SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

DAVID KATLESKI,

Plaintiff-Respondent

- against-

CAZENOVIA GOLF CLUB, INC.,

Defendant-Appellant,

- and-

JUSTIN HUBBARD AND RICHARD HUBBARD,

Appellate Div. Case No. CV-23-0642

Madison County Index No. EF2020-1607

Notice of Motion for Leave to File an *Amicus Curiae* Brief in Support Defendant-Appellant

PLEASE TAKE NOTICE that upon the affirmation of Nicole Marlow-Jones, an attorney duly admitted to practice law before the Courts of the State of New York dated November 16, 2023, and the accompanying proposed *amicus curiae* brief in support of Defendant-Appellant Cazenovia Golf Club, Inc., the undersigned will move this Court at the Appellate Division Courthouse, located at Robert Abrams Building for Law and Justice, State Street, Room 511, Albany, New York 12223 on submission on Monday, November 27, 2023, or soon thereafter as counsel may be heard, for an order granting leave to the National Golf Course Owners Association to file a brief in support of Defendant-Appellant. A copy of the attorney affirmation in support of this motion is attached hereto as Exhibit "A." A copy of the proposed amicus curiae brief is attached hereto as Exhibit "B."

PLEASE TAKE FURTHER NOTICE that any responding papers must be served in accordance with CPLR 2214(b), the Practice Rules of the Appellate Division (Part 1250) and the Appellate Division, Third Judicial Department Rules of Practice (Part 850).

Dated: November 17, 2023
East Syracuse, New York

Respectfully submitted,

Nicole Marlow-Jones
Ferrara Fiorenza PC
Attorneys for Respondent-Appellant National Golf Course Owners Association
5010 Campuswood Drive
East Syracuse, New York 13057
Phone: (315) 437-7600
nmarlow-jones@ferrarafirm.com

EXHIBIT “A”

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

DAVID KATLESKI,

Plaintiff-Respondent

- against-

CAZENOVIA GOLF CLUB, INC.,

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ATTORNEY AFFIRMATION IN SUPPORT OF MOTION TO FILE AMICUS CURIAE BRIEF

STATE OF NEW YORK)
) ss.:
COUNTY OF ONONDAGA)

NICOLE MARLOW-JONES, an attorney duly licensed to practice law in the state of New York, affirms under penalty of perjury pursuant to CPLR 2106:

1. I am an attorney duly licensed and authorized to practice law in the State of New York and of counsel to Ferrara Fiorenza, PC.

2. I submit this Affirmation pursuant to Rule 850.4(d) of the Rules of the Appellate Division, Third Judicial Department and 1250.4 (f) of the Practice Rules of the Appellate Division for leave to file an amicus curiae brief in the above-referenced appeal that concerns the potential liability of a golf course for failure to prevent an experienced golfer from sustaining personal injuries caused by an errant ball hit by another golfer.

3. We understand that the appeal has been perfected and will be heard during the Court's January term. As we were only recently retained by the National Golf Course Owners

Association (the "Association"), we respectfully respect that the Honorable Court permit this application.

4. The Association is a non-profit, membership organization representing over 4,000 golf courses ranging from daily-fee, semi-private, private and resort courses, which are grouped into 19 regional, state, and local affiliates located across the United States, Canada and Europe. The Association is the only trade association in the country dedicated exclusively to golf course owners and operators. Among other functions, the Association provides its members with business resources and data regarding operations, hosts events with partners and suppliers, and publishes trade periodicals for its membership.

5. As the representative of golf course owners and operators, the Association publicly advocates at the federal, state, and local levels to preserve the unique role that the golfing industry plays in our nation.

6. On rare occasions, the Association has been called upon to file amicus curiae briefs in litigation involving golf course owners and operators. The Association has determined that this appeal presents an important issue concerning the potential liability of a golf course owner such as Cazenovia Golf Club, Inc. ("CGC") arising out of its golf course design that has far-reaching implications for its members in New York and calls for the filing of an amicus curiae brief. The Association respectfully submits that its unique perspective as the representative of golf course owners and operators in this nation will assist the Court in its deliberations on this appeal.

7. Through its consideration of the Association's proposed amicus brief, which is attached as Exhibit "B" to this application, the Association appreciates the Court's recognition of the importance of the issues raised in this appeal addressing the motion court's decision that seeks to escape application of the well-established legal precedent of assumption of the risk in New

York, but also threatens significant practical and economic consequences to the numerous golf course owners and operators in this state.

8. The Association's proposed amicus brief explains the substantial burden that would ensue by the affirmance of the motion court's decision and why reversal of the order appealed from is in the best interests of not just CGC, but the many golf course owners and operators in New York State.

9. For these reasons, your affirmant respectfully requests that the Honorable Court grant its motion for leave to file an amicus curiae brief in the above-referenced appeal and for such other and further relief as to the Court may deem appropriate.

Dated: November 17, 2023
East Syracuse, New York

Nicole Marlow-Jones

EXHIBIT “B”

Submitted by:
NICOLE MARLOW-JONES

New York Supreme Court

Appellate Division—Third Department

DAVID KATLESKI,

Plaintiff-Respondent,

Case No.: CV-23-0642

– against –

CAZENOVIA GOLF CLUB, INC.,

Defendant-Appellant,

– and –

JUSTIN HUBBARD and RICHARD HUBBARD,

Defendants.

BRIEF FOR *AMICUS CURIAE*
NATIONAL GOLF COURSE OWNERS ASSOCIATION
IN SUPPORT OF DEFENDANT-APPELLANT

FERRARA FIORENZA P.C.
Nicole Marlow-Jones, Esq.
Attorneys for Amicus Curiae
National Golf Course Owners
Association
5010 Campuswood Drive
East Syracuse, New York 13057
(315) 437-7600
nmarlow-jones@ferrarafirm.com

Madison County Clerk's Index No. EF2020-1607

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The National Golf Course Owners Association, Inc. (the "Association") is a non-profit, membership organization representing over 4,000 golf courses ranging from daily-fee, semi-private, private and resort courses, which are grouped into 19 regional, state, and local affiliates located across the United States, Canada and Europe. The Association is the only trade association in the country dedicated exclusively to golf course owners and operators. Among other functions, the Association provides its members with business resources and data regarding operations, hosts events with partners and suppliers, and publishes trade periodicals for its membership.

The game of golf is a substantial contributor to the economic life of our nation. According to the National Golf Foundation, the golf industry contributed nearly $102 billion to the national economy in 2022 alone, with billions directly attributable to the operation of the nation's 16,035 golf courses. The golf industry's indirect and induced effects are even bigger than its direct contributions, meaning that golf's

[1] Amicus represents that the Association is a non-profit, tax-exempt organization incorporated in the State of Minnesota, that it has no parent corporation, and no publicly held company has 10% or greater ownership thereof. No party or a party's counsel authored this amicus brief in whole or in part. No party or a party's counsel or any other person or entity, other than the Association, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this amicus brief. Neither the Association nor its counsel represents or has represented one of the parties to the present appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

complete economic imprint in the United States is much greater, totaling $226.5 billion and enabling over 1.65 million jobs (including more than 1 million employees directly tied to the industry). *See* National Golf Foundation, *Golf Participation in the U.S.* (2023 ed.). Thus, the Association represents a vital component of a major American industry.

As the representative of golf course owners and operators, the Association publicly advocates at the federal, state, and local levels to preserve the unique role that the golf industry plays in our nation. On rare occasions, the Association has been called upon to file amicus curiae briefs in litigation involving golf course owners and operators. The Association has determined that this appeal presents an important issue concerning the potential liability of a golf course owner such as Cazenovia Golf Club, Inc. ("CGC") arising out of its golf course design that has far-reaching implications for its members in New York and calls for the filing of an amicus curiae brief. The Association respectfully submits that its unique perspective as the representative of golf course owners and operators in this nation will assist the Court in its deliberations on this appeal.

Through its consideration of this amicus, the Association appreciates the Court's recognition of the importance of the issues raised in this appeal addressing the motion court's decision that not only upends well-established legal precedent in New York, but also threatens significant practical and economic consequences to the

numerous golf courses in this state. This amicus brief explains the substantial burden that would ensue by the affirmance of the motion court's decision and why reversal of the order appealed from is in the best interests of not just CGC, but the many golf course owners and operators in New York State.

PRELIMINARY STATEMENT

As one jurist keenly observed, "[n]o matter how carefully we construct golf courses in the form of earthly Elysian fields, they necessarily retain some dangers to those who use them." *Rochford v. Woodloch Pines, Inc.*, 824 F.Supp.2d 343, 344 (E.D.N.Y. 2011). This appeal arises from the unfortunate realization of one risk known to those participating in the sport of golf—the risk, albeit remote, of sustaining an injury from an errant ball hit by a golfer playing an adjacent hole on the course.

Under the well-established doctrine of assumption of the risk, golf course owners in New York have traditionally enjoyed significant protection from tort liability for personal injury suits arising from the athletic and recreational pursuit of golf. *See Rochford*, 824 F.Supp.2d at 349-350. Indeed, the overwhelming weight of authority in New York (and other jurisdictions) holds that golfers, such as the plaintiff-respondent, voluntarily assume the risk of being struck by an errant golf ball while engaged in the sport of golf. *Id.* (citing, *inter alia*, *Anand v. Kapoor*, 15 N.Y.3d 946 [2010]).

The parties to this appeal dispute whether CGC may be required to compensate the plaintiff, an experienced golfer, for his injuries based on the alleged negligent design and/or maintenance of the historic, nearly hundred-year-old golf course owned and operated by CGC. Amicus supports CGC's appeal seeking dismissal of the negligence action because an experienced golfer who is struck by an errant golf ball hit by another golfer participating in a golf tournament cannot recover damages against a golf course owner where he consented to, and voluntarily assumed, the commonly appreciated risks inherent in and arising out of the game of golf. While recognizing that an owner of a golf course may have some limited obligation to design a course to avoid unreasonably enhancing the risk that players will be hit by golf balls, Amicus implores the Court to reject as a matter of law the plaintiff's expert's opinion that CGC may face liability for failing to erect an impenetrable barrier between contiguous, parallel golf holes or, alternatively, failing to create better visibility between the golf holes. The plaintiff's expert's opinion impermissibly usurped the role of the motion court to determine CGC's legal duty, which is particularly problematic where the nature and risks of golfing are commonly understood by those that engage in the sport of golf and where the demarcation of any duty owed by the golf course is judicially defined. The lower court's ruling not only negatively impacts CGC, but also creates a negative precedent threatening the entire golf industry by effectively eroding the well-established

assumption of the risk doctrine and threatening to impose obligations on golf course owners and operators that are impracticable and cost prohibitive. Amicus joins in CGC's request that the Honorable Court reverse the motion court's determination on appeal and dismiss the action against CGC in its entirety.

ARGUMENT

POINT I

ERRANT GOLF BALLS ARE A NATURAL OCCURRENCE IN THE SPORT OF GOLF AND SHOULD NOT EXPOSE A GOLF COURSE OWNER TO LIABILITY

This appeal presents the familiar observation that "[a]lthough the object of the game of golf is to drive the ball as cleanly and directly as possible toward its ultimate goal (the hole), the possibility that the ball will fly off in another direction is a risk inherent in the game." *Rinaldo v. McGovern*, 78 N.Y.2d 729, 733 (1991). As one appellate court observed, "the risk of being hit by an errant golf ball is little different from the risk of being hit by a misdirected ball at a baseball, basketball, soccer, or tennis game. The risk of being hit by a misdirected ball is equally inherent in each sport." *Anand v. Kapoor*, 61 A.D.3d 787, 790-91 (2d Dep't 2009), *aff'd* 15 N.Y.3d 946 (2010). Errant golf balls are simply a natural part of the game. *Tenczar v. Indian Pond Country Club, Inc.*, 491 Mass. 89, 98, 199 N.E.3d 420 (2022) ("errant golf balls are to golf what foul balls and errors are to baseball. They are a natural part of the game."). An appellate court in another jurisdiction recently commented that

errant golf balls "demonstrate the difficulty and challenge of the sport even for the very best players. Despite practice, instruction, technological improvements, and even good golf course design and operation -- disputed in the instant case -- golf shots go awry, as a matter of course." *Id*.

As an outgrowth of this well recognized risk, golf course owners and operators are not liable, as a matter of law, for injury to a participant in the sport of golf who is struck by an errant golf ball. *See Delaney v. MGI Land Development*, 72 A.D.3d 1254 (3d Dep't 2010); *Milligan v. Sharman*, 52 A.D.3d 1238 (4th Dep't 2008). This rule has several constant premises: "golfers are deemed to assume the risks of open topographical features of a golf course" (*Milligan*, *supra*, quoting *Brust v. Town of Caroga*, 287 A.D.2d 923, 925 [3d Dep't 2001]) and the risk that a golfer will hit an errant golf ball is inherent in the game (*id.*, quoting *Rinaldo*, 78 N.Y.2d at 733). Applying these principles, New York courts have determined that no duty is owed to an injured plaintiff who willingly assumed the risks consistent with participating in the sport of golf. *See Delaney*, 72 A.D.3d 1254 (experienced golfer who was aware of possibility of being struck by golf ball at tournament assumed risk of injuries sustained when struck in head by errant golf ball); *Milligan*, 52 A.D.3d 1238 (golfer struck by golf ball hit by player from ninth tee while he was playing the eighth hole willingly assumed risks consistent with participating in sport). An owner may be subject to liability in very limited circumstance not presented here, namely,

where it creates a unique, dangerous condition over and above the usual dangers inherent in the sport. *Delaney*, 72 A.D.3d 1254.

While some commentators and courts have questioned the continued viability of the assumption of the risk doctrine following the legislature's enactment of CPLR 1411 concerning a plaintiff's comparative fault, the New York Court of Appeals had occasion to recently revisit the well-established doctrine. In *Secky v. New Paltz Cent. Sch. Dist., decided sub nom. Grady v. Chenango Valley Cent. Sch. Dist*., 40 N.Y.3d 89 (2023), the Court reaffirmed that primary assumption of the risk remains in full force and effect in the context presented in this appeal, *viz*., athletic and recreational injuries, and operates to bar recovery by the plaintiff. Accord, *Stanhope v. Burke*, __ A.D.3d ___, 2023 WL 7028293, n. 1 (3d Dep't; dec. Oct. 26, 2023). Because errant golf balls present the quintessential illustration of the doctrine of assumption of the risk in the sport of golf, the motion court incorrectly applied the doctrine by failing to dismiss the negligence claims against CGC.

POINT II

PLAINTIFF'S EXPERT'S OPINION THAT GOLF COURSE OWNERS SHOULD INSTALL BARRIERS BETWEEN GOLF HOLES TO REDUCE THE RISK OF ERRANT GOLF BALLS IS IMPRACTICABLE AND EXTREMELY ONEROUS

Despite being injured due to a well-known risk inherent in the sport of golf, the plaintiff in this case seeks to hold CGC liable by submitting an expert affidavit

suggesting CGC somehow increased the risks of the sport of golf beyond those inherent in the sport by failing to install barriers, such as netting, hedging or trees, between the third and seventh holes on this historic nine-hole course. The Association submits this brief to underscore the point that the opinions proffered by the plaintiff's expert do not reflect the consensus within the golf design community. Accepting plaintiff's expert's opinion would impose a legal duty on golf course owners and operators that is not only impracticable, but also extremely onerous.

In the United States, there are 274 nine-hole golf courses such as CGC, 153 of which are open-to-the-public. An examination of not only nine-hole courses, but all of America's 15,000 courses undermines the validity of the plaintiff's expert's opinion that there is an industry standard, somehow customary, or in any way required. None of the courses have 130-150 feet netting dividing each hole as requested by the plaintiff. On rare occasions, 100-150-feet-high nets are seen on a few selected areas on golf courses, such as lining driving ranges that are too small to contain the typical range of shots. The plaintiff's expert's suggestion that a barrier would effectively reduce the risk of harm caused by errant golf balls should be rejected as impracticable. To be effective, nets usually need to be 100-150 feet high, unless placed directly adjacent to a problematical tee and/or adjacent to an area frequently hit. Tall nets are not only not in keeping with the natural look of golf, but they are also often limited by local codes as undesirable for larger viewsheds outside

the golf course. Environmentalists believe nets are harmful to birds. Nets are used only as a last resort for situations with repeated conflicts and rarely for situations such as that which occurred at CGC that experience a few incidents every 100 years. *See generally*, Hurdzan, *Golf and the Law, Golf Course Safety, Security and Risk Management* (stating that the only remedy to prevent an errant ball cause injury or damage, and the least preferred one, is to install a ball barrier, but that to be effective, its height would have to exceed 130 feet, which presents many challenges).

The plaintiff's expert's opinion effectively imposes a duty on golf course owners and operators in New York that is not only impracticable, but extremely burdensome. If all golf courses with similar parallel fairways as those at CGC were required to install nets between each parallel fairway, it would bankrupt most, if not all owners, removing the beloved recreational activity of golf from people's choices of healthy, outdoor recreation. By way of explanation, netting currently costs $8-10 per square foot, although there is some variance in specification and cost. Since CGC measures only 2,943 yards, the installation of 130-150 foot high netting to half of its fairways (assuming that half are parallel) would result in the substantial cost of $4.6-$5.7 million to provide the netting suggested by the plaintiff. The costs to install a barrier such as netting at a typical 7,000-yard, 18 hole course exponentially increases the expenses, easily costing a golf course owner five to ten times as much. The plaintiff's expert's proposal demonstrates the extreme financial burden

attendant with this impracticable, and notably not fool proof, risk mitigation measure to CGC.

The Association respectfully submits that it is unreasonable to subject a golf course owner or operator, such as CGC, to tort liability for failing to eliminate all possible risk of errant golf balls at its course. By permitting the plaintiff's action to proceed based solely on an expert's opinion as to the proposed legal duty of a golf course owner to mitigate the risk of injury caused by errant golf balls hit between fairways, the Court will effectively erode the principles of assumption of the risk and create a duty that imposes an inappropriate burden and unreasonable monetary cost on golf course owners and operators in New York, all with the objective of preventing an accident that has a less than one percent chance of occurring. The Association urges the Court not to permit such a result, which would threaten the continued viability of many golf course operations in New York and potentially elsewhere.

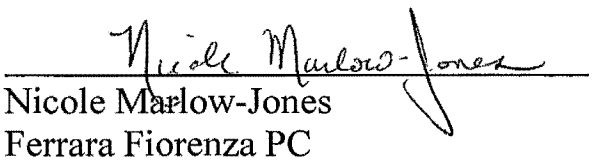
CONCLUSION

The Association respectfully submits that the Honorable Court should reverse the motion court and dismiss this negligence action brought against CGC that cannot, as a matter of law, be held liable for injuries sustained by an experienced golfer caused by an errant shot during a tournament. The Association further submits that the golf course should not as a matter of sound policy be held liable for failing

to implement measures in an attempt to reduce all possible risk of injury stemming from mishit balls where such measures are not only impracticable, but cost-prohibitive, threatening the continued viability of golf in New York.

Dated: November 17, 2023
East Syracuse, New York

Respectfully submitted,



Nicole Marlow-Jones
Ferrara Fiorenza PC
Attorneys for Respondent-Appellant National Golf Course Owners Association
5010 Campuswood Drive
East Syracuse, New York 13057
Phone: (315) 437-7600
nmarlow-jones@ferrarafirm.com

PRINTING SPECIFICATION PAGE

I hereby certify pursuant to 22 NYCRR Section 1250.8(j) that the foregoing brief was prepared on a computer.

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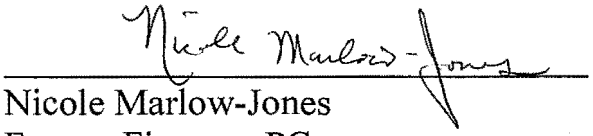
Dated: November 17, 2023
East Syracuse, New York

Respectfully submitted,



Nicole Marlow-Jones
Ferrara Fiorenza PC
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East Syracuse, New York 13057
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