Case No. A156819

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION ONE

CATHERINE WILLIAMS
Plaintiff and Respondent,

v.

COUNTY OF SONOMA
Defendant and Appellant.

[PROPOSED] AMICUS CURIAE BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF DEFENDANT AND APPELLANT COUNTY OF SONOMA

On Appeal from the Sonoma County Superior Court
Case No. SCV-261355
The Honorable Jennifer V. Dollard

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I. INTRODUCTION

This case raises a significant issue for California's cities and counties: the application of the primary assumption of risk doctrine to a dangerous condition of public property claim when plaintiff engages in recreational activity with inherent risk of injury.

Despite plaintiff's protestations to the contrary, a high-speed, long distance training ride involves the inherent risk of injury caused by road hazards, including potholes like the one plaintiff encountered here. Her recreational training meant that plaintiff was traveling much faster than the average cyclist, and for longer distances. That decreased her ability to timely react to road hazards and increased the possibility that injuries incurred as a result of those hazards would be more severe.

At the same time, this Court must consider the reasonableness of expecting cities and counties to maintain roads in a manner that would prevent all accidents for high-speed cyclists like the one that occurred here. Given the vast number of road miles that must be maintained, the ever-changing conditions that occur on those roads, and the limited resources available for road maintenance, it simply is not feasible for public agencies to keep roadways clear of all injury-causing hazards for individuals engaging in high-speed cycling at all times.

In short, this case presents a fundamental question about who should bear the risks and costs associated with injuries resulting from high-speed recreational cycling/training on public roads given the inherent risks of the sport and the impossibility of maintaining pothole-free roads. Does the statutory scheme require the taxpaying public to bear that risk, or does the risk fall on the individual voluntarily engaging in the activity?

The answer must be the latter. Though plaintiff's fall and resulting injuries are most unfortunate, at the speed she was traveling and with her decision to travel on shadowed roadways that limited her view of obstructions, her injuries could have occurred as a result of a tree branch on the road, or a cat darting into the roadway, or any number of obstacles that did not involve county road maintenance. In other words, inherent in the sport of cycling at such speeds is the risk that one will encounter a road hazard without sufficient time to avoid it, and that the injuries from falling at that speed will be severe.

A ruling in plaintiff's favor in this case would require cities and counties to either: (1) maintain their public roads free of road conditions that could foreseeably cause a high-speed bicyclist to lose control and fall (an impossibility under any reasonable standard); (2) serve as the ultimate insurer of the risk of this recreational sport; or (3) alter the fundamental nature of the sport. The statutory scheme is intended to avoid this precise result.

II. ARGUMENT

A. Cities and Counties Have No Duty to Protect Plaintiffs From Risks Inherent in Sporting or Recreational Activity.

The primary assumption of risk doctrine provides a complete defense to a cause of action arising from "any particular sports activity that 'is done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury.'" (*Peart v. Ferro* (2004) 119 Cal.App.4th 60, 71, citing *Record v. Reason* (1999) 73 Cal.App.4th 472, 482.) Application of the defense thus depends on whether the injury arose from a risk that is inherent in the activity, or from a non-inherent risk created by defendant.

The nature of the sport determines the scope of the inherent risks, and in turn defines the injuries for which liability is barred. (*Knight v. Jewett* (1992) 3 Cal.4th 296, 308-310.) Even non-competitive sports and recreational activities qualify for the primary assumption of risk doctrine if they involve inherent risk of injury to voluntary participants where the risk cannot be eliminated without altering the fundamental nature of the activity. (*Ford v. Gouin* (1992) 3 Cal.4th 339, 345; *Nalwa v. Cedar Fair, L.P*. (2012) 55 Cal.4th 1148, 1156-57.) The defendant has no duty to protect plaintiff from such risks. (*Connelly v. Mammoth Mountain Ski Area* (1995) 39 Cal.App.4th 8, 12.)

The trial court should have applied the primary assumption of risk doctrine to plaintiff's activity in this case. High-speed, long distance cycling has as an inherent characteristic the possibility of losing control and sustaining serious injuries due to road hazards, irrespective of a public agency's road maintenance practices. The record in this case certainly supports application of the doctrine here. Plaintiff was engaged in training rides that were intended to push her athletic boundaries and prepare her for a 100-mile organized ride, traveling along shadowed roads that obscured her view of hazards and limited her ability to respond to any hazards she might encounter. Her ride on the day of the accident – a planned 30-mile ride at a speed of at least 25 miles per hour – is much longer and faster than studies show are typical on public roadways, even for typical recreational rides. (Jennifer Dill and John Gliebe, *Understanding and Measuring Bicycling Behavior: A Focus on Travel Time and Route Choice, Final Report*, OTREC-RR-08-03, Prepared for Oregon Transportation Research and Education Consortium (OTREC) (Dec. 2008), pp. 34-35 [Average speed to work: 12 mph; Average speed for exercise / organized rides: 11.7 mph; Average distance to work: 3.8 miles; Average distance for exercise: 8.5 miles].)[1] Traveling at more than twice the average speed over a long

[1] This publication, published by the Portland State University Nohad A. Toulan School of Urban Studies and Planning, is available at: https://pdfs.semanticscholar.org/eeb5/74b720ba6809ef6fbfa9a80ae29977e6f854.pdf.

distance bike ride has obvious and apparent inherent risks. Both the speed and the resulting fatigue from a longer and more strenuous ride reduce the ability to avoid any manner of inevitable road hazards (uneven pavement, animals darting into the roadway, fallen tree branches, potholes, etc.), and increase the severity of any injuries that may occur. The County had no duty to protect her from those risks, which she voluntarily assumed by engaging in the activity.

Though plaintiff scoffs at the idea that there should be any legal distinction between using a bicycle to travel to work and the cycling she did on the day of her accident, as explained above it is obvious that the two are quite different in terms of the inherent risks,[2] which is the critical question in deciding whether the primary assumption of risk doctrine applies. Plaintiff's activities fall squarely within the primary assumption of risk doctrine, and the public should therefore not be the ultimate insurer for the risks that plaintiff voluntarily assumed. The trial court therefore erred by denying the County's summary judgment motion based on the doctrine, granting plaintiff's motion in limine to exclude evidence related to the assumption of risk doctrine, and denying a jury instruction on application of the same.

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[2] Consistent with the data cited above, Plaintiff's own expert testified that her style of cycling was unlike a "regular recreational ride around the block." (7 RT 933.)

B. It is Not Reasonable to Expect Cities and Counties to Maintain Roads that are Free From Hazards That Could Cause Injury During Inherently Risky Recreational Activities.

As noted in the County's opening brief, Sonoma County maintains 1,383 miles of roadway. (Opening Br., p. 19.) The importance of the issue before this Court, however, extends statewide, and it is therefore critical to understanding just how Herculean a task plaintiff and the trial court are imposing on amici's members if they are to avoid very large dollar judgments against them, like the one in this case.

Amici's member cities and counties are responsible for 85.7% of the streets and roads in California, an astounding 144,000 miles of roadway. (California Statewide Local Streets and Roads Needs Assessment (Oct. 2018), p. 6.)[3] "On a scale of zero (failed) to 100 (excellent), the statewide average Pavement Condition Index (PCI) is now 65 ("At Risk" category). Even more alarming, 53 of 58 counties are either at risk or have poor pavements." (*Id.* at p. 2.) To bring local streets and roads to a level of "good repair" – from a PCI of 65 to a PCI of 85 – would cost $68.24 billion over the next 10 years, and an ongoing $2.5 billion a year to maintain the pavements at that level. (*Id.* at p. 4.) To put that into context, existing funding levels for local streets and roads is $3.803 billion a year, which is

[3] This document can be accessed at: https://www.savecaliforniastreets.org/wp-content/uploads/2018/10/2018-Statewide-Final-Report-1.pdf

enough to maintain most roads in their current condition, and reduce very slightly the percentage of roads in "failed" or "poor" condition. (*Ibid.*) Even with new technologies to help reduce deterioration and some increased revenues from the recently-adopted Road Repair and Accountability Act of 2017 (Stats. 2017, ch. 5, § 9), there is a funding shortfall of $54.6 billion over the next 10 years for road maintenance in this State. (*Id.* at p. 5.)

Given the vast number of miles to be maintained and the significant funding shortfalls in road maintenance funding, it is simply not feasible, no matter how diligent the effort, for cities and counties to maintain roads in a manner that would remove all hazards for individuals cycling at high speeds. As noted by the Law Revision Commission and multiple courts, unlike private enterprise, government agencies cannot avoid risk by going out of the business of governing. (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1138; *Davis v. Cordova Recreation & Park Dist*. (1972) 24 Cal.App.3d 789, 797.) Instead, government is charged with taking reasonable action, taking into account practicability and cost. (See, e.g., Gov. Code, § 834.5.) The more than $68 billion it would take to ensure no city or county roadways are in poor or failing condition is simply not practical. Individuals voluntarily engaging in high-speed cycling and other high-risk recreational behavior on the public roads – and indeed the law itself – must accept that we simply cannot expect our public roadways to be

free of potholes.

Plaintiff insinuates that maintaining the roadway on which she was injured should have been a simple affair, noting that the pothole was less than 10 miles from a road maintenance yard, and would have required $100-200 of materials to repair. (Respondent's Br., p. 15.) And, of course, if this were the only mile of road the County were responsible for, and the only pothole to repair, plaintiff would be right. But isolating the cost of one repair provides a myopic and distorted view of the problem of road maintenance. In fact, the County has over one thousand miles of roadway to maintain, and a limited budget with which to perform the work. It approaches this daunting task with a remediation plan to make the best use of the resources available. In other words, the County cannot make its roadways free from hazardous for high-speed cyclists, but it does take reasonable action, considering practicality and cost.

Further, applying plaintiff's legal theory on a statewide basis would subject cities and counties to untold liability. For every pothole a government agency is able to repair, many more are created or remain unrepaired by necessity, creating a potential hazard for all high-speed cyclists, whose injuries, like the plaintiff's here, are made all the more severe because of the speed at which they choose to travel. With over 150,000 miles of roadways for cities and counties to maintain in this State and a budget shortfall measured in the billions, this is simply the reality.

Thus, there is no reasonable way for cities and counties to avoid the liability imposed by the trial court here without altering the sport of high-speed cycling.

C. Because it is Not Feasible to Protect High Speed Cyclists from Potholes and Other Road Hazards, Cities and Counties Would Have to Change the Nature of the Activity to Avoid Liability, Which is Precisely What the Primary Assumption of Risk Doctrine is Intended to Avoid.

As noted above, the primary assumption of risk doctrine applies to sports and recreational activities if they involve inherent risk of injury to voluntary participants *where the risk cannot be eliminated without altering the fundamental nature of the activity*. (*Ford, supra,* 3 Cal.4th at p. 345; *Nalwa, supra*, 55 Cal.4th at pp 1156-57 (emphasis added).) The policy reasons for this protection are clear: sports and vigorous recreational activity are not essential for life, so they would be subject to elimination all together to mitigate liability if would-be defendants were not shielded from a duty to protect would-be plaintiffs who voluntarily engage in such activities. (*Nalwa, supra,* 55 Cal.4th at p. 1157; *Cann v. Stefanec* (2013) 217 Cal.App.4th 462, 468.)

These elements are clearly present in this case. First, as experts on both side opined, there are inherent risks of road hazards causing injury when cycling at the speeds at which plaintiff rode during her training rides. Second, there is no feasible way for government to maintain the roads in

order to ensure that all hazards, including large potholes with the potential to cause injury to high-speed cyclists, are eliminated. Thus, without protection from liability in statute or common law, the only option available to cities and counties to avoid liability is to place restrictions on the activity.

A local government could avoid liability for accidents like the one in this case by, for example, imposing speed limits for cyclist. But that would fundamentally alter the nature of the recreational activity that plaintiff so enjoyed. It would remove much of the challenge and endurance, the need for certain skills, and so on. The law is designed to accommodate exactly this — to permit plaintiff and others like her to continue enjoying their recreational activities notwithstanding the inherent risks, but without making the taxpayer the ultimate insurer for damages should injury occur.

III. CONCLUSION

For all of these reasons, Amici Curiae respectfully request that this Court grant the relief sought in this appeal, and reverse the trial court's judgment against the County of Sonoma.

Dated: February 18, 2020

Respectfully submitted,

/s/
By _____
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CERTIFICATION OF COMPLIANCE WITH CALIFORNIA RULES OF COURT, RULE 8.204(c)(1)

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the word count feature in my Microsoft Word software, this brief contains 2,310 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 18th day of February, 2020 in Sacramento, California.

Respectfully submitted,

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