California State Association of Counties®

December 2, 2020

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

Re: *Williams v. County of Sonoma* (Case No. S265723)
Court of Appeal, First Appellate District Case No. A156819

Letter in Support of Request for Depublication (Cal. Rules of Court, rule 8.1125(b)(1))

Honorable Chief Justice Cantil-Sakauye and Associate Justices:

The California State Association of Counties ("CSAC") and the League of California Cities ("Cal Cities") hereby support the County of Sonoma's request for depublication of the published Opinion in the matter referenced above.

Interest of CSAC and Cal Cities

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 is a matter affecting all counties.

The League of California Cities is an association of 476 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. Cal Cities 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 have statewide or nationwide significance. The Committee has identified this case as having such significance.

CSAC and Cal Cities' members have a direct interest in clarity in the law concerning application of the primary assumption of risk doctrine to dangerous condition of public property claims. Unfortunately, the Opinion below does not provide such clarity. Rather, it makes assumptions of both fact and law that leave California's cities and counties with more questions than answers about when a limited duty exists to protect persons engaging in high risk recreational activities, and how liability can be avoided.

By Assuming, Without Deciding, the Critical Issues in This Case, the Opinion Does Not Meet the Standard for Certification

The Opinion does not meet the standard for certification in rule 8.1105(c) because it assumes without deciding the critical issues in the case, and then applies those assumptions in a manner that only exacerbates existing confusion in the law.

Fundamental to the claims and defenses involved in this case are: (1) whether the primary assumption of risk doctrine applies to dangerous condition of public property claims; and (2) whether the activity undertaken in the case – long-distance, recreational cycling – is an activity covered by the primary assumption of risk doctrine. Indeed, the Court of Appeal itself recognized these to be "threshold issues." Yet, the court went on to assume the answers to both issues without actually deciding them or providing any legal analysis.

The result creates and/or exacerbates confusion in the law. As to the first issue, there is no divergence of published opinion as to whether the assumption of risk doctrine applies to dangerous condition of public property claims. Therefore, when the Court of Appeal indicates that it will assume, but not decide, the issue, it creates the impression that there is some legitimate reason that the doctrine may not actually apply. The Opinion sheds no light on what that reason may be. It certainly would have been a simple enough exercise to cite the cases that have so applied the doctrine, or to disagree with those cases and determine the doctrine does not apply. Instead, both government entities and future plaintiffs are left with a vague and uncertain view that the doctrine may not, for unspecified reasons, be applicable under circumstances such as those raised in this case. This does not add to the law in a way that warrants publication.

As to the second issue, the presumption without any analysis that endurance cycling/training is covered by primary assumption of risk doctrine, coupled by the Opinion's subsequent determination that there is a limited duty to protect such riders, exacerbates confusion in an area of law where the distinctions are already unclear. Inherent in the assumption that plaintiff's cycling ride in this case is covered by the primary assumption of risk doctrine is a finding that her activity involved inherent risk of injury where the risk cannot be eliminated without altering the fundamental nature of the activity. It must, therefore, differ from ordinary cycling in intensity, speed, duration, and the like. Of course, by assuming without deciding the issue, the Opinion

provides the reader with no way to assess when an ordinary bike trip becomes one in which the rider is assuming inherent risks of injury.

Similarly, the Opinion does not provide any guidance to local government on how it can avoid the significant judgments that can arise from serious injuries resulting from inherently risky activities, like endurance cycling. The Opinion states that a pothole the size of the one at issue in this case creates risk for ordinary cyclists, and thus there exists a limited duty to protect endurance cyclists as well. Yet, there must be qualitative differences in the types of cycling for the Court of Appeal to presume that endurance cycling is subject to the primary assumption of risk doctrine. For example, the inability to timely avoid hazards and the scale of injury that can be sustained by traveling at high speeds may be a factor. But without any analysis, there is no way of knowing at what point the limited duty to protect an endurance cyclist ceases to apply. If the pothole would have been one foot shorter? One inch shallower? Does it turn on the speed at which the rider is traveling and whether the rider can reasonably avoid the hazard? The Opinion provides no hint at what the answers to these questions might be.

These issues are not theoretical for this State's cities and counties. Collectively, CSAC and Cal Cities' members are responsible for maintaining over 85% of the State's roadways, an astounding 155,000 miles of roads. There is a chronic underfunding of road maintenance in the State measured in the billions of dollars. Maintaining roadways in a manner that would completely eliminate all road hazards for high-speed cyclists is simply not possible.

What precisely, therefore, is a local government's obligation to a cyclist engaging in what is presumably an inherently risky activity? Can the obligation be avoided by imposing speed limits or prohibiting endurance cycling training on roadways with potholes (an outcome, incidentally, that the primary assumption of risk doctrine is intended to prevent)? How can cities and counties avoid a seven figure judgment like the one in this case? More precisely, at what point do the taxpayers become the ultimate insurers of risk of injury that may occur as a result of high-speed cycling/training? By failing to provide guidance on these issues, the Opinion only exacerbates confusion in the law over when a limited duty applies to protect individuals engaged in inherently risky activities, and when that duty has been met.

Conclusion

For all of these reasons, CSAC and Cal Cities respectfully request that this Court grant the County of Sonoma's depublication request.

Sincerely,

/s/

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