

# Trends in E-Scooter Litigation

An update on the still-evolving body of law

By KYLE WILLEMS



The past two summers have introduced residents of Minneapolis and St. Paul to one of the hottest trends in personal transportation: e-scooters. In the spring of 2018, e-scooters became an overnight sensation and completely disrupted the Twin Cities' personal transportation marketplace. As in every market where e-scooters have been introduced, their sudden popularity means there is little jurisprudence directly addressing the unique tort-based issues they create. The purpose of this article is to give an overview of these issues and to provide an idea of what e-scooter jurisprudence may develop in Minnesota based on some notable legal developments coming out of Minnesota's sister jurisdictions.

## What are they?

E-scooters are electronic scooters owned by a variety of tech companies, most notably Bird, Lime, JUMP, Lyft, and Spin. Of the four active e-scooter companies in the Twin Cities area, all four (JUMP, Lyft, Spin, and Lime) currently have agreements with the City of Minneapolis to provide scooters, and two (Lime and JUMP) have similar agreements with the City of St. Paul. Bird, one of the two biggest scooter providers, decided to opt out of the Minneapolis-St. Paul marketplace for 2019.

E-scooters are relatively simple to use. A first-time user needs to download the e-scooter company's application to their smartphone. Post-download, the app typically requires that the user first review

and accept a liability waiver. The user must also click through various usage and safety instructions, and then digitally input a payment source to enable access to any of that company's e-scooters scattered throughout the Minneapolis and St. Paul metropolitan areas. The user is able to locate available e-scooters via the app's GPS location feature.

After reading through and acknowledging the variety of instructions and safety warnings, as well as clicking through the various waivers and indemnity agreements, users can walk up to an e-scooter and access it via their smartphones.<sup>1</sup> Once a scooter is active, the rider can use the scooter as he or she sees fit, traveling up to 15 miles per hour.<sup>2</sup> When the rider is done with the e-scooter, it can be left anywhere.

## IN THE TWIN CITIES E-SCOOTERS CANNOT BE RIDDEN ON SIDEWALKS AND MUST BE RIDDEN IN BIKE LANES WHERE AVAILABLE

The e-scooters are battery operated. When they run out of power, the scooter services typically use independent contractors to pick up the e-scooters and charge them.<sup>3</sup> Scooter services will pay the contractors to charge the scooters and return them to the streets.<sup>4</sup>

Methods of e-scooter maintenance and servicing vary by company. Bird, for example, previously utilized independent contractors, trained via YouTube videos, to service their scooters.<sup>5</sup> These contractors would get notified when the e-scooter provider received reports of mechanical issues on an e-scooter and go out, retrieve, and service the e-scooter on their own. More recently, Bird has changed the way the company services its e-scooters from independent contractors to in-house employees who work in their distribution centers.<sup>6</sup> Other e-scooter providers, like Lime, have always had their e-scooters serviced by company employees who work in the providers' distribution centers.<sup>7</sup>

### **Litigation trends so far**

Major e-scooter cases are popping up in Minnesota's sister jurisdictions. These cases are mostly in their infancy, so it is difficult to determine how the courts will come down on the claims that are asserted. The tort claims so far include: rider negligence, negligent design, negligent manufacturing, negligent marketing, distribution of defective e-scooters, public nuisance, unlawful business practices, premises liability, failure to maintain and service, failure to warn of dangerous defects, gross negligence, and common carrier liability.<sup>8</sup>

### **Rider vs. e-scooter company claims**

Some of the most common yet difficult claims are those brought by e-scooter riders against e-scooter companies. These claims are difficult for a variety of reasons, most notably because a condition precedent to using an e-scooter is that a rider e-sign a liability waiver. Like many of their sister jurisdictions, Minnesota courts routinely enforce liability waivers and the acknowledgment-of-risk provisions contained therein.<sup>9</sup>

Because of the potential bar to recovery presented by liability waivers,

e-scooter riders are left with few ways to assert claims against an allegedly negligent e-scooter company. In recent high-profile attempts to hold e-scooter companies liable, riders are rooting their claims, in large part, in the products liability and products liability-related realms.<sup>10</sup> The claims in these cases vary, but some involve allegations that e-scooter companies and e-scooter manufacturers negligently manufactured the e-scooters, negligently trained and supervised contractors and other individuals tasked with day-to-day maintenance, otherwise negligently maintained and serviced the e-scooters, and even failed to ensure the software that governs the e-scooters is bug-free.<sup>11</sup>

These cases are complex and so we can expect it to be many months, if not years, before they yield any meaningful jurisprudence. Of course, this presumes these cases do not settle before then. What we have already learned from them is that if e-scooter companies are going to have any significant tort exposure to riders, it is probably going to be a result of products liability claims.

### **Pedestrian vs. rider claims**

Current data shows that a significant percentage of e-scooter claims are the result of riders colliding with motor vehicle or pedestrian traffic.<sup>12</sup> These cases are largely analogous to traditional motor vehicle accident cases, where a trier of fact has to decide whether one or both parties to the collision is negligent, and if so, what apportionment of fault is to be assigned.

A 2017-18 study conducted by the Journal of the American Medical Association (JAMA) gives us some insight into the causes of the collisions that lead to these types of claims. The study showed that 9.4 percent of riders failed to comply with traffic laws and that 26.4 percent were observed riding e-scooters on sidewalks, where scooters are typically not permitted.<sup>13</sup> This data tells us that we are likely to see a significant number of cases caused by the negligent conduct of e-scooter riders, requiring discovery on not just how, but where, an e-scooter rider was using the e-scooter at the time of the collision.

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## Premises liability claims

Perhaps some of the most unique claims born out of the e-scooter revolution are premises liability claims. As discussed above, riders can decide to stop using their e-scooter whenever and wherever they want. This means that e-scooters can be left haphazardly on a lawn, in front of a building, on a public sidewalk, or in other high-traffic areas. If an e-scooter is laid down on its side, it can become difficult to see, thereby creating a trip-and-fall hazard. For a possessor of land, this can create serious premises liability concerns.

As an example, a rider might go to a restaurant and then lay down an e-scooter at the restaurant's entrance. Shortly afterward, another customer trips over the e-scooter and sustains serious injuries. In this case, the business owner may be liable. At a minimum, significant discovery would likely need to be conducted on the issues of actual and constructive notice, and whether or not there is a duty to warn of the hazards posed by e-scooters.

In other scenarios, municipalities may become liable for pedestrian trip-and-fall claims that are the result of e-scooters being strewn about public sidewalks and in parks. The way public property trip-and-

## Developments in e-scooter class action litigation

As previously noted, there are several high-profile e-scooter class action cases in which the plaintiffs assert a variety of tort claims.<sup>15</sup> Some of the more interesting claims being asserted are those for nuisance.<sup>16</sup>

In *Borgia, et al. v. Bird Rides, Inc., et al.*, the plaintiffs allege that e-scooters create a public nuisance.<sup>17</sup> Specifically, the complaint alleges that the e-scooter defendants have a duty to the public to conduct their business in a manner that does not threaten harm or injury to public health, safety, and welfare.<sup>18</sup> It is then alleged that placing the e-scooters on sidewalks and in public places unlawfully obstructs free access to and passage through these public places, and even creates a fire hazard.<sup>19</sup> Allegedly, this conduct harms the general health, safety, and well-being of the public and otherwise creates a nuisance.<sup>20</sup>

There is not any jurisprudence on the nuisance claims yet, but the developments that are likely to come out of *Labowitz* and *Borgia* are almost certainly going to have a major impact on e-scooter litigation in jurisdictions across the United States, including Minnesota.

surrounding e-scooters, has state laws in place stating that e-scooters are not allowed on sidewalks and must be ridden on streets while obeying all traffic laws.<sup>23</sup> If there is a designated bike lane, e-scooter riders must use it.<sup>24</sup>

Currently in Minnesota, e-scooters are governed by Minn. Stat. §169.225, a statute enacted in 2005.<sup>25</sup> This law lays out regulations similar to those adopted in California, where e-scooters must be ridden on the street, or in a bike lane when possible, and cannot be ridden on sidewalks.

Since e-scooters are a relatively new phenomenon, and they typically fall under state statutes that do not specifically address e-scooters and their unique safety concerns, many large cities have begun using ordinances to regulate e-scooter deployment and rider use. Arlington, Virginia does not allow e-scooters to be ridden on sidewalks, Arlington County bike trails, or in Arlington County Parks. They must be ridden in the streets and in bike lanes where possible.<sup>26</sup>

In Washington D.C., e-scooters are not allowed on sidewalks and must be ridden in the street or a bike lane when a rider is within the Central Business District (downtown area) but are allowed on sidewalks outside of downtown.<sup>27</sup> Dallas



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fall cases play out could have severe ramifications for the future of e-scooters in public places. Despite various protections afforded via governmental immunities, the potential risk of exposure gives municipalities an incentive to heavily regulate, or even ban, e-scooters on public property.

The e-scooters are also creating ADA-related premises liability issues. Because they are routinely left on public walkways, disabled persons could have difficulty traversing these walkways. This is exactly the argument being made by plaintiffs in a class action lawsuit against Bird, Lime, and their e-scooter manufacturers. In *Labowitz, et al. v. Bird Rides, Inc., et al.*, the plaintiffs allege that since there are no docking stations or designated parking locations for the e-scooters, they are being left in the middle of the sidewalks and thus limiting disabled persons' ability to use the sidewalks and walkways.<sup>14</sup> The complaint in that case was filed on October 31, 2018, and discovery is currently ongoing.

## Legislative developments

Various state and local governments across the United States have enacted laws aimed at addressing the unique safety concerns posed by e-scooters. Most of the legislative developments are happening in warm-weather states, where the scooters pose year-round concerns. In many states and most of the recent markets, e-scooter issues have not been addressed specifically by state legislatures. Instead, local governments try to regulate them under existing statutes that do not address the specific problems that e-scooters create.

Virginia's state statute, for example, requires that e-scooters only be used on roads with speed limits less than 25 mph but allows e-scooters to operate on sidewalks.<sup>21</sup> Texas's state law has similar limitations, allowing e-scooters to operate on roads with speed limits less than 35 mph and on sidewalks.<sup>22</sup> California, the main laboratory for legal developments

has similar rules, permitting e-scooters on sidewalks outside the Central Business District.<sup>28</sup> Chicago requires e-scooters to be ridden in the street or within bike lanes when available.<sup>29</sup> Los Angeles has more restrictive rules that do not allow e-scooters to be ridden on sidewalks at any time and also prohibits them in many heavily trafficked areas of the city, like the Venice Beach Boardwalk/Ocean Front Walk, Santa Monica Pier and Bridge, Beverly Hills, West Hollywood, and other areas.<sup>30</sup>

St. Paul has recently enacted its own "shared mobility vendor" ordinance.<sup>31</sup> The ordinance states all e-scooter companies need to have a license, permit, or contract to operate in the city.<sup>32</sup> It does not add further safety regulations for scooter use or prohibit riding in any areas except sidewalks. When the St. Paul Mayor's Office was contacted for a comment regarding the city's policies on e-scooters, a representative stated that the city defers to the Minnesota statute

governing motorized foot scooters<sup>33</sup> and reiterated that e-scooters are not to be ridden on sidewalks. The mayor's office also stated that although helmets are not required, they are recommended, adding that they strongly encourage each e-scooter company to provide helmets for its riders. The City of St. Paul further requires e-scooter companies to properly re-park an incorrectly parked scooter within two hours of its being reported to the company.<sup>34</sup>

The City of Minneapolis was asked to comment on any internal discussion regarding the regulation of e-scooters but did not respond. Minneapolis has an ordinance similar to St. Paul's, requiring e-scooter companies to obtain a license agreement with the city before deploying

their scooters.<sup>35</sup> Via the city's website, it defers to the Minnesota statute that governs e-scooters and does not impose any additional regulations on operating the e-scooters.<sup>36</sup> E-scooters cannot be ridden on sidewalks and must be ridden in bike lanes where available.<sup>37</sup>

### Conclusion

E-scooters are likely here to stay. This means Minnesota attorneys need to be on the lookout for fresh legal developments concerning e-scooters, which are likely to be forthcoming over the next few years. One of the best ways Minnesota attorneys can stay abreast of recent developments concerning e-scooters is to keep a close eye on what Minnesota's sister jurisdictions are doing. ▲

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### Notes

- <sup>1</sup> A prospective rider must simply click to verify they are over the age of 18 to gain access to e-scooters; there is no affirmative verification of a rider's actual age. All scooter providers also require riders to affirm they possess a valid driver's license, but again, there is no verification of this affirmation.
- <sup>2</sup> Ethan May, *Here's Everything You Need to Know About Bird and Lime Electric Scooters*, INDIANAPOLIS STAR (last updated 4/11/2019, 11:21 AM), <https://www.indystar.com/story/news/2018/06/21/bird-electric-scooters-rental-costs-hours-charging-locations/720893002/>.
- <sup>3</sup> *Become a Lime Juicer*, LIME, INC. (last visited 7/22/2019), [https://web.limebike.com/juicer?utm\\_source=lbw&utm\\_medium=bannemav&utm\\_campaign=signup&utm\\_content=chargeourscooters](https://web.limebike.com/juicer?utm_source=lbw&utm_medium=bannemav&utm_campaign=signup&utm_content=chargeourscooters); *There is a New Way to Earn*, BIRD, INC. (last visited 7/22/2019), <https://chargers.bird.co/join>.
- <sup>4</sup> *Id.*
- <sup>5</sup> Josh Edelson & Joshua Brustein, "Bird Scooters Ditches Gig Economy Mechanics in Favor of In-House Repairs," FORTUNE (3/8/2019), <https://fortune.com/2019/03/08/bird-scooters-in-house-repairs/>.
- <sup>6</sup> *Id.* at note iii.
- <sup>7</sup> *Careers*, LIME, INC. (last visited 7/22/2019), <https://www.li.me/careers>.
- <sup>8</sup> Plaintiff's Original Petition & Request for Discovery, *Walker v. Neutron Holdings, Inc.*, et al., (Tex. Dist. 2019) No. D-1-GN-19-002433, 2019 WL 1997639; Complaint for Damages, *Duker, et al. v. Bird Rides, Inc.*, et al., (Cal. Super. 2018) No. 19STCV01214, 2018 WL 7150083; Defendant's Brief in Support of its Motion for Summary Judgment, *City of Milwaukee v. Bird Rides, Inc.*, (E.D. Wis. 2019) No. 18-CV-1066-jps, 2019 WL 2648026.
- <sup>9</sup> See *Malecha v. St. Croix Valley Skydiving Club, Inc.*, 392 N.W.2d 727, 731 (Minn. Ct. App. 1986) (holding that although upholding exculpatory clauses can be harsh, they are enforceable). Second, even if the waiver were to be theoretically held to be improper, e-scooter service providers are able to raise an assumption of risk defense. See *Schneider ex rel. Schneider v. Erickson*, 654 N.W.2d 144, 148 (Minn. Ct. App. 2002) (holding that paintball player voluntarily entered a situation where there are well-known, incidental risks and therefore assumed the risk). This is a particularly successful defense raised by defendants in a variety of recreational activities and uses. *Id.*; see *Malecha*, 392 N.W.2d 727.
- <sup>10</sup> See Complaint for Damages, *supra* note 6; Complaint For., *Conley v. Bird Rides, Inc.*, et al., (Cal. Super. 2019) No. 19STCV22858, 2019 WL 2994741; Plaintiff's Original Complaint *Phillips ex rel. Stoneking v. Neutron Holdings, Inc.*, (N.D. Tex. 2018), No. 3:18-cv-03382-S; Complaint for Damages, *Matsui v. Lime, Inc.*, et al., (Cal. Super. 2019) No. CGC-19-573730, 2019 WL 859384 (injured rider alleges defective design, negligent testing and maintenance); Plaintiff's Original Petition and Request for Disclosure, *Mahoney v. Neutron Holdings, Inc.*, (Tex. Dist. 2019) No. D-1-GN-19-000893, 2019 WL 825831 (rider injured when thrown from Lime scooter alleges negligent

manufacturing; failure to exercise reasonable care; failure to warn; failure to test, inspect, and repair; failure to remove scooters with known malfunctions/defects).

- <sup>11</sup> See Complaint for Damages, *supra* note 6; Plaintiff's Original Complaint, *supra* note 8; Plaintiff's Original Petition & Request for Discovery, *supra* note 6.
- <sup>12</sup> Tarak Trivedi, *Injuries Associated With Standing Electric Scooter Use*, JAMA NETWORK OPEN, 1/25/2019, at 3.
- <sup>13</sup> Trivedi, *supra* note 2, 4.
- <sup>14</sup> Complaint for: *Labowitz v. Bird Rides, Inc.*, (C.D. Cal. 2018) No. 2:2018-cv-09329, 2018 WL 5775613.
- <sup>15</sup> Complaint for Damages, *supra* note 6; Complaint For., *Labowitz* (No. 2:2018-cv-09329); *Borgia v. Bird Rides, Inc.*, (C.D. Cal. 2018) No. 2:2018-cv-09685.
- <sup>16</sup> *Borgia* (No. 2:2018-cv-09685); Class Action Complaint For., *Montoya, et al. v. City of San Diego, et al.*, (S.D. Cal. 2019) No. 3:19-cv-00054 2019.
- <sup>17</sup> *Borgia* (No. 2:2018-cv-09685).
- <sup>18</sup> *Id.* at 144.
- <sup>19</sup> *Id.* at ¶ 145.
- <sup>20</sup> *Id.*
- <sup>21</sup> VA. CODE ANN. §46.2-904 (1989).
- <sup>22</sup> TEX. TRANSP. CODE ANN. §551.352 (2005).
- <sup>23</sup> CAL. VEH. CODE ANN. §21235 (1999).
- <sup>24</sup> *Id.*
- <sup>25</sup> MINN. STAT. ANN. §169.225 (2005).
- <sup>26</sup> *So You Have Questions About Scooters?: LYFT, INC.* (last visited 7/18/2019), <https://www.lyft.com/scooters/arlington-va/how-to-ride#follow-traffic-laws>.
- <sup>27</sup> *So You Have Questions About Scooters?: LYFT, INC.* (last visited 7/14/2019), <https://www.lyft.com/scooters/washington-dc/how-to-ride#follow-traffic-laws>.
- So You Have Questions About Scooters?: LYFT, INC.* (last visited 7/14/2019), <https://www.lyft.com/scooters/los-angeles-cal/faq>.
- <sup>28</sup> *So You Have Questions About Scooters?: LYFT, INC.* (last visited 7/14/2019), <https://www.lyft.com/scooters/dallas-tx/faq>.
- <sup>29</sup> *So You Have Questions About Scooters?: LYFT, INC.* (last visited 7/14/2019), <https://www.lyft.com/scooters/chicago-ill/faq>.
- <sup>30</sup> *So You Have Questions About Scooters?: LYFT, INC.* (last visited 7/14/2019), <https://www.lyft.com/scooters/los-angeles-cal/faq>.
- <sup>31</sup> ST. PAUL, MN, CODIFIED ORDINANCES §373.02 (2019).
- <sup>32</sup> *Id.*
- <sup>33</sup> MINN. STAT. §169.225.
- <sup>34</sup> *Shared Bikes and Scooters*, CITY OF ST. PAUL (last visited 7/18/2019), <https://www.stpaul.gov/departments/public-works/shared-bikes-and-scooters>.
- <sup>35</sup> *Motorized Foot Scooters: How to Scoot*, CITY OF MINNEAPOLIS (last visited 7/22/2019), <http://www.minneapolismn.gov/publicworks/trans/WC-MSP-212816>.
- <sup>36</sup> *Id.*