2d Civil No. B184025
L.A.S.C. Case No. BC 305404

# In The Court of Appeal

## State of California

**SECOND APPELLATE DISTRICT**
**DIVISION 8**



**DAVID PROKOP,**
*Plaintiff and Appellant,*
v.
**CITY OF LOS ANGELES,**
*Defendant and Appellee.*

APPEAL FROM AN ORDER GRANTING SUMMARY JUDGMENT,
THE HONORABLE ROLF M. TREU, JUDGE PRESIDING.

# RESPONDENT'S BRIEF

**ROCKARD J. DELGADILLO**
City Attorney (State Bar No. 125465x)
**BLITHE S. BOCK**
Deputy City Attorney (State Bar No. 163567)
900 City Hall East
200 North Main Street
Los Angeles, California 90012-4130
Tel: (213) 978-6921 - Fax: (213) 978-8791
*blithe.bock@lacity.org*

*Attorneys for Respondent,*
*THE CITY OF LOS ANGELES*

# Court of Appeal
# State of California
# Second Appellate District

## CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: B184025

Case Name: DAVID PROKOP v. CITY OF LOS ANGELES

Please check the applicable box:

[X] There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 14.5(d)(3).

[ ] Interested entities or parties are listed below:

| Name of Interested Entity or Person | Nature of Interest |
|---|---|
| 1. | |
| 2. | |
| 3. | |
| 4. | |

*Please attach additional sheets with Entity or Person Information if necessary.*

Signature of Attorney/Party Submitting Form

Printed Name: Blithe S. Bock, Deputy City attorney
Address: 600 City Hall East, 200 N. Main Street
Los Angeles, California 90012

State Bar No: 163567
Party Represented: Respondent, CITY OF LOS ANGELES

*SUBMIT PROOF OF SERVICE ON ALL PARTIES WITH YOUR CERTIFICATE*

## TABLE OF CONTENTS

Page

## TABLE OF CONTENTS (Cont'd)

**Page**

## TABLE OF AUTHORITIES

**Cases** **Page**

## TABLE OF AUTHORITIES (Cont'd)

**Cases** **Page**



**STATUTES**

## INTRODUCTION[1]

This appeal begins and ends with a single issue: Is the City of Los Angeles immune, pursuant to Government Code section 831.4, subd. (b), from suits arising from injuries that occur on a paved bikeway? The statute is clear, and the cases are even clearer, that the City is indeed immune. This appeal can, and should, end there.

The facts of this case are straightforward. Appellant David Prokop was bicycling on a bike path along Griffith Park when he reached a locked gate that had a narrow portal for bicyclists to get through. The pavement markings before the portal — which Prokop admits he saw — read "WALK BIKE." Prokop did not walk his bike through, however; instead, he "coasted" through the portal. He made it through the portal, but as soon as he got throught, Prokop collided with the fence that was on the other side. He now seeks recovery for those injuries from the City. The Superior Court granted summary judgment on grounds that the City was immune from such a lawsuit pursuant to section 831(4).

In reviewing this summary judgment, this Court need look no further than the clear language of section 831.4(b) and the cases interpreting it, particularly *Farnham v. City of Los Angeles*, 68 Cal.App.4th 1097, 80 Cal.Rptr.2d 720 (1998).

---

[1]Citations to the record are excluded only from the Introduction. All references to the record in the remainder of the Brief are followed by the proper record citation.

Section 831.4(b) provides that a public entity is not liable for an injury caused by the condition of "[a]ny trail" that is used for the recreational purposes enumerated in the statute, which include "riding." *Farnham* specifically found that a paved, "Class I" bikeway (*i.e.,* one not open to vehicular traffic) constituted a "trail" within the meaning of section 831.4(b), and thus a public entity enjoys absolute immunity against lawsuits for injuries arising on it. (*Farnham*, 68 Cal.App.4th at 1101.) Inasmuch as Prokop himself describes the area as a Class I bikeway in both his papers below and now in his Opening Brief, the City is undeniably protected by the section 831.4(b) immunity.

Prokop's attempt to avoid this inevitable result are unavailing. In essence, he argues that because, in his opinion, the City could be liable under one statute (Cal. Govt. Code section 815.6), the City should not escape liability simply because another statute (Section 831.4) states that the City is immune. This argument misreads both of these statutes, both of which fall into the Government Tort Claims Act (Cal. Govt. Code section 810 *et seq.*).

The statutory scheme of the Act establishes that a public entity is generally *not* liable *except* in certain circumstances specified in the Act. (Cal. Govt. Code section 815, subd. (a).) Even where these exceptions apply, the public entity may nonetheless be immune from suit, as also outlined in the Act.

That is precisely the case here: even if the City could otherwise be liable under section 815.6, as Prokop argues it is, the City is nonetheless immune from suit under section 831.4 because the accident occurred on a trail.

Accordingly, the City submits that summary judgment should be affirmed.

## STATEMENT OF FACTS

Prokop alleges that on November 6, 2002, he was riding his bicycle on the paved path that runs adjacent to the Los Angeles River. (CT 11.) According to Prokop himself, this bike path is a "public bike path" (CT 37) and a "Class I bikeway" (CT 76, 94; AOB 4), meaning that it "provide[d] a completely separated right-of-way designated for the exclusive use of bicycles and pedestrians with cross flows by motorists minimized." (Cal. Sts. & Hy. Code section 890.4.) Photographs of the area confirm that it was such a bikeway. (CT 52-56, 118-120.)

Prokop had been bicycling for about four miles (CT 41) when he approached a gate that had a portal for bicyclists to walk through. (CT 46.) The gate was "closed and locked," so that this portal was the only way to get through. (CT 40.) The words "WALK BIKE" were painted on the pavement in front of the portal (CT 52-56, 118-120), and Prokop acknowledges that he saw this warning (CT 38). However, Prokop did not heed the sign and walk his bike through the narrow portal. (CT 80.)

Instead, he "coasted" his bike through it. (CT 42-43.) When he exited, his head came into contact with the fence on the other side of the gate, approximately five feet beyond the exit portal. (CT 10, 16-17, 80). He alleges that he sustained lacerations to his head. (CT 16.)

## STATEMENT OF THE CASE

On November 3, 2003, Prokop filed his complaint (CT 7), which the City answered on December 18, 2003 (CT 26).[2] During the 20-month litigation of the case, Prokop filed four separate Notices of Substitution of Attorney (on August 5, 2004, September 27, 2004, June 17, 2005 and July 12, 2005). (CT 2, 4.) On January 6, 2005, the City filed its Motion for Summary Judgment and supporting papers (CT 30-85), which was granted at the hearing on April 11, 2005 (CT 151; *see*, Reporter's Transcript of Proceedings, pp. 7-8.) Although the Order granting summary judgment decrees that "judgment be entered" for the City (CT 155), no Judgment was ever filed (CT 1-6). This Appeal followed. (CT 175.)

---

[2]Prokop complains that the City did not specifically cite section 831.4 in its answer to complaint so the City "may have" waived it. (AOB 9.) Not only was it sufficient for the City to raise the defense for the first time in its summary judgment motion (*Styne v. Stevens*, 26 Cal.4th 42, 60, fn 11, 109 Cal.Rptr.2d. 14 (2001)), and not only did the City indeed raise an immunity defense in its answer (CT 27), Prokop's failure to raise this waiver argument actually means that *he* is the one who has waived this argument now on appeal. (*Cockerell v. Title Ins. & Trust Co.*, 42 Cal.2d 284, 288, 267 P.2d 16 (1954).)

## ARGUMENT

## I.

## SECTION 831.4 AND ALL CASE LAW INTERPRETING IT, DISPOSES OF THIS CASE: THE CITY IS IMMUNE FROM LIABILITY.

### 1. Section 831.4 immunizes the City from liability arising from "*any*" trail.

Section 831.4 provides that a "public entity ... is not liable for an injury caused by a condition of" various kinds of roads or trails, falling into three categories: an unpaved road that provides access to recreational activities (section 831.4, subd. (a)); "any trail" that is itself used for a recreational activity (section 831.4, subd. (b); and a paved trail on an easement that provides access to unimproved property (section 831.4, subd. (c).) Subdivision (b), providing absolute immunity for injuries arising on "any trail" — *i.e.*, unpaved or paved — is what applies here, and it destroys Prokop's case.

### 2. The case law confirms that "any" trail in section 831.4 includes a bike path such as the one at issue here.

Uniformly, the cases have all found that subdivision (b) applies to a public bikepath and immunizes a city from liability arising from any injury occurring on it.

In *Armenio v. County of San Mateo*, 28 Cal.App.4th 413, 33 Cal.Rptr.2d 631 (1994), the Court confirmed that the 831.4(b) immunity applies to a bicyclist's

injury on a surfaced trail. There, the plaintiff was injured while riding his bicycle along a surfaced trail in a scenic park, which, the plaintiff claimed, had been improperly patched. (28 Cal.App.4th at 415.) The Court found that section 831.4, subd. (b), whose "plainly stated purpose" was to "encourage public entities to open their property for public recreational use," immunized the County from liability. (28 Cal.App.4th at 417.) *(See, also, State of California v. Superior Court of Sonoma County*, 32 Cal.App.4th 325, 328, 39 Cal.Rptr.2d 1 (1995) (applying 831.4(b) to an unpaved horse trail in a state park).)

In *Carroll v. County of Los Angeles*, 60 Cal.App.4th 606, 70 Cal.Rptr.2d 504 (1997), the locale was, again, a paved bicycle path, and again, the Court found that the 831.4(b) immunity precluded liability. The Court noted that it was the fourth case to find that subdivision (b) was not limited to access trails, but rather, "extends to include a trail whose use itself is the object of the recreational activity." (60 Cal.App.4th at 610.)

*Farnham v. City of Los Angeles*, 68 Cal.App.4th 1097, 80 Cal.Rptr.2d 720 (1998) is, by far, the most devastating to Prokop's case. There, as here, the plaintiff was a bicyclist who was injured on a bikeway in Los Angeles. (68 Cal.App.4th at 1098.) The bikeway in *Farnham* was adjudged to be a Class I bikeway (*id.*); here, Prokop himself describes the accident site as a Class I Bikeway (CT 76, 94; AOB

4). The *Farnham* plaintiff, like Prokop (AOB 46-49), argued that the bikeway was part of the public streets and highways, and thus not a "trail" within the meaning of section 831.4(b). (68 Cal.App.4th at 1100.) The *Farnham* Court flatly rejected this argument:

> "Regardless of the fact that a bicycle path may come under the broad brush of being part of the streets and highway system in general, a class I bikeway does not qualify as a street or highway....[W]e conclude that a class I bikeway is a 'trail' within the definition of section 831.4, subdivision (b)." (*Farnham*, 68 Cal.App.4th 1101.)

Similar to Prokop's apparent amazement at the idea of absolute immunity, the *Farnham* plaintiff argued that when the government creates a paved trail, it should reasonably maintain it or "face tort liability." (68 Cal.App..4th at 1102.) The Court explained that the purpose of the immunity is to ensure that trails such as these are kept open to the public:

> "Bicycle paths (or bikeways) are not velodromes, and are not necessarily designed for a user to travel as fast as she or he can, although some people often do. In today's litigious society, it does not take a very large crystal ball to foresee the plethora of litigation cities or counties might face over bicycle paths, which are used daily by a variety of people (bicyclists, skateboarders, rollerbladers, rollerskaters, joggers and walkers) all going at different speeds. The actual cost of such litigation, or even the specter of it, might well cause cities or counties to reconsider allowing the operation of a bicycle path, which, after all, produces no revenue." (68 Cal.App.4th at 1103.)

And finally, the *Farnham* plaintiff contended that *Carroll* was wrongly decided

(68 Cal.App.4th at 1103) — just as Prokop argues that *Farnham* was wrongly decided. (AOB 45). The *Farnham* Court rejected the argument — just as this Court should.

### 3. Even the "non-bicycle" cases support the City's interpretation.

In addition to *Armenio*, *Carroll* and *Farnham*, various cases have addressed the parameters of section 831.4 outside the strict bicycle path context. Even those cases support the City's immunity here.

- *Giannuzzi v. State of California*, 17 Cal.App.4th 462, 21 Cal.Rptr.2d 335 (1993) concerned a "dirt trail" that led over an "unimproved hill" in the park. (17 Cal.App.4th at 464.) Like Prokop, the *Giannuzzi* plaintiff sought relief under Govt. Code section 835. The Court found that the immunity provided by section 831.4, subd. (b) applied to any trail, including one which is itself used for the recreational activity. (17 Cal.App.4th at 466.)
- *Treweek v. City of Napa*, 85 Cal.App.4th 221, 101 Cal.Rptr.2d 883 (2000), which Prokop cites with praise, has nothing to do with this case. *Treweek* found, simply, that a boat ramp was not a trail within the meaning of section 831.4(b). (85 Cal.App.4th at 232.) In so finding, the Court expressly noted that it had "no difficulty" extending the "recreational trails immunity" to the paved bike paths in

*Armenio*, *Carroll*, and *Farnham*. (85 Cal.App.4th 231.) It simply declined to extend that immunity to a boat ramp, a finding that is irrelevant here.

- *Astenius v. State of California*, 126 Cal.App.4th 472, 23 Cal.Rptr.3d 877 (2005) is the Court's latest examination of the statute, and again, it falls in favor of immunity. The accident at issue there occurred when a woman was driving an off-road vehicle through a state-owned recreational area. Although the area's other trails had been marked with hazard signs to warn users of dangerous trails, the trail that the driver followed had not been so marked, and, in traversing through it, she fell to her death. (126 Cal.App.4th at 475.) The Court acknowledged the State's mandatory duty to maintain the trails, and its failure to warn the decedent of the hazards of this trail, but found that the absolute immunity of section 831.4 precluded liability. (126 Cal.App.4th at 476.)

In sum, then, the case law and the statute are clear: public entities such as the City are immune from liability for injuries occurring on a bike path.

## II.

## PROKOP'S ATTEMPTS TO AVOID THE IMPACT OF SECTION 831.4 ARE UNAVAILING.

### 1. Prokop's interpretation of section 831.4 is erroneous.

Prokop's interpretation of the statute (AOB 51-52) makes no sense — literally,

it is not understandable — but the upshot of it seems to be that Prokop is asking this Court "to impute the adjective 'unpaved' that modifies the word 'trail' in subsection (a) to the word 'trail' in subsection (b)." (AOB 52.) Aside from the fact that a cardinal rule of statutory interpretation is not to add or alter language in the statute (*Olaes v. Nationwide Mutual Ins. Co.*, 135 Cal.App.4th 1501, 1505, 38 Cal.Rptr.3d 467 (2006)), Prokop's interpretation of the statute has been specifically rejected by several courts. In *Carroll, supra*, the Court declared:

> "Subdivision (a) speaks of *unpaved* roads, while subdivision (c) refers to *paved* trails. It is therefore logical to interpret subdivision (b)'s reference to "*any trail*" to mean just that, i.e., any trail, whether paved or unpaved." (60 Cal.App.4th at 609.)

In *Armenio, supra,* similarly, the Court found that "[t]he logical inference of the all-encompassing 'any' in subdivision (b), particularly in relationship to the limiting adjectives in its sister subdivisions, is that the nature of the trail's surface is irrelevant to questions of immunity." (28 Cal.App.4th at 418.) And the *Astenius* Court specifically declined to add any "limiting language" to the immunities in 831.4. (126 Cal.App.4th 476.)

In sum, then, neither logic nor authority supports the view that the immunity of 831.4(b) is limited to unpaved trails.

2. **Prokop's disagreement with the concept of immunity is not a basis to ignore the clear immunity here.**

In essence, Prokop expresses outrage that the City's duty to maintain the bike trail could be "ignored" by virtue of the City's immunity under Section 831.4. But that is just the nature of immunity. As the *Astenius* Court explained, even assuming that a public entity has a mandatory duty to maintain its trails, "any breach of that duty comes within the scope of the immunity provisions of section 831.4." (*Astenius*, 126 Cal.App.4th at 476.) The purpose of this immunity is noble: to make sure that these public areas are kept open. (*Farnham*, 68 Cal.App.4th 1103.)

While Prokop protests that the City's duties should be considered paramount, and thus should eclipse its immunity, the cases cited by Prokop himself for this proposition clearly explain that the opposite sequence pertains. In *Walt Rankin & Associates, Inc. v. City of Murietta*, 84 Cal.App.4th 605, 612-613, 101 Cal.Rptr.2d 48 (2000), the Court, quoting *Davidson v. City of Westminister*, 32 Cal.3d 197, 201-202, 185 Cal.Rptr. 252 (1982), explained:

> "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 and thus would be liable in the absence of such immunity." (*Davidson v. City of Westminister*, 32 Cal.3d 197, 202, 185 Cal.Rptr. 252 (1982).

In other words, even if this Court were to agree with Prokop's analysis

regarding the City's duty to maintain the trail, 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.

Finally, Prokop takes issue with the City's allegedly inadequate warning signs, but again, "nothing in section 831.4 makes immunity contingent on giving proper warnings. The immunity granted by section 831.4 is absolute." (*Astenius, supra,* 126 Cal.App.4th at 476.)

### 3. *Muskopf* is not only noncitable, it is the case that inspired the Tort Claims Act and the immunities that protect the City today.

Prokop asserts that the Supreme Court abolished the "ancient" doctrine of governmental immunity in *Muskopf v. Corning Hospital Dist.*, 55 Cal.2d 211, 11 Cal.Rptr 89 (1961). In fact, just the opposite occurred:

> "The history [of the Tort Claims Act] begins in 1961, when this court [the California Supreme Court] held that the doctrine of sovereign immunity would no longer protect public entities from civil liability for their torts. (*Muskopf* [Citation]. **The Legislature responded by suspending the decision's effect** (Stats. 1961, ch. 1404, pp. 3209-3210) and by directing the California Law Revision Commission ...to conduct a study of whether the doctrine of sovereign immunity should be abolished or revised. Following extensive research, the Commission published a recommendation ... which became the Tort Claims Act." (*Brown v. Poway Unified School District*, 4 Cal.4th 820, 830, 843 P.2d 624 (1993) (emphasis added).)

As such, *Muskopf* is not citable, as it has been superseded by the Government

Tort Claims Act (Cal. Govt. Code section 810 *et seq.*), the Act which grants the City immunity here.

A key tenet of the Act is Govt. Code section 815, which codifies the general rule that

> "a public entity is *not* liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee of any other person." (Govt. Code section 831, subd. (a).)

Although the Act also includes exceptions to this rule, *i.e.*, specific circumstances in which an entity could be liable, Section 815 further instructs:

> "[t]he liability of a public entity established by this part ... is subject to any immunity of the public entity provided by statute." (Cal. Govt. Code section 815, subd. (b).)

In other words, the Act establishes that a public entity is *not* liable for tort injuries *except* as specified in the Act; and even where such liability may exist, it is subject to the various immunities that are also outlined in the Act. (*Nestle v. City of Santa Monica*, 6 Cal.3d 920, 932, 101 Cal.Rptr. 568 (1972).) So even if section 815.6 would otherwise apply to this case, the Legislative Comment to that statute expressly warns that "[i]n the sections that follow in this division, there are stated some immunities from the general rule of liability." Sure enough, section 831.4 is such an immunity, and inoculates the City from any liability here. No matter how much Prokop tries to fit this case into section 815.6, the next step in the analysis

begins — and ends — with section 831.4.

## CONCLUSION

It is thus undeniable that Section 831.4 applies, and that it immunizes the City from liability here. The City respectfully submits that summary judgment should be affirmed in its entirety and that costs should be awarded to the City.

DATED: August 8, 2006

Respectfully submitted,

**ROCKARD J. DELGADILLO**, City Attorney

By _____

**BLITHE S. BOCK**
Deputy City Attorney

Attorneys for Respondent,
**CITY OF LOS ANGELES**

## NOTICE OF RELATED CASES

Respondent City of Los Angeles is not aware of any related cases.

## CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 14(c)(1) or 33(b)(1) of the California Rules of Court, the enclosed Appellant's Brief is produced using 13-point Roman type including footnotes and contains 3,892 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: August 8, 2006

**ROCKARD J. DELGADILLO**, City Attorney
**JANET G. BOGIGIAN,** Assistant City Attorney

By _____
**BLITHE S. BOCK**
Deputy City Attorney

Attorneys for Respondent,
**CITY OF LOS ANGELES**

PROOF OF SERVICE
Business Practice to Entrust Deposit to Others)
(CCP SECTION 1013a(3))
(Via Various Methods)

I, **LINDA F. JOHNSON,** the undersigned, say: I am over the age of 18 years and not a party to the within action or proceeding. My business address is 600 City Hall East, 200 North Main Street, Los Angeles, California 90012.

On, August 8, 2006, I served the foregoing document(s) described as **RESPONDENT'S BRIEF** on all interested parties in this action by placing copies thereof enclosed in a sealed envelope addressed as follows:

## PLEASE SEE ATTACHED SERVICE LIST

**[ X ] BY MAIL** - I deposited such envelope in the mail at Los Angeles, California, with first class postage thereon fully prepaid. I am readily familiar with the business practice for collection and processing of correspondence for mailing. Under that practice, it is deposited with the United States Postal Service on that same day, at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postage cancellation date or postage meter date is more than (1) day after the date of deposit for mailing in affidavit; and/or

**[ ] BY PERSONAL SERVICE** - ( ) I delivered by hand, or ( ) I caused to be delivered via messenger service, such envelope to the offices of the addressee with delivery time prior to 5:00 p.m. on the date specified above.

**[ ] BY FACSIMILE TRANSMISSION** - I caused such document to be transmitted to the offices of the addressee via facsimile machine, prior to 5:00 p.m. on the date specified above, at the respective telephone numbers indicated.

**[ ] BY OVERNIGHT COURIER** - I deposited such envelope in a regularly maintained overnight courier parcel receptacle prior to the time listed thereon for pick-up. Hand delivery was guaranteed by the next business day.

**[ X ] - 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.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 8, 2006, at Los Angeles, California.

Linda F. Johnson

LINDA F. JOHNSON, Secretary

Doc. #259101

**SERVICE LIST**

# DAVID PROKOP v. CITY OF LOS ANGELES

**Superior Court California - County of Los Angeles**
Case No. BC 305 404
Court of Appeal Case No. B184025

## RESPONDENT'S BRIEF

**August 8, 2006**

Matthew Blumkin, Esq.
NEMECEK & COLE
15260 Ventura Boulevard, Suite 920
Sherman Oaks, California 91403-1500

John A. Clarke, Clerk
LOS ANGELES SUPERIOR COURT
For: Hon. Rolf M. Treu, Judge Presiding
111 N. Hill Street
Los Angeles, California 90012-3117

California Supreme Court
300 South Spring Street
Second Floor, North Tower
Los Angeles, California 90013
**(4 Copies of Brief)**