Molly M. McKibben
GREENE BROILLET & WHEELER, LLP

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
March 2017 Issue

Governmental immunities that preclude bicyclists from prevailing in their actions

A FINDING OF LIABILITY IS NOT GUARANTEED — EVEN WHEN IT SEEMS OBVIOUS

Imagine you receive a call from a client who was riding a bike down a brand new bicycle path built by the County of Los Angeles. It was a beautiful day, and the path they were traveling on looked clear and safe. But as they rounded a bend in the path, they rode right into a huge unmarked hole installed in the middle of the pathway. Think you've got a slam-dunk case lawsuit against the County for this ridiculous bicycle path design? Think again.

Thanks to a handful of immunities that the Legislature has enacted for the benefit of the State, counties, and cities, it is increasingly difficult, if not impossible, for bicyclists to prevail on premises-liability claims against government entities.

Due to an increasingly environment-conscious society, bicycling has become exponentially more popular both as a mode of transportation and a recreational activity. The number of people in the United States who had ridden a bicycle in the prior 12 months increased from around 47 million in 2008 to over 67 million in 2014. More than double the amount of bicycles are sold each year than passenger cars, and bicycle sales have been steadily increasing since the 1990's in comparison to declining car sales. Accordingly, cities and counties have had to change the infrastructure of their property to adapt to this recent boom in bicycling interest.

The City of Los Angeles has over 590 miles of bikeways, with over 19,500 people using bicycles as their primary mode of transportation. In Los Angeles, bicycles are often used by commuters who rely upon public transportation due to gaps between where they live and where they connect with public transit. Approximately nine percent of Los Angeles Metro passengers either drive or are dropped off at a stop at the start of their commute. Los Angeles instituted a bicycle sharing program in August 2016 in Santa Monica and Downtown, and recently extended its Expo Line train from Downtown all the way to Santa Monica, and built an adjoining bicycle path that runs parallel to the tracks. Many cities, including Sacramento and Los Angeles, are turning old train tracks into bike trails.

Similarly, San Francisco has 434 miles of bikeways, including buffered bicycle lanes, protected bicycle lanes, and off-street paths and trails. Bicycle ridership there has risen significantly over the past few years, increasing by 184 percent from 2006 to 2015 at the same 19 intersections. Over one million bicycle trips were logged on Market Street in 2015, and

McKibben, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
March 2017 Issue

there were an estimated 82,000 bicycle trips in the city per day.

Dangerous bicycle facilities

With increased ridership comes increased opportunity for injury or even death. Bicycle facilities that are not properly inspected and maintained can pose a serious hazard.

The California Office of Traffic Safety (OTS) ranks individual cities and counties based upon their traffic safety statistics. According to the most recent OTS report, San Francisco had the *highest* incidence of bicycle injuries/fatalities out of cities with populations of over 250,000. Sacramento had the highest incidence of bicycle injuries/fatalities with bicyclists under the age of 15. Los Angeles ranked in the middle on the list. While there are incidents that are caused by collisions with other vehicles or user error, oftentimes injuries are caused by unsafe design of public biking facilities.

Clearly government entities are aware of this increased risk of injury or death to bicyclists. Both Sacramento and San Francisco have adopted a Vision Zero policy, with a goal of eliminating traffic-related deaths. The goal is to have zero traffic deaths – hence the name "Vision Zero." While these policies are admirable, they often fail to address structural or design issues that put cyclists at risk.

It seems axiomatic that if a city or county builds something and encourages citizens to make use of it, those entities should be required to design it safely and to maintain its safety. However, anyone who is injured by hazards posed by public biking property faces serious roadblocks in getting past summary judgment and recovering damages in a case against a government entity.

Governmental immunities preclude liability

That hole mentioned above? Even if you can establish the obvious – that designing a hole in the middle of a bicycle pathway is dangerous – the city or county that built the hole can nonetheless avoid liability.

Where a private landowner can be sued under general principles of negligence, a government entity can only be sued in specific instances which are outlined in statutes that the government wrote for itself. California Government Code section 835 provides the only grounds on which a plaintiff can sue a government entity for a dangerous condition on public property. Under Section 835, a plaintiff must establish:

- That the property was in a dangerous condition at the time of the injury;
- That the injury was proximately caused by the dangerous condition;
- That the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred; and that either:
- A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
- The public entity had actual or constructive notice of the dangerous condition a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

"Dangerous condition" means a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property... is used with due care in a manner in which it is reasonably foreseeable that it will be used. (Cal Gov. Code, § 830(a).)

However, even if a bicyclist meets all of these requirements, their case can still be knocked out on summary judgment due to immunities that protect government entities, even where their property – including paved bicycle paths and on-street bicycle lanes – is demonstrably dangerous.

Trail immunity (Gov. Code, § 831.4)

The least-known immunity that provides perhaps the most absolute barrier to a bicyclist's recovery is trail immunity. Government Code section 831.4 states that "[a] public entity…is not liable for an injury caused by a condition of (a) any unpaved road which provides access to… riding" and "(b) any trail used for the above purposes." This seems innocuous enough to only cover non-urbanized property where one would assume a bicyclist would assume the risk of injury. In fact, the plain language of the statute provides immunity only for "unpaved roads" or "trails."

However, in the course of defending lawsuits, governmental entities have gotten the courts to significantly expand the breadth of section 831.4 so that the immunity now applies to anything the government can convince a court constitutes a "trail," including paved bicycle paths and on-street bicycle lanes. Few cases have addressed this immunity, and most of the published decisions involve a court of appeal affirming a grant of summary judgment against plaintiffs injured on paved, maintained pathways. In *Amberger-Warren v. Piedmont* (2006) 143 Cal.App.4th 1074, 1077-1078, the court of appeal found that a paved pathway in a dog park constituted a "trail" for purposes of section 831.4. In *Carroll v. County of Los Angeles* (1997) 60 Cal.App.4th 606, 607, the court of appeal held that the South Bay Bicycle Path was a "trail" and granted immunity to the County of Los Angeles, despite a dangerous crack in the pavement. In *Farnham v. City of Los Angeles* (1998) 68 Cal.App.4th 1097, 1099, the court affirmed a grant of summary judgment against a bicyclist riding on the Sepulveda Basin Bikeway when the pavement disintegrated underneath him, causing him to be thrown from his bicycle. In *Hartt v. County of Los Angeles* (2011) 197 Cal.App.4th 1391, 1393, summary judgment was affirmed where a bicyclist was killed after colliding with a county-owned vehicle on a paved road in a community park.

Courts that have been asked to address the immunity provided by section 831.4 usually discuss the fact that the intended purpose of the statute was to encourage the government to open undeveloped property to recreational use by the public without burdening the government with the responsibility of improving or maintaining the property

McKibben, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
March 2017 Issue

in a safe condition. (*Armenio v. County of San Mateo* (1994) 28 Cal.App.4th 413, 417.) Despite this, there is little recognition by these same courts that it would not be burdensome to require public entities which already improve or maintain property such as paved bicycle paths to do so non-negligently.

Once a court determines that the injury-producing property is a "trail" under section 831.4, there are no exceptions to this immunity. At this point, given the expansive breadth of the few cases that have addressed this immunity, the only hope plaintiffs have is to repeal or amend section 831.4 to circumscribe its scope.

Design immunity (Gov. Code, § 830.6)

The defense most commonly asserted by cities, counties, and the State in opposition to dangerous condition of public property cases is design immunity. Government Code section 830.6 provides immunity to any public entity where an injury occurs because of a dangerous condition that had a plan or design which was approved prior to construction, and the reasonableness of which was supported by substantial evidence. The Legislature created the design immunity defense "to prevent a jury from second-guessing the decision of a public entity by reviewing the identical questions of risk that had previously been considered by the government officers who adopted or approved the plan or design." (*Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 69.)

There are only a few exceptions to this immunity. One is to prove that the public entity had no written plan or design for the injury-inducing design feature. In order to be shielded by section 830.6's immunity, the injury-producing feature of public property must have been part of an approved plan. (*Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931, 939-941.) In *Martinez v. County of Ventura* (2014) 225 Cal.App.4th 364, the court reversed a jury trial's defense verdict based on design immunity after it agreed with the plaintiff's argument that there was no "plan or design" for the drain system that injured the plaintiff. There is currently no California case where a court found that a government entity was entitled to design immunity without a written design or plan for the injury-producing feature. However, plaintiffs' counsel must take into account the fact that courts have found that something as simple as a "shop drawing" can constitute a "plan or design" for purposes of design immunity. (*Thomson v. City of Glendale* (1976) 61 Cal.App.3d 378, 385.)

Another is to argue that conditions of the property have changed such that a trap has been created that can injure members of the public using the property with due care. The failure to warn of a trap can constitute independent negligence, regardless of design immunity. (*Cameron v. State of California* (1972) 7 Cal.3d 318, 328-329; *Hefner v. County of Sacramento* (1988) 197 Cal.App.3d 1007, 1017-1018.) For instance, a public entity is liable "where a design defect in the roadway causes moisture to freeze and create an icy road surface, a fact known to the public entity but not to unsuspecting motorists. . . ." (*Chowdhury v. City of Los Angeles* (1995) 38 Cal.App.4th 1187, 1197 [citing *Flournoy v. State of California* (1969) 275 Cal.App.2d 806, 808-810].)

Hazardous recreational activity immunity (Gov. Code, § 831.7)

Another immunity standing in the way of a bicyclist's case is hazardous recreational immunity. Government Code section 831.7 provides that a government entity is not liable for its dangerous property where the bicyclist was participating in what the Legislature and the courts consider a "hazardous recreational activity." Section 831.7 contains a non-inclusive list of activities the Legislature determined automatically qualify as "hazardous recreational activities," and defines "hazardous recreational activity" as "a recreational activity conducted on property of a public entity that creates a substantial, as distinguished from a minor, trivial, or insignificant, risk of injury to a participant or a spectator." (Gov. Code, § 831.7, subd. (b).)

Public entities have sought to expand the application of this statute to any other act they can argue is "recreational" or in any way risky that a plaintiff was engaged in when they were injured. For instance, *Yarber v. Oakland Unified School District* (1992) 4 Cal.App.4th 1516, reversed a trial court's award of damages to a plaintiff who sustained a head and spine injury while he was participating in an adult, unsupervised, after-school-hours basketball game in a junior high school's gymnasium.

In *Wood v. County of San Joaquin* (2003) 111 Cal.App.4th 960, the court affirmed demurrers sustained without leave to amend against surviving family members of plaintiffs who were killed when a motorboat towing a water-skier collided with a canoe full of fishermen. The court of appeal affirmed dismissal of the plaintiff's case after a demurrer in *Devito v. Cal* (1988) 202 Cal.App.3d 264, 270-272, where the plaintiff was injured from falling while swinging from a tree rope swing in a State park.

Fortunately, this immunity has a number of exceptions, both statutory and case-created. First, a government entity can still be liable for a dangerous condition that is not reasonably assumed by the participant. (Gov. Code, § 831.7, subd. (c)(1)(A).) The court of appeal in *Perez v. City of Los Angeles* (1994) 27 Cal.App.4th 1380, 1384, examined this exception, stating:

> Falling from a rope down the slope of a hill or a ravine would classically be "assumed by the participant as an inherent part of the activity of 'tree rope swinging.'" However, if a person were to swing from a rope and jump into a body of water where, to the rope swinger's surprise, there were, for example, dangerous piranhas or crocodiles whose presence was known by the public entity, liability could be premised on the public entity's failure "to guard or warn of a known dangerous condition", i.e., the dangerous fish or reptiles, despite the legal characterization of tree rope swinging as a hazardous recreational activity.

McKibben, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
March 2017 Issue

Similarly, a bicycle rider can argue that bicycle racers assume the risk that they may crash into another cyclist and be injured; they do not assume the risk that there will be a huge hole in the middle of the path on which they are riding. (Second,) the immunity does not apply where the government entity charges an activity-specific fee for participation. (Gov. Code, § 831.7, subd. (c)(1)(B).) (Third,) the public entity is nonetheless liable for a plaintiff who was engaged in a hazardous recreational activity where an act of gross negligence caused the injury. (Gov. Code, § 831.7, subd. (c)(1)(D)-(E).) However, in order to invoke this exception to section 831.7's immunity, a plaintiff must plead and present evidence of facts showing the public entity's "extreme departure from the ordinary standard of care." (*Devito v. Cal* (1988) 202 Cal.App.3d 264, 272 [citing *Gore v. Board of Medical Quality Assurance* (1980) 110 Cal.App.3d 184, 198].)

In addition, there is an exception to this immunity for instances in which a plaintiff is injured by the public entities' negligent failure to properly construct or maintain any structure utilized in the hazardous recreational activity. (Gov. Code, § 831.7, subd. (c)(1)(C).) Courts have also recognized that section 831.7 does not apply to bar claims by minors participating in school-sponsored extracurricular athletics on public property. (*Acosta v. Los Angeles Unified School Dist.* (1995) 31 Cal.App.4th 471, 477-478.)

Summary

This list is in no way exhaustive but these are the most commonly asserted defenses by public entities in cases filed by bicyclists. Thoroughly understanding the text of and the exceptions to each immunity is absolutely necessary to draft a complaint that will withstand motions to strike, and a case that will survive summary judgment and motions for nonsuit.

In addition, plaintiffs' counsel must be active in seeking publication of appellate decisions that diminish the scope of these immunities. There are a number of state court appellate opinions related to trail immunity and hazardous recreational immunity that are favorable to plaintiff bicyclists that were never published and thus cannot be relied upon by future plaintiffs in their cases. Plaintiffs' counsel must be as zealous in their efforts to urge the courts to publish opinions as defense counsel have been in obtaining publication of the many cases that have substantially increased the scope of these immunities.

Molly M. McKibben is an attorney at Greene Broillet & Wheeler, LLP *in Santa Monica, California. She has been practicing with GBW for over six years after graduating from Pepperdine University School of Law. She is certified to practice in California state courts and the Central District of California, and her trial practice focuses on catastrophic personal injury, wrongful death, municipal liability, and products liability.*