A·D·C VERITAS
Association of Defense Counsel of Northern California and Nevada

ASCDC
Association of Southern California Defense Counsel

June 17, 2019

Hon. Gregory J. Weingart
Hon. Jeffrey W. Johnson
Hon. Helen I. Bendix
Court of Appeal of the State of California
Second Appellate District, Division One
300 South Spring Street, Second Floor, North Tower
Los Angeles, CA 90013

Re: Request for Publication of *Stevens v. Azusa Pacific University, et al.* (May 29, 2019, B286355)

Honorable Justices:

Interest of the Requesting Organizations

Pursuant to Rules 8.1105 and 8.1120 of the California Rules of Court, the Association of Defense Counsel of Northern California and Nevada ("ADCNCN") and the Association of Southern California Defense Counsel ("ASCDC") write jointly to urge the Court to order publication of its opinion in this case.

Interest of the Requesting Organizations

ADCNCN is an association of approximately 800 attorneys primarily engaged in the defense of civil actions. ADCNCN members have a strong interest in the development of substantive and procedural law in California, and extensive experience with civil matters generally. The Association's Nevada members are also interested in the development of California law because Nevada courts often follow the law and rules adopted in California.

ASCDC is the nation's largest and preeminent regional organization of lawyers who specialize in defending civil actions. It has over 1,100 attorneys in Central and Southern California, among whom are some of the leading trial and appellate lawyers of California's civil defense bar. The ASCDC is actively involved in assisting courts on issues of interest to its members. In addition to representation in appellate matters, the ASCDC provides its members with professional fellowship, specialized continuing legal education, representation in legislative matters, and multifaceted support, including a forum for the exchange of information and ideas.

Although ADCNCN and ASCDC are separate organizations, they coordinate from time to time on matters of shared interest, such as this letter. Together and separately, they have appeared as *amicus curiae* in numerous cases before both the California Supreme Court and Courts of Appeal across the state to express the interests of their members and their members' clients, a broad cross-section of California businesses, organizations, public entities and educational institutions. Their members are involved in trials across the state virtually every day.

Why the opinion deserves publication

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. 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;" and "[i]nvolves a legal issue of continuing public interest." (Rule 8.1105(c) (2), (3) and (6).)

Yes, the decision follows the reasoning in *Aaris v. Las Virgenes Unified School District* (1998) 64 Cal.App.4th 1112. And yes, a number of published cases have considered the doctrine of primary assumption of the risk in the context of collegiate and/or coached group athletic activities. However, a review of just the cases cited in this Court's Opinion reveals the particular factual scenario in this case, one that occurred over a period of months, is not addressed in any published opinion.

The facts in this case take a step beyond *Aaris* and necessarily required this court to consider several other cases in order to distinguish *Wattenberger v. Cincinnati Reds, Inc.* (1994) 28 Cal.App.4th 746. Most certainly, *Aaris* distinguished *Wattenberger*. (*Aaris, supra*, 64 Cal.App.4th at p. 1117 ["Appellant's reliance on [*Wattenberger*] is misplaced. [There,] the instructor/coach gave specific directions which increased the risk of harm to the student over and above that inherent in the sport."].) However, here, the Court was required to and, in fact, gave import a series of events that occurred over a number of weeks from August – November 2012. The Court also considered the extent of knowledge and control on the part of the cheer advisor, the impressions rendered by healthcare practitioners between injuries, and the plaintiff's choice to return to more strenuous activity weeks after her first two injuries. None of this Court's cited post-*Wattenberger* cases take this journey of examination. In fact, the cited California Supreme Court cases do not discuss *Wattenberger*, at all. As a result, there is a dearth of authority on point.

The opinion thus meets the standard for publication in multiple ways.

• It "[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions" (Cal. Rules of Court, rule 8.1105(c)(2)). Although, *Aaris* addressed cheerleading injuries, it did not extend to series of events and intervening involvement by the plaintiff and others over a period of months. The present case, however, recognizes the timeline of events that led up to plaintiff's final injury to point out that the defendant did not exert *control* to increase "the risk of injury inherent in cheerleading by failing to stop or restrict plaintiff's participation beyond the ways in which it was indisputably already halted and limited." (Opinion at pp. 17-18.)

• The decision "explains …with reasons given, an existing rule of law" (Cal. Rules of Court, rule 8.1105(c)(3)), in that it provides a roadmap for examining a series of events over time, not just one injury producing event. In the future, courts and counsel can examine the same substantive authority and recreate the holding in this case. However, why should they when publication of this case can provide a well-reasoned application of facts to law?

• The decision "[i]nvolves a legal issue of continuing public interest" (Cal. Rules of Court, rule 8.1105(c)(6)), because cheerleading has changed dramatically over the years, it is reasonable to expect that similar factual scenarios will occur in the future.

For these reasons, ADCNCN and ASCDC urge this Court to certify its opinion for publication.

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3610 Fourteenth Street, P. O. Box 1299, Riverside, California 92502.

On June 18, 2019, I served true copies of the following document(s) described as **REQUEST FOR PUBLICATION** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 18, 2019, at Riverside, California.

/s/

_____

ERMINIA OLIVAS

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