Association of Defense Counsel of Northern California and Nevada

Association of Southern California Defense Counsel

October 18, 2019

Acting Presiding Justice Art W. McKinster
Associate Justice Douglas P. Miller
Associate Justice Michael J. Raphael
California Court of Appeal
Fourth Appellate District, Division Two
3389 12th Street
Riverside, California 92501

**Re:** ***Stjerne v. Petersen***
Court of Appeal No. E068060
Date of Opinion: 9/30/19
Request for Publication (Cal. Rules of Court, rule 8.1120)

Dear Honorable Justices:

Pursuant to California Rules of Court, rule 8.1120 (a), the Association of Southern California Defense Counsel and the Association of Defense Counsel of Northern California and Nevada (hereinafter "Associations") request that this Court publish its September 30, 2019 opinion.

## INTEREST OF THE ASSOCIATIONS

The Associations are among the nation's largest and preeminent regional organizations of lawyers who routinely defend civil actions. They are comprised of more than 1,800 attorneys in Southern and Northern California, who are certainly interested in the development of California law. The Nevada members are similarly interested because Nevada courts often follow the law and rules adopted in California.

The Associations afford its members with professional fellowship, specialized continuing legal education and a forum for the exchange of information and ideas. They also act as a liaison between the defense bar and the courts and the Legislature. The Associations are therefore active in assisting courts on issues of interest to its members, having appeared numerous times as amicus curiae in the California Supreme Court and the Court of Appeal, including cases like this one that involve the doctrine of primary assumption of risk and the public policy concerns that underlie whether it is appropriate

to impose a tort duty or not. (See, e.g., *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148; *Kesner v. Superior Court* (2016) 1 Cal.5th 1132; *Vasilenko v. Grace Family Church* (2017) 3 Cal.5th 1077.)

This Court's opinion is supported by and discusses the *Nalwa* case, in which the Associations appeared as amicus to support application of the doctrine of primary assumption of risk because of the following public policy concerns that support publication here due to the significant and recurring issues involved:

> "The primary assumption of the risk doctrine rests on a straightforward policy foundation: the need to avoid chilling vigorous participation in or sponsorship of recreational activities by imposing a tort duty to eliminate or reduce the risks of harm inherent in those activities. It operates on the premise that imposing such a legal duty 'would work a basic alteration—or cause abandonment' of the activity." (Typed Opinion at p. 6, citing *Nalwa,* 55 Cal.4th at 1156.)

The Associations' members regularly defend civil cases involving tort claims that involve the doctrine of primary assumption of risk, which this Court's opinion helpfully clarifies while also addressing attempts by Plaintiffs to create exceptions that would fundamentally alter the nature of the sport involved (Typed Opinion at 11-12), and is contrary to the "*post-Knight* duty analysis." (Typed Opinion at 14.) Unless this Court's opinion is published, similar attempts will undoubtedly be made in subsequent cases to argue for exceptions that would inject uncertainty and contravene the public policy concerns underlying the doctrine of primary assumption of risk. This directly affects many clients of the Associations' members, including those involved in sporting and recreational events held at schools, universities, clubs, parks and other facilities that can ran the gamut from youth leagues to club, scholastic and/or professional sports.

**REASONS WHY THE OPINION SHOULD BE PUBLISHED**

California Rules of Court, rule 8.1105(c) provides that an "opinion of a Court of Appeal . . . *should* be certified for publication in the Official Reports" if the opinion falls within any *one* of nine categories. (Emphasis added.) Here, the Opinion satisfies several of the enumerated criteria. As discussed below, publication is warranted because the Opinion "[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions;" "[m]odifies, explains, or criticizes with reasons given, an existing rule of law;" "[i]nvolves a legal issue of continuing public interest;"

and "[m]akes a significant contribution to legal literature" by reviewing and discussing the law on important and recurring issues. (Rule 8.1105(c) (2), (3), (6) and (7).)

First, this case certainly involves a "legal issue of continuing public interest." Attendance at sporting events such as the polo match involved here, where a ball was hit out of bounds towards spectators, also unquestionably involves recurring issues. Every sport that uses a ball and is attended by spectators—which includes golf, baseball, football, soccer and many others—involves the inherent risk that balls could be mishit or sent out of bounds intentionally. For instance, at golf events like The Masters, spectators commonly line the tee box, fairway and green. If Tiger Woods or another golfer slices or hooks the ball, there is always the inherent risk of a spectator being hit by an errant shot. The same is true at a youth soccer game, when players often intentionally kick the ball out of bounds or towards the sideline—where friends and family stand to watch—while attempting to protect a lead and hoping the running clock expires while the ball is outside the field of play and is being retrieved. Because playing and attending sporting events are the "great American pastime" (*Nemarnik v. Los Angeles Kings Hockey Club, L.P.* (2002) 103 Cal.App.4th 631, 641), cases like this one involve issues that are of widespread importance to the general public, bench and bar. Thus, this warrants publication of this Court's opinion, so that litigants and trial courts have proper guidance on how to properly apply the doctrine of primary assumption of risk.

Second, publication of the opinion is also warranted because of Plaintiffs' multiple attempts to create exceptions to the doctrine of primary assumption of risk based on the "status as a bystander," the public's purported lack of "knowledge" about a sport and/or the "youth" of an injured person. (Typed Opinion at 9-14.) This Court addressed each of these arguments by explaining, with valuable legal analysis, that these were unavailing because the proper focus is on the nature of the activity. As the Court recognized, imposing liability here would "fundamentally alter" the sport of polo, contrary to the "post-*Knight* duty analysis." (Typed Opinion at 14.) The legal discussion of these points provides necessary guidance, as it applies to many other spectator sports that involve similar inherent risks. No other appellate decision includes an analysis of these three issues in one opinion.

Third, this Court also provided much needed guidance concerning why arguments like those advanced here by Plaintiffs would improperly chill sporting events and recreational activities that should be encouraged. (Typed Opinion at 10-11.) In doing so, this Court discussed the development of the law and the policy reasons underlying the doctrine of primary assumption in a manner that "makes a significant contribution" and

provides much needed clarity on the recurring issues involved. Respectfully, this Court's analysis should not be lost in an unpublished opinion.

**Conclusion**: For the reasons explained above, this Court's Opinion meets the criteria for publication under rule 8.1105(c) of the California Rules of Court, and therefore should be published. Thus, the Associations urge this Court to order publication of the Opinion.

Respectfully submitted,

**ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL**

By: _____
David K. Schultz

Polsinelli LLP
2049 Century Park East, Suite 2900
Los Angeles, California 90067
(310) 203-5325
dschultz@polsinelli.com

Respectfully submitted,

**ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA**

By: _____
Don Willenburg

Gordon Rees Scully Mansukhani
1111 Broadway, Suite 1700
Oakland, CA 94607
dwillenburg@grsm.com

cc: *See Attached Proof of Service*

## PROOF OF SERVICE BY MAIL

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I am employed in the aforesaid county, State of California; I am over the age of 18 years and not a party to the within action; my business address is **2049 Century Park E, Suite 2900, Los Angeles, CA 90067**.

On October 18, 2019, I served the **"REQUEST FOR PUBLICATION"** on the interested parties in this action by placing the **true copy**/original thereof, enclosed in a sealed envelope, postage prepaid, addressed as follows:

***SEE ATTACHED SERVICE LIST.***

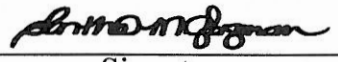
I am readily familiar with the business practice of my place of employment in respect to the collection and processing of correspondence, pleadings and notices for mailing with United States Postal Service.

The foregoing sealed envelope was placed for collection and mailing this date consistent with the ordinary business practice of my place of employment, so that it will be picked up this date with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of such business.

☑ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

☐ **(FEDERAL)** I declare under penalty of perjury that the foregoing is true and correct, and that I am employed at the office of a member of the bar of this Court at whose direction the service was made.

Executed on October 18, 2019, at Los Angeles, California.



Signature

***Eartha M. Guzman***
Print Name

## SERVICE LIST

Brooke Stjerne et al. v. Eldorado Polo Club et al.
Case Number E069091

| PARTY | ATTORNEY |
|---|---|
| ***Plaintiff and Appellant*** **BROOKE STJERNE; DANICA STJERNE; KYLE STJERNE** | Graham Bruce LippSmith, Esq,<br>Jaclyn Louise Anderson, Esq.<br>KASDAN LIPPSMITH WEBER TURNER LLP<br>360 East 2nd Street, Suite 300<br>Los Angeles, CA 90012 |
| ***Defendant and Respondent*** **ELDORADO POLO CLUB; and DESERT POLO LAND COMPANY, LLC** | Robert Harwood Quayle, IV, Esq.<br>Kristina Marie Pfeifer, Esq.<br>DALEY & HEFT<br>462 Stevens Avenue, Suite 201<br>Solana Beach, CA 92075-2065 |
| ***Defendant and Respondent*** **CHARLES D. PETERSEN** | Elaine Katherine Fresch, Esq.<br>Rachel Elizabeth Hobbs, Esq.<br>Melanie Marie Smith, Esq.<br>SELMAN BREITMAN, LLP<br>11766 Wilshire Blvd., Sixth Floor<br>Los Angeles, CA 90025 |
| ***Defendant and Respondent*** **UNITED STATES POLO ASSOCIATION, INC.** | Allison W. Meredith, Esq.<br>Robert H. Wright, Esq.<br>HORVITZ & LEVY LLP<br>3601 West Olive Avenue, 8th Floor<br>Burbank, CA 91505 |
| ***Defendant and Respondent*** **UNITED STATES POLO ASSOCIATION, INC.** | Mark Daniel Shield, Esq.<br>KULUVA ARMIJO & GARCIA<br>9655 Granite Ridge Drive, Suite 450<br>San Diego, CA 92123 |
| ***Defendant and Respondent*** **COTTEREL FARMS, LLC** | John Gloger, Esq.<br>Michael E. Leight, Esq.<br>LAW OFFICES OF MICHAEL LEIGHT<br>6700 Pacific Coast Highway, Suite 237<br>Long Beach, CA 90803 |

TrueFiling

# Receipt

**AUTHORIZATION DATE**
10-18-2019

**RECEIPT #**
291308255107

**AUTHORIZATION CODE**
036393

**MATTER NUMBER**
931000-546768

| COURT | CASE NUMBER | CASE TITLE |
|---|---|---|
| CA 4th District Court of Appeal Division 2 | E068060 | Brooke Stjerne et al. v. Charles Petersen et al. |

| PAYMENT ACCOUNT ID | PAYMENT ACCOUNT NUMBER | PAYMENT EXPIRATION DATE |
|---|---|---|
| fe16fe42-21e5-49a0-517a-08d70ac59a83 | XXXX-XXXX-XXXX-9870 | 04-01-2022 |

| DOCUMENT TITLE | FILING TYPE | FILING FEE |
|---|---|---|
| ADCNCN & ASCDC Joint Letter Brief Requesting Publication | LETTER BRIEF - LETTER BRIEF | $0.00 |
| | EFILING SYSTEM FEE | $7.50 |
| | **TOTAL** | **$7.50** |