June 25, 2012

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Honorable Tani Cantil-Sakauye, Chief Justice
and the Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749
Case No. **S202785** (Sixth District Court of Appeal No. H035444)
Request for Depublication (Cal. Rules of Court, rule 8.1125(a))

To the Chief Justice and the Associate Justices of the California Supreme Court:

I. California State Association of Counties' and League of California Cities Interest in Depublication

The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that publication of the opinion in this case is a matter affecting all counties.

The League of California Cities (League) is an association of 469 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide or nationwide significance. The Committee has identified this case as being of such significance.

II. Why The Opinion Should Be Depublished

A decade ago, in *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112 (*Zelig*), this Court affirmed that in order to state a cause of action for dangerous

condition of public property under Government Code section 835, a plaintiff must allege a causal connection between the property and the third party conduct causing her injury. The Sixth District Court of Appeal's recent opinion in *Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749 (*Cole*) misreads *Zelig*, and concludes that this causal connection is required ***only*** in cases involving "violent" third party conduct. *Cole* specifically declines to follow the Fourth District Court of Appeal's opinion in *City of San Diego v. Superior Court* (2006) 137 Cal.App.4th 21 *(Hanson)*, which required such a showing in a case involving nonviolent conduct. If *Cole* remains a published opinion, it calls into question the settled principle that a plaintiff must allege a casual connection between the public property and the injury in every dangerous condition case, including every case involving third party conduct.

CSAC and the League will separately file an amicus curiae letter in support of the Town of Los Gatos' Petition for Review in this case. Should the petition be denied, CSAC seeks depublication of the opinion for the reasons set forth below.

A. The Opinion Should Not Remain Published Because It Confuses Rather Than Clarifies Well-Settled Principles Relating To Causation In Dangerous Condition Cases Involving Third Party Conduct.

This case involves an injury sustained on public property but caused by third party criminal conduct. Plaintiff was standing near her car on a gravel lot when she was struck by a drunk driver, who veered off of the adjacent paved road. (*Cole*, *supra*, 205 Cal.App.4th at p. 754.) Defendant town successfully moved for summary judgment, arguing the plaintiff could not prove all of the elements of a dangerous condition of public property claim under Government Code section 835, including the element of causation. (*Id.* at p. 755.) The Court of Appeal reversed, in a published opinion that confuses rather than clarifies long established principles relating to dangerous condition cases.

More than a decade ago, this Court in *Zelig* restated the principle that when an injury is caused by a third party, "the defect in the physical condition of the property must have some causal relationship to the third party conduct that actually injures the plaintiff." (*Zelig, supra,* 27 Cal.4th at p. 1136, citations omitted.) *Cole* acknowledges and even quotes this language from *Zelig,* but concludes *Zelig* misstated the holdings of the cases on which it relied. (*Cole, supra,* 205 Cal.App.4th at 771.) *Cole* states: "The [*Zelig*] court attributed the quoted language to two other decisions, *Constance B. v. State of California* (1986) 178 Cal.App.3d 200 (*Constance B.*); *Moncur v. City of Los Angeles* (1977) 68 Cal.App.3d 118 (*Moncur*). Neither of them contains such language, however, and *neither supports a rule requiring a direct causal link between a dangerous condition and the conduct of the third party*, as distinct from the harm to the plaintiff." (*Ibid.*; internal citation omitted, emphasis added.)

Cole reasons that since *Constance B.* involved a sexual assault and *Moncur* involved the planting of a bomb in an airport locker, the rule that third party conduct must be connected to some defect in the property applies only in cases involving violence. (*Cole, supra,* 205 Cal.App.4th at p. 772-773.) *Cole* states: "it may well be that unless the condition of the property somehow induced, facilitated, or 'occasioned' the violent conduct, it could not be viewed as a cause of the plaintiff's injuries. *But this hardly means that in every case of intervening third party conduct, whether deliberate or not, a public entity is excused from liability for a dangerous condition of its property unless the plaintiff shows the dangerous condition caused the third party's conduct.*" (*Id.* at p. 773, emphasis added.)

It is, however, a long established rule that in every dangerous condition case involving third party conduct, the plaintiff *must* make such a showing. In any dangerous condition case, "liability is imposed only when there is some defect in the property itself and a causal connection is established between the defect and the injury." (*Zelig, supra,* 27 Cal.4th at p. 1135.) To establish such a causal connection where injury is caused by a third party, the plaintiff must show the defect somehow caused or contributed to the third party's conduct. (*Id.* at p. 1137.) *Zelig* involved a shooting in a courthouse and this Court concluded the allegations of the complaint failed to establish either the existence of a dangerous condition or the required causal relationship between a property defect and the injury. (*Ibid.*)

As the Court stated: "In the present case, the risk of injury was not increased or intensified by the condition of the property, and the necessary causal connection between the condition of the property and [the shooting] was not present." (*Zelig, supra,* 27 Cal.4th at p. 1137.) *Zelig* repeatedly referenced this lack of a causal connection in the case before it. (See *Id.* at p 1140 [no allegations property conditions "were causally related to the shooting."]; *Id.* at p. 1145 [no allegations showing how physical features "had any causal connection with the shooting."].) *Zelig* also expressly disapproved of *Zuniga v. Housing Authority* (1995) 41 Cal.App.4th 82, because that opinion did not require a causal connection between the defect in the property and the third party conduct. (*Id.* at p. 1138 ["The failure of the court in *Zuniga* to relate the physical condition of the property *to the conduct of the arsonists* renders questionable its conclusion that liability may be found under Government Code section 835."].)

Numerous other published cases have applied the rule that "third party conduct, by itself, unrelated to the condition of the property, does not constitute a 'dangerous condition' for which a public entity may be held liable." (See *Salas v. California Dept. of Transp.* (2011) 198 Cal.App.4th 1058, 1070, citing *Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1348, internal quotation marks and citations omitted.) The long settled rule is that "[t]here must be a defect in the physical condition of the property and

that defect must have some causal relationship to the third party conduct that injures the plaintiff." (*Ibid.*; see also *Song X. Sun v. City of Oakland* (2008) 166 Cal.App.4th 1177, 1187; *Avedon v. State* (2010) 186 Cal.App.4th 1336, 1341.)

If the *Cole* opinion remains published, these long standing principles are called into question. Contrary to these decisions, *Cole* finds that a plaintiff need only show a causal connection between defective property and third party conduct where such conduct is "violent." (*Cole, supra*, 205 Cal.App.4th at p. 772-774.) For these reasons, the opinion should not remain published.

B. The Opinion Should Not Remain Published Because It Conflates Two Elements Of A Dangerous Condition Claim.

The opinion should not remain published for another reason. As noted, a plaintiff alleging a dangerous condition claim must show *both* the existence of a dangerous condition *and* a causal relationship between the condition and the third party conduct. (*Zelig, supra,* 27 Cal.4th at p. 1137.) A property defect that increases or intensifies the danger of injury by a third party may establish the existence of a dangerous condition, but does not establish causation. (*Ibid.*) *Cole* conflates these two elements into one, reading *Zelig* to require only a showing that the property may have "increased or intensified" the danger from third party conduct. (*Cole, supra*, 205 Cal.App.4th at p. 774.) *Cole* supports its reading of *Zelig* by stating that in *Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139 (*Bonanno*), this Court "described *Zelig* as holding that 'public liability lies under section 835 only when a feature of the public property has 'increased or intensified' the danger to users from third party conduct.'" (*Ibid.*) However, *Bonanno* cited this language to show that "a physical condition of the public property that increases the risk of injury from third party conduct may be a 'dangerous condition' under the statutes." (*Bonanno, supra,* 30 Cal.4th at p. 154.) *Bonanno* emphasized the opinion did *not* address whether the dangerous condition "proximately caused" the injury in that case. (*Id.* at p. 155.) The decision in *Cole* thus confuses rather than clarifies the showing necessary to establish the statutory elements of a dangerous condition cause of action involving third party conduct. For this reason as well, the decision should not remain published.

C. The Opinion Should Not Remain Published Because It Misreads *Zelig*, *Bonanno*, and *Hanson*.

Cole not only misreads *Zelig* and *Bonnan*, it misreads the Fourth District Court of Appeal's opinion in *Hanson*, which involved a nighttime street race on a public roadway that resulted in injury to the plaintiff. (*Hanson, supra,* 137 Cal.App.4th at p. 21.) Relying on *Zelig*, *Hanson* stated: "for purposes of deciding when a dangerous condition exists in cases involving third party conduct, it is necessary that two elements be

addressed. The first is whether it can be said the defect complained of describes a dangerous physical condition and second, whether the dangerous condition has a causal relationship to the third party conduct that actually injured the plaintiff." (*Id.* at p. 29, citing *Zelig, supra,* 27 Cal.4th at 1136, 1138.)

Regarding the first element, *Hanson* explained that "*Zelig* notes the necessary coupling of third party conduct and defective condition occurs where the property itself exists in a dangerous condition, and that condition increases or intensifies the risk of injury to the public." (*Hanson, supra,* 137 Cal.App.4th at p. 29, citing *Zelig* at p. 1136.) As to the second element, *Hanson* found that "*Zelig* instructs us the defect in the physical condition of the property must also have some causal relationship to the third party conduct that actually injures the plaintiff." (*Id.* at p. 30, citing *Zelig* at p. 1136.) Applying these principles, *Hanson* found no dangerous condition existed and also concluded that even if a lack of lighting along the roadway created a dangerous condition, there was no causal relationship between the defect and the third party conduct in that case. (*Id.* at p. 31 ["even if we were to conclude a defective physical condition exists for failure to install lighting, there is no evidence the racers were influenced by the absence of street lights"].)

In *Cole,* the Sixth District Court of Appeal declined to follow the *Hanson* case, characterizing *Hanson* as having adopted "a new and extremely restrictive rule for determining when the conduct of a third party will operate as a superseding cause excusing a public entity from liability for a dangerous condition of its property." (*Cole, supra*, 205 Cal.App.4th at p. 774.) *Cole's* reading of *Hanson* creates additional confusion because the rules *Hanson* applies are far from new or extremely restrictive. Moreover, the element of causation is not a defense or an immunity that must be proven by a public entity to "excuse" the entity from liability. Rather, causation is one of the statutory factors that a plaintiff must affirmatively prove to establish a "dangerous condition" claim under Government Code section 835. (*Bonanno, supra*, 30 Cal.4th at p. 155.) Contrary to *Cole*'s reading of the case, the *Hanson* decision correctly concludes that a plaintiff cannot establish the element of causation where there is no evidence that a physical characteristic of the entity's property caused or contributed to the third party conduct that resulted in plaintiff's injury. For this reason as well, *Cole* should not remain published.

D. The Opinion Should Not Remain Published Because It Misapplies Applicable Law.

Finally, *Cole* should not remain published because it misapplies the principles discussed above to the facts of this case. *Cole* concludes there are questions of fact regarding whether any physical characteristics, such as the narrowing of lanes, increased

the risk that a driver would leave the road and enter the gravel area where plaintiff was struck. (*Cole*, *supra*, 205 Cal.App.4th at p. 760-761.) But *Cole* states the intoxicated driver in this case may have "left the road for the same reason any other impatient driver might have done under the circumstances: to bypass an obst uction [traffic stopped behind a car turning left] in the road." (*Id.* at p. 778.) Such hypothetical evidence neither establishes the existence of a dangerous condition nor causation in this particular case.

For example, a drunk driver might d ift off a roadway onto a shoulder that has drop-off, and the drop-off might cont ibute to the driver's inability to cont ol the vehicle. As a result, the driver might over-steer and head into the opposite lane of traffic, injuring another driver. In that hypothetical, the injured d iver could allege that (1) a physical defect (the drop-off) combined with third pa ty conduct to increase the risk of inju y to users of the road, and (2) the defect contributed to the inju y in that particular case. By contrast, the court in *Cole* does not cite to any physical condition that forces drivers to exit the paved travel lane and drive into the gravel area—an area well known to be used for parking. Rather than cite any physical characteristic, the court cites "impatience" as the possible "cause" of the intoxicated driver's maneuver. For this reason as well, the opinion should not remained published.

III. Conclusion

For all the foregoing reasons, CSAC and the League respectfully request that the opinion in this case be depublished.

Respectfully submitted,

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Counsel for California State Association of Counties
and League of California Cities

Proof of Se vice Attached

Proof of Service by Mail

Cole v. Town of Los Gatos
Case No. **S202785**

I, Mary Penney, declare:

That I am, and was at the time of the service of the papers herein referred to, over the age of eighteen years, and not a party to the within action; and I am employed in the County of Sacramento, California, within which county the subject mailing occurred. My business address is 1100 K Street, Suite 101, Sacramento, California, 95814. I served the within **LETTER REQUESTING DEPUBLICATION** by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Proof of Service List

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Court of Appeal	Clerk of the Court Sixth Appellate District 333 West Santa Clara Street, #1060 San Jose, CA 95113-1717
Trial Court	Santa Clara County Superior Court Attn: Hon. James Kleinberg 161 North First Street San Jose, CA 95113-1090

and by placing the envelopes for collection and mailing following our ordinary business practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on June 25, 2012, at Sacramento, California.

MARY PENNEY