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September 26, 2018

Honorable Tani Cantil-Sakauye
Chief Justice and Associate Justices
Supreme Court of California
350 McAllister St.
San Francisco, CA 94104

*Willhide-Michiulis v. Mammoth Mountain Ski Area, LLC, S*250776
Amicus Curiae Letter in Support of Petition for Review

Honorable Justices:

On behalf of the Consumer Attorneys of California and the American Association for Justice, counsel submits this letter[1] in support of the petition for review of Kathleen Willlhide-Michiulis.[2] The Court of Appeal has misinterpreted the concept of gross negligence which negates recreational-facility release provisions. An employee's reckless disregard of the employer's written safety rules is gross negligence. A recreational facility employee's conscious disregard of the employer's safety rules is not a risk inherent in any sport.

The Court of Appeal imposes on members of the public the risk of all injuries caused by employee safety-rule violations at recreational facilities so long as the patron acquiesces to the employer's contract-of-adhesion release. No other case goes so far for good reason. The basic questions of "gross negligence" and "risks inherent in a sport" are ones for a jury. The Courts of Appeal are not

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[1] No party has participated in the preparation of this letter and no party has provided any funding for it.

[2] Cal. Rules of Court, rule 8.500, subd. (g).

uniform in their approach.[3] These are important questions of law the Court should settle. (Rule 8.500.)

Interest of CAOC and AAJ as Amici Curiae

Founded in 1962, CAOC is a voluntary non-profit membership organization representing over 6,000 consumer attorneys practicing in California. Its members predominantly represent individuals subjected to consumer fraud, unlawful employment practices, personal injuries and insurance bad faith. CAOC has taken a leading role in advancing and protecting the rights of consumers, employees and injured victims in both the courts and the Legislature.

The American Association for Justice is a voluntary national bar association whose trial lawyer members primarily represent plaintiffs in personal injury lawsuits, civil rights and employment rights actions, and small business litigation. AAJ's mission is to preserve the constitutional right of access to the courts for redress of wrongful injury as well as the Seventh Amendment right to trial by jury in civil cases.

Conscious indifference to written safety rules is not a risk inherent in any sport and constitutes gross negligence.

Gross negligence has long been a tort concept in California. Over eighty years ago the Court said: "Gross negligence has been repeatedly defined in the California cases as 'the want of slight diligence,' 'an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others,' and 'that want of care which would raise a presumption of the conscious indifference to consequences.' (Citations.)" (*Cooper v. Kellogg* (1935) 2 Cal.2d 504, 510–511 (*Cooper*).) The Court relied on cases earlier still.

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[3] Compare the opinion under review with *Jiminez v. 24 Hour Fitness* (2015) 237 Cal.App.4th 546 (*Jiminez*) and *Rosencrans v. Dover Images, Ltd.* (2011) 192 Cal.App.4th 1072.

Gross negligence has a place in the criminal law. "Indifference to consequences" put differently is "conscious indifference." And so the Court has held. Gross negligence is "[t]he state of mind of a person who acts with conscious indifferences to the consequences is simply, "I don't care what happens." (*People v. Bennett* (1991) 54 Cal.3d 1032, 1036 (*Bennett*).)"[T]he test of gross negligence is an objective one, i.e., whether a reasonable person in the defendant's position would have been aware of the risks." (*Ibid.*)

Measured by the *Bennett* standard, the question of whether Clifford Mann's driving a snowcat with the tiller running in direct violation of Mammoth Mountain Ski Area written safety rules amounted to gross negligence is for the jury. Mann knew operating the snowcat with the tiller running was dangerous to skiers. He knew there had been previous tiller-caused injuries. And he knew of the two written MMSA safe rules prohibiting such operation.[4] What's worse, Mann's operating the tiller with skiers present was something he would do again.[5] In other words, a jury could find his state of mind was "I don't care what happens." (*Bennett, supra,* 54 Cal.3d at p. 1036.)[6]

In assessing whether Willhide's injury was a risk inherent to snowboarding, the Court of Appeal's focus was too broad. Whether or not the presence of a snowcat on an active run is a risk inherent in the sport, snowcat operations on an active ski run *with the tiller running* are not risks inherent to skiing and snowboarding. Willhide's injuries were not the result of her colliding with the snowcat. Rather, they resulted from her being caught up in the rotating tiller.

Consider a prospective MMSA skier. What safety risks am I running one might inquire. If that prospective skiier looked at MMSA's own rules, he or she would learn that rotating tillers were not among those risks. But the Court of

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[4] 9 AA 1310, 1311, see also the factual record more fully developed in the Petition for Review at pages 11-18.

[5] 9 AA 1462-1463.

[6] Amici submit the Court could properly find Mann's conduct to constitute gross negligence as a matter of law.

Appeal would have skiers assume that risk even though it was created by a violation of MMSA's own safety rules.

Other appellate courts likely would disagree. In *Chavez v. 24-Hour Fitness USA, Inc.* (2015) 238 Cal.App.4th 632, 640-641, the defendant's failure to perform equipment maintenance in accordance with the written schedule created an issue of fact whether the defendant was grossly negligent. In *Jimenez, supra*. 237 Cal.App.4th at p. 556, the court found a permissible inference of gross negligence in defendant's failure to follow the safety precautions in the treadmill owner's manual. And in *Rosencrans, supra*, 192 Cal.App.4th at p. 1086, an inference of gross negligence found support in the defendant's failure to adhere to a motocross operations safety manual.

The *Bennett* court was addressing the gross negligence required for the crime of "gross vehicular manslaughter while intoxicated." (*Bennett, supra,* 54 Cal.3d at p. 1034, Pen. Code., § 191.5;) This Court should grant review and make clear that such a standard applies in the civil tort law. The Court should resolve the conflict in the Courts of Appeal.

A civil defendant can have no less a standard of care than a criminal one. A defendant's conscious failure to follow its own written safety rules is not a risk inherent in any sport and supports an inference of gross negligence.

Respectfully,

/s
Alan Charles Dell'Ario

PROOF OF SERVICE BY MAIL

I declare that:

I am employed in the County of Napa, California. I am over the age of eighteen years and not a party to the within cause; my business address is 1561 Third Street, Suite B, Napa, California 94559. On September 26, 2018, I served the within Letter ISO Petition for Review on the below named parties in said cause, by placing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States mail at Napa, California addressed as follows:

Hon. Stanley L Eller
Mono County Superior Court
PO Box 1037
Mammoth Lakes, CA 93546

The following parties were served through the Truefiling system:

Sharon J. Arkin, Daniel E. Hoffman, Jae Y. Lee - Attorneys for appellant

John E. Fagan, Paul J. Killion, Kristin Bohm - Attorneys for respondent.

California Court of Appeal, Third Appellate District

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on September 26, 2018 at Napa, California.

/s

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Alan Charles Dell'Ario