



## School Business Law Update

TEL: 661.636.4830  
FAX: 661.636.4843  
E-mail: sls@kern.org  
www.schoolslegalservice.org

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### APPELLATE COURT RULES ON DANGEROUS CONDITION OF FENCE

The California Court of Appeal for the Third District recently ruled that a school district was not liable for injury to a student who climbed a chain link fence to pull an orange from a tree. *Biscotti v. Yuba City Unified School District* (2007) 158 Cal.App.4<sup>th</sup> 554. The fence, which had sharp metal prongs across the top, was installed when the school was constructed in 1959; the orange tree belonged to a neighbor.

In the *Biscotti* case, a nine-year-old boy poked the handlebar of his bike through a fence and then stood with one foot on the seat and the other on the handlebar to reach over the fence to pull an orange from a neighboring tree. Unfortunately, the bike slipped and he mangled his arm on the sharp prongs along the top edge.

Is the school district liable for this child's injury? Under California's Tort Claims Act, a district is liable for injuries caused by a "dangerous condition" on its property when the injury was actually and proximately caused by the "dangerous condition," the general nature of the injury was reasonably foreseeable, and the district knew or should have known of the "dangerous condition" in time to take protective measures.

A jury usually decides whether or not a given set of facts and circumstances amounts to a dangerous condition. One could imagine a convincing argument, particularly in hindsight, that sharp metal prongs across the top edge of a chain link fence at an elementary school, in combination with a juicy orange hanging from a tree within arm's length, would entice impulsive youngsters to climb a fence—and that some of them, due to their young age, might be unable to appreciate the risk of injury presented by the circumstances.

However, in the *Biscotti* case, the issue never made it to a jury. Instead, the trial judge dismissed the case after ruling that as a matter of law on the facts presented, a dangerous condition did not exist and therefore the school district could not be found liable. The Appellate Court upheld the trial judge's decision.

What is a "dangerous condition" on school grounds for purposes of a tort claim against a district? Government Code Section 830 describes a "dangerous condition" as one that creates a substantial risk of injury (as opposed to one that creates a trivial risk of injury) when the property is used in a manner that is "reasonably foreseeable" by someone who is being "reasonably careful." Courts have held that if the property is safe when used with reasonable care and a risk of harm is created only when a foreseeable user fails to exercise due care, the property is not dangerous. *Fredette v. Long Beach* (1986) 187 Cal.App.3d 122; *Fuller v. State of California* (1975) 51 Cal.App.3d 926. Moreover, the California Supreme Court has determined that the intent behind California's Tort Claims Act is to impose liability only when there is a substantial risk of danger which is not apparent to those using the property in a reasonably foreseeable manner and with due care. *Hayes v. State of California* (1974) 11 Cal.3d 469. Finally, there is a line of cases which indicate that public entities have no duty, as a matter of law, to prevent members of the public, including young children, from scaling walls and fences erected for the purpose of keeping them out. See *Dominguez v. Solano Irrigation Dist.* (1991) 228 Cal.App.3d 1098, *Schonfeldt v. State of California* (1998) 61 Cal.App.4<sup>th</sup> 1462.

The Appellate Court in *Biscotti* reasoned that even though it was predictable that a child would attempt to scale the fence, this particular child was not being as careful as a typical nine-year-old should have been. The Court further concluded that the risk of danger was obvious, even to a typical nine-year-old, and it was not foreseeable that a child would use his bicycle as an impromptu ladder in order to scale the fence. Finally, the Court suggested that the Tort Claims Act did not require the district to make its fence safe to climb, even though it was on the grounds of an elementary school.

Does this mean that districts are immune from liability when a student is injured scaling a school fence? The answer is no. Slightly different facts could have resulted in the “dangerous condition” determination going to a jury for decision, or in recovery under an alternate legal theory. For example, had the plaintiff been a younger child, had he not used his bicycle as a ladder, or even had the case been heard in another Appellate District, the “dangerous condition” issue would likely have been decided by a jury and the plaintiff would have undoubtedly prevailed. Finally, if school had been in session, the plaintiff’s attorney would have most likely argued that school personnel negligently supervised the child and probably would have prevailed.

If you have any questions concerning this matter, feel free to contact me or the other members of our business practice group.

—Alan B. Harris

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