S146114

COPY

IN THE SUPREME COURT OF CALIFORNIA

JOHNNY SHIN,

Plaintiff and Respondent,

vs.

JACK AHN,

Defendant and Appellant.

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION TWO
CASE NO. B184638

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES, FARMERS INSURANCE EXCHANGE; NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES AND PERSONAL INSURANCE FEDERATION OF CALIFORNIA IN SUPPORT OF DEFENDANT JACK AHN

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Pursuant to California Rules of Court, rule 8.520, subdivision (f), the Association of California Insurance Companies, Farmers Insurance Exchange, National Association of Mutual Insurance Companies and Personal Insurance Federation of California request permission to file the attached amici curiae brief in support of defendant Jack Ahn.

The Association of California Insurance Companies (ACIC) is an affiliate of the Property Casualty Insurers Association of America, a leading

national property/casualty insurance company trade group with more than 1,000 members. ACIC represents more than 300 property/casualty insurance companies doing business in California. ACIC member companies write almost 40% of the total property/casualty insurance in California, including 53% of personal automobile insurance, 43% of commercial automobile insurance, 35% of homeowners insurance, 31% of business insurance and 43% of private workers compensation insurance.

Farmers Insurance Exchange is a major insurer organized and existing under the laws of California. It does business throughout the state.

Founded in 1895, the National Association of Mutual Insurance Companies (NAMIC) is a full service national insurance trade association with more than 1,400 member companies that underwrite more than 40% of the property/casualty insurance premiums in the United States.

The Personal Insurance Federation of California (PIFC) is a trade organization dedicated to representing its member companies' interests before governmental bodies, including the California Legislature, the California Insurance Commissioner, and the California courts. PIFC's members are insurers specializing in personal lines of insurance, primarily private passenger automobile and homeowners insurance. These member companies account for approximately thirty-five percent of all personal lines insurance premiums sold in California.

Farmers, along with many of ACIC's, NAMIC's and PIFC's members, insure golfers, golf facilities and others exposed to liability for errant golf shots similar to the one at issue here. Thus, Farmers and the members of ACIC, NAMIC, and PIFC are vitally interested in the outcome of this case.

As counsel for ACIC, Farmers, NAMIC, and PIFC, we have reviewed the briefs filed in this case and believe this court will benefit from additional

briefing on the application of the primary assumption of risk doctrine to cases involving errant golf shots.

Accordingly, amici respectfully request that this court accept and file the attached amici curiae brief.

Dated: March 20, 2007

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AMICI CURIAE BRIEF

INTRODUCTION

Each year 14 million golfers play 40 million rounds of golf at 16,000 golf facilities in the United States. (Kraker, *Golf Course Risks and Greek Mythology?* (Aug. 21, 2006) Insurance Journal <www.insurancejournal.com /magazines/east/2006/08/21/features/72307.htm>[as of Mar. 19, 2007] (*Golf Course Risks and Greek Mythology*).) Roughly 50,000 of these golfers are injured each year while playing a round of golf. (*Ibid.*) Many of those injuries result in lawsuits between golfers. This court must decide the appropriate standard to govern such lawsuits. In particular, this court must decide whether those participating in the sport of golf owe a duty to other participants not to play in a careless manner, i.e., by hitting errant shots, or whether by participating in the game golfers assume the risk of injury caused by careless golfers. As in other sports, the doctrine of primary assumption of risk should apply, requiring a plaintiff to demonstrate that the defendant "'intentionally injure[d] another player or engage[d] in conduct that [was] so reckless as to be totally outside the range of ordinary activity involved in the sport.'" (*Cheong v. Antablin* (1997) 16 Cal.4th 1063, 1068 (*Cheong*).)

Here, defendant Jack Ahn carelessly teed off while his playing partner, plaintiff Johnny Shin, was nearby. The resulting errant shot injured Shin. The trial court and Court of Appeal found that Ahn's conduct was outside the protection afforded by the primary assumption of risk doctrine. However, Ahn's conduct was merely careless; it was not "so reckless as to be totally outside the range of ordinary activity involved in" golf. Accordingly, this court should reverse the Court of Appeal and direct the entry of summary judgment in favor of the defendant.

FACTUAL AND PROCEDURAL BACKGROUND

A. Ahn tees off while Shin is nearby. Shin is hit in the head by the errant golf shot.

On April 10, 2003, Shin, Ahn, and two others were grouped together to play a round of golf at Rancho Park Golf Course. (*Shin v. Ahn* (2006) 141 Cal.App.4th 726, 730 [46 Cal.Rptr.3d 271, 275], review granted Oct. 25, 2006, S146114.)[1/] One member of the foursome left after playing the 10th or 11th hole. (*Ibid.*) When Ahn finished the twelfth hole, he immediately walked up the embankment to the thirteenth hole tee area and prepared to hit his drive. (*Ibid.*) Shin and the third member of the group lingered on the twelfth green to practice putting before beginning to walk toward the thirteenth tee area. (*Ibid.*) Before he reached the tee area, Shin stopped on the cart path, took out a bottle of water from his golf bag, and checked messages on his phone. (*Ibid.*) Shin then made eye contact with Ahn while Shin was standing in front of Ahn and to his left between the twelfth green and the thirteenth tee area. (*Ibid.*)

While on the tee, Ahn, as was his custom, took a practice swing. (*Shin v. Ahn*, *supra*, 141 Cal.App.4th at p. 730 [46 Cal.Rptr.3d at p. 275].) At the time he took his practice swing, Ahn did not see anyone on the fairway and did not know where Shin was located. (*Ibid.*) After his practice swing, Ahn stepped forward, focused on the ball for 15-20 seconds, and struck the ball. (*Ibid.*) Ahn did not know where Shin was when he teed off. (*Ibid.*) The ball struck Shin. (*Id.* at p. 731 [46 Cal.Rptr.3d at p. 276].) Ahn looked up and saw Shin on the ground approximately 25-35 feet away, located to Ahn's left at

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1/ We cite to the facts as set forth in the Court of Appeal's opinion.

about a 40-45 degree angle from Ahn toward the tee box. (*Id.* at pp. 730-731 [46 Cal.Rptr.3d at pp. 275-276].)

B. The trial court grants summary judgment for Ahn. The trial court then grants Shin's motion for a new trial. Ahn appeals.

Shin sued Ahn for negligence. (*Shin v. Ahn*, *supra*, 141 Cal.App.4th at p. 731 [46 Cal.Rptr.3d at p. 276].) The trial court granted Ahn's summary judgment motion, ruling that under the primary assumption of risk doctrine Shin assumed the risk of being hit by a golf ball. (*Ibid.*) The trial court later granted Shin's motion for a new trial, finding that summary judgment was erroneous because there was a triable issue whether Ahn knew that Shin was located in a "zone of danger" and whether Ahn increased Shin's inherent risk of being hit by a golf ball. (*Id.* at pp. 731-732 [46 Cal.Rptr.3d at pp. 276-277].) Ahn appealed.

C. Over a dissent, the Court of Appeal affirms the grant of a new trial.

The Court of Appeal majority held that Ahn "owed Shin a duty of care 'to play within the bounds of the game' . . . . [which] included the duty to ascertain Shin's whereabouts before hitting the ball." (*Shin v. Ahn*, *supra*, 141 Cal.App.4th at p. 739 [46 Cal.Rptr.3d at p. 283].) Relying on *Yancey v. Superior Court* (1994) 28 Cal.App.4th 558, the Court of Appeal reasoned that "[w]e cannot find that Shin assumed the risk of [Ahn's] teeing off without first ascertaining his whereabouts. . . .[O]ne of the first rules of golf promulgated by the United States Golf Association is that before playing a stroke or making

a practice swing, 'the player should ensure that no one is standing close by or in a position to be hit by . . . the ball. . . . ' The undisputed evidence further showed that [Ahn] did not comply with this rule. As such, [Ahn's] conduct was not an inherent part of the sport and involved an increase in golf's inherent risks. . . . [¶] Furthermore, imposing a duty on a golfer to determine the whereabouts of the individuals in his group before teeing off does nothing to alter or destroy the nature of the activity." (*Shin*, at pp. 741-742 [46 Cal.Rptr.3d at pp. 284-285].)

The Court of Appeal distinguished other cases applying the primary assumption of risk doctrine to errant golf shots (*American Golf. Corp. v. Superior Court* (2000) 79 Cal.App.4th 30 (*American Golf*); *Dilger v. Moyles* (1997) 54 Cal.App.4th 1452 (*Dilger*); *Morgan v. Fuji Country USA, Inc.* (1995) 34 Cal.App.4th 127 (*Morgan*)) on the basis that "the circumstances here do not involve a golfer being hit by an errant ball from another fairway." (*Shin v. Ahn*, *supra*, 141 Cal.App.4th at pp. 739-740 [46 Cal.Rptr.3d at pp. 282-283.])

The dissent argued that this case should be governed by the decisions in *Dilger*, *American Golf*, and *Morgan* because "[t]he evidence indicated that [Ahn's] conduct resulting in injury to Shin was, at most, careless or negligent. It was neither intentional, nor 'so reckless as to be totally outside the range of the ordinary activity involved in'" golf. [Citation.] Rather, respondent Shin chose to stop in close proximity to his coparticipant to take out his water bottle and check his phone for messages at the very time his coparticipant was walking toward the tee box and preparing to tee off. Shin's duty was, in the words of W.C. Fields, to '[s]tand clear and keep [his] eye on the ball.' [Fn. omitted.] Being hit by a ball is an inherent risk of golf; '[t]hat shots go awry is a risk that all golfers, even the professionals, assume when they play.' [Citation.] Having placed himself in harm's way at the time [Ahn] was

preparing to swing, Shin is in no position to complain that [Ahn] increased the inherent risk of the game by failing to shout 'fore' or to confirm Shin's location." (*Shin v. Ahn*, *supra*, 141 Cal.App.4th at p. 746 [46 Cal.Rptr.3d at p. 288] [Boren, J., dissent].)

This court thereafter granted Ahn's petition for review.

LEGAL ARGUMENT

THE PRIMARY ASSUMPTION OF RISK DOCTRINE BARS SHIN'S LAWSUIT ARISING FROM AHN'S ERRANT GOLF SHOT.

A. Primary assumption of the risk bars recovery for injuries resulting from the negligent conduct of a co-participant in a sporting activity that does not increase the risks inherent in the sport.

The primary assumption of the risk doctrine is an exception to the general rule that persons have a duty of care to avoid injury to others. (See *Knight v. Jewett* (1992) 3 Cal.4th 296, 314-315 (*Knight*).) The doctrine applies "where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury . . . ." (*Ibid.*) In such cases, the doctrine "operate[s] as a complete bar to the plaintiff's recovery." (*Id.* at p. 315.) "[T]he existence and scope of a defendant's duty is an issue of law, to be decided by a court, not a jury." (*Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 161; see also *Freeman v. Hale* (1994) 30 Cal.App.4th 1388, 1395 ["Since the existence of the primary

assumption of the risk is dependent upon the existence of a legal duty, and since duty is an issue of law to be decided by the court, the applicability of that defense is amenable to resolution by summary judgment"].)

In *Knight,* a plurality of the California Supreme Court held the primary assumption of the risk doctrine applies to sports participants. The court explained that sports participants "generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself. . . . " (*Knight, supra,* 3 Cal.4th at p. 315.) Similarly, "it is improper to hold a sports participant liable to a coparticipant for ordinary careless conduct committed during the sport – for example, for an injury resulting from a carelessly thrown ball or bat during a baseball game. . . . " (*Id.* at p. 318.) A majority of the Supreme Court reaffirmed *Knight*'s holding in *Cheong, supra,* 16 Cal.4th at pages 1067-1068, noting that a condition or conduct that creates a risk of injury may be an integral part of the sport itself, and risks inherent in a sport may include the careless conduct of others. (See also *Avila v. Citrus Community College Dist., supra,* 38 Cal.4th at p. 161.)[2/]

Accordingly, a participant does not have a legal duty to protect another participant from the risks which are inherent in the sport. Rather, the participant breaches a legal duty of care only if he or she (1) "'increase[s] the risks to a [co]participant over and above those inherent in the sport'" by (2) "'intentionally injur[ing] another player or engag[ing] in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.'" (*Cheong, supra,* 16 Cal.4th at p. 1068, quoting *Knight, supra,* 3 Cal.4th at pp. 315-316, 320; see also *Mosca v. Lichtenwalter* (1997) 58 Cal.App.4th 551, 553 (*Mosca*); *Staten v. Superior Court* (1996) 45 Cal.App.4th 1628, 1633.)

2/ Thus, in light of the majority decision in *Cheong*, plaintiff's point that *Knight* was a plurality opinion (e.g., ABOM 15-17) is irrelevant.

The Court of Appeal applied the wrong standard, asking whether "the careless conduct at issue is an inherent part of the sport and whether the imposition of a duty will alter the nature of or chill participation in the sport." (*Shin v. Ahn*, *supra*, 141 Cal.App.4th at p. 741 [46 Cal.Rptr.3d at p. 284].) The first part of the court's formulation is correct, but the second part seemingly imposes a lesser standard than "conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport." The Court of Appeal improperly took the rationale behind the adoption of the recklessness requirement and made it the requirement itself.

In the following sections, we will address both parts of the test and show that Ahn owed no duty to Shin. We will also show that imposing a duty here would alter the nature of and chill participation in golf.

B. The risk of being hit by an errant golf ball is inherent in the sport of golf.

In determining whether a duty will be imposed on a coparticipant in a sporting activity, the court must first determine whether the injury suffered arises from a risk inherent in the activity. (*Mosca, supra,* 58 Cal.App.4th at p. 553.) This determination is made by the court, applying its common knowledge of the sport and its risks. (*Knight, supra,* 3 Cal.4th at p. 313; *Staten v. Superior Court, supra,* 45 Cal.App.4th at p. 1635 ["This determination is necessarily reached from the common knowledge of judges, and not the opinions of experts"].)

The sport of golf involves the risk of being hit by a careless golfer's errant ball. Of roughly 50,000 golf injuries each year, a significant number arise from errant golf shots, and according to one study, 47.6% of all golfers

have been hit by an errant golf ball at some point.[3/] The scope of the risk is further evident from published opinions from around the nation involving such

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3/ *Golf Course Risks and Greek Mythology* <www.insurancejournal.com/magazines/east/2006/08/21/features/72307.htm>, *supra*, [Roughly 50,000 golfers are injured each year]; Smith, *Duck*! (1999) 50 Golf Digest 104 ["Each year, nearly 40,000 golfers are admitted to emergency rooms after being injured at play, most by errant golf balls and flying clubheads"]; Nicholas et al., *An Epidemiologic Survey of Injury in Golfers* (1998) Sport Rehabilitation 112, 113-117 [findings of study that was the "first report of the magnitude of injury resulting from being struck by a golf ball" showed that 47.6% of golfers surveyed "reported having been struck, at least once, by a golf ball"]; *id.* at p. 115 [most common place to be hit by golf ball (37.9% of total) is the lower extremity, followed by 20.4% in trunk, 18.7% in upper extremity, 17.9% in head, and 5.1% in neck]; *ibid.* [most common injury inflicted by golf ball (87.3% of cases) is a contusion, followed by strain/sprain (5.1%), concussion (2.5%), fracture (2.3%), cut/laceration (1.9%), and scratch/abrasion (0.6%)]; *Heads Up!* (2000) 61 Joe Weider's Muscle & Fitness 28 [noting study showing 47.6% of golfers had been hit by a golf ball]; Mell, *If One of These Golfers Hits a Bad Shot and Shatters a Window, Who Pays? If You Say the Golfer, You May Also Be Off Target*, South Florida Sun Sentinel (Feb. 4, 2007) [47,000 golf injuries per year]; *National Electronic Injury Surveillance System*, <http://www.nyssf.org/statistics1997.html>[39,473 golf injuries in 1997]; American *Orthopedic Society for Sports Medicine* <http://www.sportsmed.org> [noting that rate of golf injuries is rising]; Lindsay et al., (1980) British Med. J. 789 [in small case study, golf accidents were one of leading sports-related causes for head injuries]; McHardy et al., *Golf Injuries: A Review of the Literature* (2006) Sports Med., pp. 182-183 [noting that golfers are at risk for major head and eye injuries as a result of being struck by a stray golf ball; one case study showed that golf accidents were one of the larger percentage of sports-related head injuries]; *The Mechanism and Prevention of Sports Eye Injuries* <http//www.protecteyes.org/PECC%20Injuries%20prevention.pdf> [two percent of all sports related eye injuries are from golf injuries].

accidents[4/] and examples from popular culture illustrating that getting hit on the head by a golf ball is a known risk of golf[5/].

The above sources confirm why, contrary to the Court of Appeal here, three other California appellate courts have already held that "golf is an active sport to which the assumption of the risk doctrine applies. [Citation.] 'Hitting a golf ball at a high rate of speed involves the very real possibility that the ball will take flight in an unintended direction. If every ball behaved as the golfer wished, there would be little "sport" in the sport of golf. That shots go awry is a risk that all golfers, even the professionals, assume when they play.'" (*American Golf Corp.*, *supra*, 79 Cal.App.4th at pp. 37-38; see also *Dilger*, *supra*, 54 Cal.App.4th at pp. 1455-1456; *Morgan*, *supra*, 34 Cal.App.4th at

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4/ Annot., Liability to One Struck by Golf Ball (1987) 53 A.L.R.4th 282 [showing over 100 published opinions nationwide dealing with golf injuries]; O'Kane & Schaller, *Injuries from Errant Golf Balls: Liability Theories and Defenses* (1987) 37 Federation of Ins. & Corp. Counsel 247 [describing numerous cases around the nation involving injuries from errant golf shots]; Note, *Golfing Accidents*, (4th ser. 1973) 12 Negligence Comp. Cases Annot. 79, 84-99 [describing numerous cases of accidents to golfers from errant shots].

5/ The New Yorker Book of Golf Cartoons (Mankoff edit., 2002) pp. 21, 25, 71, 96-97 [in a collection of golf cartoons that have been published in the *New Yorker*, four involved a situation where a golfer is hit on the head by a golf ball]; Drennan, *Wills, Trusts, Schadenfreude, and the Wild, Wacky Right of Publicity: Exploring the Enforceability of Dead-Hand Restrictions* (2005) 58 Ark. L. Rev. 43, 111 [noting that President Gerald Ford "hit people with errant golf shots"]; Lazarof, *Golfers' Tort Liability – A Critique of an Emerging Standard* (2002) 24 Hastings Comm. & Ent. L.J. 317, 317 ["In a warning to potential skin cancer victims, the American Academy of Dermatology offers the following humorous advertisement - Five Ways to Die on the Golf Course: 1. Hit by a golf ball, 2. Run over by a golf cart, 3. Whacked by a golf club, 4. Struck by lightning, and 5. Forgot your hat"]. Finally, the frequent use of the term "duffer" in books and other contexts shows an acknowledgment that most players will hit errant shots. (E.g., Rice & Briggs, The Duffers Handbook of Golf (1926); Vannatta, The Care and Feeding of the True Duffer (2007).)

p. 134.) Accordingly, Shin's injury, being hit by an errant golf shot, is a risk inherent in the sport of golf.

As we now show, Ahn was at most negligent in hitting the golf ball when and where he did, which puts this case squarely within the doctrine of primary assumption of the risk.

C. Ahn did not intentionally injure Shin and did not engage in conduct that was so reckless as to be totally outside the range of the ordinary activity involved in the sport.

1. This court should take into account the high burden of showing recklessness.

To determine whether Ahn owed Shin a duty, Shin must show that Ahn either intentionally injured him or engaged in conduct that was "'so reckless as to be *totally* outside the range of the ordinary activity involved in the sport.'" (*Cheong, supra*, 16 Cal.4th at p. 1068, emphasis added, quoting *Knight, supra,* 3 Cal.4th at p. 320.) In formulating that test in prior cases, this court could have simply said that a co-participant owes a duty for any conduct "outside the range" of the sport, but instead modified the phrase with the adverb "totally" and the admonition that the conduct had to be "so reckless" as to be "totally outside the range of ordinary activity."

"Totally" is the adverb form of total, meaning "complete; absolute." (Compact Oxford English Dict. (2d ed. 2003) p. 1217.) Thus, Ahn's conduct must be completely or absolutely outside the range of ordinary activity involved in the sport for assumption of risk not to apply.

"'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the

'high degree of probability' that an injury will occur. . . .Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action . . . with knowledge of the serious danger to others involved in it.'" (*Delaney v. Baker* (1999) 20 Cal.4th 23, 31-32; see also *Conservatorship of Gregory* (2000) 80 Cal.App.4th 514, 521 [same]; Rest.2d Torts, § 500, com. a, p. 588 ["to be reckless, [conduct] must be something more than negligent. It must not only be unreasonable, but it must involve a risk of harm to others substantially in excess of that necessary to make the conduct negligent. It must involve an easily perceptible danger of death or substantial physical harm, and the probability that it will so result must be substantially greater than is required for ordinary negligence"].)

Whether or not a defendant's conduct is so reckless as to be totally outside the range of the ordinary activity involved in the sport is an issue of law. (See *Knight, supra,* 3 Cal.4th at pp. 320-321; *Ford v. Gouin* (1992) 3 Cal.4th 339, 344-345.)

Because of the high burden of showing reckless as opposed to negligent conduct, courts have applied the primary assumption of risk doctrine on disputed facts where even assuming the truth of plaintiff's version of events, the conduct did not rise to the required level of recklessness. (E.g., *Knight, supra,* 3 Cal.4th at pp. 300-301, 320-321; *Ford v. Gouin* (1992) 3 Cal.4th 339, 343-345; cf. *Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1012-1013.)

2. Ahn was simply negligent when he teed off while Shin was nearby. Ahn's conduct was not "totally" outside the range of ordinary golf activity.

Shin's theory, endorsed by the Court of Appeal, is that Ahn owed a duty to Shin because (1) Ahn did not check for Shin's whereabouts before teeing off and (2) Ahn thereby violated a rule of the game.

The problem with Shin's argument is that failing to take a precaution, such as looking for a playing partner's whereabouts, is classic negligence, not recklessness: "'Recklessness, unlike negligence, involves more than "inadvertence, incompetence, unskillfulness, or a failure to take precautions" but rather rises to the level of a "conscious choice of a course of action . . . with knowledge of the serious danger to others involved in it."'" (*Towns v. Davidson* (2007) 147 Cal.App.4th 461, 470.) "Certain activities have been held not to be inherent in a sport and thus not subject to the primary assumption of risk doctrine. For example, drinking alcoholic beverages is not an activity inherent in the sport of skiing. [Citation.] On the other hand, in various sports, going too fast, making sharp turns, *not taking certain precautions*, or proceeding beyond one's abilities are actions held not to be totally outside the range of ordinary activities involved in those sports." (*Moser v. Ratinoff* (2003) 105 Cal.App.4th 1211, 1222, emphasis added.) Accordingly, Ahn's failure to take the precaution of locating Shin before teeing off is negligence not recklessness.

Moreover, an examination of the type of negligent and careless conduct that courts have found to be protected by the primary assumption of the risk doctrine shows that Ahn's failure to determine Shin's whereabouts is similarly protected by the doctrine.

In *Knight, supra,* 3 Cal.4th 296, this court discussed the type of truly egregious behavior by a co-participant during a sporting event that would fall outside the range of ordinary activity in the sport. This court held that the defendant was at most careless or negligent, even though, during a touch football game, he knocked down the plaintiff (who was not the ball carrier) from behind, stepped on her hand seriously injuring her little finger, then continued running until he tagged the receiver so hard she fell and twisted her ankle, after having been asked by the plaintiff not to play so rough. (*Id.* at pp. 300-301, 320.) The *Knight* court observed: "[T]he conduct alleged in [plaintiff's] declarations is not even closely comparable to the kind of conduct . . . so reckless as to be totally outside the range of ordinary activity involved in the sport. . . . " (*Id.* at pp. 320-321.)

In *Ford v. Gouin, supra,* 3 Cal.4th 339, this court held a ski boat driver was at most negligent in steering too close to an overhanging branch, even though the plaintiff's position of skiing backwards made him totally dependent upon the driver to observe and avoid obstacles. (*Id.* at pp. 342-343, 345.) In *Cheong, supra,* 16 Cal.4th at p. 1066, this court held that a defendant who skied too fast and out of control, in violation of a county ordinance, was not liable for a collision with another skier because collision is an inherent risk of downhill skiing.

Intermediate appellate court opinions also demonstrate that careless conduct akin to that at issue here should not give rise to liability. (See, e.g., *Balthazor v. Little League Baseball, Inc.* (1998) 62 Cal.App.4th 47, 52 [liability for failure of Little League to reduce injuries by providing helmets with faceguards barred by assumption of the risk; risk that player may be hit with carelessly thrown ball is inherent in baseball]; *Mosca, supra,* 58 Cal.App.4th at pp. 554-555 [liability for failure of fisherman to use safer method to release kelp from fishing line barred by assumption of the risk;

being hit by recoiling line is an inherent danger in sportfishing]; *Staten v. Superior Court, supra*, 45 Cal.App.4th at p. 1634 [liability for failure of ice skater to check route before beginning backward spiral barred by assumption of the risk; collision with other skaters is an inherent risk in group skating sessions]; *Moser v. Ratinoff, supra*, 105 Cal.App.4th at p. 1222 [liability for failure of cyclist to avoid swerving into another cyclist barred by assumption of the risk; "one cyclist riding alongside another cyclist and swerving into the latter is a risk that is inherent in a long-distance, recreational group bicycle ride"]; *Stimson v. Carlson* (1992) 11 Cal.App.4th 1201,1203-1205 [liability for failure of sailboat captain to yell out course changes to crew to minimize danger of being struck by boom barred by assumption of the risk; a swinging boom is a risk inherent in the sport of sailing]; *Towns v. Davidson, supra*, 147 Cal.App.4th at p. 471 [liability for "skiing quickly and aggressively.... [and] turn[ing] without first looking to see where he was going" is barred by assumption of risk because collision is inherent risk of skiing]; *Rostai v. Neste Enterprises* (2006) 138 Cal.App.4th 326, 334-336 [liability for personal trainer's "failing to adequately assess plaintiff's physical condition and in particular his cardiac risk factors" is barred by assumption of risk because injuries including heart attack are inherent risk of training]; *Record v. Reason* (1999) 73 Cal.App.4th 472, 483-484 [liability for driver of motor boat pulling rider on inner tube who ignored rider's "admonition to [driver] to 'kick back' and 'take it easy'" and instead drove boat at high rate of speeds and made sharp turns is barred by assumption of risk because falling off inner tube is inherent risk of sport].)

The above authority confirms the soundness of other intermediate appellate decisions that have addressed liability for errant golf shots and have held that liability is barred by the primary assumption of risk doctrine. (*Ante*, pp. 12-13.) Shin and the Court of Appeal seek to distinguish that authority on

the basis that those cases involved errant shots that reached adjoining fairways, rather than errant shots when the golfer did not know the whereabouts of a playing partner. (See, e.g., *Shin v. Ahn*, *supra*, 141 Cal.App.4th at pp. 739-740 [46 Cal.Rptr.3d at p. 283].) The fact that prior cases happened to address situations where errant shots crossed from one fairway to another is irrelevant. Those courts addressed whether liability should be imposed for a golf ball that "take[s] flight in an *unintended* direction." (*Dilger*, *supra*, 54 Cal.App.4th at p. 1455, emphasis added; see also *American Golf Corp.*, *supra*, 79 Cal.App.4th at pp. 37-38 [same].) Here, Ahn's tee shot went in an *unintended* direction. Even if Ahn knew where Shin was located, it is undisputed that Ahn's shot was errant in that it did not go in the direction intended, i.e., straight down the fairway.

Furthermore, a distinction founded upon the direction of the errant shot, the distance it travels or the subjective knowledge of the golfer would require impossible line-drawing for courts. An errant shot can go in many different directions and distances. The ball can travel to an adjoining fairway as in prior cases, or toward an area between two holes as in this case. Because there are no clear barriers on golf courses to tell golfers when they would and would not be protected from liability, a rule under which liability depends on the direction or distance of the errant shot would lead to arbitrary, inconsistent results. Put another way, all errant shots should be treated the same. Similarly, there is no workable test to distinguish between similar errant shots based upon golfers' differing subjective knowledge. It would make no sense to treat similar errant shots differently for purposes of liability, depending on whether the golfer knew someone might be located in the direction the ball traveled, which by definition was an unintended direction. They are both errant shots. In both cases, the golfer's conduct is at most careless, not reckless.

3. Ahn's failure to yell "fore" or to comply with safety rules requiring him to locate his playing partners before teeing off does not make his conduct anything other than negligent.

Similarly, even if Ahn violated a rule of golf requiring him to look for his playing partners or to yell "fore" after his errant shot was hit, his conduct was merely negligent, not reckless. "[E]ven when a participant's conduct violates a rule of the game and may subject the violator to internal sanctions prescribed by the sport itself, imposition of *legal liability* for such conduct might well alter fundamentally the nature of the sport by deterring participants from vigorously engaging in activity that falls close to, but on the permissible side of, a prescribed rule." (*Knight, supra,* 3 Cal.4th at pp. 318-319; see also *Avila v. Citrus Community College Dist.*, *supra*, 38 Cal.4th at pp. 164-165.) Thus, for example, even though "intentionally throwing at a batter is forbidden by the rules of baseball" and even where such violation of the rules "may subject the violator to internal sanctions prescribed by the sport itself," no legal liability attaches because "such conduct might well alter fundamentally the nature of the sport by deterring participants from vigorously engaging in activity that falls close to, but on the permissible side of, a prescribed rule.'" (*Avila*, at p. 165.)

The above authority confirms the holding of another intermediate appellate court which held that while "[g]olf etiquette requires that a player whose shot may endanger another warn the other by shouting 'fore[,]'" such "golf etiquette does not necessarily rise to the level of a duty. If no duty was owed, the defense of primary assumption of the risk completely bars recovery." (*Dilger*, *supra*, 54 Cal.App.4th at pp. 1455-1456.) The court

concluded that "[w]e do not believe the failure to yell 'fore' is that reckless or intentional conduct contemplated by the *Knight* court." (*Id.* at p. 1456.)

Thus, Ahn's failure to comply with various rules of golf, which might be evidence of his negligence, cannot rise to the level of recklessness required to establish liability under the primary assumption of risk doctrine.[6/]

D. The authorities relied on by Shin and the Court of Appeal are inapposite.

1. The golf cases focusing on whether the plaintiff was in the "zone of danger" are inapposite because those cases applied standard negligence principles rather than the primary assumption of the risk doctrine.

The out of state cases relied on by Shin do not accurately reflect California law. They arise in states that do not have an assumption of the risk doctrine for golfers and that rely instead on simple negligence standards, under which liability can be assessed where a golfer acts negligently by hitting a golf shot when another golfer is within the "zone of danger." (See, e.g., *Bartlett v. Chebuhar* (Iowa 1992) 479 N.W.2d 321, 322; *Cook v. Johnston* (Ariz.Ct.App. 1984) 688 P.2d 215, 216-217; *Richardson v. Muscato* (N.Y.App.Div. 1991) 576 N.Y.S.2d 721, 722; *Schick v. Ferolito* (N.J.Super.Ct.App.Div. 2000) 744 A.2d 219, 221-222; *Cavin v. Kasser*

6/ Moreover, yelling "fore" is not a guarantee of safety for potential plaintiffs. Medical studies have shown that a problem with yelling "fore" is that golfers tend to respond "to the call of 'fore' by turning in the direction of the call and looking up into the air. This position exposes the face, eye and head to the flight of the ball, which can cause significant damage if it strikes these areas." (McHardy et al., *Golf Injuries: A Review of the Literature Sports Medicine*, *supra*, at p. 183.)

(Mo.Ct.App. 1991) 820 S.W.2d 647, 650-651; *Jenks v. McGranghan* (N.Y. 1972) 30 N.Y.2d 475, 479; *Allen v. Pinewood Country Club, Inc.* (La.Ct.App. 1974) 292 So.2d 786, 789.) These cases are unpersuasive in California because, under the primary assumption of the risk doctrine, the risk of a sporting participant's negligence is assumed by other participants and is therefore not actionable. (See *Avila v. Citrus Community College Dist.*, *supra*, 38 Cal.4th at pp. 160-162.)

Shin's and the Court of Appeal's citation to an intermediate New Jersey appellate opinion, *Schick v. Ferolito*, *supra*, 744 A.2d 219, supporting a negligence standard for errant golf shots, is wrong for an additional reason: it is not good law, having been superseded by a Supreme Court opinion. The New Jersey Supreme Court reversed the Court of Appeal and held that "a recklessness or intentional conduct standard [applies] to a cause of action involving a golfing injury." (*Schick v. Ferolito* (N.J. 2001) 767 A.2d 962, 968.)

Indeed, the modern trend of sister state opinions is to apply the more stringent recklessness or intentional standard, rather than a simple negligence standard, to cases involving golf injuries. (E.g., *Thompson v. McNeill* (Ohio 1990) 559 N.E.2d 705, 706; *Allen v. Donath* (Tx.Ct.App. 1994) 875 S.W.2d 438, 442-443 (Conc. opn. of Vance, J.); *Hathaway v. Tascosa Country Club, Inc.* (Tx.Ct.App. 1993) 846 S.W.2d 614, 616-617; *Monk v. Phillips* (Tx.Ct.App. 1998) 983 S.W.2d 323, 325; *Gray v. Giroux* (Mass.Ct.App. 2000) 730 N.E.2d 338, 340-341; *Yoneda v. Tom* (Haw. 2006) 133 P.3d 796, 808-809; *Gyuriak v. Millice* (Ind.Ct.App. 2002) 775 N.E.2d 391, 395; *Havens v. Kling* (N.Y.App.Div. 2000) 277 A.D.2d 1017.)

Similarly, the California golf cases cited by Shin that pre-date adoption of the primary assumption of risk doctrine are unavailing because they assume that liability attaches for mere negligence rather than requiring a higher

recklessness standard. (E.g., *Oakes v. Chapman* (1958) 158 Cal.App.2d 78, 85-86; *Strand v. Conner* (1962) 207 Cal.App.2d 473, 476.)

Thus, the frequent refrain in the Shin's brief that he was in the "zone of danger" (e..g, ABOM 8) is not relevant because it assumes the court will inquire only whether Ahn was negligent, not whether Ahn acted recklessly.

2. *Yancey v. Superior Court,* which permits plaintiffs to recover for merely negligent conduct in sporting activities, is distinguishable from this case and conflicts with this court's jurisprudence.

Shin and the Court of Appeal also rely on a case involving a discus thrower in a college physical education class who did not ensure that his target area was clear before throwing the discus. (See *Shin v. Ahn*, *supra*, 141 Cal.App.4th at pp. 740-743 [46 Cal.Rptr.3d at pp. 283-286], citing *Yancey v. Superior Court* (1994) 28 Cal.App.4th 558.) In *Yancey*, the plaintiff threw her discus first, and then walked onto the throwing field to retrieve it. (*Yancey,* at p. 561.) The defendant, who was throwing next, "failed to observe the field before throwing the discus, failed to warn [plaintiff] he was about to throw, and failed to observe elementary safety precautions before throwing the discus." (*Ibid.*) The "'carelessly' thrown discus struck [plaintiff's] head causing physical and mental injuries." (*Ibid.*) In concluding that liability could attach, the court explained that a participant throwing a discus owes a duty of care to check the throwing field before throwing because "[n]othing about the inherent nature of the sport requires that one participant who has completed a throw and is retrieving his or her discus should expect the next participant to throw without looking toward the landing area." (*Id.* at p. 566.) The court further reasoned that "[r]equiring discus participants to check the

target area before launching a throw will not alter or destroy the inherent nature of the activity itself. At most, it may cause a slight delay before the thrower begins. Neither do we see any indication that 'vigorous participation' in the discus likely would be chilled if legal liability were imposed on a participant for injury caused by his or her failure to observe that the target area is clear before throwing the discus." (*Id.* at p. 566.)

Yancey is distinguishable because its basic premise is inapplicable to golf. Discus, "unlike many sports . . . does not require that a ball or other article be propelled towards other participants or into a defined area occupied by other participants." (*Yancey v. Superior Court*, *supra*, 28 Cal.App.4th at pp. 565-566.) In discus there is never a circumstance where anyone should be on the discus field at the time a discus is being thrown, whereas in golf, there are typically other players ahead of the golfer and to either side. Thus, any time a golfer hits a shot, he or she is hitting it into an area with other participants. Indeed, if a golfer could be liable for hitting an errant shot, the fundamental nature of golf would need to be changed. Golf courses would need to allow far fewer golfers on the course at any given time, and existing golf courses might need to be re-designed to provide greater protective space between holes. It is for this reason that California courts have held that being hit by an errant golf shot is an inherent risk of the sport.[7/]

Further, in light of decisions from this court, *Yancey* misapplied the *Knight* rule because it unduly eased the high burden of showing recklessness by elevating mere careless conduct to the level of recklessness. (See, e.g., *Avila v. Citrus Community College Dist.*, *supra*, 38 Cal.4th at p. 165.) The *Yancey* court made the same mistake as the Court of Appeal here, by seeming

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7/ Thus, *Yancey*'s dicta about the nature of golf (*Yancey v. Superior Court*, *supra*, 28 Cal.App.4th at p. 566) should yield to the other golf-specific cases that have underscored the risks inherent in golf and found no liability attaches to errant shots or to the failure to yell "fore."

to ignore the requirement that liability can attach only if conduct is "so reckless as to be totally outside the range of the ordinary activity involved in the sport." Instead, *Yancey* and the Court of Appeal here simply inquired whether the sport would be changed if participants had to avoid the risk of causing injuries similar to the one suffered by plaintiff.

This court should explicitly disapprove *Yancey* or, at the very least, expressly limit its application because lower courts, including the court below, have been relying on it to justify refusal to apply the primary assumption of risk doctrine to conduct that appears negligent rather than reckless. (E.g., *Lackner v. North* (2006) 135 Cal.App.4th 1188, 1199-1201 [using *Yancey* to find that snowboarder who was racing too fast when he collided with skier might be reckless as opposed to simply negligent]; *Campbell v. Derylo* (1999) 75 Cal.App.4th 823, 828-829 [using *Yancey* to find that snowboarder who did not use a retention strap to stop runaway snowboards might be reckless as opposed to simply negligent].)

E. If golfers are to be liable for negligent acts like Ahn's, many people will be deterred from taking advantage of the numerous benefits afforded by golf.

Shin suggests that this court should revisit its prior case law on primary assumption of risk and adopt a standard more conducive to permitting liability between co-participants in a sport. (E.g., ABOM 15-49.) As set forth above, this court has thoughtfully developed the primary assumption of risk doctrine and Shin offers no reason for this court to revisit it and possibly upset the settled expectations of millions of Californians who participate in sports. Moreover, existing law rests on sound policy considerations.

"[I]n the heat of an active sporting event[,] . . . a participant's normal energetic conduct often includes accidentally careless behavior." (*Knight, supra,* 3 Cal.4th at p. 318.) "[V]igorous participation in such sporting events likely would be chilled if legal liability were to be imposed on a participant on the basis of his or her ordinary careless conduct." (*Ibid.* ; see also *Stimson v. Carlson*, *supra*, 11 Cal.App.4th at p. 1206 [primary assumption of the risk doctrine "ensures that the fervor of athletic competition will not be chilled by the constant threat of litigation 'from every misstep, sharp turn and sudden stop"]; *Ford v. Gouin*, *supra*, 3 Cal.4th at p. 345 ["vigorous participation in the sport likely would be chilled, and, as a result, the nature of the sport likely would be altered, in the event legal liability were to be imposed on a sports participant for ordinary careless conduct"]; *Regents of University of California v. Superior Court* (1996) 41 Cal.App.4th 1040, 1045 [same].)

> "A mere ordinary [negligence] standard, coupled with the high risk of injury in recreational activities, could potentially create a flood of litigation between co-participants. If co-participants in recreational activities owed each other a duty not to act carelessly, the courts might find themselves awarding damages to every athlete injured at the hands of another, even though those athletes were aware of the potentially dangerous nature of the activity.
>
> Anyone who plays sports, or even simply watches them, knows that a potential for danger exists even in non-contact activities. . . . Holding co-participants responsible for every careless move they make assigns others no responsibility for assuming the inherent risk of the activity in which they knowingly engaged.
>
> There is indeed a place in this society for an ordinary care standard of negligence. . . . [I]t is the appropriate standard to govern individuals in ordinary situations. In these situations that do not involve inherently dangerous activities, it is not foreseeable when one will be injured at the hands of another. The same cannot be said for people who voluntarily chose to participate in a recreational activity. Such participants know of

> the potential injury and they participate in spite of the risk. It is logical that they should assume some of the risk while engaging in such activities."

(Cohen, *Tort Law – Recreational Activity – Standard of Care – Co-Participants in Recreational Activities Owe Each Other a Duty Not to Act Recklessly – Ritchie-Gamester v. City of Berkley, 597 N.W2d 517 (Mich. 1999)* (2000) 10 Seton Hall J. Sport L. 187, 202-203.)

Golf, like football, basketball, or any other sport, involves a game plan for each round. (E.g., Rotella, Golf is Not a Game of Perfect (1995) pp. 132-133.)[8/] A golfer faces extreme pressure for each golf shot. A great deal of concentration and energy are required to hit each shot in a desired direction. (E.g., Miller, I Call the Shots: Straight Talk About the Game of Golf Today (2004) pp. 22-34.) Imposing liability for the failure of a golfer, immediately before executing a shot, to stop and look again for the whereabouts of other players, would change how golf is played. Moreover, "[h]olding participants liable for missed hits would only encourage lawsuits and deter players from enjoying the sport. Golf offers many healthful advantages to both the golfer and the community. The physical exercise in the fresh air with the smell of the pines and eucalyptus renews the spirit and refreshes the body. The sport offers an opportunity for recreation with friends and the chance to meet other citizens with like interests. A foursome can be a very social event, relieving each golfer of the stresses of business and everyday urban life. Neighborhoods benefit by the scenic green belts golf courses bring to their

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8/ This court has looked to similar sources to understand other sports, such as baseball, because appellate courts may take judicial notice of such facts in making the purely legal determination of whether defendant owed plaintiff a duty of care. (*Avila v. Citrus Community College Dist.*, *supra*, 38 Cal.4th at p. 165, fn. 12.)

communities, and wild life enjoy and flourish in a friendly habitat. Social policy dictates that the law should not discourage participation in such an activity whose benefits to the individual player and the community at large are so great." (*Dilger, supra*, 54 Cal.App.4th at p. 1455.)[9/] Indeed, the policy behind the *Dilger*, *American Golf*, and *Morgan* opinions is that "[h]olding participants liable for *missed hits* would only encourage lawsuits and deter players from enjoying the sport." (*Ibid.*, emphasis added.)

The primary assumption of risk doctrine was fashioned to ensure that everyone would have the freedom to play sports and gain the benefits associated with that exercise. A legal regime which permits liability to be imposed against Ahn will impose a hurdle to achieving such benefits.

CONCLUSION

For the above reasons, and for those set forth in Ahn's briefing on the merits, this court should reverse the Court of Appeal and hold that Shin's lawsuit is barred by the primary assumption of risk doctrine. At a minimum,

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9/
In light of the demonstrated need for Americans to exercise (e.g., CBS Broadcasting, *Extreme Obesity Ballooning in U.S. Adults* (Oct. 13, 2003) Health/Lifeline<http://wcco.com/health/health_story_286145350. html>[as of Mar. 19, 2007]); Myers, *Exercise and Cardiovascular Health* (2003) American Heart Association <http://circ.abajournals.org/cgi/content/full/107/1/e2>[as of Mar. 19, 2007]), this court should not add liability concerns to the list of excuses people make to not exercise.

this court should confirm that lawsuits arising from errant golf shots are governed by the primary assumption of the risk doctrine.

Dated: March 20, 2007

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CERTIFICATE OF WORD COUNT
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The text of this brief consists of 7,564 words as counted by the Corel WordPerfect version 11 word-processing program used to generate the brief.

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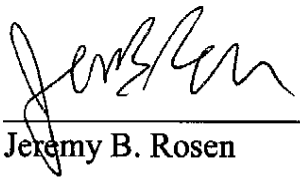

Jeremy B. Rosen

PROOF OF SERVICE [C.C.P. § 1013a]

I, **Connie Christopher**, declare as follows:

I am employed in the County of Los Angeles, State of California and over the age of eighteen years. I am not a party to the within action. I am employed by Horvitz & Levy LLP, and my business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436. I am readily familiar with the practice of Horvitz & Levy LLP for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, such correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, the same day I submit it for collection and processing for mailing. On **March 20, 2007**, I served the within document entitled **APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES, FARMERS INSURANCE EXCHANGE, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES AND PERSONAL INSURANCE FEDERATION OF CALIFORNIA IN SUPPORT OF DEFENDANT JACK AHN** on the parties in the action by placing a true copy thereof in an envelope addressed as follows:

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and, following ordinary business practices of Horvitz & Levy LLP, by sealing said envelope and depositing the envelope for collection and mailing on the aforesaid date by placement for deposit on the same day in the United States Postal Service at 15760 Ventura Boulevard, Encino, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on **March 20, 2007** at Encino, California.

/s/
Connie Christopher