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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

NICHOLAS T. et al.,

Plaintiffs and Appellants,

v.

THE CITY OF VACAVILLE et al.,

Defendants and Respondents.

A131405

(Solano County  
Super. Ct. No. FCS 034004)

Plaintiffs Nicholas, Antonia, and Francesca, by their guardians ad litem, Rodney and Cathy T., who are also plaintiffs, appeal the judgment dismissing their second amended complaint against the City of Vacaville (“City”) after the court sustained the City’s demurrer without leave to amend. This case concerns whether plaintiffs pleaded sufficient facts to state causes of action against the City for a dangerous condition of public property, nuisance, and a claim for special damages. Plaintiffs did not plead sufficient facts to state a valid cause of action under any of the three theories. Accordingly, we affirm.

**FACTUAL AND PROCEDURAL BACKGROUND**

On October 12, 2008, three-year-old plaintiff Nicholas T. was riding his scooter in a City skateboard park when he was hit by Drake B., who was “exiting a bowl” on his

BMX bicycle.<sup>1</sup> Nicholas was injured and incurred medical expenses as a result of the accident.

At the time of the accident, Vacaville Municipal Code section 10.54.060<sup>2</sup> prohibited operation of bicycles at City-owned or controlled skateboard parks. A sign notifying the public of the ordinance was posted at the entrance to the skateboard park. The sign had been vandalized with graffiti and the warnings were obscured. Prior to the accident, police officers periodically parked their patrol cars in a lot adjacent to and facing the skateboard park.

Plaintiffs promptly presented their claim to the City, which rejected it.<sup>3</sup> They timely filed suit. The City demurred and plaintiffs voluntarily filed a first amended complaint. The trial court sustained the City's demurrer to the first amended complaint with leave to amend. When the court sustained the City's demurrer to the second amended complaint, it did so without leave to amend. The trial court concluded, that despite multiple opportunities and attempts, plaintiffs failed to allege sufficient facts to state a cause of action against the City. Plaintiffs filed a timely appeal.

## **DISCUSSION**

“On appeal from a judgment after a demurrer is sustained without leave to amend, we review the trial court's ruling de novo, exercising our independent judgment on whether the complaint states [facts sufficient to constitute] a cause of action.” (*Lincoln Property Co., N.C., Inc. v. Travelers Indem. Co.* (2006) 137 Cal.App.4th 905, 911.) “ “We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.]” . . . Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context.’ ” (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126, citing *Blank v.*

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<sup>1</sup> We accept as true all material facts properly pleaded from plaintiffs' second amended complaint.

<sup>2</sup> Enacted by City of Vacaville Ordinance No. 1686 (March 11, 2003); amended by Ordinance No. 1787 (September 25, 2007).

<sup>3</sup> Further unspecified statutory references are to the Government Code.

*Kirwan* (1985) 39 Cal.3d 311, 318.) Thus, in evaluating the propriety of the order sustaining the demurrer, we determine de novo whether the factual allegations of the complaint are adequate to state a cause of action under any legal theory.

When a demurrer is sustained after a plaintiff has been afforded successive opportunities to plead claims for relief, we consider whether the court abused its discretion in denying further leave to amend. (See *Oddone v. Superior Court* (2009) 179 Cal.App.4th 813, 823.)

#### **A. Dangerous Condition of Public Property**

The California Tort Claims Act allows private tort actions against government entities and employees when permitted by statute, but otherwise retains the general concept of governmental immunity. (§ 815.) Section 835 of the Act provides that a public entity can be held liable for injury caused by a dangerous condition of its property. Plaintiffs' second amended complaint seeks to hold the City liable for the "general plan for operation of the skateboard park [that] included allowing bicyclists to ride bicycles in the skateboard park . . . simultaneously with skateboarders and small children riding scooters." Accordingly, we must consider whether the City's acquiescence in allowing bicyclists to use the skateboard park simultaneously with other users is a dangerous condition of public property within the meaning of the Act.

A dangerous condition of public property is one "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." (§ 830, subd. (a).) A dangerous condition is proven when "the plaintiff establishes that the [public] 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 either: [¶] (a) 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 [¶] (b) The public entity had actual or constructive notice of the dangerous condition under section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous

condition.” (§ 835.) Section 835.2 provides that a public entity has knowledge of a dangerous condition when it has actual knowledge of a condition of property and should know of its dangerous character, or when a condition has existed for such a period of time that an entity exercising due care should have known of the condition and that it was dangerous.

The second amended complaint does not allege that any particular City employee created the condition that caused plaintiffs’ injury due to negligence or a wrongful act. Instead, plaintiffs argue that the City should have known the operation of its skateboard park was dangerous because police officers were known to park in the vicinity and observe bicyclists using the park, and it both passed an ordinance and posted signs intended to prohibit bicyclists from using the park.<sup>4</sup> Neither contention persuades us that the City can be held liable for a dangerous condition of public property.

First of all, any negligence or lack of care on the part of the bicyclist does not implicate the City’s liability. It is well settled that “[l]iability for a dangerous condition of property cannot be premised upon third party conduct alone. [Citations.] Such liability may arise only where third party conduct is coupled with a defective condition of the property.” (*Turner v. State of California* (1991) 232 Cal.App.3d 883, 892, citing *Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 810.) But the defective condition must be more than a general plan of operation as alleged in the second amended complaint. “Most obviously, a dangerous condition exists when public property is physically damaged, deteriorated, or defective in such a way as to foreseeably endanger those using the property itself. [Citations.] But public property has also been considered to be in a dangerous condition ‘because of the design or location of the improvement, the interrelationship of its structural or natural features, or the presence of latent hazards associated with its normal use.’ ” (*Bonanno v. Central Contra Costa*

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<sup>4</sup> In the demurrer to the second amended complaint, the City successfully demurred to the fourth and fifth causes of action, premised on the inadequacy of the signs and alleging liability for the City’s failure to warn of a known danger. Plaintiffs are not appealing the ruling on these causes of action.

*Transit Authority* (2003) 30 Cal.4th 139, 148-149, italics omitted.) The second amended complaint is bereft of any allegations that the skateboard park was dangerous due to any physical feature or latent hazard or defect.

The municipal code section that prohibits bicyclists from the skateboard park and the signs posted to that same effect do not support plaintiffs' claim that there is a plan of operation to permissively allow bicyclists to use the park. (See Vacaville Mun. Code, § 10.54.060.) Rather, they demonstrate just the opposite. Both the code section and the signs demonstrate the City's policy decision that bicyclists should be excluded from the park. It simply makes no sense to conclude, on the minimal facts alleged in the second amended complaint, that the City has adopted a plan of operation at odds with its formal statements of policy. To the extent plaintiffs' claims are based upon the City's failure to enforce its ordinance, a public entity is not liable for an injury caused by failing to enforce any law. (§ 818.2.) As stated above, plaintiffs are not appealing the trial court's dismissal of their failure to warn causes of action premised upon the allegedly inadequate warning signs.

Plaintiffs' claim essentially seeks to impose liability for the City's failure to take adequate precautions to ensure that one unauthorized user of the skateboard park will not cause injury to another. But so long as a municipality adopts a local ordinance in compliance with state guidelines, a municipal skateboard park may be an unsupervised facility where users permissively engage in a hazardous recreational activity. (Health & Saf. Code, § 115800.) The City adopted just such an ordinance, and in the absence of a defective condition or deficiencies in "the design or location of the [park], the interrelationship of its structural or natural features, or the presence of latent hazards associated with its normal use" should not be held liable for injury caused by a third party. In the absence of such a defect in the skateboard park or its surroundings, plaintiffs did not allege a dangerous condition of public property that could survive demurrer. (See *Avedon v. State* (2010) 186 Cal.App.4th 1336, 1344.)

The authorities plaintiffs rely upon to demonstrate error are inapposite. Plaintiffs cite *Bauman v. City and County of San Francisco* (1940) 42 Cal.App.2d 144 to state that

a general plan of operation may give rise to government liability for a dangerous condition. But *Bauman* and the other cases plaintiffs rely upon for this proposition require more to impose government liability for the acts of a third party than a general plan of operation. In *Bauman*, the city positioned a baseball field in dangerous proximity to a children's sandbox. (*Id.* at p. 153.) In *Wexler v. City of Los Angeles* (1952) 110 Cal.App.2d 740, the city allowed water to dangerously pool on a beach at the terminus of a storm drain in disregard of the recommendations of its engineer that were intended to prevent the hazard. *Teilhet v. Santa Clara County* (1957) 149 Cal.App.2d 305 involved county liability for an accident when the highway was obscured by smoke resulting from a county burn of weeds and grass along the roadside. The county was liable because it knew from previous experience that the smoke would completely obscure the view of drivers using the highway. (*Id.* at pp. 308-309.) Thus, the dangerous condition was not the highway, but conducting the controlled burn in such close proximity to the highway. Moreover, *Teilhet* was decided before enactment of the Tort Claims Act. It would now be more properly characterized as a dangerous condition claim rooted in negligence under section 835, subdivision (a).<sup>5</sup>

Finally, *Quelvog v. City of Long Beach* (1970) 6 Cal.App.3d 584 imposed liability on a city when a person was struck by a small electric cart, called an autoette, that was driven on the sidewalk. But the city was held liable in that case because it “creat[ed] and maintain[ed] easy means of access to the sidewalks by autoettes without warning the operators to keep them off the sidewalks and the alleged encouragement of the operators to use them.” (*Id.* at p. 591.) The city's liability did not arise solely from a general plan of operation. The trial court correctly sustained the demurrer to the causes of action in the second amended complaint premised on a dangerous condition of public property.

## **B. Remaining Causes of Action**

Plaintiffs' claim for nuisance is predicated on their claim based upon a dangerous condition of public property. While a nuisance claim may provide a remedy independent

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<sup>5</sup> See, section 815.2.

of section 835 that is not subject to the immunity provisions of the Government Code (*Pfleger v. Superior Court* (1985) 172 Cal.App.3d 421, 430), plaintiffs do not allege any facts that suggest their nuisance claim is independently viable from their claim for a dangerous condition of public property. In light of our conclusion “that appellants cannot proceed on their claim for dangerous condition of public property, it follows that the nuisance claim which mirrors that cause of action also cannot proceed.” (*Avedon v. State, supra*, 186 Cal.App.4th at p. 1345.)

Plaintiffs acknowledge their cause of action for special damages also depends upon the sufficiency of their claims due to a dangerous condition of public property. Accordingly, the cause of action for special damages cannot proceed.

Plaintiffs were allowed two opportunities to state a viable cause of action against the City. We cannot conclude the trial court abused its discretion because it did not afford them a third. (See *Oddone v. Superior Court, supra*, 179 Cal.App.4th at p. 823.) Therefore, the trial court properly dismissed this claim.

**DISPOSITION**

The judgment entered following the order sustaining the demurrer without leave to amend is affirmed.

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Siggins, J.

We concur:

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Pollak, Acting P.J.

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Jenkins, J.