

July 5, 2012

Honorable Tani Cantil-Sakauye, Chief Justice
and the Associate Justices
California Supreme Court
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Re: *Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749
(Sixth District Court of Appeal No. H035444)
Letter of Amicus Curiae In Support of Petition For Review (Cal. Rules
of Court, rule 8.500(g)(1))

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

I. The Applicants' Interest

The California State Association of Counties (CSAC) and the League of California Cities (League) support the Town of Los Gatos' Petition for Review of the Sixth District Court of Appeal's opinion in *Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749 (*Cole*). 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 this case involves 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 This Court Should Grant Review

Review is necessary to facilitate uniformity of decision in cases alleging a dangerous condition of public property and to resolve an important issue of law in this area, which affects public entities statewide. The decision in *Cole* misreads and misapplies this Court's opinion in *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112 (*Zelig*) and misreads and 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*).

Contrary to the holdings of these and other published opinions, *Cole* concludes that with very limited exceptions, a plaintiff is not required to show that some physical condition of public property caused or contributed to the third party conduct that resulted in her injury. If review is not granted and the opinion remains published¹, it will create confusion as to the showing necessary to establish a dangerous condition of public property claim under Government Code section 835, in virtually every case involving third party conduct.

A. Review Is Necessary To Facilitate Uniformity Of Decision.

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 754.) Defendant town 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 diverges from existing case law.

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 p. 771.) *Cole* states: "The

¹ CSAC and the League have filed a letter that alternatively requests depublication of the opinion.

[*Zelig*] court attributed the quoted language to *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.*; 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. (*Id.* at pp. 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 the plaintiff must make such a showing in *every* dangerous condition case involving third party conduct. In every 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 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. (*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* 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.”]; emphasis added.)

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.)

However, *Cole* distinguishes such cases and reads *Zelig* as only requiring 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, citing *Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 155. (*Bonanno*)). *Cole* also expressly declines to follow the Fourth District Court of Appeal’s opinion in *Hanson*, *supra*, 137 Cal.App.4th 21, because that opinion required plaintiff to allege a causal relationship between some property defect and the third party conduct that injured the plaintiff. (*Ibid.*)

Review is thus necessary to facilitate uniformity of decision.

B. Review Is Necessary To Resolve An Important Issue of Law In Dangerous Condition Cases Involving Third Party Conduct.

Review is also necessary to resolve the important issue of law raised in the *Cole* opinion, i.e., whether a plaintiff must allege a causal relationship between a property defect and the third party conduct that resulted in injury *only* in cases involving “violent conduct.” (*Cole*, *supra*, 205 Cal.App.4th at p. 773.) This issue is of statewide importance because Government Code section 835 applies to all cities and counties within this State as well as numerous other public entities, and dangerous condition claims under this section frequently involve third party conduct. (*Bonanno*, *supra*, 30 Cal.4th at p. 152 [“No shortage exists of cases recognizing a dangerous condition of public property in some characteristic of the property that exposed its users to increased danger from third party negligence or criminality.”])

Honorable Tani Cantil-Sakauye, Chief Justice

and the Associate Justices

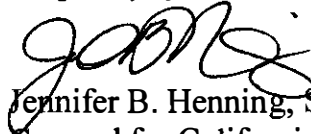
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III. Conclusion

For the foregoing reasons, CSAC and the League respectfully request that the Town of Los Gatos' Petition for Review be granted.

Respectfully submitted,



Jennifer B. Henning, SBN 193915

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

Proof of Service 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 IN SUPPORT OF PETITION FOR REVIEW** 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

Party	Attorney
Cole, Sara : Plaintiff and Appellant	Daniel U. Smith Smith & McGinty 220 16th Avenue, #3 San Francisco, CA 94118-1051 Michael A. Kelly Walkup, Melodia, Kelly, Wecht & Schoenberger 650 California Street, 26th Floor San Francisco, CA 94108
Town of Los Gatos, et al : Defendant and Respondent	Joseph C. Howard Howard Rome Martin & Ridley LLP 1775 Woodside Road Suite 200 Redwood City, CA 94061 Mark G. Bonino Hayes, Scott, Bonino, Ellingson & McLay, LLP 203 Redwood Shores Parkway, #480 Redwood City, CA 94065
State of California, Department of Transportation : Pub/Depublication Requestor	Bruce Donald McGagin P.O. Box 1438 CalTrans/Legal MS 57 Sacramento, CA 95812-1438

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 July 5, 2012, at Sacramento, California.



MARY PENNEY