Case No. S146114

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Case No. S146114

JOHNNY SHIN,

Plaintiff and Respondent,

vs.

JACK AHN,

Defendant and Appellant.

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

AMICUS CURIAE BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF DEFENDANT AND APPELLANT

FRED J. HIESTAND
State Bar No. 44241
The Senator Office Bldg.
1121 L Street, Suite 404
Sacramento, CA 95814
Fhiestand@aol.com
(916) 448-5100
(916) 442-8644 fax

Attorney for *Amicus Curiae*
The Civil Justice Association
of California (CJAC)

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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INTRODUCTION

A. Importance of Issue

The Civil Justice Association of California ("CJAC")[1] welcomes the opportunity to address a central issue this case presents:[2] Does a golfer who "tees off"after establishing no one is on the fairway where he intends to drive the ball – but who does not ascertain the location of everyone in his "threesome"[3] – forfeit the

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[1] CJAC is a more than quarter century old non-profit organization whose members are businesses, professional associations and local governments. Our principal purpose is to educate the public about ways to improve our civil liability system so that it is more fair, efficient, certain and economical. Toward these ends, we regularly petition the Legislature, courts and, through the initiative process, the people themselves to determine who gets how much, from whom and under what circumstances when injured by the wrongful acts of others.

[2] CJAC requested on March 12 permission to file an amicus curiae brief herein in support of defendant case and the Court ordered the brief be filed by March 22, 2007.

[3] The group began as a "foursome," which is preferred if not required at many golf courses, but the fourth golfer left the group after playing the tenth or eleventh hole. (Petitioner's Opening Brief on the Merits (OBM), p. 4.)

assumption of risk defense when his hit ball "hooks"[4] and strikes a member of the group who, unbeknownst to defendant, was standing on the golf cart path about 30 feet in front of him at a 45° angle and below the tee box while talking on his cell phone with his back to defendant?

A majority of justices in a sharply divided appellate opinion answered "yes" to this question, explaining that "a golfer who tees off without ascertaining the location of the individuals in his own group increases [the] . . . risk [of injury to another] beyond that inherent in the sport" and, as a result, cannot rely upon the defense of primary assumption of risk."[5] The dissenting opinion, however, felt strongly that this case should be dismissed because it is a "classic" example of when to apply the primary IAR defense, and plaintiff, "[h]aving placed himself in harm's way at the time appellant was preparing to swing, . . . is in no position to complain that appellant increased the inherent risk of the game by failing to shout 'fore' or to confirm [plaintiff's] location."[6]

Not surprisingly, the majority and dissenting opinions bolster their opposed conclusions by reliance upon different case authority, the majority leaning heavily on *Yancey v. Superior Court* (1994) 28 Cal.App.4th 558 (*Yancey*) and *Allen v. Pinewood Country Club, Inc.* (La.App.1974) 292 So.2d 786 (*Allen*), and the dissent resting mainly on *Dilger*

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[4] Jay E. Pietig, *Golf Course Liability – A "Fore!" Warning* (1993) 42 DRAKE L. REV. 905, 907, fn. 16: "'Hooking' a shot causes the golf ball to spin rapidly in a counterclockwise direction thereby curving the shot violently from right to left."

[5] *Shin v. Ahn* (2006) 141 Cal.App.4th 726, 46 Cal.Rptr.3d 271, 283. The defense of primary implied assumption of risk is also referred to hereinafter by the initials for "implied assumption of risk," or the acronym "IAR."

[6] *Id.*, 46 Cal.Rptr. at 288.

v. Moyles (1997) 54 Cal.App.4th 1452, 1454 (*Dilger*) and *Morgan v. Fuji Country USA, Inc.* (1995) 34 Cal.App.4th 127 (*Morgan*).

The issue thus presented, while it sounds narrow – perhaps even provincial – like something from "inside golf" that requires one to learn the rules of the game and the terminology (e.g., "tee," "hook," "slice," "foursome," "threesome" and "tee box") unique to it, is vitally important in determining the scope and application of primary assumption of risk as well as, depending upon what this Court says about the continued viability of that doctrine, the future of golf as we know it.[7]

Golf, long heralded as the sport of "gentle" people, has for several years been one of the top ten recreational activities in this country.[8] It is fast growing in popularity and, with that growth, contributing answers through liability litigation about who should pay whom for injuries sustained during the game due to the conduct of participants, spectators, club owners and designers, and golf manufacturers. The seemingly symbiotic relationship between the sport of golf and tort litigation is aptly explained by a law professor and ardent golfer:

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[7] "With insurance becoming increasingly expensive or largely unavailable, 'the legal implications of such accidents are vitally important to golfers, golf courses and insurers.'" Louis J. DeVoto, *Injury on the Golf Course: Regardless of Your Handicap, Escaping Liability Is Par for the Course* (1993) 24 *U. TOL. L. REV*. 859, fn 8, citing to and quoting from Harry J. O'Kane & William L. Schaller, *Injuries from Errant Golf Balls: Liability Theories and Defenses* (1987) 37 *FED'N OF INS. & CORP. COUNS*. 247.

[8] "According to the National Sporting Goods Association . . . , the ten sports in which the most Americans participated more than once in 2001 were exercise walking, swimming, camping, fishing, exercising with equipment, bowling, bicycle riding, billiards, basketball, and golf." Carolyn B. Ramsey, *Homicide on Holiday: Prosecutorial Discretion, Popular Culture, and the Boundaries of the Criminal Law* (2003) 54 *HASTINGS L.J.* 1641, 1650, n. 48.

> Upon reflection it became obvious that there can be a coming together of [golf and torts]. After all, golfers swing their clubs at speeds approaching 100 miles per hour in order to propel hard balls considerable distances at speeds almost half again as fast. Anyone who has ever watched a professional golf tournament knows that even the best golfers cannot always control the direction of their shots. Any golfer's inability to always control shot direction and distance places people and property in peril of being struck by a ball. Furthermore, all but a few golfers play the game on courses that are owned and operated by others. There they are exposed not only to errant shots of other golfers, but also to any dangerous conditions or equipment located on the course. Finally, the balls, clubs, and other equipment used by golfers are products that may be defectively made or designed, and thus potential product liability issues exist.[9]

The author logically sorts his discussion of torts and golf into three categories of "tort defendants" – (1) the golfer; (2) the golf course owner or operator; and (3) the golf equipment seller,[10] only the first of which concerns us here.

B. Interest of Amicus

CJAC is no stranger to the issue presented. We participated as a friend of the court in the briefing and oral argument for two of the seminal cases defining the

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[9] John J. Kircher , *Golf and Torts: an Interesting Twosome* (2001) 12 MARQ. SPORTS L. REV. 347.

[10] *Id.* at 348.

contours of IAR. The first, *Ford v. Gouin* (1992) 3 Cal.4th 339 (and its companion case, *Knight v. Jewett* (1992) 3 Cal.4th 296), defined the role of primary assumption of risk in the context of co-participants in recreational sports, water-skiing and touch football, respectively; and the second, *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, explained how and why IAR applies to shield a commercial activity (waste disposal) from liability to a recreational sports participant (a horse rider) who was injured when he inadvertently intersected with that activity.

As a result of these opinions we now know that "primary assumption of risk" arises when a plaintiff voluntarily participates in an activity or sport involving certain inherent risks; and primary assumption of risk bars recovery because no duty of care is owed as to such risks. (*Knight v. Jewett, supra*, 3 Cal.4th at pp. 314-316.) In contrast, "[s]econdary assumption of risk [arises] where a defendant breaches a duty of care owed to the plaintiff but the plaintiff nevertheless knowingly encounters the risk created by the breach. Secondary assumption of risk does not bar recovery, but requires the application of comparative fault principles." (*Knight*, at pp. 314-315.)

The difference of opinion here between the appellate court majority and dissent as to which of the two variants of assumption of risk—primary or secondary— applies is not, unfortunately, surprising given the ambiguity left in the wake of the plurality view about IAR from *Knight, supra*, 3 Cal.4th 296 and *Ford v. Gouin, supra*, 3 Cal.4th 339.[11] While the division by the court in *Knight* and *Ford* over

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[11] Some of the understandable confusion engendered by these companion opinions is evident from attempts to explain what the Court actually decided therein, to wit:

> "*Knight v. Jewett* contained four separate opinions. Justice George authored the plurality opinion in which Chief Justice Lucas and Justice Arabian joined. The plurality believed that only the doctrine of 'primary' implied assumption of risk survived as a complete

(continued...)

whether to infuse IAR as a subjective consent-based defense or an objective no-duty defense appears by now to have been firmly resolved in favor of the objective, no-duty approach,[12] difficulty in divining useful guidelines for deciding disputes in which the defense obviously applies in some form, remains.[13] Hence this case presents a unique opportunity for the Court to provide further clarification as to the scope and application of IAR; specifically, whether primary assumption of risk applies when the defendant is a co-participant in a golf game and tees off with the ball hooking to strike and injure a fellow member of his group standing in front of him but not within his clear line of sight to the fairway. Amicus shall argue that when the court employs the duty analysis necessary to determine the applicability of primary assumption of risk, it should properly focus on the risks inherent in the recreational sport of golf and on

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[11](...continued)
defense after the court's adoption of comparative fault, and that 'secondary' implied assumption of risk was merged into the comparative fault scheme.

Justice Mosk wrote a concurring and dissenting opinion. Although Justice Mosk generally agreed with the analysis and the result of the plurality opinion, he believed the court should go farther and eliminate implied assumption of risk entirely.

Justice Panelli also wrote a concurring and dissenting opinion in which Justice Baxter joined. Justice Panelli wrote separately because he agreed only with the result reached by the plurality, but he disagreed with their analysis. He believed, along with Justice Kennard, that assumption of risk must be analyzed under a 'consent-based' theory in which the defense of assumption of risk will negate the defendant's liability when the plaintiff has voluntarily chosen to encounter a known risk.

Finally, Justice Kennard wrote a dissenting opinion in which she disagreed with not only the plurality's definition of assumption of risk, but also with the results reached in the case." John Bianco, *The Dawn of a New Standard? Assumption of Risk Doctrine in a Post-Knight California* (1994) 15 *WHITTIER L. REV*. 1155, 1168.

[12] See, *e.g.*, *Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, and *Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148.

[13] It is significant that of the 163 intermediate appellate opinions discussing and applying "primary assumption of risk" since *Knight v. Jewitt* was decided fifteen years ago (omitting opinions in which review was granted), 78 – or 47% – are not certified for publication in the official reports.

the policy question of whether the defendant should be held liable for negligently causing the plaintiff's injury. When that approach is taken in this case, the ensuing result should be judgment for the defendant.

SUMMARY OF ARGUMENT

Promotion of vigorous participation in recreational sports and avoidance of a flood of litigation over sports accidents are sound public policies furthered by application of primary assumption of risk to all recreational sports. There is no good reason to draw an artificial distinction between "contact" and "non-contact" sports with respect to this doctrine, a distinction contrary to the sensible notion that risk of injury is a "common and inherent aspect" of athletic effort generally. The risk of being injured as a co-participant in a recreational sport arises in myriad forms and for many reasons, especially from the physical nature of the athletic endeavor creating the possibility, or likelihood, of direct physical contact with another player or with a ball thrown or hit by other players.

In general, a golfer preparing to drive a ball should have no duty to warn persons who are not in the intended line of flight on another tee or fairway. Nor should a golfer have a duty to warn persons with whom he or she is golfing and who are not directly visible within one's clear line of sight from the tee box to the fairway that they are about to tee off. A "zone of danger" test, which was employed by the majority opinion herein to impose a duty upon defendant toward plaintiff, should not be used unless it is defined as within the golf ball's intended line of flight; otherwise, it is too vague to be helpful, which is why it has long since been rejected as a criterion

for determining who is entitled to recover for emotional distress suffered upon witnessing negligently inflicted physical harm to another.

LEGAL DISCUSSION

I. A GOLFER SHOULD NOT BE LIABLE UNDER PRIMARY ASSUMPTION OF RISK TO ANOTHER GOLFER WHOM HE INADVERTENTLY HITS WITH THE BALL FROM AN ERRANT "HOOKED" TEE SHOT BECAUSE THE RISK OF SUCH HARM IS INHERENT IN THE GAME.

Knight and *Ford* hold that in determining whether primary assumption of risk applies to bar liability, the court analyzes the nature of the activity and the relationship of plaintiff and defendant to it. With respect to the nature of the activity, the sports setting is unlike other settings where a duty is owed to all. (*Knight v. Jewett*, *supra*, 3 Cal.4th at 315.) Participants generally have no duty to eliminate risks inherent in the sport, but will be held liable for increasing the risk of injury. (*Id.* at 316.) Risks inherent in various sports include injury from a carelessly thrown ball during a baseball game; an extended elbow in a basketball game; injury to a player from a gliding base runner; a hockey player hit by an opposing player's hockey stick; and a player injured during an informal tackle football game. (*Id.* at 316-320.)

"Golf is [also] an active sport to which the [primary] assumption of the risk doctrine applies. (*Dilger v. Moyles*, *supra*, 54 Cal.App.4th 1452, 1454) '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.' [Citation.]" (*American Golf Corp. v. Superior Court* (2000) 79 Cal.App.4th 30, 37-38.)

As between golf co-participants, the doctrine of primary assumption of risk applies. There is an inherent risk that golfers will occasionally be hit from errant shots by other golfers. Thus, golfers are subject to primary assumption of risk and, absent intentional or reckless conduct, that doctrine bars an action by one golfer against another who hits him or her with an errant shot. (*Knight v. Jewett, supra,* 3 Cal.4th 296, 320; *Morgan v. Fuji Country USA, Inc., supra,* 34 Cal.App.4th at p. 134.)

Failure to yell "fore" or otherwise give warning of an errant shot is not and should not be considered reckless or intentional conduct. Although it may be customary to give such warning, the failure to do so is within the "range of the ordinary activity involved in the sport. " (*Dilger v. Moyles, supra,* 54 Cal.App.4th at 1455-1456; *Morgan v. Fuji Country USA, Inc., supra,* 34 Cal.App.4th at 134.)

Accordingly, appellant's conduct in failing to ascertain the location of all the other members of his golfing group before teeing off was neither undertaken with the intention of injuring the plaintiff nor "so reckless as to be totally outside the range of the ordinary activity involved in the sport." (*Cheong v. Antablin* (1997) 16 Cal.4th 1063, 1067-1068.) Appellant was, at worst, negligent; but negligence does not suffice to so increase the inherent risk of injury to other golfers that it vitiates primary assumption of risk. Indeed, if negligence were enough to negate primary assumption of risk with respect to injuries to co-participants in recreational sports, there would be nothing to the doctrine that would distinguish it from secondary assumption of risk or comparative negligence.

II. THE BETTER REASONED AND MORE PERSUASIVE AUTHORITIES SUPPORT APPLICATION OF PRIMARY ASSUMPTION OF RISK TO BAR LIABILITY OF GOLFERS FOR HITTING ERRANT BALLS THAT INADVERTENTLY STRIKE AND INJURE OTHER GOLFERS.

Not surprisingly, and as previously mentioned, a bevy of case authority can be marshalled in support or opposition to primary assumption of risk in the sport of golf, and specifically to support or oppose liability of appellant herein. Counting the number of authorities on each side of the issue, however, adds nothing to its principled resolution. Instead, courts must parse the holdings of pertinent opinions to determine which best "fit" the facts of this case and make the most sense in terms of furthering strong public policies the law favors. On this score, appellant should not be found liable.

Neither *Yancey*, *supra*, 28 Cal.App.4th 558 nor *Allen*, *supra*, 292 So.2d 786, both cited and relied upon by respondent and the appellate majority, are persuasive precedents for making appellant liable. In fact, they both argue for application of primary assumption of risk to relieve appellant of liability. *Yancey* concerns a plaintiff who suffered injuries after being hit by a discus thrown by another during a college physical education class. The plaintiff had gone onto the track field to retrieve her discus and the defendant, who was throwing next, failed to observe the field before his throw. (*Yancey, supra,* 28 Cal.App.4th at 561.) Reversing summary judgment in favor of defendant, the appellate court held that the doctrine of primary assumption of risk was inapplicable because the defendant "owed a duty of care to [plaintiff] to ascertain that the target area was clear before he commenced his throw." (*Id.* at 566.) In reaching this conclusion, *Yancey* found that application of primary assumption of

risk to a sport requires affirmative answers to two questions: "First, is the careless conduct of participants an inherent risk of the sport? Second, will imposition of a legal duty, with potential liability, alter the nature of the sport or chill participation in it?" (*Id.* at 565.)

Yancey answered "no" to both queries, but in so doing shows why the answers to these same two questions when applied to the facts here should be "yes." To begin with, the majority opinion found that "[n]othing about the inherent nature of the sport [of discus throwing] 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 566, fn. omitted.) In analogizing discus throwing to golf, the majority explained: "Discus bears some similarity to golf. Neither sport has, as one of its objectives, the endangering of co-participants. Anyone playing golf is subjected to a risk of being hit by a ball struck by another golfer on the course. Still, it is common knowledge that golfers check their intended target area and make sure it is clear before hitting a shot. . .." (*Ibid.*) Here, of course, it is undisputed that appellant did check his intended target area to make sure no one on the fairway where he intended to hit his ball was in danger of being struck by it. What appellant did not do was ascertain that those in his group were all out of harm's way of any "hook" or "slice" he might hit, but nothing in the law requires or should require that he do so.

Next, *Yancey* states that imposition of a legal duty, with potential liability, would not alter the nature of the sport of discus throwing or chill participation in it. Not so with golf and the duty respondent seeks to impose upon appellant. It is one thing to require that a golfer look down the fairway to make sure no one in the field of his

intended target is likely to be hit by his drive from the tee, which appellant indisputably did here. It is quite another matter, however, to require appellant to account for the whereabouts of every member of his group who could be hit by a "hook" or "slice" from the tee-off. If liability is the consequence for not doing so, then judicial micro-management of the game through imposition of various duties will significantly alter or chill participation in it. It is certainly likely that, even with the best golfers, an errant ball will sometimes travel outside its intended target range and strike another person.

That the imposition of a duty to first account for the whereabouts of all members of one's party before teeing-off would likely "alter" the game of golf, can be inferred from the other principal authority the majority opinion relies upon, the out-of-state opinion of *Allen, supra,* 292 So.2d 786. *Allen* reversed the dismissal of an action brought by a golfer against a member of his foursome which alleged that the defendant was negligent when he hit a shot on the fairway knowing the plaintiff was in the ball's intended line of flight and was unaware that the defendant was about to strike the ball. The court found the principle that a golfer assumes the risk of being hit by an errant ball inapplicable and stated "plaintiff had the right to assume a member of his own party would not drive while [he] was standing in full view near the intended line of flight with [his] back turned toward the impending play. This was a risk plaintiff did not assume." (*Id.* at 790.)

Here again, of course, the facts in the two situations are significantly different: appellant did not, in contrast to the defendant in *Allen*, see the plaintiff before he teed off because the plaintiff was "not standing in full view" within "the intended line of flight." Now, if one is to mince words, it is arguable that plaintiff was "near" the

intended line of flight if by "near" one means, or a court could be persuaded to accept, that 30 feet at a 45° angle to the left of the target line for the ball qualifies. What's more, the *Allen* opinion and respondent herein appear to be arguing for a special duty to be imposed upon golfers toward members of their "foursome" in contrast to other golfers who may be hit by errant balls. One can readily imagine golfers being "chilled" from participation when faced with unique duties, and liabilities, owed to different persons participating or otherwise somehow involved in the game of golf.

Dilger, *supra*, 54 Cal.App.4th 1452 and *Morgan*, *supra*, 34 Cal.App.4th 127 underscore the importance of applying primary assumption of risk to this case. *Dilger* holds that failure by a golfer to comply with "golf etiquette" and warn another golfer that his shot may endanger the other does not constitute a breach of any duty of care. (*Id.* at 1455.) Instead, *Dilger* holds that primary assumption of risk bars one golfer's suit against another golfer when the former is hit by a ball shot from the next fairway, even if the defendant was negligent in failing to warn the plaintiff by yelling "fore," a duty respondent claims was breached herein by appellant. (*Ibid.*) But this court should "not be ignorant as judges of what we know as men [and women]":[14] yelling "fore" after teeing-off offers no protection to someone who, like respondent, was standing 30 feet and at a 45° angle to the left of appellant, outside and below the intended target area of his drive from the tee-box.

Oakes v. Chapman (1958) 158 Cal.App.2d 78 is consistent with *Dilger* even though primary assumption of risk did not come into play, only contributory

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[14] *Rumsfield v. Padilla* (2004) 542 U.S. 426, 465, fn. 10.

negligence which, at the time, operated as a complete defense. In *Oakes* the plaintiff and defendant were members of the same foursome. On the sixteenth hole, the plaintiff was standing about forty-five feet from defendant. The defendant hit the ball, which took off on a ninety-degree angle from its intended line of flight, striking the plaintiff in the eye. The trial court instructed the jury that, as a matter of law, the defendant was not liable if the plaintiff knew the defendant was about to hit the ball. The plaintiff claimed this was error, but the appellate court disagreed. "In golf, the person about to hit the ball is not required to give a warning to persons who know his intention, nor is he required to warn persons in a position that is not, reasonably, in a state of danger." (158 Cal.App.2d at 85.) Because plaintiff knew or should have known the defendant was about to hit the ball, any warning by the defendant that this was what he was about to do would have been superfluous. "The shot was purely a 'freak shot' . . . Neither party knew, or had reason to believe, that the ball would go 90 degrees off course." (*Oakes*, *supra*, 158 Cal.App.2d at 86.)

Similarly, *Morgan* holds that while a golf course owes a duty of care to a golfer to provide a reasonably safe course, giving rise to secondary assumption of the risk, primary assumption of risk bars recovery between golfers. (34 Cal.App.4th 127.) "As between golfers, the duty is to play within the bounds of the game; to not intentionally injure another player or to engage in conduct 'that is so reckless as to be totally outside the range of the ordinary activity involved in' golf. [Citation.]" (*Id.* at 134.) It is plain that appellant's conduct was not undertaken with the intent to harm respondent or so reckless as to fundamentally increase the risks inherent to the sport.

Other jurisdictions that have dealt with analogous golf injury lawsuits have wisely denied liability and done so in reliance on primary assumption of risk and this

Court's limning of the doctrine in *Knight* and *Ford*. *Yoneda v. Tom* (2006) 110 Hawai'i 367, 133 P.3d 796, for instance, affirmed summary judgment for the defendant golfer sued by a fellow golfer who was struck in the eye by the other's errant golf ball. In doing so a unanimous state supreme court explained why requiring a recklessness standard to overcome the bar of primary assumption of risk makes good sense in co-participant golf injury suits:

> Our conclusion that a recklessness standard is the appropriate one to apply in the sports context is founded on more than a concern for a court's ability to discern adequately what constitutes reasonable conduct under the highly varied circumstances of informal sports activity. The heightened standard will more likely result in affixing liability for conduct that is clearly unreasonable and unacceptable from the perspective of those engaged in the sport yet leaving free the supervision of the law the risk-laden conduct that is inherent in sports and more often than not assumed to be "part of the game." [¶] One might well conclude that something is terribly wrong with a society in which the most commonly-accepted aspects of play – a traditional source of a community's conviviality and cohesion – spurs litigation. The heightened recklessness standard recognizes a commonsense distinction between excessively harmful conduct and the more routine rough-and-tumble of sports that should occur freely on the playing fields and should not be second-guessed in courtrooms. (*Id.* at 379; 133 P.3d at 808.)

III. THE "ZONE OF DANGER" TEST URGED BY RESPONDENT IS, UNLESS DEFINED AS "WITHIN THE INTENDED LINE OF FLIGHT," TOO VAGUE TO BE USEFUL FOR DETERMINING LIABILITY FOR INJURIES TO GOLFERS FROM ERRANT BALLS.

Respondent would have this Court employ, in lieu of primary assumption of risk, an ill-defined "zone of danger" test using traditional foreseeability analysis to determine appellant's liability. (Answering Brief on the Merits, pp. 32-34.) "But what about the situation where a member of . . . a group of players intentionally hits a golf ball in a zone of danger, knowing that a fellow player could get hit by it, fails to heed the danger, and hits the ball anyway?" (*Id.* at 33.)

Nowhere does respondent suggest how a court is to determine this so-called "zone of danger," understandably preferring a fact specific determination so as to defeat summary adjudication on the ground that there exists a genuine dispute of material fact as to the proper parameters of the "zone of danger." As one commentator has observed of this malleable term: "The most notable problem . . . is defining the zone of danger. Courts have not agreed on [its] exact parameters . . . , resulting in widespread variance in the standard of care required by individual golfers." (Pietig, *supra*, 42 DRAKE L. REV. at 909.)

Significantly, narrow definitions of the "zone of danger" have been adopted by courts that, if used herein, would absolve appellant of liability. "There is generally no duty to warn persons not in the *intended line of flight* on another tee or fairway of an intention to strike the ball." (*Richardson v. Muscato* (App. Div. 1991) 576 N.Y.S.2d 721, 722, emphasis added, quoting *Noe v. Park Country Club* (App. Div. 1985) 495 N.Y.S.2d 846.) "Even if [the defendant] had given the warning before he made the shot, there

was no indication from plaintiff that she could have heard or would have heeded the warning, since she was not in or near the *line of the defendant's intended shot*." (*Knittle v. Miller* (Colo. Ct. App. 1985) 709 P.2d 32, 35, emphasis added.)

California courts have not found the "zone of danger" principle particularly helpful in other contexts. For several years, for instance, the "zone of danger" test was a criterion used to determine liability to bystanders who suffered emotional distress upon observing negligently caused harm to someone with whom they were "closely related." (*Dillon v. Legg* (1968) 68 Cal.2d 728, 740-741.) The unworkability of the criterion resulted in its eventual abandonment, however. (*Thing v. LaChusa* (1989) 48 Cal.3d 644.) Now is not the time to try and revive it for determining the duty co-participants in recreational sports like golf owe each other.

CONCLUSION

The undisputed evidence is that respondent was not in the line of appellant's drive from the tee to the fairway on the thirteenth hole, and that appellant did not intend to harm respondent or act recklessly beyond the ordinary activities of golf. Accordingly, the doctrine of primary assumption of risk applies. The Court should reverse the order granting a new trial and reinstate judgment in favor of appellant.

Dated: March 22, 2007

Respectfully submitted,

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Fred J. Hiestand
Counsel for Amicus Curiae
The Civil Justice Association of California

CERTIFICATE OF WORD COUNT

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Date: March 22, 2007

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Fred J. Hiestand
General Counsel for Amicus Curiae

PROOF OF SERVICE

I, David Cooper, am employed in the city of Sacramento, Sacramento County, State of California. I am over the age of 18 years and not a party to the within action. My business address is The Senator Office Building, 1121 L Street, Suite 404, Sacramento, CA 95814.

On March 22, 2007, I served the foregoing document(s) described as: Amicus Curiae Brief of the Civil Justice Association of California in Support of Defendant/Appellant in *Shin v. Ahn*, Case No. S146114 on all interested parties in this action by placing a true copy thereof in a sealed envelope(s) addressed as follows:

Kathryn Albarian
Michael Maguire & Associates
701 N. Brand Blvd. Suite 600
Glendale, CA 91203
Attorney for Defendant/Appellant

Michael Silvers
Attorney at Law
11500 W. Olympic Blvd., #322
Los Angeles, CA 90064
Attorney for Plaintiff/Respondent

Richard L. Knickerbocker
Gregory Yacoubian
Knickerbocker Law Corp.
233 Wilshire Blvd., Suite 400
Santa Monica, CA 90401
Attorneys for Plaintiff/Respondent

The Honorable Paul G. Flynn
Judge, Los Angeles County Superior Court
111 N. Hill Street
Los Angeles, CA 90012

Clerk, California Court of Appeal
Second Appellate District, Div. 4
300 S. Spring Street
Floor 2, N. Tower
Los Angeles, CA 90013

[X](BY MAIL) I am readily familiar with the practice of the Senator Office Building for the collection and processing of correspondence for mailing with the United States Postal Service and such envelope(s) was placed for collection and mailing on the above date according to the ordinary practice of the law firm of Fred J. Hiestand, A.P.C.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed this 22nd day of March 2007 at Sacramento, California.

/s/

David Cooper