GMSR

LOS ANGELES
SAN FRANCISCO

GREINES, MARTIN, STEIN & RICHLAND LLP
APPELLATE LAWYERS

Law Offices
5900 Wilshire Boulevard, 12th Floor
Los Angeles, CA 90036
P: +1 310 859 7811
F: +1 310 276 5261
gmsr.com

Email: nsarkis@gmsr.com

November 23, 2020

REQUEST TO DEPUBLISH OPINION
CALIFORNIA RULES OF COURT, RULE 8.1125

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

Re: *Williams v. County of Sonoma* (2020) 55 Cal.App.5th 125
First Appellate Dist., Division 5, No. A156819
Cert. for Partial Publication September 28, 2020

Dear Chief Justice Cantil-Sakauye and Associate Justices:

We write on behalf of our client and defendant/appellant, the County of Sonoma, to request that the opinion in *Williams v. County of Sonoma* (2020) 55 Cal.App.5th 125 (*Williams* or Opinion) be depublished from the official California Appellate Reports pursuant to California Rules of Court, rule 8.1125.

I. The Opinion

Williams involves the intersection of dangerous condition of public property (Gov. Code, § 835 (Section 835)) and the primary assumption of risk doctrine. Plaintiff encountered a large pothole while bicycling at least 25 miles per hour on a 30-mile course, in preparation for an upcoming, long-

distance cycling event. (Opn., pp. 1-2.) She fell down and blamed the County, suing for dangerous condition of public property. (Opn., p. 2.)

The County appealed a jury verdict in Plaintiff's favor on the grounds that: (1) her training ride for an upcoming cycling event—which was more than twice as fast and three times as long as an ordinary recreational ride[1]—was an activity subject to the primary assumption of risk doctrine; (2) road hazards, including large potholes, were an inherent risk of that type of cycling; and (3) the County owed no limited duty to avoid increasing those inherent risks because it had no organized relationship with recreational cycling and did not hold out the road as safe for that activity.

The Court of Appeal found that Plaintiff's claim was not barred by primary assumption of risk, holding "(1) if the primary assumption of risk doctrine applies, the County nonetheless owes Plaintiff a duty not to increase the inherent risks of long-distance, recreational cycling, and (2) the County has forfeited any claim that its failure to repair this pothole did not breach its duty." (Opn., pp. 11-12.)

II. Why Depublication Is Necessary

Depublication is warranted because: (1) the Opinion's analysis is unsound, and rests upon a series of assumptions in lieu of actually deciding key issues; (2) its conclusions rest upon fact-specific and case-specific findings, instead of providing broad guidance worthy of publication; and (3) it adds substantial uncertainty to an area of the law in which courts are already struggling.

A. The Opinion rests upon assumptions in lieu of deciding key threshold issues.

"One of the institutional functions of the California Court of Appeal is to state its holding in clear language as a guidepost for the trial courts and the bar to properly evaluate cases." (*Hoffman v. Young* (Oct. 30, 2020, No. B292539) __ Cal.App.2d __ [p. 8].) The Opinion fails in serving that function.

[1] See California State Association of Counties and League of California Cities Amicus Curiae Brief, p. 7.

Instead, it announces a new form of common law liability for public entities, without any elaboration, explanation, or application.

The Opinion is equivocal from the outset, expressly declining to decide several important threshold issues. It "assume[s], without deciding" that the primary assumption of risk doctrine applies to claims against public entities for dangerous conditions of public property. (Opn., p. 4.) And it "assumes"—but again, without deciding—that Plaintiff's cycling "constitutes the type of activity covered by the primary assumption of risk doctrine." (*Ibid.*)

Even the Opinion's primary holding is stated in ambivalent terms: *"[I]f* the primary assumption of risk doctrine applies, the County nonetheless owes Plaintiff a duty not to increase the inherent risks of long-distance, recreational cycling." (Opn., p. 11, italics added.) The Opinion then proceeds to postulate some more, "assuming"—but again, without deciding—"that some falls and road obstacles" would be "inherent risks" of Plaintiff's cycling, but other potholes are "so large" that they cannot be "an inherent risk of long-distance, recreational cycling." (Opn., pp. 10-11.) How large is too large? The Opinion doesn't say.

It is the County's view that the Opinion is wrongly decided for several reasons.[2] Foremost among them: The Opinion's creation of a new, judicially declared category of common law tort liability for public entities directly contravenes California's exclusive statutory scheme for public entities' property-based liability. (See *Quigley v. Garden Valley Fire Protection Dist.* (2019) 7 Cal.5th 798, 803 ["(T)here is no such thing as common law tort liability for public entities; a public entity is not liable for an injury '(e)xcept as otherwise provided by statute'"]; Gov. Code, § 815.)[3] Imposing a limited duty also flouts this Court's recognition that "those with no relation" to a recreational activity have no duty to avoid increasing the activity's inherent risks. (*Avila v. Citrus Community College District* (2006) 38 Cal.4th 148, 162

[2] Those reasons are detailed in the County's Petition for Rehearing.

[3] Even Plaintiff recognized that a "limited duty" analysis was contrary to the exclusive statutory scheme for public entity liability, and instead took the position that primary assumption of risk simply shouldn't apply at all to Section 835 claims. (RB 19-30.)

(*Avila*); see also *Bertsch v. Mammoth Community Water District* (2016) 247 Cal.App.4th 1201, 1211 (*Bertsch*) [public entity owed no duty to plaintiff because it had no organized relationship with skateboarding and did not hold out the roadway as safe for that activity].)

But even if this Court disagrees with the County, depublication is still warranted because the Opinion reads as a series of assumptions, untethered to any actual decision. It does not define the contours of the duty it imposes, or provide any guideposts to public entities on how to avoid a breach of this newly minted duty.

B. The Opinion's conclusions rest on factual idiosyncrasy, rather than any application of the "limited duty" it announces.

The Opinion imposes a limited duty on public entities in the primary assumption of risk context, but never says what that actually means. The Opinion equivocates, suggesting that the duty should either be the "same" or "similar" to public entities' statutory duties pursuant to Section 835. (Opn., p. 8.) That reasoning is suspect: Public entities' statutory duty to maintain roads is limited to use that is "'neither extraordinary nor unusual'" (*Childs v. County of Santa Barbara* (2004) 115 Cal.App.4th 64, 74 (*Childs*), quoting *Acosta v. Los Angeles County* (1961) 56 Cal.2d 208, 214), and the use of public roads for inherently dangerous sports is a form of extraordinary use.

But ultimately the Opinion never decides a standard, sidestepping the question altogether. That all but guarantees further litigation because the answer is far from obvious. California law holds that the limited duty is breached when a defendant increases "the *risk of injury* beyond that inherent in the sport, not when the defendant's conduct may have increased the severity of the injury suffered." (*Calhoon v. Lewis* (2000) 81 Cal.App.4th 108, 116 (*Calhoon*), original italics.) Applying that paradigm here, that means falling as a result of a road hazard either is or is not an inherent risk of long-distance, high-speed recreational cycling. The size of the road hazard does not increase the *risk* of injury. It only increases the *severity* of the injury involved, which is irrelevant for purposes of primary assumption of risk. That should mean no breach of the County's limited duty, to the extent one exists.

But the Opinion never delves into these questions. Instead, it takes an abrupt left turn, concluding that there was no need to consider the question because the County "forfeited" its right to argue no breach. (Opn., p. 12.) The Opinion's forfeiture holding is rooted in a mistake of fact.[4] It is also wrong as a matter of law. It was *Plaintiff's* burden—not the County's—to prove a breach of any limited duty that the County owed. (CACI 470, 472.)

But again, these errors of law and fact—while they are significant enough to merit depublication in and of themselves—are not the only, or even the primary, reason for this Court to depublish the Opinion. Even if this Court were to disagree with the County that the Court of Appeal erred, the Opinion is still not worthy of publication because it conclusions rest upon fact-specific and case-specific findings rather than providing broad guidance worthy of publication.

C. The Opinion exacerbates existing confusion in the law.

Finally, the Opinion should be depublished because it compounds already-existing uncertainty in the law. It does so in two ways.

First, the Opinion's refusal to actually decide threshold issues—(1) whether the primary assumption of risk doctrine applies to Section 835 claims, and (2) whether Plaintiff's cycling is covered by the doctrine—call into question principles that have already been long settled as a matter of California law, creating confusion where there was none before. A broad consensus of decisions have already established that primary assumption of

[4] Neither party argued the existence of a limited duty on appeal. The County argued that it owed *no duty* to Plaintiff. (AOB 53-54.) And Plaintiff took the position that the primary assumption of risk doctrine did not apply to Section 835 claims at all. (RB 19-30.) But once the Court issued its September 8, 2020 Order asking the parties to address the limited duty exception during oral argument, the County *did* take a position: It stated *repeatedly* that if the Court were to find a limited duty, the existence of a breach was a question of fact for the jury and that it was *Plaintiff's* burden to prove a breach. (Petn. For Rehg., p. 22.)

risk is an available defense to a Section 835 claim.[5] There is no published decision holding otherwise. That Plaintiff's cycling is covered by the primary assumption doctrine is also the only possible conclusion based on existing case law.[6]

Second, the Opinion adds confusion to an area of law in which there is already significant conflict. *Avila,* 38 Cal.4th at p. 162, *Bertsch,* 247 Cal.App.4th at p. 1211, and *Calhoon,* 81 Cal.App.4th at pp. 116-117 all recognize that defendants who are wholly uninvolved with and have no connection with a recreational activity, do not owe a limited duty to avoid increasing its inherent risks. But *Childs,* 115 Cal.App.4th at pp. 73-74, *Huffman,* 84 Cal.App.4th at p. 995, and now *Williams* all suggest otherwise, asserting that public entities should owe some sort of limited duty, although none articulate what that means, let alone agree on a standard. Unpublished decisions are likewise all over the map, including in the recreational cycling context.[7]

---

[5] See, e.g., *Kim v. County of Monterey* (2019) 43 Cal.App.5th 312, 325; *Bertsch, supra,* 247 Cal.App.4th at p. 1205, fn. 2; *Childs, supra,* 115 Cal.App.4th at p. 71; *Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 993-994 (*Huffman*).

[6] *Moser v. Ratinoff* (2003) 105 Cal.App.4th 1211, 1221 established long ago that non-competitive, organized, long distance group bicycle rides are subject to the primary assumption of risk doctrine. Plaintiff was training for just such an event. As a matter of law, if an activity is covered by the primary assumption of risk doctrine, the doctrine is equally applicable to practice or training associated with that activity. (*West v. Sundown Little League of Stockton, Inc.* (2002) 96 Cal.App.4th 351, 360; *Aaris v. Las Virgenes Unified School Dist.* (1998) 64 Cal.App.4th 1112, 1118; *Fortier v. Los Rios Community College Dist.* (1996) 45 Cal.App.4th 430, 432, 436-440.)

[7] Cf. *Palaski v. State* (May 1, 2007, No. F048746) 2007 WL 1252629, at *11, 14-15 [nonpub. opn.] [where plaintiff cyclist fell to his death due to dangerous condition of a public road, public entity owed no limited duty to avoid increasing inherent risks because that exception "was made in the context" of "the duty owed by parties who have some organized relationship with each

Williams does not provide the guidance that Courts of Appeal need in this muddled area of the law. To the contrary, instead of bringing analytical clarity, the Opinion significantly increases the existing confusion in the law. This Court should reduce this uncertainty and confusion by depublishing the Opinion.

III. Conclusion

For all of the foregoing reasons, the Court should order the depublication of the Opinion.

Date: November 23, 2020

COUNTY OF SONOMA
Bruce D. Goldstein
Michael A. King

GREINES, MARTIN, STEIN & RICHLAND LLP
Timothy T. Coates
Nadia A. Sarkis

By /s/ Nadia A. Sarkis
Nadia A. Sarkis

Attorneys for Defendant and Appellant COUNTY OF SONOMA

other and to a sporting activity" and road hazard did not increase the inherent risk of harm, only the severity of harm]; *Sirott v. State Department of Transportation* (Aug. 23, 2007, No. B194114) 2007 WL 2391105 [nonpub. opn.] [public entity's maintenance of a dangerous road condition "'increased the risk of harm'" of plaintiff's recreational cycling].

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On November 23, 2020, I served the foregoing document described as: **REQUEST TO DEPUBLISH OPINION CALIFORNIA RULES OF COURT, RULE 8.1125** on the parties in this action by serving:

SEE ATTACHED SERVICE LIST

I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

By Envelope: by placing a true copy thereof enclosed in sealed envelopes addressed as above and delivering such envelopes:

By Mail: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on November 23, 2020, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

/s/ Chris Hsu
Chris Hsu

SERVICE LIST

Todd A. Walburg (SBN, 213063)
Celine E. Cutter (SBN, 312622)
CUTTER LAW, P.C.
401 Watt Avenue
Sacramento, California 95864
Phone (916) 290-9400
twalburg@cutterlaw.com
ccutter@cutterlaw.com

Alan Charles Dell'Ario (SBN, 60955)
ATTORNEY AT LAW
P.O. Box 359
Napa, California 94559
Phone (707) 666-5351
charles@dellario.org

Attorneys for Plaintiff and Respondent CATHERINE WILLIAMS

Vial U.S. Mail
Clerk of the Court
Sonoma County Superior Court
Courtroom 18
600 Administration Drive
Santa Rosa CA 95403
Case Number SCV261355

CALIFORNIA
SUPREME COURT
[Electronic Service under Rule 8.212(c)(2)]