No.: A156819

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

CATHERINE WILLIAMS, Plaintiff and Respondent, *vs*. COUNTY OF SONOMA, Defendant and Appellant.	)	Sonoma County Superior Court No.: SVC 261355

Appeal from a Judgment Following a Jury Verdict
Honorable Arnold Rosenfield, Jennifer Dollard, Judges

RESPONDENT'S BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

This is the initial certificate of interested entities or persons submitted on behalf of Plaintiff and Respondent Catherine Williams in the case number listed above.

The undersigned certifies that there are no interested entities or persons that must be listed in this Certificate under California Rules of Court, rule 8.208.

Dated: December 19, 2019 By: /s/ Alan Charles Dell'Ario

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RESPONDENT'S BRIEF

Sunday, July 10, 2016 was not much different from other summer days in western Sonoma County. Catherine Williams and her friend, Michele Habeeb, avid recreational cyclists, set out on a 30-mile ride in anticipation of participating in an upcoming Gran Fondo - an organized, social ride.[1] Willams and Habeeb were aware Sonoma County roads suffered from years of county neglect. But they didn't know a "LARGE,"[2] shadow-obscured pothole remained unrepaired in the southbound lane of Bloomfield Road. The hole measured at least 4′ wide by 3′4″ across and 4″ deep.[3]

As Williams and Habeeb descended toward Canfield Road and prepared to turn left, Williams' bike struck the hole and threw her to the pavement, face first.[4] She suffered severe, life-altering injuries including cognitive impairment.[5] She brought this action for dangerous condition of public property.[6]

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[1] 6 RT 775, 7 RT 910-911, 9 RT 1249, 1253.

[2] 4 RT 467, AA 322. Sharon Vanetti, a nearby resident, so described the hole when she reported it six weeks earlier on the county's electronic road-hazard reporting app. (4 RT 467, AA 320 (Ex. 1), 322 (Ex. 71).)

[3] 10 RT 193. (The reporter did not number the pages in this volume consecutively with the other volumes.)

[4] 6 RT 724-726, 733-735, 9 RT 1237-1239.

[5] 6 RT 1230-1237.

[6] AA 10, Gov. Code, § 835.

The county never contested the pothole was dangerous and should have been fixed right away. In his opening statement at trial, county counsel conceded:

> The County does have an obligation to maintain its roads. There's no question about that. And Bloomfield Road is, in fact, one of the roads that it maintains. That's clear.[7]

A local resident had reported the pothole on May 24,[8] more than six weeks before the accident. All the county's road-maintenance supervisors agreed, "It's a pothole we'd want to fix as soon as possible."[9] It was a hazard to "anything on the roadway."[10] But the county did nothing until after the accident.

A unanimous jury found the pothole as encountered by Williams amounted to a dangerous condition of public property and was a cause of her accident.[11] The jury awarded Williams $1,895,034.50 and assigned her 30% comparative fault for a net award of $1,326, 524.15.[12]

The county does not contest the jury's factual finding that the pothole was a dangerous condition of public property. Rather, the county asserts Williams' action is barred by the common law

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7 4 RT 447.

8 4 RT 467.

9 12 RT 1645, see also 6 RT 813, AA 335.

10 6 RT 811.

11 AA 182-183.

12 AA 183-184, 190.

doctrine of primary assumption of risk. That is, the county says Williams' accident was caused by the "inherent risks of high-speed[13] cycling."[14]

Three trial judges[15] have disagreed and they are right. In denying the county's motion for nonsuit, the court refused to apply the doctrine to the county's duty to maintain its roads.[16] The parties had acknowledged the handful of Court of Appeal cases[17] applying primary assumption of risk to claims of dangerous conditions of public property under the Government Claims Act.[18] But the Supreme Court has never so held. A proper reading of its decisions compels the conclusion that the doctrine does not apply to dangerous-condition cases at all. Public entity liability is wholly statutory and the Legislature has provided a

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[13] For the first time on appeal, the county has minted a previously-unknown activity of "*high-speed* recreational cycling" so as to create the false impression that Williams engaged in a risky activity different from and more dangerous than ordinary recreational cycling. Nothing in the record so characterizes her cycling. The trial court rejected the county's attempt to cast Williams as other than a recreational cyclist. (13 RT 1860.)

[14] AOB 40.

[15] Different judges ruled against the county on this point, first denying its motion for summary judgment, then its motion for nonsuit and, finally, its motions for judgment notwithstanding the verdict and new trial. (AA 66-71, 127, 301-302.)

[16] 13 RT 1860.

[17] E.g, *Bertsch v. Mammoth Comm. Water Dist.* (2016) 247 Cal.App.4th 1201, 1205, fn. 2.

[18] Gov. Code, § 810 et seq., 10 RT 271-272.

comprehensive statutory scheme including recreational-use immunity statutes.[19] No immunity exists for cycling on paved roads.

In any event, the doctrine does not apply because potholes, especially three-foot by four-foot ones, are not "inherent risks" of recreational cycling. An inherent risk is one that cannot be eliminated without altering the fundamental nature of the activity.[20] Falling is an inherent risk of all types of cycling. But potholes, particularly the size of this one, in a paved public roadway are not inherent risks of cycling because potholes that otherwise constitute a dangerous condition of public property *can* "be eliminated without altering the fundamental nature of [cycling]."[21] As the county admits, and as the Legislature requires, the county has a duty to repair and maintain its roadways.[22]

The county agrees the doctrine does not apply to cycling as a "means of transportation."[23] But, it says, a cyclist using county roads for recreational cycling compels a finding of "no duty."[24] Over forty-five years ago, the Supreme Court characterized such an argument as an "absurdity."

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[19] *Quigley v. Garden Valley Fire Prot. Dist.* (2019) 7 Cal.5th 798, 803–804 *(Quigley)*,Gov. Code, § 831.7.

[20] *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1156 (*Nalwa*).

[21] *Ibid.*

[22] Sts. & Hy. Code, § 941; 4 RT 447.

[23] AOB 35.

[24] AOB 37.

> Therefore, an improved but dangerously rutted street would expose a city to liability to a bicyclist who commutes to work, even though it was under "no duty" to keep the same street safe for the recreational rider right behind him. We doubt that there is a single city attorney in this state who would submit such an absurdity to a court of law.[25]

The high court was correct about the law but failed to anticipate the county's arguments here. Public entities have a duty to keep their paved, public roadways free of dangerous conditions for all users. The judgment must be affirmed.

[25] *Delta Farms Reclamation Dist. v. Superior Court* (1983) 33 Cal.3d 699, 707, footnote 7 omitted (*Delta Farms*). The court was speaking in a slightly different context - did the recreational-use immunity statute for private persons, Civil Code 846, apply to public entities - but the point is apt here.

The court's footnote 7 is also instructive. "In what category would one put the commuter who, solely for exercise, pedals home by a circuitous route?" The trial judge commented he knew such a person. (10 RT 273.)

STATEMENT OF FACTS[26]

I. The hole – Everyone agrees it should have been filled.

Bloomfield Road in western Sonoma County runs generally from northeast to southwest. (AA 322–323 (Ex. 71). It bears west where it intersects with Canfield Road. (*Ibid,* 4 RT 483.)

On May 24, 2016, Sharon Vanetti accessed the county's "Report It" computer application and reported a "LARGE pot hole in south bound lane" at 2499–2541 Bloomfield Rd. (AA 322–323, 4 RT 467.) The county confirmed receipt of her notice. (4 RT 468.)

The hole was too large to avoid with her Ford F-150 pickup. (4 RT 470.) It got deeper over time. (4 RT 474.) Vanetti thought the hole dangerous to motorists and cyclists and subsequently amended her report. (4 RT 470.) By the time of Williams' accident, the hole was at least 4′ by 3′4″ x 4″ as measured by the California Highway Patrol investigating officer. (10 RT 193.)

Thomas Warren, a volunteer firefighter and former aviator, lives near the corner of Bloomfield and Canfield. (4 RT 483.) He considered the hole the biggest hole he had ever seen in the county. (4 RT 488.) Neighbors Vail and Tonia Bello observed the hole as being "deep" and "something you had to avoid to avoid damaging your vehicle." (4 RT 531, 5 RT 568.)

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[26] Williams states the facts in a manner most favorable to the judgment and to the duty determination. (*M.W. v. Panama Buena Vista Union Sch. Dist.* (2003) 110 Cal.App.4th 508, 516–517.) Although the county acknowledges this principle (AOB 28), it fails to heed it.

Robert Houweling, Jr., is Sonoma County's road maintenance operations division manager. (6 RT 790.) He agreed Vanetti's complaint entered the county system on May 25. (6 RT 807–808.) He also agreed the hole was large and would pose a hazard to cyclists and "anything on the roadway." It should have been fixed "right away." (6 RT 810–811.) The hole would cause a cyclist to crash. (6 RT 812.)

Nathan Mayo, another county roads division supervisor agreed. (16 RT 1682–1683, AA 335.) "[T]hat pothole needed to be filled as soon as possible." (AA 335.) Robin Silva, the county roads operations division supervisor preceding Houweling, also agreed. "It's a pothole we'd want to fix as soon as possible." (12 RT 1637.) "[W]e would want to schedule it as quickly as possible once we become aware of it." (12 RT 1679.) The hole was 8.8 miles from the nearest county road-maintenance yard. (6 RT 815.) Only $100-$200 of material would be required. (6 RT 814.)

But despite receiving Vanetti's report on May 25, the county did nothing until after the accident on July 10, 2016, 46 days later. (6 RT 807–808.)

II. The cyclists – Two safety-conscious women, Williams and Habeeb, went out for a recreational Sunday ride.

Catherine Williams is the dean of instruction and enrollment management at Santa Rosa Junior College. (9 RT 1235.) Although she cycled as a young woman, she re-started cycling more seriously in 2011. (9 RT 1236.) In 2016, she was riding one

to four times a week. (9 RT 1252.) She had attended cycling safety classes and knew of a cyclist's need to be aware of road conditions. (9 RT 1251, 1253.) She also knew west Sonoma County roads were in poor condition. (9 RT 1254.) Her bike was in great condition with puncture-resistant tires. (7 RT 873–874.) She was an avid recreational cyclist. (9 RT 1249.)

Michele Habeeb is Williams' long-time friend and fellow cyclist. (6 RT 721.) In 2016, they were riding together five to ten times a month, between 15 and 100 miles at a time. (6 RT 722.) When they rode together, they always wore helmets and ensured their bikes were in good condition. (6 RT 722.) They were aware of rules of the road and other safe practices. (6 RT 775–776.) Michele, too, was aware Sonoma County roads had potholes, including Bloomfield Road. (6 RT 764.)

III. The accident – Williams suffers life-altering injuries after her bike strikes the LARGE shadow-hidden hole.

July 10, 2016 was a nice day. (6 RT 723.) The women set out for a 30-mile ride in anticipation of participating in an upcoming organized ride called a Gran Fondo. (6 RT 775, 9 RT 1255.) A Gran Fondo is a "super fun" ride for all age groups covering distances up to 100 miles. (7 RT 910.) It is not a race. (*Ibid.*)

They rode off-set from one another, with Williams about 7–8 feet in front and about 5–6 feet to the left of Habeeb. (6 RT 724–725.) They were descending Bloomfield Road toward Canfield at about 25 miles per hour, intending to turn left at the

corner when Williams' bike struck the hole, stopping the bike and throwing her face-first to the pavement. (6 RT 725–726, 752, 767–768.) The hole was obscured by the shadow of an over-hanging tree (4 RT 489–490, 518, 5 RT 568, 6 RT 735, 770), and Williams did not see it in time to brake or avoid it. (9 RT 1237.) Habeeb, who also did not see the hole, traveled past, stopped, and saw Williams lying on the ground. (7 RT 725–726, 770.)

Williams suffered catastrophic facial and cranial injuries. (9 RT 1175–1177, 1188–1189, 1198–1199.) She now experiences cognitive impairment that affects her work and home lives. (6 RT 1230–1237.)

STATEMENT OF THE CASE

The county's procedural history is chronologically accurate. The parties tried the case – a single cause of action for dangerous condition of public property – to a jury starting October 24, 2018. (AA 95.)

The county moved for nonsuit on the grounds Williams' claim was barred by the doctrine of assumption of risk. (AA 109.) On November 6, the court denied the motion. (AA 127, see also 13 RT 1860–1861.)

The court also refused the county's proposed instruction[27] on assumption of the risk.

[27] The record fails to reflect the language of this proposed instruction as does the AOB. (See 13 RT 1859, AA 220, AOB 59-60.)

> I previously informed counsel that I was not going to grant the request to give the assumption of the risk instruction because it is targeted towards the duty that is owed and the Court's research indicates that the duty still arises and for recreational bicyclist hitting a pothole is not an inherent risk of recreational finding.

(13 RT 1860.)

The jury returned a unanimous verdict in favor of Williams on November 14. (AA 182–184, 15 RT 2068–2070.) The jury awarded Williams $1,895,034.50 in economic and non-economic damages. (AA 184.) It assessed her 30 percent comparative fault resulting in a net award of $1,326,074.15. (15 RT 2072.) The court entered judgment accordingly on December 14, 2018. (AA 188–190.)

The county moved for a new trial and judgment notwithstanding the verdict, again asserting primary assumption of risk barred Williams' claims or the court should have instructed the jury on the doctrine. (AA 206–207, 234.) The court denied both motions on February 25, 2019. (AA 301–302.) The county filed its notice of appeal on March 25. (AA 304–305.)

ARGUMENT

At the time of Williams' accident, Bloomfield Road was in a dangerous condition that created a reasonably foreseeable risk that such an accident could occur. (AA 182.) The county had ample notice but failed to take reasonable steps to repair the hole. (AA 183, see AA 157, 159, Gov. Code, §§ 830, § 835.2, 835.4.)

The county does not contest the jury's findings that the hole constituted a dangerous condition of public property, causing Williams' accident within the meaning of section 835. (*Behr v. Redmond* (2011) 193 Cal.App.4th 517, 538 [failure to brief issue on appeal waives it].)

Rather, the county asserts her claim is barred by the common law doctrine of primary assumption of risk. While the county admits it has a duty to maintain its roads, including for cyclists using the roads as "transportation," it declaims any duty to recreational riders. (AOB 35.)

The trial court disagreed, correctly noting there was no basis to distinguish the county's admitted duty to automotive users and transportation-motivated cyclists from Williams' activity. Moreover, potholes are not risks "inherent" to recreational cycling. (13 RT 1860.) Although the court did not elaborate on its reasoning, the court was right.

I. Common law primary assumption of risk does not apply to a county's duty to maintain its paved roads.

A public entity's property-based liability is wholly statutory. (*Zelig v. Cnty. of Los Angeles* (2002) 27 Cal.4th 1112, 1134 *(Zelig)*.)

> In structuring Government Code section 835 to define the circumstances in which a public entity properly may be held liable for an injury caused by a dangerous condition of public property, the

> Legislature took into account the special policy considerations affecting public entities in their development and control of public property and made a variety of policy judgments as to when a public entity should or should not be liable in monetary damages for injuries that may occur on public property.

(*Zelig*, *supra*, 27 Cal.4th at p. 1132.)

Thus, a plaintiff may not invoke general tort liability statutes such as Civil Code section 1714 and common law principles because to do so would "undermine" those policy judgments. (*Ibid.*) Government Code section 815 allows a public entity to assert "defenses that would be available to the public entity if it were a private person" but only if not "otherwise provided by statute."

A. The Legislature has provided an exclusive statutory scheme for public-property liability to recreational users.

To protect public entities from unlimited property-based liability the Legislature requires a plaintiff to do more than simply prove the existence of a "dangerous condition."[28] Under section 835, the plaintiff must prove either the condition had

[28] Proving the existence of a "dangerous condition" requires establishing 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." (Gov. Code, § 830.)

been created by a public employee or the public entity had notice of it and sufficient time to take protective measures. (*Metcalf v. Cnty. of San Joaquin* (2008) 42 Cal.4th 1121, 1130 *(Metcalf)*.) The Legislature adopted an affirmative defense of "reasonableness." (Gov. Code, § 835.4.) A "public entity may avoid liability if it shows that it acted reasonably in the light of the practicability and cost of pursuing alternative courses of action available to it." (*Metcalf*, *supra*, at p. 1137.)

In *Delta Farms Reclamation Dist. v. Superior Court* (1983) 33 Cal.3d 699 *(Delta Farms)*, the Supreme Court held Civil Code section 846 – the private property recreational-use immunity statute – did not apply to public property liability. (*Delta Farms*, *supra*, at p. 709.)

Delta Farms involved the "death of two 15-year-old girls who drowned in a canal owned by the district." (*Delta Farms*, *supra*, 33 Cal.3d at p. 702.) The district sought to invoke the recreational-use immunity statute applicable to private persons, Civil Code section 846. The court rejected the argument. "The basic rule of liability for dangerous and defective public property, stated in section 835, is preceded by several immunities, some of which relate exclusively—or nearly so—to recreational activities." (*Delta Farms*, *supra*, at p. 708.)

> Sections 831.2, 831.4 and 831.8 are clear and express recognition that the fact that the injured party is using public property for a recreational purpose is immaterial and that where liability attaches in favor of a nonrecreational user, it will also attach in favor

> of the hunter, hiker, swimmer, camper and so on. These three sections, therefore, negative the applicability of section 846 to public entities.

(*Delta Farms*, *supra*, 33 Cal.3d at p. 709.)

The statutory scheme for public-property liability was exclusive. (See *Quigley*, *supra*, 7 Cal.5th at p. 804.) The defense was not available under section 815, subdivision (b)[29] because the Legislature had "otherwise provided." (*Delta Farms*, *supra*, 33 Cal.3d at p. 709.)

The county acknowledges, the existence of a duty is "an expression of policy considerations." (AOB 31 citing *Bertsch v. Mammoth Comm. Water Dist.*, *supra*, 247 Cal.App.4th at p. 1207.) As with section 835 itself, the enactment of the immunity statutes reflect policy decisions consigned to the Legislature which should not be circumvented by resort to inconsistent common law doctrine. (*Zelig*, *supra*, 27 Cal.4th at p. 1132.)

Anticipating the court's *Delta Farms* decision, the Legislature acted swiftly and, later in 1983, adopted an additional recreational-use immunity statute for public property, Government Code section 831.7. (Stats. 1983, ch. 863, *Avila v. Citrus Comm. Coll. Dist.* (2006) 38 Cal.4th 148, 156–157 *(Avila)*.)

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[29] *"Except as otherwise provided by statute*:

. . .

(b) The liability of a public entity established by this part (commencing with Section 814) . . . is subject to any defenses that would be available to the public entity if it were a private person."

Over the years, the Legislature has added additional recreational activities to the statute.[30] It could have, but did not add recreational cycling.

The county seriously misreads *Avila* with its assertion that assumption of risk can bar a public-property plaintiff even if section 831.7 does not immunize the activity. (AOB 56 fn. 13.) *Avila* was not a dangerous-condition-of-public-property case at all. Rather, an inter-collegiate baseball player was injured when struck in the head by a pitched ball. He claimed the ball had been thrown at him intentionally and sued alleging negligence by the district. (*Avila*, *supra*, 38 Cal.4th at pp. 152–153.) The district asserted section 831.7's immunity applied to bar the player's claim. The Supreme Court disagreed. It traced the history of section 831.7 and its enactment in response to *Delta Farms*. (*Id.* at pp. 157–158.) "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." (*Avila*, *supra*, at p. 157.)

The court stopped short of deciding that section 831.7 only applied to premises-liability claims. It did not immunize the district from the player's claims of negligent supervision by the

[30] Stats. 1995, ch. 597 (paragliding, mountain biking), Stats. 2010, ch. 73 (SCUBA), Stats. 2014, ch. 913 (bicycle motocross). Legislation is pending to add "small unmanned aircraft systems." (Assem. Bill. No. 1190 (2019-2020 Reg. Sess.).)

public-employee coaches because inter-collegiate baseball was not "recreational" within the meaning of the statute. (*Avila*, *supra*, 38 Cal.4th at pp. 158–159.)

The court then turned to the district's claim that the player had assumed the risk of this possible injury. "Separate and apart from the body of law governing premises liability claims, another body of law establishes that public schools and universities owe certain nonproperty-based duties to their students." (*Avila*, *supra*, 38 Cal.4th at p. 158.) To this nonproperty-based duty to supervise, the court applied the assumption of risk analysis on which the county heavily relies here. "Being hit by a pitch is an inherent risk of baseball," the court concluded. (*Id.* at p. 163.)

> Here, even if the Citrus College pitcher intentionally threw at Avila, his conduct did not fall outside the range of ordinary activity involved in the sport. The District owed no duty to Avila to prevent the Citrus College pitcher from hitting batters, even intentionally. Consequently, the doctrine of primary assumption of the risk bars any claim predicated on the allegation that the Citrus College pitcher negligently or intentionally threw at Avila.
>
> (*Avila*, *supra*, 38 Cal.4th at p. 165.)

That primary assumption of risk would apply to a public entity's non-property-based liability while not applying to dangerous conditions of public property is consistent with the legislative scheme. There is no direct public entity liability for negligence. (Gov. Code, § 815, subd. (a).) Entities can only be vicariously

liable for the acts and omissions of of their employees. (*Regents of U.C. v. Superior Court (Rosen)* (2018) 4 Cal.5th 607, 618.) "[A] a public employee is liable for injury caused by his act or omission to the same extent as a private person." (§ 820, subd. (a).) "A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment." (Gov. Code, § 815.2, subd. (a).) Thus, primary assumption of risk, a no-duty doctrine, applies to non-property duties as a limitation on the liability created by section 815.2 and 820 but not to section-835 claims. (*Avila*, *supra*, 38 Cal.4th at pp. 16–161.)

Nothing in *Avila* supports the county's claim that assumption of risk applies to its acknowledged, statutory duty to maintain its paved roads. (Sts. & Hy. Code, § 941, 4 RT 447, 452.) Rather, *Avila* confirms that the Legislature's own policy decisions govern public-property liability.

B. Common law assumption of risk does not apply to public-property liability because it is not an immunity or defense within the meaning of section 815.

"Although traditionally viewed as a defense to an action for negligence, the modern doctrine of primary assumption of risk involves a situation where defendant does not owe a duty of care to plaintiff. Since such a duty of care is an element of the tort of negligence, such situations should perhaps be described as the absence of negligence." (*Herrle v. Estate of Marshall* (1996) 45

Cal.App.4th 1761, 1764–1765.) The doctrine of primary assumption of risk is "like the fundamental nature of duty itself in tort law, a legal conclusion based on the relationship between the parties." (*Id.* at p. 1767.)

> The primary assumption of risk doctrine rests on a straightforward policy foundation: the need to avoid chilling vigorous participation in or sponsorship of recreational activities by imposing a tort duty to eliminate or reduce the risks of harm inherent in those activities. It operates on the premise that imposing such a legal duty "would work a basic alteration—or cause abandonment" of the activity.

(*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1156.)

In its decision adopting the present common law assumption of risk construct, *Knight v. Jewett* (1992) 3 Cal.4th 296 *(Knight)*, the court established participants in and operators of certain activities have no duty of ordinary care to protect other participants from risks inherent in the activity. (*Id.* at pp. 315–316.) The opinion makes clear the court was creating a no-duty exception to general negligence liability under Civil Code section 1714. [31](*Knight*, *supra*, at p. 315.)

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[31] "Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself." (Civ. Code, § 1714, subd. (a).)

Because primary assumption of risk is a policy-based, no-duty concept, it is not imported into public-property liability by Government Code section 815, subdivision (b). It is neither an immunity nor a defense.[32] It cannot vitiate the duty created by section 835 for which the Legislature has adopted a specific recreational-use immunity in Section 831.7. (See *Delta Farms*, *supra*, 33 Cal.3d at p. 710 [acknowledging the issue but not deciding it].)

Civil Code section 1714 has no application to public-premises liability under the Government Code. (*Zelig*, *supra*, 27 Cal.4th at p. 1132.) Likewise, a no-duty exception to section 1714 such as primary assumption of risk can have no application.

Williams acknowledges the section-835 cases which have applied primary assumption of risk. But in each, the appellate court merely assumed the doctrine's application. A central principle of California stare decisis is that an opinion is authority only as to issues "actually involved and actually decided." (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 620.)

In *Bertsch,* on which the county relies heavily, skateboarders were injured when they struck a raised manhole cover in a street owned by a private community association. The plaintiffs were

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[32] The 1963 Legislative Committee Comments-Senate to section 815 suggests assumption of risk could be incorporated into government tort liability as a "defense." But Supreme Court abolished primary assumption of risk as a defense when it re-cast the doctrine as one of duty or no-duty. (*Knight*, *supra*, 3 Cal.4th at p. 312 ["the doctrine has been utilized in framing the duty of care owed by a defendant in the context of a sporting event"].)

riding the wrong way on the street, without helmets. The water district defendant "inspected and maintained" the manhole cover. (*Bertsch v. Mammoth Comm. Water Dist.*, *supra*, 247 Cal.App.4th at p. 1247.)

Apparently the plaintiffs did not raise the issue and the court assumed, without comment, primary assumption of risk applied to the section-835 claims against the district.[33] The court's discussion focused exclusively on the private-property roadway owner. (*Bertsch v. Mammoth Comm. Water Dist.*, *supra*, 247 Cal.App.4th at p. 1209.)

Childs v. Cnty. of Santa Barbara (2004) 115 Cal.App.4th 64 *(Childs)* was also a section-835 case. A child who fell riding a scooter on a residential sidewalk "sued the County for personal injury, alleging that the County negligently maintained the subject sidewalk in a dangerous condition." (*Id.* at p. 68.) The county argued

> that its liability "is subject to any defenses that would be available to the public entity if it were a private person" (Gov.Code, § 815, subd. (b)), and that the defense of assumption of risk constitutes a complete bar to liability in this case. (Citations.)

(*Childs*, *supra*, 115 Cal.App.4th at p. 69.)

[33] *Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 993–994 also assumed, without deciding, the doctrine applied.

The plaintiff did not challenge this assertion and the court did not decide it. As Williams has established, primary assumption of risk is a duty doctrine not a "defense" within the meaning of Government Code section 815, subdivision (b).(§ I, B, *supra*.)

In the recent case of *Kim v. County of Monterey* (Cal. Ct. App., Dec. 12, 2019, No. H045577) 2019 WL 6790317, the court addressed the county's section-835 liability in terms of assumption of risk. But as with the other cases, the court merely assumed such analysis was proper. (*Id.* at *7–8.) The dissenting justice noted the applicability of section 831.7. (*Id.* at * 13.)

The federal case that the county cites likewise does not address the question. The federal government is a private person for purposes of premises liability - not a public one. (*Spence v. United States* (E.D. Cal. 2009) 629 F.Supp.2d 1068,, aff'd (9th Cir. 2010) 374 F.Appx. 717, 718.) *Spence* relied on Civil Code section 846. (*Spence v. United States*, *supra*, at pp. 1083–1084.) That section does not apply to California public entities. (*Delta Farms*, *supra*, 33 Cal.3d at p. 706.)

The Legislature is the policymaker for public-property liability. (*Zelig*, *supra*, 27 Cal.4th at p. 1132.) The county acknowledges this principle, but fails to realize the impact on its argument.[34] The Legislature, not the common law, creates and limits a public entity's liability. "Enacted in 1963, the

[34] "For public entities, this policy discussion generally takes place in the context of immunity statutes. Section 831.7, the hazardous recreational immunity statute, in many ways mirrors the common law primary assumption of risk doctrine." (AOB 55-56.)

Government Claims Act (GCA or Act) is a comprehensive statutory scheme governing the liabilities and immunities of public entities and public employees for torts." (*Quigley*, *supra*, 7 Cal.5th at p. 803.) It provides the substantive bases of liability and immunity of public entities. (*Id.* at p. 813.)

"Sections 831.2, 831.4 and 831.8 [and now section 831.7] are clear and express recognition that the fact that the injured party is using public property for a recreational purpose is immaterial and that where liability attaches in favor of a nonrecreational user, it will also attach in favor of the hunter, hiker, swimmer, camper and so on." (*Delta Farms*, *supra*, 33 Cal.3d at p. 709.) On paved public roads there can be no distinction between the recreational user and the rider who bikes to and from work. The Legislature has not created a recreational-cycling exception to the county's duty here.

C. The Court must affirm on any correct ground regardless of the trial court's reasoning or lack of it.

The county devotes significant portions of its brief discussing and complaining about the trial court's reasoning or its failure to express reasons for its rulings. (E.g, AOB 10, 23–24, 26–27, 59.)

The court's refusal to instruct on assumption of risk is inconsistent with its summary judgment order,[35] it says. (AOB 23–24, 59–60.) The arguments carry no weight.

A trial court's decision will be affirmed on any legal grounds even if not articulated by the court or if the articulated grounds are erroneous. (*Davey v. Southern Pac. Co.* (1897) 116 Cal. 325, 329–330.) "In other words, it is judicial action, and not judicial reasoning or argument, which is the subject of review; and, if the former be correct, we are not concerned with the faults of the latter." (*Id.* at p. 330.) Moreover, "[r]espondents are free to urge affirmance of the judgment on grounds other than those cited by the trial court." (*Little v. Los Angeles Cnty. Assessment Appeals Bd.* (2007) 155 Cal.App.4th 915, 925 fn. 6.)

Even if Williams could be said to be raising a new theory for the first time on appeal, "[i]t is settled that a change in theory is permitted on appeal when a question of law only is presented on the facts appearing in the record." (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742.) The rule has particular application where the "new" theory is offered to establish the judgment was correct. (*Bailon v. Superior Court* (2002) 98 Cal.App.4th 1331, 1339.)

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[35] "In general, an order denying a motion for summary judgment or summary adjudication does not constitute prejudicial error if the same question was subsequently decided adversely to the moving party after a trial on the merits." (*Federal Deposit Ins. Corp. v. Dintino* (2008) 167 Cal.App.4th 333, 343.)

D. Section 831.7 does not immunize the county's failure to maintain its roads. The county may not assert an immunity for the first time on appeal in any event.

Section 831.7 immunizes public entities from claims of "any person who participates in a hazardous recreational activity." The section enumerates several categories of hazardous recreational activities to which it applies including "bicycle racing or jumping, bicycle motocross, [and] mountain bicycling." (§ 831.7, subd. (b)(3).) "'[M]ountain bicycling' does not include riding a bicycle on paved pathways, roadways, or sidewalks." (*Ibid.*) The Legislature could not have intended to exclude mountain biking on paved roads from section 831.7's operation while including recreational cycling on those same roads. "[T]he expression of certain things in a statute necessarily involves exclusion of other things not expressed." (*People v. Weatherill* (1989) 215 Cal.App.3d 1569, 1578–1579.[36]) A contrary interpretation would be an absurdity. (*Hubbard v. California Coastal Com.* (2019) 38 Cal.App.5th 119, 135 [statutes to be interpreted to avoid absurdity].)

The county acknowledges it never raised section 831.7 below but says there is "no meaningful difference" between "bicycle racing" as used in the statute and Williams' "high-speed cycling." (AOB 56 fn. 13.) The county waived section 831.7 by failing to raise it below. (*Quigley*, *supra*, 7 Cal.5th at p. 815 [public entity immunities are not jurisdictional and are waived if not raised].)

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[36] *Expressio unius est exclusio alterius*.

Moreover, the county's minting a new category of recreational cycling for the first time on appeal is improper and unfair. "New theories of defense, just like new theories of liability, may not be asserted for the first time on appeal.' (Citation." (*Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 997.) The adjective "high-speed" in reference to cycling does not exist in the record. Neither side's expert characterized Williams' and Habeeb's ride in this way. Doug Shapiro, Williams' bicycle-safety expert, testified 25 to 35 miles-per-hour was a safe speed for a cyclist under the conditions she encountered. (7 RT 891, 912.) Williams was an "avid recreational cyclist." (7 RT 911.) Toby Gloekler, the county's accident-reconstruction expert, opined Williams could have avoided the hole but did not offer an opinion of her speed. (13 RT 1781–1782.)

Had the county attempted at trial to carve out a form of riding that was neither "racing" nor "organized" nor "recreational," Williams could have examined her expert on the issue or offered additional evidence. The rule against raising a new theory on appeal applies with particular force where it involves disputed factual matters. "'[I]f the new theory contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial the opposing party should not be required to defend against it on appeal.' (Citation.)" (*Krechuniak v. Noorzoy* (2017) 11 Cal.App.5th 713, 725.) The Court should reject the county's gambit.

II. The trial court correctly applied the comparative fault principles of secondary assumption of risk to Williams' recreational cycling.

> In cases involving "primary assumption of risk"-where, by virtue of the nature of the activity and the parties relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury-the doctrine continues to operate as a complete bar to the plaintiff's recovery. In cases involving "secondary assumption of risk"-where the defendant does owe a duty of care to the plaintiff, but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty-the doctrine is merged into the comparative fault scheme, and the trier of fact, in apportioning the loss resulting from the injury, may consider the relative responsibility of the parties.

(*Knight*, *supra*, 3 Cal.4th at pp. 314–315.)

The trial court correctly determined Williams' cycling fell into the latter – secondary assumption of risk – category.

A. Williams' subjective knowledge of cycling's risks and her alleged lack of care are irrelevant to whether the hole constituted a dangerous condition.

The county spends considerable energy articulating Williams' knowledge and understanding of the risks of cycling. As it did at trial, it discusses her having to execute liability waivers for previous organized races in which she participated. But the county then proceeds to state the rule that makes all of these

facts irrelevant in analyzing assumption of risk. As the county points out, the "inherent risk" determination does not consider "what risks a particular plaintiff subjectively knew and chose to encounter." (AOB 30.) Rather, "courts evaluate the fundamental nature of the activity; and (2) the defendant's role in or in relationship to that activity." (AOB 30 citing *Avila*, *supra*, 38 Cal.4th at p. 161.)

What risks are inherent in an activity is to be determined objectively, without consideration of the plaintiff's subjective understanding of the risks of the activity. Again the county states the rule. (AOB 30–31 citing *Saville v. Sierra Coll.* (2005) 133 Cal.App.4th 856, 866.)

Williams' subjective understanding of cycling's risks and any failure to exercise due care are likewise irrelevant in determining whether the hole constituted a dangerous condition. "[T]he fact the particular plaintiff may not have used due care is relevant only to his [or her] comparative fault and not to the issue of the presence of a dangerous condition." (*Castro v. City of Thousand Oaks* (2015) 239 Cal.App.4th 1451, 1459, CACI No. 1102.) Williams disagrees with but does not challenge the comparative-fault finding. The county does not challenge the dangerous-condition finding. The Court should wonder the county's purpose in including material irrelevant to the issues before it.

B. The county's financial limitations are irrelevant to the assumption of risk determination. They were rejected by the jury, in any event, a finding the county does not challenge.

The county likewise devotes considerable energy in lamenting what it characterizes as its inability to make its roads "100% safe for high-speed cycling." (AOB 54.) But it cites no authority for the proposition that this consideration is relevant in the assumption of risk analysis. Under section 835.4, the county's financial situation is relevant only to the issue of the reasonableness of the county's response to the dangerous condition the hole posed.

Metcalf, on which the county relies, dealt with public finances only in the context of section 835.4. *Metcalf* is not an assumption of risk case. (*Metcalf*, *supra*, 42 Cal.4th at p. 1138 [under § 835.4 public entities may defend against liability based on financial considerations].)

The county's quotations from *Avila* deal with recreational-use immunity under section 831.7, not assumption of risk. (*Avila*, *supra*, 38 Cal.4th at pp. 157, 159.) The full quote makes this clear. "As noted, the legislative history demonstrates Legislature had in mind immunizing public entities from liability arising from injuries sustained by members of the public during voluntary unsupervised play on public land, in order to prevent public entities from having to close off their land to such use to limit liability." (*Id.* at p. 159.)

The county acknowledges *Farnham v. City of Los Angeles* (1998) 68 Cal.App.4th 1097 is an immunity case. It is not an assumption of risk one. (AOB 56–57.)

The county presented its evidence of its asserted financial inability to conduct proper road maintenance, complete with a slide show. (10 RT 210, 220 [Deputy director of public works], AA 340–352 [Ex. 514].) The court instructed the jury on section 835.4. (AA 160.) The jury rejected the county's defense. (AA 183.) The county has not challenged that rejection.

The county's indiscriminate reliance on governmental immunity cases merely highlights the Legislature's intention to provide a comprehensive statutory scheme for public-property premises liability. (See *Quigley*, *supra*, 7 Cal.5th at p. 803.) The immunity statutes may, as the county asserts, "mirror" assumption of risk but the mirror has waves in it that reflect policy judgments consigned exclusively to the Legislature. (AOB 55–56, *Zelig*, *supra*, 27 Cal.4th at p. 1132.)[37] The county's financial situation is irrelevant to the assumption of risk inquiry.

[37] "In structuring Government Code section 835 to define the circumstances in which a public entity properly may be held liable for an injury caused by a dangerous condition of public property, the Legislature took into account the special policy considerations affecting public entities in their development and control of public property and made a variety of policy judgments as to when a public entity should or should not be liable in monetary damages for injuries that may occur on public property."

C. Eliminating those potholes that constitute dangerous conditions of public property would not alter the fundamental nature of cycling. Such holes are not "inherent risks" of cycling.

Williams disputes whether common law assumption of risk can apply at all in a section-835 case. But if it does, her proceeding to encounter the risks posed by the county's breach of its admitted duty to maintain its roads free of dangerous conditions is secondary assumption of risk to which comparative fault principles apply.

"The primary assumption of risk doctrine rests on a straightforward policy foundation: the need to avoid chilling vigorous participation in or sponsorship of recreational activities by imposing a tort duty to eliminate or reduce the risks of harm inherent in those activities. It operates on the premise that imposing such a legal duty 'would work a basic alteration—or cause abandonment' of the activity." (*Nalwa v. Cedar Fair, L.P.*, *supra*, 55 Cal.4th at p. 1156.)

Judges determine the "inherent risk" question and "may consider not only their own or common experience with the recreational activity involved but may also consult case law, other published materials, and documentary evidence introduced by the parties." (*Nalwa v. Cedar Fair, L.P.*, *supra*, 55 Cal.4th at p. 1164.) When the county argued a 30-mile ride such as Williams' was different from a "transportation" ride, the trial judge observed that he knew a friend who commuted that distance on a bike. (10 RT 273.)

The "inherent risk" determination cannot be made without considering the alternative to primary assumption of risk – secondary assumption of risk where "the defendant does owe a duty of care to the plaintiff, but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty." (*Knight*, *supra*, 3 Cal.4th at a p. 315.) In other words, not every risk a recreational-property user encounters is inherent to the activity. The existence of paved public roads in poor condition may be widespread but poor roads are a result of the government's breach of its duty to maintain them. (Sts. & Hy. Code, § 941.) "The doctrine of assumption of risk is intended to reduce a person's legal duty to avoid risks created by a particular type of sport or recreational activity, but is not intended to eliminate a duty to avoid risks not only to the participants in the activity but also to other members of the public who properly and foreseeably utilize the same facilities." (*Childs*, *supra*, 115 Cal.App.4th at p. 74.)

Both sides agree that falls are an inherent risk of cycling and that potholes exist on paved roads. But potholes that amount to dangerous conditions of public property are not "inherent" risks of cycling. Statutorily-defined dangerous conditions of public property can be eliminated from county roadways without altering the fundamental nature of cycling. Rather than chilling recreational cycling, better roads would encourage more cyclists to venture forth. (See *Childs*, *supra*, 115 Cal.App.4th at p. 71.)

As the trial court found, the risk here arose from the county's breach of its duty to maintain its roads and its breach of duty to

keep its property free of "dangerous conditions" within the meaning of section 835.[38] This is the risk Williams "proceeded to encounter." The trial court properly addressed her exercise of care or lack of it through the comparative fault instructions and verdict form presented to the jury. (AA 157–160, 162, 182–183.) At the county's request, the court instructed on the basic speed law and the presumption of negligence that arose if the jury determined Williams was riding too fast for conditions. (AA 164.)

The comprehensive statutory scheme of public premises liability and immunity provides the county with protection from unlimited liability to the recreational cyclists who choose to encounter the risks presented by the county's poorly maintained roads. (Gov. Code, §§ 830 - 831.8) Under section 830, a paved public roadway is not "dangerous" unless the plaintiff proves there existed "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." The public entity must have created the condition or had adequate notice of it in time to correct it. (§ 835.2.) Among other statutory defenses, the public entity may avoid liability by demonstrating it

[38] The county attempts to analogize the accident to that which befell the rider in *Spence*. But Spence participated in an organized, "grueling day-long, 210–mile cycling event with more than 13,800 feet of climbing." (*Spence*, *supra*, 629 F.Supp.2d at p. 1090.) And the court's assumption of risk discussion was surplusage because it had already found Spence's claim to be barred by her signed release and Civil Code section 846.(*Spence*, *supra*, at pp. 1083, 1089.)

acted reasonably under the circumstances, which include "the practicability and cost of protecting against the risk of such injury." (Gov. Code, § 835.4.)

Moreover, the county is immune if the recreational activity falls within section 831.7. And the county is not liable for injuries to the extent the cyclist's own negligence contributed to them. (AA 162.)

As one county road-maintenance supervisor observed, potholes are like snowflakes, no two are alike. (12 RT 1718.) Not every pothole will amount to a dangerous condition of public property. The county only has a duty to protect against those that do, subject to the full panoply of defenses and immunities found in the Government Claims Act. Williams merely "proceed[ed] to encounter a known risk imposed by the [county's] breach of duty." (*Knight*, *supra*, 3 Cal.4th at a p. 315.) This was secondary assumption of risk. (*Ibid.*)

III. The county's instructional-error argument is unintelligible because the county failed to submit its proposed instruction here or below.

The county says it is entitled to a new trial "based on the trial court's failure to even instruct the jury on the [assumption of risk] doctrine." (AOB 59.) But the county's brief fails to provide the text of the instruction it claims should have been given. It fails to demonstrate error, much less prejudicial error. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580.)

The record is also unhelpful. Nothing in it relating to an assumption of risk instruction exists beyond a vague reference to CACI 470. (13 RT 1859.) CACI 470 deals only with co-participants. As the use note indicates, "This instruction sets forth a plaintiff's response to the affirmative defense of primary assumption of risk asserted by a defendant who was a coparticipant in the sport or other recreational activity." (*Ibid.*) The county fails to indicate just how it intended the instruction be modified for use in this case. CACI does not offer a section-835-specific instruction.

"Appellate briefs must provide argument and legal authority for the positions taken. 'When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived.' (Citation.)" (*Cahill v. San Diego Gas & Elec. Co.* (2011) 194 Cal.App.4th 939, 956.)

CONCLUSION

Bloomfield Road is a popular cycling route. Over a two-hour period one Sunday, Williams' expert observed some 50 cyclists descend the road southbound at speeds from 20 to 35 miles-per-hour. Some riders were advanced; some were not.[39]

The county would have the Court find that its duties to those cyclists differed depending on whether they were "high-speed" recreational cyclists, recreational cyclists or cyclists riding for

[39] 7 RT 883.

"transportation." As the Supreme Court recognized, the argument is an "absurdity" no right-thinking public attorney would assert.[40]

To the extent assumption of risk applies to the Legislature's comprehensive public-premises liability scheme at all, it does not bar Williams' claims. Williams proceeded to encounter the risk - a large, dangerous pothole - the county's breach of duty created. The parties' conduct was properly measured by the county's statutory duties and comparative fault principles. The judgment must be affirmed.

Respectfully submitted,

Dated: December 19, 2019 By: /s/ Alan Charles Dell'Ario

Attorney for Plaintiff and Respondent Catherine Williams

[40] *Delta Farms*, *supra*, 33 Cal.3d at p. 707. "In what category would one put the commuter who, solely for exercise, pedals home by a circuitous route?" (*Id.* at p. 707 fn. 7.)

CERTIFICATE OF COMPLIANCE

This brief is set using **13-pt Century Schoolbook**. According to TypeLaw.com, the computer program used to prepare this brief, this brief contains **7,025** words, excluding the cover, tables, signature block, and this certificate.

The undersigned certifies that this brief complies with the form requirements set by California Rules of Court, rule 8.204(b) and contains fewer words than permitted by rule 8.204(c), 8.360(b), 8.412(a) or by Order of this Court.

Dated: December 19, 2019 By: /s/ Alan Charles Dell'Ario

PROOF OF SERVICE

I declare:

At the time of service I was at least 18 years of age and not a party to this legal action. My business address is 1561 Third St, Suite B, Napa, CA 94559. I served document(s) described as Respondent's Brief as follows:

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

Dated: December 19, 2019 By: /s/ Alan Charles Dell'Ario