 36 C.F.R. § 4.2.

Divide Road. (United States Court of Appeals for the Ninth Circuit Excerpts of Record "E.R.," Tab 7, pgs. 56-57.) Anderberg was engaged in his regular employment activities in observing California condors for the U.S. Forest Service within the Angeles National Forest national park when his vehicle collided with Alan Klein in the northbound lane of Bear Divide Road. (E.R. Tab 7, pgs. 13-26.)

Klein's view was unobstructed for over 100 feet prior to the impact to Anderberg's vehicle. Anderberg drove his vehicle into Klein's lane thereby obstructing Klein's right-of-way. The head-on impact between Klein and Anderberg's vehicle occurred in Klein's lane. (E.R. Tab 7, pgs. 13-26.) Anderberg was traveling at approximately 25 miles per hour at the time of the incident. (E.R. Tab 7, pgs. 13-26.) Anderberg's view was obstructed by a hair-pin turn just prior to impact. (E.R. Tab 7, pgs. 28-41.) Anderberg veered into Klein's lane to avoid a tight turn and large pothole. Within a few feet around this hair-pin turn Anderberg's vehicle collided with Klein. (E.R. Tab 7, pgs. 64-66.)

Klein's accident reconstruction expert indicated that independent of any dangerous condition that may have existed, Respondent David Anderberg's negligence was a cause of the accident. Klein's expert

opined that Anderberg negligently drove his vehicle to the left of the center of the roadway while driving to the left of the large pothole. After passing the pothole and beginning a right turn around a "blind" curve, Anderberg continued driving to the left of the center of the roadway and collided with Alan Klein who was approaching from the opposite direction on his bicycle on his own side of the roadway. (E.R. Tab 7, pgs. 64-66.)

The collision resulted in catastrophic injuries to Alan Klein, including a partially severed ear, broken ribs, collapsed lung, brain injury (affecting memory and speech), a catastrophic torn brachial plexus (resulting in the permanent loss of use of his left arm), sleeping disorder, and multiple contusions and lacerations.

Mr. Klein is no longer able to complete many of life's simplest tasks. As a result, he can no longer put on his clothes, cut his food, tie his shoes, sleep in different positions, as well as many other daily activities that persons with two functional arms can perform with ease. Mr. Klein is in excruciating pain on a daily basis due to the injuries suffered in the incident. (E.R. Tab 7, pgs. 56-57.)

As a result of the accident, Klein was medically retired by the federal government as an air-traffic controller. This medical retirement has been financially devastating. Klein's net income decreased from approximately $6,000.00 per month to slightly more than $500.00 per month. Mr. Klein's wife, Sheryll Klein, was employed as an elementary school principal in the Santa Clarita Valley. Mrs. Klein took an inordinate amount of sick and vacation days to care for her spouse, and took early retirement as a result of the strain caused by having to care for her husband on a daily basis.

The Kleins' life plans were forever and tragically altered by Anderberg's careless driving while working as a volunteer for the United States Fish and Wildlife Service.

LEGAL ARGUMENT

I. CALIFORNIA'S RECREATIONAL USE IMMUNITY STATUTE CANNOT BE READ TO ENCOMPASS ACTIVE VEHICULAR NEGLIGENCE BY A LANDOWNER EMPLOYEE WITHIN THE COURSE AND SCOPE OF HIS EMPLOYMENT

A. Civil Code Section 846, By Its Very Wording, Applies Only To Premises Liability Claims

California Civil Code section 846 reads, in pertinent part, as follows:

> "An owner of any estate or any other interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except as provided in this section.
>
> . . . .

> A "recreational purpose," as used in this section, includes such activities as fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding . . . .
>
> . . . .
>
> This section does not limit the liability which otherwise exists (a) for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity . . . ." (Cal. Civ. Code § 846).

There is little legislative history surrounding the enactment of California Civil Code section 846. *Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1105-06 fn.8 [17 Cal.Rptr.2d 594] (en banc) (legislative history inconclusive); *Nelsen v. City of Gridley* (1980) 113 Cal. App. 3d 87, 91 [169 Cal.Rptr.2d 757] (legislature silent about underlying intent); *Donaldson v. United States* (9th Cir.1981) 653 F.2d 414, 418 (history provides insufficient insight as to intent of legislature).

Because of the limited evidence of legislative history and the dearth of appellate opinions which interpret this aspect of the statute, this Court must interpret the statute's plain meaning.

None of the cases upon which the United States relies, as to the ultimate issue, come from the California Supreme Court. Thus, no definitive construction of Section 846 currently exists.

B. Fundamental Canons of Statutory Interpretation Conclusively Establish That The Immunity Provided in Section 846 Is Applicable to Premises Liability Claims, and Not Those Of Active Negligence Not Caused By A Recreational User Upon the Land

While canons of statutory construction can always be perverted to seek a construction favorable to either side of an argument, a few rules of construction are more uniformly accepted by both liberal and conservative commentators. For example, it is fairly indisputable that the primary goal in interpreting statutory language is to give effect to the plain meaning of the words, unless it is contradictory to a clearly expressed legislative intent.

The United States refers to the "broad language of the statute" in *Ornelas v. Randolph*, supra, 4 Cal.4th 1095, but fails to properly characterize what the Court stated. The *Ornelas* court was indicating the broad nature of the language in the statute as it related to which types of land were subject to the act, not as to the critical language at issue herein. Klein submits that the language describing the coverage of the types of liability subject to immunity is narrowly tailored to capture all premises liability claims not subject to express statutory exception.

In this appeal, a careful reading of the controlling words of the statute lead to the inexorable conclusion that the Legislature **said** that the immunity was designed to cover premises liability based claims. The Legislature never mentions its intent to immunize all negligence occurring upon the land to recreational users. The words 'no duty of care to protect against all negligence' are different from the words set forth in the statute.[5]

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[5] California Civil Code section 846 provides, in pertinent part, that "[a]n owner. . . . owes no duty of care **to keep the premises safe** for entry or use by others for any recreational purpose . . . . (emphasis added).

The canon of statutory construction "expressio unius est exclusio alterius," or the express mention of one thing excludes all others, is certainly applicable to the interpretation of the statute. Civil Code section 846 expressly mentions the words "keep the premises safe," but does not more broadly provide, for example, that 'negligence of any kind causing injury to recreational users upon the land' is subject to immunity. Had the Legislature so intended, it clearly would have included more broadly worded language.

This Court concisely summarized the principles and methodology for the interpretation of statutory language in *Allen v. Sully-Miller Contracting Co.* (2002) 28 Cal.4th 222 [120 Cal.Rptr.2d 795]:

> "Where, as here, the issue presented is one of statutory construction, our fundamental task is "to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute." . . . We begin by examining the statutory language because it generally is the most reliable indicator of legislative intent. . . . We give the language its usual and ordinary meaning, and "[i]f there is no ambiguity, then we presume the lawmakers meant what they said, and the

> plain meaning of the language governs." . . . If, however, the statutory language is ambiguous, "we may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history." . . . Ultimately we choose the construction that comports most closely with the apparent intent of the lawmakers, with a view to promoting rather than defeating the general purpose of the statute. . . . Any interpretation that would lead to absurd consequences is to be avoided." *Id.* (citations omitted.)

Further, courts must strive to give significance to every word, phrase and sentence employed by the Legislature. (See *Dyna-Med, Inc. v. Fair Employment & Housing Comm.* (1987) 43 Cal.3d 1379, 1386-87 [241 Cal.Rptr. 67]; *Brown v. Superior Court* (1984) 37 Cal.3d 477, 484, [208 Cal.Rptr. 724]).

Based upon these precepts, the only plausible reading of the critical language at the very outset of Section 846 would be to interpret the words as applying to premises and dangerous condition cases alone.

"An owner of any estate or any other interest in real property. . . owes no duty of care **to keep the premises safe** for entry or use by

others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities **on such premises** to persons entering for such purpose. . . ." California Civil Code § 846 (emphasis added).

The Legislature chose its words carefully. Rather than stating, for example, that a landowner is not liable for any negligence which occurs on its land resulting to recreational users, the Legislature specifically cast the analysis in terms of "premises." Whether it be by a plain meaning interpretation or by resort to common legal usage or definition, it is evident that these particular words establish the intent of the enactment.

The unambiguous words of the statute make it clear that the statute was designed to immunize property owners only for dangerous conditions on their "premises." It strains logic to characterize the negligence of an employee as part of a landowner's "premises." Unless the Court is persuaded to ignore the words or the statute and contort it to satisfy the broad intent of the enactment, the statute should properly be construed as inapplicable to vehicular negligence.

This is clearly a premises liability immunity and there can be no logical basis, legislative intent included, which would explain the illogical result of immunizing property owners for the independent vehicular negligence of their employees within the course and scope of their employment.

Here, the words of the statute undoubtedly mark Civil Code section 846 as a narrowly tailored premises liability immunity statute.

1. Civil Code Section 846 Does Not Discharge a Landowner, Or Its Employees From the Independent Duty to Drive With Due Care As Mandated By the California Vehicle Code

The landowner immunity provided by Civil Code section 846 should not be construed to override and eliminate the duty of all drivers in the State of California and across the United States to drive with due care.

A logical assessment of the potential applicability of Section 846 discloses a distinction between the classes of conduct subject to the Act. This distinction separates affirmative conduct of the landowner subject

to an independent duty of care and often subject to regulation, from passive failures to maintain or keep safe the land.

In *Avila v. Citrus Community College District*, supra, 38 Cal.4th 148, the independent duty of care was the duty not to increase harm inherent to a college sport. Another example of the potential misapplication of the immunity granted by Civil Code section 846 was raised by Justice Gould during the course of oral argument before the Ninth Circuit. Justice Gould highlighted the potential inconsistency of the application of Section 846 to a hypothetical use of excessive force by a government employee in violation of an independent duty owed to a visitor of a national park.

In this instance, the independent duty at issue is the duty to operate a motor vehicle safely on the roads of the State of California while subject to either state or federal regulations governing the conduct of the driver.

In light of the foregoing analysis, Civil Code section 846 cannot be reasonably interpreted to abrogate all other duties owed to recreational users.

Anderberg was subject to traffic regulations while on Bear Divide Road. Under 16 U.S.C. §3, the National Park Service has set forth regulations governing vehicular traffic in the nation's parks. *United States of America v. Palmer* (9th Cir. 1991) 956 F.2d 189, 190. These regulations incorporate all state traffic and vehicle laws except those "specifically addressed" in the regulations. *Id.*

In addition, Title 36, Section 4.2 of the Code of Federal Regulations, provides the following:

> "(a) Unless specifically addressed by regulations in this chapter, traffic and the use of vehicles within a park area are governed by State law. State law that is now or may later be in effect is adopted and made a part of the regulations in this part.
>
> (b) Violating a provision of State law is prohibited."

36 C.F.R. § 4.2.

It is well settled that every driver within the State of California is subject to the requirement that they operate motor vehicles safely upon the roads of the state.

And, as it applies to the case at bar, California Vehicle Code section 21651 states:

> "(a) Whenever a highway has been divided into two or more roadways by means of . . . markings on the roadway, it is unlawful to do either of the following:
>
> (1) To drive any vehicle over, upon, or across the dividing section.
>
> (2) To make any left, semicircular, or U-turn with the vehicle on the divided highway, except through an opening in the barrier designated and intended by public authorities for the use of vehicles or through a plainly marked opening in the dividing section.
>
> (b) It is unlawful to drive any vehicle upon a highway, except to the right of an intermittent barrier or a dividing section which separates two or more opposing lanes of traffic. Except as otherwise provided in subdivision (c), a violation of this subdivision is a misdemeanor.
>
> (c) Any willful violation of subdivision (b) which results in injury to, or death of, a person shall be punished by

imprisonment in the state prison, or imprisonment in a county jail for a period of not more than six months."

Simply put, there exists no circumstance under which a vehicle operator is excused from these duties and responsibilities required under the Vehicle Code, and the corresponding civil duty of care derived from these rules of the road.

To further illustrate the policy behind our state's vehicle code and driving laws, emergency vehicles owe the same duty to drive with due care.

Vehicle Code section 21056 states:

"Section 21055 [exemption from traffic laws for emergency vehicles] does not relieve the driver of a vehicle from the duty to drive with due regard for the safety of all persons using the highway, nor protect him from the consequences of an arbitrary exercise of the privileges granted in that section."[6]

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[6] In accordance with Vehicle Code section 21056, Vehicle Code section 21807 states: "The provisions of Section 21806 [duty to yield to emergency vehicles] shall not operate to relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all (continued...)

Thus, an independent duty exists which fundamentally alters the analysis in determining the scope and applicability of Civil Code section 846 in this case.

The Court must determine whether the public policy in protecting landowners from liability to recreational users of their property sufficiently outweighs the state and federal requirements of vehicular safety on the roads of the state, and the corresponding civil responsibility for injury to third parties consonant with this independent legal duty.

2. The Statute's Express Provision Regarding Invitee Immunity Constitutes Additional Proof That the Legislature Sought to Draft a More Narrow Immunity than Proposed by *Shipman*

A closer look at additional language within Section 846 appears to indicate that the Legislature specifically addressed other circumstances subject to the law, including the treatment of invitees (Mr. Klein would likely be considered a non-paying invitee to the

---

[6](...continued)
persons and property."

publicly accessible National Park), and the circumstances under which immunity would apply to injuries sustained by such invitees while engaged in recreational activities upon the land of another.

The words of the statute provide:

> "**An owner of any estate or any other interest in real property,** whether possessory or nonpossessory, **who gives permission to another for entry or use for the above purpose upon the premises does not thereby** (a) extend any assurance that the premises are safe for such purpose, . . . or (c) **assume responsibility for or incur liability for any injury to person or property caused by any act of such person to whom permission has been granted** except as provided in this section." Civil Code § 846. (emphasis added.)

Thus, the California legislature expressly provided that a landowner would not be liable for injury "caused by any act of" the invitee, thereby expressing a narrowed basis for the applicability of Section 846 immunity. In other words, the statute directly provides that,

unless the invitee's injury is "caused by any act" of the invitee, no immunity can attach. This would seemingly mean that acts of any person other than the invitee (here Mr. Klein) would not be subject to the immunity provided by the Act. The language is additional proof that the Legislature sought to draft a more narrow immunity which it anticipated would protect landowners for premises liability claims and negligent injuries caused by the recreational user.

Nowhere in the language of the statute is it suggested that active liability of third parties (or for that matter, landowner employees within the course and scope of their employment on the land) would be subject to immunity. Rather, both the preliminary paragraph, setting forth the primary purpose as relieving landowners of premises liability responsibility, and this telling subsequent language, which appears to pigeonhole only injuries caused by the negligent acts of the recreational users themselves as the type of acts (as opposed to failures to act) causing injury upon the property to recreational users, which are subject to immunity caused by their own conduct.

The textual evidence is compelling. When read in light of obvious plain meaning precepts, and interpreted in light of the

underlying legal meanings, the answer is clear: the Legislature intended an extremely broad immunity to encompass every conceivable premises liability based claim and/or injury occurring as a result of any act of negligence by the recreational user while on the land. The statute is very specific as to the circumstances under which landowner immunity will attach, but never provides for applicability as to injuries caused by the vehicular negligence of the landowner.

This construction recognizes both the telling language of the enactment, as well as the purported broad intent behind the law. The language can therefore be harmonized with the intent, without perverting the meaning of the words used.

II. THIS COURT SHOULD CONSTRUE CALIFORNIA CIVIL CODE SECTION 846 AS A PREMISES LIABILITY IMMUNITY STATUTE

A. A Careful Reading of *Ornelas* Discloses That It Is Supportive of Appellants' Position

This Court's most recent pronouncement on Civil Code section 846, in *Ornelas v. Randolph*, supra, 4 Cal.4th 1095, indicates that logic

should dictate an analysis of the applicability of Section 846, and that it should be viewed as **dealing with premises liability issues, and nothing else.**

> "In sum, we conclude that the so-called "suitability" exception to section 846 is not compelled by law or logic. On the contrary, assuming, as we must, that the Legislature chose its words carefully, the broad language of the statute suggests that the Legislature consciously eschewed any restrictions on the property subject to the statute in order to provide clear guidance to landowners, to encourage access to recreationists, and to fairly balance the interests of both. One who avails oneself of the opportunity to enjoy access to the land of another for one of the recreational activities within the statute may not be heard to complain **that the property was inappropriate for the purpose**." *Id.* at 1108. (emphasis added.)

Further, this quotation from *Ornelas* suggests that this Court actually believes that there should be a balance between the rights of

recreationists and land owners, a finding ignored in the *Shipman* opinion.

Ornelas also sheds light upon this Court's view of the proper method of interpretation: because the statutory language is clear and serves a rational purpose, resort to extrinsic sources is unnecessary and uncalled for. "'When statutory language is thus clear and unambiguous there is no need for construction, and courts should not indulge in it.'" *Id.*, at 1105 fn.8, (citing *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 800 [268 Cal.Rptr. 753]).

Moreover, "[l]egislative silence after a court has construed a statute gives rise at most to an arguable inference of acquiescence or passive approval. . . . But something more than mere silence is required before that acquiescence is elevated into a species of implied legislation . . . . In the area of statutory construction, an examination of what the Legislature has done (as opposed to what it has left undone) is generally the more fruitful inquiry. '[L]egislative inaction is " 'a weak reed upon which to lean.'" *Id.* at 1107-08.

Because the statutory language is clear, this Court can remain true to *Ornelas* only by supporting the interpretation advanced by

Appellants. To contort the statute beyond the words, without legislative history, would run contrary to this Court's prior pronouncements in *Ornelas*.

1. The Dissent in *Ornelas* Reflects This Court's Position That Civil Code Section 846 Applies to Premises Liability Claims Relating to Ordinary Negligence

In a split decision, this Court ruled, 4-3, to abrogate the suitability exception which essentially limited the scope of the recreational use immunity created by Civil Code section 846. The dissenting opinion in *Ornelas*, submitted by Justice Panelli further supports Klein's argument that this Court analyzed the scope of immunity provided by Civil Code section 846 as it applies to premises liability claims.

While disagreeing with the majority's interpretation of Civil Code section 846 in abrogating the suitability exception, Justice Panelli, with Justices Mosk and Kennard concurring, stated:

> "The majority's interpretation of section 846 permits the exception created by that section to swallow the general

duty of care in practically all nonbusiness contexts, thereby upsetting the balance of the trade-off contemplated by the Legislature. The result is a blanket immunity that is unnecessary to achieve any significant public benefit.

. . . .

An interpretation of the statute leading to closure of marginal recreational lands is more consistent with the legislative trade-off between increased recreational opportunities and diminished legal protections for persons who choose to take advantage of such opportunities than the blanket immunity resulting from the majority's interpretation.

. . . .

. . . [T]he majority reasons that the Legislature rationally could have determined that it was unfair to permit claims of negligence by persons choosing to enter private property for recreational purposes. . . . Initially, nothing in the statutory language or the sparse legislative history of this

statute supports the majority's speculation on this point . . . . **Moreover, I cannot believe that, if the Legislature indeed had been concerned with achieving fairness or rationality in premises liability torts, rather than simply attempting to ensure the availability of recreational lands for the public, the statutory immunity in question would have been phrased in terms of recreation**. Borrowing a persuasive example from one of our lower courts, I cannot conclude that, if the legislative intent was as the majority suggests, the Legislature would have chosen to immunize a developer from suits by children coming to play on its construction site, but leave the developer unprotected from suits by adults who enter the property for nonrecreational, illegal purposes (other than to commit one of the felonies listed in section 847), such as to steal a piece of lumber lying on the ground."

Ornelas v. Randolph, supra, 4 Cal.4th at 1112-13 (Citations omitted) (emphasis added).

It is evident from both the majority opinion, as well as Justice Panelli's dissenting opinion, that this Court analyzed Civil Code section 846 and determined that it only applied to claims of "ordinary negligence" within the context of determining what lands the law applied, an approach consistent with a finding that the statute relates exclusively to premises-based claims. Nowhere in either the majority opinion nor the dissent does this Court provide any evidence that it intended to extend its holding in *Ornelas* to any other negligence claims but those related to a landowner's premises.

This Court should adopt the reasoning set forth in Justice Panelli's dissent in *Ornelas* because the focused policy analysis developed therein is sufficiently compelling to tip the scales in favor of Appellant on this appeal.

B. This Court's Position Is Clear That the California Recreational Use Statute under Civil Code Section 846 Is a Premises Liability Statute

In the recent California Supreme Court case, *Avila v. Citrus Community College District,* supra, 38 Cal.4th 148, this Court held that a governmental immunity statute relating to injuries stemming from

hazardous recreational activity did not apply to immunize a college from negligence claims. The Court analyzed the ambiguity in the language of California Government Code section 831.7, and analyzed its model statute, California Civil Code section 846.

This Court stated:

> "This ambiguity is reflected in the disparate conclusions the Courts of Appeal have reached when applying the statutory language to negligence claims against schools and universities. For example, in *Acosta,* 31 Cal.App.4th 471, a high school gymnast was practicing at his high school during the off-season under the supervision of an assistant gymnastics coach. He fell during a difficult maneuver, landed on his neck, and was rendered a quadriplegic. The Court of Appeal ruled that section 831.7 did not immunize the school district from liability for negligent supervision. While the court acknowledged that gymnastics was a hazardous activity, it concluded that school

districts have a well-established duty to provide reasonable supervision of school-sponsored extracurricular sports programs. (citations omitted.) The court found no indication the Legislature, when it adopted section 831.7, had intended to abrogate that duty.

. . . .

In *Iverson*, 32 Cal.App.4th 218, an eighth grade student was injured by a hard tackle during a physical education class soccer game. Here again, the court rejected section 831.7 immunity. . . . [The court in *Iverson*] found in the legislative history of the statute no indication the Legislature intended to immunize schools from liability for injuries to students participating in school sports.

. . . .

In the absence of an unambiguous plain meaning, we must look to extrinsic sources such as legislative

history to determine the statute's meaning. (Citations omitted.) Our review of the legislative history of section 831.7 leads us to agree with *Acosta* and *Iverson*. **The statute's roots lie in Civil Code section 846, a premises liability statute that provides qualified immunity for landowners against claims by recreation users. . . .**

. . . .

The Senate Committee on the Judiciary's analysis confirms that Government Code section 831.7 was designed to mirror Civil Code section 846's circumscription of property-based duties. Assembly Bill No. 555 [which proposed Government Code section 831.7], "by providing a qualified immunity, would limit a public entity's *duty to keep its land safe* for certain recreational users." (Sen. Com. On Judiciary Analysis of Assem. Bill No. 555 (1983-1984 Reg. Sess.) as amended May 31, 1983, p.7, italics added.) The bill's focus,

the analysis explained, was on recreational users who might injure themselves during hazardous unsupervised activities and attempt to attribute their injuries to conditions of public property. "The primary purpose of [Assembly Bill No. 555] is to prevent the hang glider or rock climber from suing a public entity when that person injured himself in the course of the activity."

. . . .

Thus, Government Code section 831.7 was adopted as a premises liability measure, modeled on Civil Code section 846, and designed to limit liability based on a public entity's failure either to maintain public property or to warn of dangerous conditions on public property. Nothing in the history of the measure indicates the statute was intended to limit a public entity's liability arising from other duties, such as any

> duty owed to supervise participation in particular activities." *Id.* at 154-158. (emphasis added.)

Thus, this Court has made a recent decree as to the clear purpose of Civil Code section 846. The legislative history of Government Code section 831.7, a statute modeled after Civil Code section 846, establishes "an intent focused exclusively on premises liability claims." *Id.* at 159.

Looking further into the legislative history of Government Code section 831.7, this Court stated:

> "The paramount goal of statutory interpretation is to 'ascertain the intent of the drafters so as to effectuate the purpose of the law.' (Citations omitted.) Nothing in the legislative history indicates the Legislature ever contemplated or intended that passage of section 831.7 would overrule the body of law governing supervisorial duties and liability in the school sports context. . . . In the absence of any indication of such a legislative intent, we will not read section 831.7 as immunizing public entities

from potential liability arising out of their oversight of school-sponsored activities." *Id.* at 160.

It is evident from this Court's decision in *Avila,* that based on its interpretation of Civil Code section 846 and Government Code section 831.7, these premises liability statutes will not immunize a landowner from liability arising out of independent common law or statutorily imposed duties.

C. The Lack of Analysis and Reason by the Court of Appeals in *Shipman* Dictates a Contrary Finding

As stated previously, the *Shipman* opinion, and the apparent dicta therein, provides no logical reasoning as to the basis for its determination that an intervening act of vehicular negligence by a third party within the course and scope of employment, is governed by the immunity provided by Civil Code Section 846. *Shipman v. Boething Treeland Farms*, supra, 77 Cal.App.4th 1424.

This Court has cautioned that lower court analysis should be given little or no credence when a lower court fails to critically analyze and construe statutory language. In *Delaney v. Superior Court,* supra,

50 Cal.3d 785, this Court interpreted the California Constitution with respect to the newsperson's shield law that was enacted 50 years prior but was never construed by the high court. This Court noted that there were conflicting Court of Appeals decisions, and it ultimately followed those cases in which the lower courts relied on the explicit language of the shield law. The Court stated, "the Court of Appeal decisions provide little guidance for our decision, and little would be gained by our reviewing them in detail." *Id.* at 804. The court of appeals decisions not followed "paid insufficient attention to the shield law's language" and did not explain how the court of appeals came to those conclusions. *Id.*

The *Shipman* Court avoided a substantive analysis of whether vehicular negligence by the landowner which causes injury is subject to Section 846. Here, as in the *Delaney* case, this Court should once again rely on the explicit language of Civil Code section 846. Moreover, due to the Court of Appeal's lack of reasoning and analysis, this Court cannot rely on the decision in *Shipman* as the appellate court paid "insufficient attention" to the plain language of Civil Code section 846 and failed to set forth a cogent explanation as to how it arrived at its conclusions.

What is most disturbing about the *Shipman* opinion is the utter lack of critical analysis devoted to the issue of independent vehicular negligence of the landowner's employee. It appears that the court placed almost total reliance on the generally accepted premise that Civil Code section 846 is to be construed broadly, and completely disregarded all of the well reasoned authority from other jurisdictions. The case adopted the broad construction theory, which, as explained herein, would serve to allow immunity for all conceivable recreational user liability claims, and extend the immunity to a factual scenario which was never intended by the Legislature.

The *Shipman* court relied heavily upon the two-prong analysis set forth in the *Ornelas* decision as well as the general proposition that Civil Code section 846 immunizes a landowner from liability for ordinary negligence.[7] However, it is apparent that the Court of Appeal misconstrued the *Ornelas* decision in overextending what this Court held in that case. The *Ornelas* court set forth a thorough analysis of

---

[7] The entire reasoning, as to the vehicular negligence itself, appears to be as follows: "Negligence is insufficient to overcome Civil Code section 846 immunity." *Shipman*, supra, 77Cal.App.4th at 1431 [92 Cal.Rptr.2d, at 571].

Civil Code section 846 and concluded that "absent willful or malicious misconduct the landowner is immune from liability for ordinary negligence." *Ornelas v. Randolph*, supra, 4 Cal.4th at 1100. Appellants contend that *Ornelas* construed Civil Code section 846 in the context of premises liability claims and that the language regarding "ordinary negligence" related to the Court's interpretation of the language of the statute providing that landowners "owe no duty of care to keep the premises safe . . . ." This language from *Ornelas* is certainly more consistent with the application of the immunity for ordinary negligence as it relates to premises claims.

As the *Shipman* opinion itself is difficult to understand, the absence of critical analysis marks the opinion as questionable authority, upon which this Court should not rely.

Furthermore, if this Court relies on the position of the United States and the *Shipman* court, in essence, the Court will be creating a blanket immunity protecting landowners from virtually all acts of negligence, premises and non-premises related alike. Such absurd results are contrary to the Court's obligation to guard the public's safety and interpret statutes in a manner consistent with public policy.

III. A SERIES OF WELL REASONED CASES FROM OTHER JURISDICTIONS UNIFORMLY FIND THAT ACTIVE NEGLIGENCE OF THE LANDOWNER IS EXEMPTED FROM RECREATIONAL USE IMMUNITY

Due to the extremely limited California case law on the topic of the applicability of immunity to active negligence of a landowner causing injury to a recreational user on his land, this Court should review a fertile ground for this determination: the courts of other states.

Both supreme and appellate courts throughout the United States have determined that landowner immunity statutes should not apply to active negligence of the landowners or its employees within the course and scope of their duties upon the land.

The well reasoned opinion by the Utah Supreme Court in *Young v. Salt Lake City Corp.* (Utah 1994) 876 P.2d 376, speaks for itself:

> "Although this court and the court of appeals have addressed the Act in four previous cases, each case arose in the context of traditional premises liability. Neither has considered whether the Act provides immunity for

landowners who negligently operate motor vehicles on their land.

. . . .

Adhering to the general rule that the terms of a statute should be interpreted in accord with their usual and accepted meanings, (citations omitted), we conclude that the Act does not apply to active vehicular negligence.

. . . .

Nothing in the language of [the statute] suggests a legislative intent to immunize all negligent acts of landowners, their agents, or employees. Nor do we believe such broad application of the statute would serve the public purpose envisioned by the legislature. Though focused on reducing landowner liability, the statute was also enacted to serve ' a growing need for additional recreation areas for use by our citizenry.' The public's incentive to enter and enjoy private agriculture land would be greatly diminished

> if users were subject, without recourse, to human error as well as natural hazards.
>
> . . . .
>
> Nonetheless, the Act does not relieve the City and its employees of their separate and distinct duty to operate maintenance vehicles in a nonnegligent manner, just as the defendant in Scott had a duty to operate the tractor nonnegligently.
>
> . . . .
>
> Because the Act applies to premises liability and not to liability for alleged negligent operation of vehicles, summary judgement was inappropriate." *Id.*

In *Scott v. Wright* (Iowa 1992) 486 N.W.2d 40, the Iowa Supreme Court held that a recreational use statute did not apply where negligent operation of a tractor caused the plaintiff's injury. *Id.* at 42. The *Scott* case, by contrast, rested not on duties to keep the premises safe or to warn of dangerous conditions on the land, but on vicarious liability for

negligence, which the court determined took the case outside the purview of Iowa's recreational use statute.

> "The Iowa statute provided, "[a]n owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes." Iowa Code Ann. § 111C.3 (West 1984).

The plaintiff Scott resisted the applicability of the statute because her claim rested on the vehicular negligence, not premises liability. The court reasoned that the intervening cause of active vehicular negligence defeated immunity claims:

> "We recently observed that the purpose of chapter 111C is to encourage property owners to make suitable lands available for recreational use. (citation omitted). To promote that objective, we interpreted the statute as intending a "blanket abrogation of duty to all recreational users." *Id.* Seizing on this language, Wrights argue that *Peterson* compels the reversal of the district court's ruling.

. . . .

The "blanket abrogation of duty" announced in *Peterson*, however, arose on the context of a clear case of premises liability. . . . By contrast, Scott's suit against Wrights rests-not on duties addressed by section 111C.3-but on vicarious liability for alleged negligence in the operation of a motor vehicle. We are convinced, as was the district court, that this intervening act of negligence takes the case outside the purview of chapter 111C.

. . . .

By its terms, section 111C.3 immunizes landowners from only two specific duties of care toward persons using agricultural property for recreational purposes: to keep the premises safe and to warn of dangerous conditions. Nothing in the language of chapter 111c suggests a legislative intent to immunize all negligent acts of landowners, their agents, or employees. Nor do we believe such broad application of the statute would serve the public purpose envisioned by the legislature. Though focused on

> reducing landowner liability, the statute was also enacted to serve "a growing need for additional recreation areas for use by our citizenry." Explanation to H.F. 151 at 3, 62nd G.A. (Iowa 1967). The public's incentive to enter and enjoy private agricultural land would be greatly diminished if users were subject, without recourse, to human error as well as natural hazards.
>
> . . . .
>
> Because the language of chapter 111C is couched in terms of premises liability, and the legislative history of the statute evinces no other motive for its passage, we are convinced the court correctly refused to apply it in this case."

In the well reasoned New York appellate case of *Bush v. Valley Snow Trailers* (N.Y. Sup. 2004) 790 N.Y.S.2d 350, the court critically analyzed an analogous factual scenario involving a collision of two vehicles on recreational land and came to the inexorable conclusion that where a recreational use immunity statute identifies premises liability as the target of its reach, it would be wrong to excuse the landowner from

his or her separate and distinct duty to operate a vehicle on its recreational property with reasonable care.

In determining that the statutory recreational immunity provided to landowners was clearly inapplicable to vehicular negligence, the Court reasoned as follows:

> "Plaintiff alleges that there is affirmative negligence and this affirmative negligence is a further exception to the statute that makes the conditional immunity inapplicable (citations omitted).
>
> . . . .
>
> However, to be a valid exception, affirmative negligence really involves an analysis of duty. There is a duty breached when there is conduct outside the relationship to the land or the recreational use of it. There is a separate specific duty breached when a train operator does not safely operate that vehicle (citations omitted) or when a hay wagon driver does not safely operate that piece of machinery (Scott v. Wright, 486 N.W.2d 40 [Iowa 1992]).

. . . .

To be valid exception to the statute affirmative negligence as the Court interprets it is closer to the concept referred to as 'intervening negligence', (see Scott, 486 N.W.2d 40; citation omitted) a phrase which allies the negligence with a separate duty apart from the land.

. . . .

Even in some cases with a vehicle operation, there is landowner/occupier immunity, but based on land condition, not the separate specific safe duty required of the vehicle operator (citations omitted.)

. . . .

These holdings reinforce that ". . . the mere creation of a dangerous condition by a property owner, even a trap will not be determinative of whether such owner has willfully failed to warn or guard against such condition." (citations omitted). In all of the above cases there was an affirmative act by the landholder/occupier that altered the nature of the

landscape. Yet, even with such affirmative actions the landowners/occupiers were granted protection of the recreation use statute, and were deemed acting consistent with the intended scope of the statute."

In a more recent pronouncement, the New York Court of Appeal in *Del Costello v. Hudson Railway Co.* (N.Y.A.D. 2000) 711 N.Y.S.2d 77, echoed the reasoning which should control herein when it opined:

"To be sure, this case arises out of a collision between two vehicles, albeit on recreational land, and the allegations of liability hinge solely on the manner in which the vehicles were being operated, particularly the train. . . .

. . . .

There is no indication in the language of General Obligations Law § 9-103 itself that the Legislature intended to immunize an owner of recreational property from his or her own negligent operation of a vehicle on such property (citation omitted). Furthermore, the legislative history of the statute reveals that it was never

intended to relieve a landowner from affirmative acts of negligence.

. . . .

The distinction between affirmative acts of negligence (which would result in liability) and mere failure to use care, to keep premises safe for entry by a licensee or to warn of hazards, is significant for this bill, which deals only with the duty to keep premises safe or warn of hazards.

. . . .

Here. . . plaintiff has submitted proof raising at least an issue of fact concerning whether defendant's engineer was negligent in his operation of the train that afternoon.

. . . .

Thus, upon our review of General Obligations Law § 9-103, as well as its legislative history, we agree . . . that an owner of recreational land is not immune from liability under the statute arising out of the manner in which it or

one of its employees operates a vehicle on the land when the allegations of negligence stem solely from the manner of operation of that vehicle. Said differently, the statute does not immunize a landowner from its separate and distinct duty to operate a vehicle on its recreational property with reasonable care (see generally, *Scott v. Wright*, 486 N.W.2d 40). Furthermore . . . we do not believe that the broad application of the statute as advanced by defendant would serve the public purpose envisioned by the Legislature. Though clearly focused on reducing a recreational landowner's liability, it was also enacted "to allow or encourage more people to use more accessible land for recreational enjoyment" (citation omitted). The public's incentive to use recreational land would be diminished if users were to be left without recourse in the event of a landowner's negligent operation of any vehicle on that property."

Finally, *Linville v. City of Janesville* (Wis. 1994) 516 N.W.2d 427, where paramedics were allegedly negligent in responding to the injury of a recreational user, is instructive:

> "The City and paramedics assume that a threshold conclusion that the Linvilles were engaged in a recreational activity at the time of drowning affirmatively answers this second question. It does not.
>
> . . . .
>
> In addition, granting immunity to the landowner when the landowner and the employer of the negligent employee are functioning in two different capacities and are therefore not the same entity in the eyes of the law would produce absurd consequences. In *Ervin*, we stated that the statute was intended to "shif[t] some of the risk in injury from the landowner to the entrant." (citation omitted). But it "was not enacted to provide discriminate immunity for landowners without regard to possible consequences." *Id.* To interpret the language of sec. 895.52(2)(b), Stats., to include injury resulting from negligent rescue and

treatment by the paramedics in this case, would produce absurd consequences.

. . . .

The more rational result, consistent with the focus and purpose of the statute, is to immunize from liability only the landowner who is the same entity under the law as the employer of the persons whose alleged negligence caused injury. We hold that the City as landowner and the City as employer of the paramedics are not the same entity for purposes of the recreational immunity statute, and therefore the City is not immune from liability for the negligence of its paramedic employees.

The City has two distinct roles here. First, its owns the Pond. In this role, it is entitled to immunity from suits claiming that the Pond was negligently maintained or that the City's or its employees' (whose employment is connected to the Pond) actions with respect to the Pond were negligent.

. . . .

> On the other hand, the City operates its paramedic services for the public benefit of providing emergency medical treatment. It does not operate these services for any reason connected to the Pond. It is more coincidence that the City is both owner of the Pond and provider of public rescue and medical treatment services. Further, the paramedics' employment, as employees of the City in this capacity, is unrelated to the Pond. The paramedics provide emergency medical treatment in every part of the City, no matter the situs. Thus the City's rescue attempts and medical treatment are separate and apart from the City's ownership of or activities as owner of recreational land. We therefore conclude that the City as the paramedics' employer is not immune from the Linvilles' claims of negligent rescue and medical treatment."

While the authority on this issue is not unanimous, the cases which have precluded immunity for vehicular negligence are, without doubt, the more well reasoned and thoughtful cases, as they actually

delve into critical analysis of the terms of the statutes at issue, the policy considerations involved, and the logical consequences of a determination including such negligence. As such, these decisions should control in this Court's determination of the applicability of Section 846 in active negligence by landowner employees.

In this instance, refusal to engage in substantive analysis of the statutory language, legislative intent (or lack thereof), and opinions from other jurisdictions, would generate an absurd result not contemplated by the Legislature.

IV. A LOGICAL POLICY ANALYSIS OF THE ISSUE ALSO LEADS TO THE CONCLUSION THAT THE IMMUNITY STATUTE MUST APPLY ONLY TO CONDITIONS UPON THE PROPERTY CAUSING INJURY

The Court must determine whether the public policy in protecting landowners from liability to recreational users of their property sufficiently outweighs the state and federal requirements of vehicular safety on the roads of the state, and the corresponding civil responsibility for injury to third parties consonant with this independent legal duty.

"The State of California is blessed with an abundance of scenic treasures. Its natural landscape contains over 1,100 miles of Pacific shoreline, massive mountains, magnificent lakes and sweeping deserts. Such diversity and contrast lend to its appeal as a place where recreational pursuits may flourish, at times on realty owned by others." *Ornelas v. Randolph*, supra, 4 Cal.4th at 1098. As such, there is recognition in California that in order to ensure recreational access, landowners must be legislatively encouraged.

Appellants submit that while the policy decision to exempt landowners for injuries sustained for non-vehicular accidents upon their property is strong, the competing policy dictating safe roads and compensation for injuries to victims, even in recreational areas, outweighs the desire to provide recreational areas to state residents. In this particular instance, visitors are invited to use the national parks by the government, and while the government is under no duty to keep the park safe for all purposes, it certainly should be responsible for the safe driving of its employees while they work on the roads of the national park.

Nothing in the words, intent or design of the statute implies or remotely suggests that it anticipates abrogation of this fundamental responsibility of drivers in California. To do so would be dangerous and contrary to logic.

In fact, it would appear to invite private property owners and their employees to act as irresponsibly as they desire with no risk of liability to recreational users on their land. This, again, is an unacceptable policy result under the auspices of the Court of Appeal's determination in *Shipman*. To blindly exempt landowners from the vehicular negligence of their employees within the course and scope of their employment on their land makes absolutely no sense.

Public policy considerations warrant the contemplation of the various consequences of a court interpretation exempting landowners from vehicular negligence. While *Ornelas* correctly recognized the consequences of the continued viability of the "suitability" exception as expanding premises liability beyond that contemplated by Section 846, the same is not the case in this appeal.

The statute and its intent contemplate an extremely broad protection for landowners as it relates to specific premises liability

concepts. The implications of exempting vehicular negligence are vastly different.

Not only are landowners responsible for vehicular negligence as a general proposition in society, but California mandates automobile insurance, thereby ensuring that the expense related to vehicular bodily injury claims will be satisfied by insurance. Such automobile insurance is readily available to compensate victims of vehicular injuries that occur upon the land of another. As such, any argument that exemption of such vehicular negligence from Section 846 immunity would unnecessarily or unreasonably increase the liability of the landowner is likely overstated, given the likelihood of insurance coverage for the affected landowner.

In fact, practically speaking, the denial of compensation to an injured recreational user afforded by landowners' automobile insurance is an unacceptable result when the landowner directly causes injury to an innocent recreational user on the paved roads of the State of California.

In weighing the various public policies implications, it is apparent that the public policy favoring compensation to victims of vehicular

injuries clearly outweighs the stated public policy of Section 846 encouraging landowners to allow recreational access to their lands. Public policy cannot condone favoring recreational access over the rights of an injured victim to receive compensation as a result of a vehicular accident where the words of the immunity statute do not suggest such a result. This consequence was not intended by the Legislature in enacting Section 846 and could not have been envisioned as an appropriate result under the statute.

In conclusion, the public policy analysis from *Ornelas* is apt. This Court, as *Ornelas* suggests, should interpret Section 846 "in order to provide clear guidance to landowners, to encourage access to recreationists, and to fairly balance the interests of both." *Ornelas*, *supra* at 1107. The only way to accomplish this directive is to determine that public policy favors the exemption of vehicular negligence from the application of the recreation immunity created in Civil Code Section 846.

CONCLUSION

An analysis of the effect of Section 846 requires a three step process. First, the court must determine whether the property and landowner are eligible for immunity. Second, the Court must determine whether the injured party was engaged in a "recreational" activity upon the land. Apparently, the Respondent and Court of Appeal stops here, essentially absolving a defendant landowner of liability if these two questions are answered affirmatively. This analysis ignores a necessary additional question: Is the negligent conduct alleged subject to the premises liability immunity granted by Section 846? In this instance, the answer is a resounding "No."

For the foregoing reasons, this Court should unequivocally confirm that the immunity created by California Civil Code section 846 extends only to premises liability claims and that the statute does not apply to immunize a landowner from liability for acts of vehicular negligence committed by the landowner's employee in the course and scope of his employment that cause personal injury to a recreational user

of that land.

Dated: November 17, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), counsel for Appellants Alan Klein and Sheryll Klein hereby certify that Appellants' Opening Brief on the Merits consists of 10,317 words, as counted by the WordPerfect 12 word-processing program used to generate this brief.

Dated: November 17, 2008

Respectfully submitted,

SANTIAGO RODNUNSKY & JONES

David G. Jones

Tamara S. Fong

By: _____

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ALAN RICHARD KLEIN AND SHERYLL KLEIN

CERTIFICATE OF SERVICE

I, Eugenia Kalomiris, declare as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 5959 Topanga Canyon Boulevard, Suite 220, Woodland Hills, California, 91367, in said County and State.

On November 17, 2008, I served the following document(s):

APPELLANTS' OPENING BRIEF ON THE MERITS

on the parties stated below, by placing a true copy thereof in an envelope addressed as shown below by the following means of service:

SEE ATTACHMENT A

☑ **BY MAIL:** I placed a true copy in a sealed envelope addressed as indicated above, on the above-mentioned date. I am familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of 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 on affadavit.

☐ **BY PERSONAL SERVICE:** I placed a true copy in a sealed envelope addressed to each person[s] named at the address[es] shown and giving same to a messenger for personal delivery before 5:00p.m. on the above-mentioned date.

☐ **BY FACSIMILE:** From facsimile number (818) 593-7086, I caused each such document to be transmitted by facsimile machine, to the parties and numbers indicated above, pursuant to Rule 2008. The facsimile machine I used complied with Rule 2003(3) and no error was reported by the machine. Pursuant to Rule 2008(e)(4), I caused the machine to print a transmission record of the transmission.

☐ **BY FEDERAL EXPRESS NEXT DAY AIR:** On the above-mentioned date, I placed a true copy of the above-mentioned document(s) in a sealed envelope or package designated by Federal Express with delivery fees paid or provided for, addressed to the person(s) as indicated above and deposited same in a box or other facility regularly maintained by Federal Express or delivered same to an authorized courier or driver authorized by Federal Express to receive documents.

☑ I am employed in the office of David G. Jones, a member of the bar of this court, and that the foregoing document(s) was (were) printed on recycled paper.

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

☐ **(FEDERAL)** I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 17, 2008

Eugenia Kalomiris

ATTACHMENT A
Klein et al. v. United States of America et al.
California Supreme Court Case No. S165549

Respondents UNITED STATES OF AMERICA; DAVID ANDERBERG
(CRC 8.25(a)(1))

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