S146114

IN THE

CALIFORNIA SUPREME COURT

JOHNNY SHIN,

Plaintiff and Respondent,

v.

JACK AHN,

Defendant and Appellant.

AFTER DECISION BY THE OF COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION TWO (B184638);
APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY
HON. PAUL G. FLYNN, JUDGE

APPLICATION OF CONSUMER ATTORNEYS OF CALIFORNIA TO FILE BRIEF AMICUS CURIAE; BRIEF AMICUS CURIAE

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, Rule 8.208

Case name: *Shin v. Ahn*

Case No.: S146114

Initial Certificate: XX Supplemental Certificate:

Interested Entity/Person	**Nature of Interest**	**Party/Non-Party**
Consumer Attorneys of California	Amicus Curiae	Non-Party

The undersigned certifies that the above persons/entities (not including government entities or agencies) have either (1) an ownership interest of 10 percent or more in the party if an entity; or (ii) a financial or other interest in the outcome of the proceeding that the justicies should consider in determining whether to disqualify themselves, as defined in rule 8.208.

Attorney submitting form: Daniel U. Smith

Attorney Signature

Date: March 22, 2007.

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Interest of Consumer Attorneys of California.

The Consumer Attorneys of California is a voluntary, non-profit membership organization of over 4,000 associated consumer attorneys practicing throughout California. The Association was founded in 1962. The Association's members predominantly represent individuals subjected to personal injuries, consumer fraud practices, insurance bad faith, and business-related torts. Consumer Attorneys of California has taken a leading role in advancing and protecting the rights of consumers and injured victims in both this Court and in the Legislature.

Important safety issues raised in the case under review.

The case under review raises significant safety issues for California citizens participating in sporting and recreational activities.

Since 1992, the safety of California citizens during sporting and recreational activities has been subject to the "primary assumption of risk." *Knight v. Jewett* (1992) 3 Cal.4th 296; and *Ford v. Gouin* (1992) 3 Cal.4th 339.

In the case under review, the majority and dissenting opinions disagree over the requirements for applying the primary assumption of risk doctrine.

The majority holds that the risk of teeing off without first looking down the fairway for persons who might be struck by the golf ball is "not an inherent party of the sport and involved an increase in golf's inherent risks." *Shin v. Ahn* (2006) 141 Cal.App.4th 726, 742.

The dissent holds that "[b]eing hit by a ball is an inherent risk of golf . . ." *Id.* at p. 746.

This disagreement shows that lower courts need a more precise definition of "inherent risk" and guidance in how to apply the test. On these points this Amicus Curiae brief suggests the following:

1. An "inherent risk" is one necessarily incurred to gain a competitive advantage in a sport or to gain a recreational benefit in a recreational activity. If the risk falls outside this definition, then ordinary duty principles apply.

2. Whether plaintiff was injured by an "inherent risk" is determined by analyzing *only the defendant's actions*, not the mechanism of the plaintiff's injury. Here that means the focus is on defendant Ahn's failure to look before teeing off, *not* plaintiff's injury from being struck by a golf ball (an accident that in some circumstances may occur due to an inherent risk).

3. Where the defendant's conduct did not create an inherent risk, applicable rules or statutes apply to define the defendant's duty.

We have read the briefs filed by the parties and find that the analysis contained in the attached Amicus Brief adds to the analysis by the parties, and so we believe this Amicus Brief will aid the Court's resolution of the issues presented by the Opinion below.

Dated: March 22, 2007. Respectfully submitted,

DANIEL U. SMITH
Attorney for Consumer Attorneys
of California

I.
Courts need guidance on the definition and application of the "inherent risk" test.

A. Appellate decisions manifest confusion and conflict in applying the "inherent risk" test.

The confusion and conflict created by the current definitions of "inherent risk" are manifest in the majority and dissenting opinions below.

The majority focused on Ahn's "teeing off without first checking to see where [Shin] was standing." *Shin, supra,* 141 Cal.App.4th at p. 741. The majority found that Ahn's conduct—violating the rule 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 . . . .'—was *not an inherent part of the sport* and involved an increase in golf's inherent risks." *Id.* at p. 742 (emphasis added).

By contrast, the dissenting justice focused on the risk of getting hit by a golf ball on a golf course. *Shin, supra,* 141 Cal.App.4th at p. 746. The dissent concluded that the risk of getting hit by a golf ball was an inherent risk because Ahn's conduct was not reckless or intentional, but 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." *Shin, supra,* 141 Cal.App.4th at p. 746.

Shin is not alone in manifesting confusion and conflict over the meaning of "inherent risk."

For example, where a skateboarder lost his balance and fell into a planter containing a metal pipe that caused serious injury, the court ruled that primary assumption of risk barred the skateboarder's claim against the homeowner because "*falling is an inherent risk* of skateboarding . . . ." *Calhoon v. Lewis* (2000) 81 Cal.App.4th 108, 116 (emphasis added). Yet where a young girl riding a scooter on a sidewalk fell after because of a

height differential in the pavement, the appellate court ruled that primary assumption of risk did *not* apply, ruling that the risk of "[f]alling," though "possible in any physical activity . . . is not necessarily an *inherent danger* of the activity." *Childs v. County of Santa Barbara* (2004) 115 Cal.App.4th 64, 73 (emphasis added).

To resolve the conflict between the majority and the dissent below and reflected in *Calhoon*, and *Childs*, this Court should give the more precise definition of "inherent risk" that we propose.

B. This Court should make explicit *Knight*'s holding: "Inherent risks" arise only when defendant pursues a competitive or recreational goal.

As shown below, *Knight* necessarily held that "inherent risks" are limited to those risk that arise while the defendant was pursuing a competitive or recreational goal.

In *Knight*, the parties were playing touch football. Plaintiff was injured when defendant, playing defense on the opposing team, chased the ball carrier, knocked plaintiff to the ground and stepped on her hand, injuring her little finger, eventually requiring amputation. *Knight, supra,* 3 Cal.4th at 300-301.

Knight discussed the primary assumption of risk doctrine in language that embraced (but did not state) our proposed definition—that an "inherent risk" is one incurred in the pursuit of a competitive or recreational goal.

For example, *Knight* cited as examples of "inherent risks" a baseball player "hit and injured by a carelessly thrown ball," or a basketball player injured by a "carelessly extended elbow." *Id.* at p. 316. This Court recognized that "[i]n the sports setting . . . conditions or conduct that otherwise might be viewed as dangerous often are an *integral part* of the sport itself." *Knight, supra,* 3 Cal.4th at p. 315 (emphasis added). Under this formula, a coparticipant's actions that are *not integral* to the

activity—i.e., that do not involve achieving a competitive or recreational goal—are not an inherent risk and so should not be subject to the primary assumption of risk doctrine.

We urge the Court now to clarify the meaning of "integral to the activity" by offering a more precise definition of "inherent risk." With the more precise definition we propose—that inherent risks are those created by the defendant's pursuit of a competitive or recreational goal—courts will consistently reach the correct result. If the risk did *not* necessarily arise in pursuit of a competitive or recreational goal, then the risk is not an inherent risk and the primary assumption of risk doctrine does not apply.

This vital test was applied by implication in *Knight*, but the test is usually overlooked (as by the dissent below). Courts cite *Knight* as creating only the dividing line between negligent conduct (subject to primary assumption of risk) and reckless and intentional conduct (which is not). *Knight* expressly allowed liability when the defendant "intentionally injures another player or engaged in reckless conduct that is totally outside the range of the ordinary activity involved in the sport." *Id.* at p. 318, 320. That "reckless" test was restated by this Court most recently in *Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148: "[C]oparticipants have a duty not to act recklessly, outside the bounds of the sport . . . ." *Id.* at p. 162.

But this dividing line between negligence on the one hand and reckless or intentional conduct on the other hand fails to resolve the issue where, as here, judges disagree whether the defendant's conduct was negligent or reckless.

That disagreement is manifest in the majority and dissenting opinions. The majority below applied the "intentional or reckless" test to reason that Ahn's failure to look before teeing off was "totally outside the range of the ordinary activity involved in golf," [citation], so that Ahn had a "duty to

ascertain Shin's whereabouts before hitting the ball." *Shin v. Ahn* (2006) 141 Cal.App.4th at p. 739.

By contrast, the dissent argued that Ahn's conduct was "at most . . . careless or negligent rather than reckless, [so that] appellant [Ahn] did nothing outside the range of the ordinary activity involved in golf that enhanced the inherent risk of the sport." *Id.* at p. 746.

Appellant adopts the reasoning of the dissent, relying on the distinction between negligent and reckless conduct: "The primary assumption of risk doctrine applies to golf. Therefore, one golfer is not liable for injuring another golfer unless he intentionally injures the other golfer or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in golf." Reply Brief on the Merits, p. 1.

The more precise definition of "inherent risk" that we propose is confirmed by the following illustrative decisions, though their formulation of the definition of "inherent risk" is not as clear as we urge this Court to make it.

For example, where student golfers stand too close to each other while practicing their swing, causing one of the student to be struck in the head by a club, the Court imposed a duty to check the area before swinging the club, a duty that would *not* interfere with the golfer's competitive goal: "once a golfer has checked the surrounding area, the golfer is then free to swing the golf club. . . . Ensuring a safe distance between golfers has nothing to do with the mechanics of the golf swing or the fundamental nature of the game of golf." *Hemady v. Long Beach Unified School Dist.* (2006) 143 Cal.App.4th 566, 577. *Hemady* illustrates that a risk is not "inherent" if it can be avoided without interfering with the defendant's pursuit of a competitive or recreational goal. Specifically, requiring that golfers first check their area to ensure no one is standing close by will not interfere with the golfer's goal of making a good swing to hit a good shot.

Similarly, where an unlicensed 14-year old off-road driver of an all terrain vehicle (ATV) caused a head-on collision at the crest of a hill, a duty was properly imposed for the driver to comply with Vehicle Code section 38503 and a Bureau of Land Management rule, requiring persons under 18 to take a safety training course from a certified ATV instructor. *Huff v. Wilkins* (2006) 138 Cal.App.4th 743. *Huff* ruled that taking the required training would not impair a young driver's ability to achieve the recreational goals of off-roading: "compliance with Vehicle Code section 38503 and the BLM safety rule does not preclude young operators of ATV's from fully participating in the "'[t]hrills, chills, and spills"' of the sport after undergoing the requisite safety training. [Citation.] Moreover, the imposition of liability on teenage ATV operators for violating the safety regulations would not otherwise alter the fundamental nature of the sport." *Id.* at p. 743.

Similarly, imposing a duty on a discus thrower to first look downfield before throwing the discus does not impede the participant from achieving the competitive goal of a long throw. *Yancey v. Superior Court* (1994) 28 Cal.4th 558. "Discus . . . does not require that a ball or other article be propelled towards other participants or into a defined are occupied by other participants. . . . Nothing 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. 565-566. "Requiring 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." *Ibid.*

These three cases—*Hemady, Huff*, and *Yancey*—implicitly follow the rule we urge this Court to make express: That the only risks that may be deemed to be "inherent risks," and so subject to primary assumption of risk,

are those risks necessarily incurred in pursuit of a competitive or recreational goal. Risks created by conduct that is not necessary to pursuing a competitive or recreational goal are not "inherent risks" and do not invoke primary assumption of risk.

C. The "inherent risk" test focuses on defendant's conduct, *not* on the mechanism of plaintiff's injury.

The Opinion below manifests confusion over the proper focus of the "inherent risk" test. We urge the Court to dispel this confusion by clearly stating that the "inherent risk" test focuses on defendant's conduct, *not* on the mechanism of plaintiff's injury. In short, the reference point is only the defendant's conduct—was the defendant acting in pursuit of a competitive or recreational goal?

The majority below correctly focused on defendant Ahn's conduct—before taking his swing, he failed to look. From this point of reference, the majority concluded that Ahn's failure to look was not an "inherent risk" in golf, so that imposing a duty to look before swinging would not diminish a golfer's competitive goal of executing the desired swing.

By contrast, the dissenting justice focused merely on the mechanism of injury—the risk of being struck by a errant golf ball. Accordingly, the dissenting justice concluded that "[b]eing hit by a ball is an inherent risk of golf." *Shin, supra,* 141 Cal.App.4th at p. 746. The dissenting justice, by focusing only on the risk of being struck by a golf ball, ignored the crucial distinction between a defendant hitting an errant ball from another fairway (despite having done everything reasonably possible to ensure a safe landing on the proper fairway) and defendant Ahn, who hit a member of his own party by failing before swinging to see that the plaintiff was standing just a few feet away in the ball's likely path. Appellant Ahn is urging this Court to adopt the rationale of the dissent, focusing merely on the mechanism of

injury (being hit by a golf ball) and thus arguing that "[g]etting hit by a golf ball is a risk inherent in golf." OBM at p. 3.

But focusing on the defendant's conduct (rather than the mechanism of injury) shows that a golf case cited by the dissent and by Ahn, *Dilger v. Moyles* (1997) 54 Cal.App.4th 1452, involved significantly different conduct by the defendant, thereby rendering the application of primary assumption of risk in *Dilger not controlling* here.

In *Dilger*, the defendant teed off from the fifth tee, but his shot went "awry," striking plaintiff on the sixth fairway. *Dilger* applied the primary assumption of risk doctrine because the risk "[t]hat shots go awry is a risk that all golfers, even the professionals, assume when they play." *Id.* at pp. 1453-1455. *Dilger* focused on the defendant's conduct—he was attempting to hit the ball on his own fairway, but failed. Accordingly, *Dilger* does not support the over-simplified conclusion of the dissent, below, that "[b]eing hit by a ball is an inherent risk of golf." *Shin, supra,* 141 Cal.App.4th at p. 726.

The importance of *focusing on the defendant's conduct* as a prerequisite to reaching a correct result is illustrated by two skiing cases where the mechanism of injury was the same—both plaintiffs were run into by the defendant—yet the courts reached opposite conclusions as to primary assumption of risk because their analysis focused on the defendant's conduct, not the mechanism of injury.

In *Cheong v. Antablin* (1997) 16 Cal.4th 1063, the defendant skier, to slow his speed, turned and crashed into another skier. This Court applied primary assumption of risk, ruling that the risk of "collision with other skiers" was an "[i]nherent risk." *Id.* at pp. 1067, 1069 (ordinance omitted).

By contrast, in *Lackner v. North* (2006) 135 Cal.App.4th 1188, where the defendant snowboarder was racing other snowboarders at an excessive speed and failed to see a skier standing in plain view to the side of the ski

run and crashed into her, the appellate court focused on the snowboarder's recklessness and so barred application of primary assumption of risk. *Id.* at p. 1200-1201.

In sum, we urge the Court to dispel the confusion manifest in the disagreement below by emphasizing that Courts considering whether plaintiff was injury by an "inherent risk" must focus on the defendant's conduct, *not* the mechanism of injury.

D. Where plaintiff was not injured by an inherent risk, applicable rules and statutes support a duty.

Finally, where (as here) the defendant's conduct did not create an inherent risk, applicable rules establish the defendant's duty.

The Rules of Golf created by the United States Golf Association, impose two relevant duties for player safety:

(1) "Players should ensure that no one is standing close by or in a position to be hit by the . . . ball . . . when they make a *stroke* or practice swing." United States Golf Association, The Rules of Golf (2006-2007), **"Safety,"** p. 1; 9':23-92:2.

(2) "Players should not play until the players in front are out of range." AA 100:27-101:6. *Ibid.*

These rules are relevant here to determine that defendant Ahn had a duty to look first before teeing off. Most important, these rules requiring a golfer to look before swinging do *not* interfere with the player's competitive effort in striking the ball.

We acknowledge that in *Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, this Court applied primary assumption of risk even thouogh rules prohibited throwing at the batter. We do not challenge that ruling. Rather, we point out the different factual circumstances that render *Avila* distinguishable.

In *Avila*, the offending pitch was thrown at the batter for a competitive purpose. *Avila, supra,* 38 Cal.4th at pp. 164-165. Therefore, *Avila* declined to allow this rule violation to support "*legal liability*" because, in light of the competitive purpose of throwing at the batter, such liability "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, supra,* 38 Cal.4th at p. 165 (quoting *Knight, supra,* 3 Cal.4th at pp. 318-319).

Here, *Avila*'s concern of interfering with the "nature of the sport" is absent. Defendant Ahn, by failing to first look in the likely direction of his ball to ensure no person would be endangered, gained no competitive advantage. Unlike *Avila*, Ahn's failure to look was *not* supported by "the nature of the sport."

Accordingly, the rule violations by defendant Ahn support the Opinion below that the primary assumption of risk doctrine does not apply.

CONCLUSION

For the foregoing reasons, this Court should affirm the ruling below by emphasizing the following clarifications of the rule in *Knight v. Jewett*:

1. Whether the risk that befell plaintiff was an "inherent risk" is determined by asking whether the defendant's conduct was necessary to achieve a competitive or recreational goal.

2. Whether the risk that befell plaintiff was an "inherent risk" is determined by focusing on *the defendant's conduct and its purpose*, not the mechanism of injury.

3. Where (as here) the risk that befell the plaintiff was not an "inherent risk," applicable rules or statutes should be consulted to determine the scope of the defendant's duty.

Dated: March 22, 2007.

Respectfully submitted,

LAW OFFICE OF DANIEL U. SMITH

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CERTIFICATION

I hereby certify that this brief, excluding tables, consists of 3,202 words.

By: _____
Daniel U. Smith

PROOF OF SERVICE BY MAIL
(C.C.P. §1013(a), 2015.5)

I, the undersigned, hereby declare under penalty of perjury as follows: I am a citizen of the United States, and over the age of eighteen years, and not a party to the within action; my business address is Post Office Box 278, Kentfield, California 94914. On this date I served the interested parties in this action the within document: AMICUS CURIAE BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA by placing a true copy thereof enclosed in a sealed envelope, postage prepaid, in the United States Mail at Kentfield, California, addressed as follows:

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Executed at Kentfield, California on March 22, 2007.

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