Willamette Sports Law Journal

Volume 1:1 Winter 2004

Avoiding Legal Sandtraps on the Golf Course – How Liability is Apportioned for Golfer's Bad Shots.

by

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INTRODUCTION

Led by arguably the most popular athlete in the United States, Tiger Woods, golf continues to increase in popularity. According to The National Golf Foundation, more people than ever are playing golf.[1] In fact, the foundation reports that in 2002, a total of 502.4 million rounds of golf were played.[2] Additionally, the foundation reports that the game of golf generated $22.83 billion dollars in total revenue in the United States.[3]

The purpose of golf is simple, to hit the little white ball into the cup. However, as anyone who has ever golfed knows, it is very difficult to control where the ball actually goes. As one court wrote, "It is well known that not every shot played by a golfer goes to the point where he intends it to go. If such were the case, every player would be perfect and the whole pleasure of the sport would be lost."[4] These errant shots sometimes hit other people and their property, resulting in injuries and subsequent lawsuits. These injuries range from minor to extremely severe. Some of the more severe have included

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[1] *See generally,* The National Golf Foundation's website, *available at*, http://www.ngf.org. (last visited, January 28, 2004).

[2] *Id*.

[3] *Id*.

[4] Thomson v. McNeill, 559 N.E.2d 705 (Ohio 1990).

the loss of eyesight,[5] the loss of the actual eye,[6] a fractured skull,[7] a blood clot in the brain resulting in mental retardation,[8] a severe groin injury,[9] and even the opening up of an incision that had been made to perform heart surgery.[10] The lawsuits generated by these injuries present some unique legal theories and provide for many interesting decisions by the court. For example, are golfers liable for their shots that injure other golfers? Are golfers liable for shots that injure golf course employees? Does it matter if the injured person is a spectator? Does it matter if the injured person is just passing by the golf course? Can a neighbor of a golf course seek an injunction against the course on a theory of nuisance or trespass? Can a golf course defend itself by arguing that it has acquired a prescriptive easement to hit golf balls onto its neighbor's property? Who exactly is liable for these actions? The golfer? The golf course owner and operator? The golf course designer? For organizational purposes, I will examine these issues from the perspective of the classes of plaintiffs that typically bring these suits against golf courses: golfers, spectators, employees, non-participants, and neighboring landowners.[11]

I. INJURED GOLFERS AS PLAINTIFFS

Golfers injured by golf balls hit by another golfer often attempt to recover from both the other golfer who hit the shot and the golf course owner.[12] Whether one of these defendants is liable does not depend on the other's liability. In this section, I will examine

[5] Duffy v. Midlothian Country Club, 481 N.E.2d 1037 (Ill. App. Ct. 1985).
[6] Grism v. TapeMark Charity Pro-Am Golf Tournament, 415 N.W.2d 874 (Minn. 1987).
[7] Morrison v. Sudduth, 546 F.2d 1231 (5th Cir. 1977).
[8] Gant v. Hanks, 614 S.W.2d 740 (Mo. 1981).
[9] McGuire v. New Orleans City Park Imp. Ass'n, 835 So. 2d 416 (La. 2003).
[10] Baker v. Mid Maine Med. Ctr., 499 A.2d 464 (Me. 1985).
[11] Although there are many different types of injuries that may result from the game of golf, I will focus only on those which occur as a result of a golfer hitting the golf ball.
[12] In Section I, I will refer to the injured golfer as "the plaintiff" and the other parties as "the defendant(s)."

the different theories typically alleged by the plaintiffs, the different standards employed by the courts, and the defenses asserted by the defendants.

I(a). Injured Golfers' Claims Against Other Golfers

There is a not a consensus among different jurisdictions as to one specific standard that should be applied when a golfer hits a ball injuring another golfer. All jurisdictions do agree that a player is liable for any "intentional" action resulting in the injury of another player.[13] All jurisdictions also agree that intentionally striking the golf ball does not constitute "intentional" for liability purposes and the intention must be to injure another player. [14] However, the jurisdictions are divided as to whether recklessness or negligence is the appropriate standard.[15] Regardless, both the recklessness and the negligence standard seem to be decided based upon whether the plaintiff was within the foreseeable zone of danger and whether the defendant gave the appropriate warning.

I(a)(1). Recklessness

Many courts have held that recklessness is the appropriate standard in cases where one golfer injures another. The Restatement Second of Torts defines recklessness as follows:

> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that

[13] *See* Thomson v. McNeill, 559 N.E.2d 705 (Ohio 1990).
[14] *See* Jenks v. McGranaghan, 285 N.E.2d 876 (N.Y. App. Div. 1972).
[15] The recklessness standard is also occasionally referred to as a "willful and wanton standard."

> such risk is substantially greater than that which is necessary to make his conduct negligent.[16]

In the first case to apply this reckless standard in a golfing context, *Thomson v. McNeill*, the plaintiff was standing twelve to fifteen yards from the plaintiff and at angle of approximately ninety degrees when she was hit in the eye by the defendant's shot.[17] The Ohio Supreme Court found that negligence was an inapplicable standard given that risk and inadvertent harm are built into the sport.[18] The court reasoned that acts that would give rise to tort liability for negligence on the street or in a backyard are not negligent in the context of a sporting event because such acts are a foreseeable and inherent danger of the game.[19] Additionally, the court theorized that a negligence liability standard would "stifle the rewards of athletic competition."[20] In declining to list actions that would constitute reckless conduct, the court emphasized reckless conduct can only be determined in light of the rules and customs of the game that shape the participants' ideas of foreseeable conduct.[21] Thus, the court found that shanking, slicing, hooking, pushing, and pulling the ball are foreseeable occurrences in the game of golf.[22] The court also held that golfers have a duty to warn other golfers who are in the intended line of flight of their shots and furthermore, this duty also requires a golfer to immediately warn anyone in the line of flight of an errant shot.[23] However, the court found that given the

[16] RESTATEMENT (SECOND) OF TORTS § 500.
[17] 559 N.E.2d at 706.
[18] *Id*. at 706-07.
[19] *Thomson*, 559 N.E.2d at 707.
[20] *Id*.
[21] *Id*. at 708.
[22] *Id.* at 709. (All these terms refer to ways a golfer may mis-hit a shot).
[23] *Id.*

slight distance between the golfers and the speed of the ball, the defendant did not have time to warn the plaintiff and hence, the duty was inapplicable.[24]

In *Gray v. Giroux*, a Massachusetts court also applied a recklessness standard and came to a similar conclusion as the *Thomson* court.[25] In this case, the plaintiff was standing on the left side of the fairway which doglegged to the right, approximately thirty-five to fifty yards ahead of the defendant.[26] The plaintiff saw the defendant but it was undisputed that the defendant did not see the plaintiff.[27] The defendant's shot unintentionally traveled toward the plaintiff, hitting her in the head.[28] The court held that the defendant's conduct was not reckless because he did not see the plaintiff, he was aiming away from the plaintiff, and she was not in the intended path of his shot.[29] Similar to the *Thomson* court, the court in this case also reasoned that the "promotion of vigorous participation in athletic activities would be threatened by a flood of litigation if the standard were ordinary negligence.[30]

This recklessness standard is an extremely high bar for an injured golfer to satisfy. In fact, I have been unable to find any cases where an injured golfer recovered from the other golfer where the court employs the recklessness standard.

The closest case I could find was *Schick v. Ferilito*.[31] In this case, the defendant decided to hit an unannounced mulligan[32] after all the golfers in his foursome had already

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[24] *Thomson*, 559 N.E.2d at 709.
[25] 730 N.E.2d 338 (Mass. App. Ct. 2000).
[26] *Id*. at 339-40.
[27] *Id*. at 340.
[28] *Id*.
[29] *Gray*, 730 N.E.2d at 340.
[30] *Id*. For other examples of cases where the courts apply a recklessness standard, see Allan v. Donath, 875 S.W.2d 438 (Tex. Crim. App. 1994); Hathaway v. Tascosa Country Club, Inc., 846 S.W.2d 614 (Tex. Crim. App. 1993); Monk v. Phillips, 983 S.W. 2d 323 (Tex. Crim. App. 1998); Dilger v. Moyles, 63 Cal. Rptr. 2d 591 (Cal. Ct. App. 1997). For academic legal commentaries on why recklessness should be applied to golf, *see* Karen M. Viera, Comment, *'Fore!' May just be Par for the Course*, 4 SETON HALL J. SPORT L. 187 (2000); Melissa Cohen, Note, *Co-Participants in Recreational Activities Owe Each other a Duty Not to Act Recklessly*, 10 SETON HALL J. SPORT L. 181 (1994).

teed off. The defendant's mulligan shot hit the plaintiff who was seated in a cart approximately thirty feet ahead, at a forty-five-degree angle from where the defendant teed off.[33] The trial judge granted summary judgment against the plaintiff but the New Jersey Supreme Court held that summary judgment in this case was improper and remanded the case for trial on the facts.[34]

I(a)(2). Negligence

Alternatively, other jurisdictions have determined that an ordinary negligence standard should be applied when a golfer injures another golfer with an inadvertent shot. To state a claim of negligence, the plaintiff must allege that a duty was owed, that duty was breached, that the breach was both the cause-in-fact and proximate cause of the plaintiff's injuries, and that there was resulting damage.[35] In this context, most of the decisions focus on the duty owed by the defendant to the injured plaintiff. Whether a defendant owed a duty to a particular plaintiff is a question of law to be determined by the trial court.[36] Similar to courts that apply a recklessness standard, most courts applying a negligence standard find that there is a duty to warn other golfers who are within the zone of danger of the ball.[37] However, this negligence standard is much easier for injured golfers to meet.

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[31] 767 A.2d 962 (N.J. 2001).
[32] A mulligan is when a golfer hits a second shot, generally because she did not like her first shot. Although prohibited by the rules of golf, hitting mulligans is often an accepted part of the game.
[33] *Schick*, 767 A.2d at 963.
[34] *Id*. at 962.
[35] Jenks v. McGranaghan, 285 N.E.2d 876 (N.Y. App. 1972); Boozer v. Arizona Country Club, 434 P.2d 630 (Ariz. 1967).
[36] Knittle v. Miller, 709 P.2d 32, 34 (Colo. Ct. App. 1985).
[37] Jenks v. McGranaghan, 285 N.E.2d 876 (N.Y. App. 1972); *see also* Cavin v. Kasser, 820 S.W.2d 647 (Mo. Ct. App. 1991); Boozer v. Arizona Country Club, 434 P.2d 630 (Ariz. 1967). (Some courts also refer to this as the "line of play" or "ambit of danger").

For example, in *Jenks v. McGranghan*, the plaintiff was standing behind a protective fence on an adjacent hole when the defendant hit his tee shot.[38] The defendant mishit his shot hooking it wildly to the left.[39] After realizing his shot was heading for the plaintiff, the defendant and the other members of his foursome yelled "fore," but the plaintiff did not hear the warning and the ball hit the plaintiff in the eye causing severe injury. [40] Recognizing that even the best professional cannot avoid the occasional hook or slice, the court held that the fact that a ball fails to travel the anticipated line of flight does not constitute negligence.[41] The court also held that although a duty exists for a golfer to make a timely warning to others within the foreseeable ambit of danger, the plaintiff in this case was not in the ambit of danger because he was behind the protective fence.[42]

In a similar case, the plaintiff was waiting to tee off and was struck by a ball hit by the defendant who was playing on an adjacent hole.[43] The defendant did not warn the plaintiff before teeing off but shouted a warning after mishitting his shot.[44] However, the plaintiff was unable to avoid the defendant's errant shot.[45] In affirming summary judgment for the defendant, the court observed that there is no absolute duty to warn everyone on the golf course before making a shot.[46] The court found that "one about to strike a golf ball must exercise ordinary care to warn those within the range of intended flight of the ball or general direction of the drive, and the existence of such a duty to warn

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[38] 285 N.E.2d at 877.
[39] *Id*.
[40] *Id*. (Fore is the traditional warning yelled by golfers when a ball is headed in the direction of another golfer).
[41] *Id*. at 878.
[42] *Jenks*, 285 N.E.2d at 878.
[43] Cavin v. Kasser, 820 S.W.2d 647 (Mo. Ct. App. 1991).
[44] *Id.* at 648.
[45] *Id*.
[46] *Id*. at 650.

must be determined from the facts of each case."[47] Therefore, the court held that the defendant had satisfied his duty to the plaintiff.[48]

Other cases applying a negligence standard sometimes employ a more subjective interpretation of the duty that is owed and when a warning must be given. For example, in *Cook v. Johnston*, the plaintiff was hit in the eye by a shot hit by a member of his foursome who had a tendency to hit the ball directly to the right.[49] The court specifically noted that this was different from a hook or slice where the hit ball gradually curves to the left or right respectively.[50] At the time the defendant hit his shot, the plaintiff was sitting in a golf cart, approximately thirty yards to the right of the intended line of the shot.[51] Immediately upon hitting the ball, the defendant realized it was going to the right and yelled "fore."[52] The court found that generally, a golfer only has a duty to warn others that he intends to hit the ball when (1) others are in the zone of danger, and (2) they are unaware the golfer intends to hit the ball and the golfer knows or should know of their unawareness.[53] The court also found that conversely, there is no duty to warn where the other player is not in or near the intended line of flight or when the other player is aware of the imminence of the intended shot.[54] However, the court held that in this case, where the golfer had an alleged propensity to mishit his shot, whether the golfer had a duty to warn others playing with him in is foursome was a question of fact for the jury.[55]

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[47] *Cavin*, 820 S.W.2d at 650.
[48] *Id*.
[49] 688 P.2d 215 (Ariz. Ct. App. 1984).
[50] *Id*. at 216.
[51] *Cook*, 688 P.2d at 216.
[52] *Id*.
[53] *Id*.
[54] *Id.* at 217.
[55] *Id*.

Thus, this Arizona court broadened the foreseeable zone of danger to include anywhere the golfer subjectively knows she may hit the ball.

In *Bartlett v. Chebuhar*,[56] the Supreme Court of Iowa relied on *Cook v. Johnston* in reaching its similar holding that the appropriate zone of danger encompasses a wider range than simply the intended flight path of the ball. In this case, the defendant had hit his two previous shots to the right of his intended target.[57] After hitting his third shot, he realized that the ball was heading to the right, towards a group of people.[58] He yelled "fore," but the ball struck an embankment near the plaintiff, ricocheting up and hitting him in the eye.[59] The trial court held that since the plaintiff was not in the intended line of flight, he was outside the zone of danger.[60] However, the Supreme Court remanded the case holding that the zone of danger encompasses a wider zone than the line of flight, and is to be determined based on the facts and circumstances in each individual case.[61]

General negligence principles also apply injuries resulting from the actual swinging of the golf club.[62] Some courts have also broadened the zone of danger for golf club related cases. For example, after hitting his first two shots into the woods adjacent to the fairway, the defendant in *Thurston Metals & Supply Co. v. Taylor*, stepped back to take a practice swing.[63] At the top of his back swing, the club slipped from his hand flying twenty feet behind him and hit the plaintiff in the head causing significant injury to

[56] 479 N.W.2d 321 (Iowa 1992).
[57] *Id*. at 322.
[58] *Id*.
[59] *Id*.
[60] *Bartlett*, 479 N.W.2d at 322.
[61] *Id*.
[62] *See* Thurston Metals & Supply Co. v. Taylor, 339 S.E.2d 538, 540 (Va. 1986); Brady v. Kane, 111 So. 2d 472 (Fla. Dist. Ct. App. 1959); Morrison v. Sudduth, 546 F.2d 1231 (5th Cir. 1977).
[63] 339 S.E.2d 538, 540 (Va. 1986).

his eye.[64] The plaintiff had seen the defendant hit his two previous shots and thinking he was done, was walking back to the cart and not watching the defendant when he was struck by the club.[65] The plaintiff and others testified at trial that it was not customary to take practice swings after hitting the ball and that the defendant had a frantic, unconventional and violent swing.[66] The court held that whether, given this evidence, the defendant was liable for negligence was a question of fact for the jury to determine.[67]

I(b). Injured Golfers' Claims Against Golf Course Owners and Designers

A golfer injured by an errant golf ball may also be able to recover from a golf course owner. As a preliminary matter, an owner's liability may depend on whether the course is publicly or privately owned.[68] Generally, publicly owned courses are immune from suit while private owners enjoy no immunity privilege.[69]

There are several theories upon which an injured plaintiff golfer may sue the owners of the golf course. For example, in *Morgan v. Fuji Country USA*, the plaintiff alleged that the defendant was negligent in failing to exercise ordinary care in maintaining the course in reasonably safe condition.[70] In this case, the plaintiff regularly played the golf course a couple of times per week and routinely saw balls being hit from the fourth tee fly over a large pine tree and land on or near the fifth tee.[71] For protection

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[64] *Taylor*, 339 S.E.2d at 540.
[65] *Id*.
[66] *Id*.
[67] *Id*.
[68] *See* Gruhin v. Overland Park, 836 P.2d 1222 (Kan. Ct. App. 1992); Atlanta v. Mapel, 174 S.E.2d 599 (Ga. Ct. App. 1970).
[69] *Id*.
[70] 40 Cal. Rptr. 2d 249 (Cal. Ct. App. 1995).
[71] *Id*. at 250.

from the errant golf balls, the plaintiff would stand under the large tree.[72] After the owners removed the tree, the plaintiff testified that he saw at least four golf balls almost strike golfers standing on the fifth tee box.[73] On the day of the accident, the plaintiff was returning his club to his golf bag located near the fifth tee box when he was struck in the eye by a golf ball hit from the fourth tee.[74] The court determined that the owner's duty to the plaintiff to provide a reasonably safe golf course required the owner to minimize the risks without altering the nature of the sport.[75] The court found that such minimization may require the owner to provide protection for the players from being hit by errant shots where the greatest danger exists and such an occurrence is reasonably foreseeable.[76] Thus, the court held that the danger that someone would be hit by an errant shot while standing in that location was foreseeable.[77]

Cornell v. Langland was also decided on a similar negligent maintenance theory.[78] In this case, the golf course had changed the location of the green, shortening the yardage of the hole from 315 yards to 232 yards, but had failed to change the yardage indicated on the scorecard.[79] Two years after the green location was changed, a golfer teed off while the plaintiff was standing on the green.[80] The golfer had never played the course before and consulted the scorecard to determine the distance to the green.[81] The golfer saw the plaintiff standing on the green, but knowing that he could not drive the ball

[72] *Morgan*, 40 Cal. Rptr. 2d at 250.
[73] *Id*.
[74] *Id*.
[75] *Id*. at 253.
[76] *Id*.
[77] *Id*.
[78] 440 N.E.2d 985 (Ill. App. Ct. 1982).
[79] *Id*. at 987.
[80] *Id*.
[81] *Id*. at 986.

over 300 yards decided to tee off.[82] His shot traveled to the green, hitting and injuring the plaintiff.[83] The court held there was sufficient evidence to sustain the jury's determination that the golf course was negligent in failing to change the yardage on the scorecard and hence, the course owners were liable for the plaintiff's injuries.[84]

Additionally, the court in *Cook v. Johnston* alluded to the fact that the golf course may have a duty to protect golfers from other golfers' errant shots if it knows, or has reason to know, of the golfers propensity to mishit shots in a certain direction.[85]

An injured golfer may also be able to recover from a golf course designer. For example, in *Klatt v. Thomas*, the plaintiff alleged negligence in the design and construction of the golf course where the golfers standing on the fourteenth and fifteenth tee were nearly facing each other, but were slightly to the right of each other, 50 to 75 feet apart.[86] The court held that the plaintiff's expert's affidavit was sufficient to show a genuine issue of material fact as to the designer's negligence and therefore preclude summary judgment.[87]

Finally, although there is not a decision where an injured golfer sued the golf course on the theory that the golf course was negligent in supervising those using the course or excluding those who did not have permission to use the course, it appears that many courts would allow the course to be held liable under these circumstances.[88]

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[82] *Cornell*, 440 N.E.2d at 986.
[83] *Id*.
[84] 788 P.2d 510 (Utah 1990). (However, the court also held that the evidence was not sufficient to justify the imposition of punitive damages).
[85] 688 P.2d at 216.
[86] *Id*. at 511.
[87] *Id*. at 512.
[88] *See* Ramsden v. Shaker Ridge Country Club, 265 N.E.2d 762 (N.Y. 1965) (verdict for plaintiff caddy against defendant golf course not allowed because it conflicts with the weight of the evidence and violates the workman's compensation exclusive remedy provisions); *See also* Nussbaum v. Lacopo, 265 N.E.2d 762

I(c). Defenses

Defendants in these cases often assert the defense of assumption of risk. Assumption of risk bars injuries resulting from actions and events incident to the game of golf.[89]

Under the implied form, the plaintiff's assumption of the risk is determined from the conduct of the parties.[90] This implied form has also been divided into primary and secondary categories.[91] Primary implied assumption of risk is usually applied to situations where a plaintiff assumes known risks inherent in the game of golf, not those created by the defendant's negligence.[92] Secondary implied assumption of risk occurs when plaintiff implicitly assumes the risks created by the defendant's conduct.[93] For the doctrine of assumption of risk to apply, the defendant must show that three elements are present: (1) a risk of harm to the plaintiff caused by the defendant's conduct; (2) the plaintiff has actual knowledge of the particular risk and appreciates its magnitude; and (3) the plaintiff voluntarily chooses to enter or remain within the area of the risk under circumstances that manifest his willingness to accept that particular risk.[94] Golfers are generally held to assume the known risks, inherent in the game but they do not "assume

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(N.Y. 1970) (finding there was sufficient control over those who were permitted to play was exercised by the country club).

[89] Duffy v. Midlothian Country Club, 481 N.E.2d 1037 (Ill. App. Ct. 1987).

[90] *Id*. at 1041.

[91] *Id*. at 1041.

[92] *Duffy*, 481 N.E.2d at 1041. *See also* Morgan v. Fuji Country USA, 40 Cal. Rptr. 2d 249, 251 (Cal. Ct. App. 1995). Primary implied assumption of risk has been criticized as not a true negligence defense because negligence in never alleged. Kionka, *Implied Assumption of the Risk: Does It Survive Comparative Fault?* 1982 S. Ill. U. L.J. 371.

[93] Duffy v. Midlothian Country Club, 481 N.E.2d 1037 (Ill. App. Ct. 1985); *See also* Morgan v. Fuji Country USA, 40 Cal. Rptr. 2d 249, 251 (Cal. Ct. App. 1995).

[94] McGriff v. McGriff, 549 P.2d 210, 212 (Ariz. Ct. App. 1976).

the extraordinary risk of an unforeseen act of negligence."[95] Thus, while a golfer assumes the risk that a ball may be hit to the right or left, he does not assume the additional risk that another player will hit a ball without a proper warning.[96] As a result, many courts have held that an injured plaintiff cannot recover when hit by an errant golf ball since he assumed the risk, unless the defendant's conduct was negligent.[97]

Another possible defense that a defendant my use is that of contributory negligence. Contributory negligence has been defined as: "[C]onduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause co-operating with the negligence of the defendant in bringing about the plaintiff's harm."[98] A successful contributory negligence defense may act as either a total bar to the plaintiff's recovery or a reduction in defendant's liability toward the plaintiff depending on the jurisdiction.[99] Since the majority of states have adopted some form of comparative fault, contributory negligence is generally less attractive than the assumption of risk defense, which always acts as a complete bar to the plaintiff's recovery. However, the assumption of the risk defense is not applicable in actions involving negligent conduct by a defendant golfer.[100] Thus, as a practical matter, where a defendant golfer is partly negligent, contributory negligence is a better defense.[101]

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[95] Wood v. Postelthwaite, 496 P.2d 988, 993 (Wash. Ct. App. 1972).
[96] *Id*.
[97] Cavin v. Kasser, 820 S.W.2d 647, 650-51 (Mo. Ct. App. 1991); Thompson v. McNeill, 559 N.E.2d 705, 707 (Ohio 1990).
[98] RESTATEMENT (SECOND) OF TORTS § 463 (1965).
[99] Outlaw v. Bituminous Ins. Co., 357 So. 2d 1350, 1352-53 (La. Ct. App. 1978).
[100] Wood v. Postelthwaite, 496 P.2d 988 (Wash. Ct. App. 1972).
[101] Dashiell v. Keavthon-Kona Co., 487 F.2d 957 (9th Cir. 1973); Boyton v. Ryan, 257 F.2d 70 (3d Cir. 1958); Westborough Country Club v. Palmer, 204 F.2d 143, 149 (8th Cir. 1953).

However, at least one court has recognized an exception to these defenses for minor children.[102] In *Outlaw v. Bituminous Ins. Co*., a nine-year-old child was located on the left side of the fairway when the defendant teed off. Although the child was crouched behind a golf bag for protection, he raised his head to see whether the defendant had hit his shot and was struck in the eye by the ball.[103] The court held that the duty owed by the defendant to the child was to not drive the ball at all in the child's general direction, even though the child was playing in the foursome and had consented to the defendant hitting the ball.[104] In so holding, the court reasoned that the defendant golfer should have anticipated that the child might raise his head above the bag or otherwise leave the protection of the bag and place himself in danger.[105]

II. INJURED SPECTATORS AS PLAINTIFFS

II(a). Injured Spectators' Claims Against Golfers

In the cases where a spectator is injured by a golfer's errant shot, the courts are generally in accordance that a golfer does not owe a duty to a spectator. For example, in *Grisim v. TapeMark Charity Pro-Am Golf Tournament*, the plaintiff, a spectator at a golf tournament, decided to sit under a tree to watch the play because the provided bleachers were very crowded. [106] She was subsequently hit in the eye by a shot hit by the defendant who was an amateur golfer playing in the tournament.[107] Sadly, the plaintiff lost her eye

[102] *Outlaw*, 357 So. 2d 1350, 1354.
[103] *Id*. at 1352.
[104] *Id*.
[105] *Id*.
[106] 415 N.W.2d 874 (Minn. 1987).
[107] *Id*. at 874.

as a result of the accident.[108] The Minnesota Supreme Court held that by being a spectator, the plaintiff assumed the risk of being injured by an errant golf ball and therefore, the defendant did not owe her any duty to warn her before hitting a shot.[109]

Another example is the case of *Knittle v. Miller* where the plaintiff spectator was struck in the eye by an errant shot while attending a pro-amateur event.[110] The plaintiff was sitting in a designated viewing area approximately forty-five feet to the right of the tenth green.[111] The court similarly found that a spectator is not entitled to a warning and the golfer hitting the shot will not be liable for failing to give any such warning before hitting the shot.[112] The court reasoned that this rule is "predicated on the fact that golfers and golfing spectators know many shots go astray from the line of flight, and that such fact is a risk all such persons must accept."[113]

II(b). Injured Spectators' Claims Against Golf Course Owners and Event Sponsors

Injured spectators have also sued the golf course owners and the event sponsors on a negligence theory. In *Baker v. Mid Maine Med. Ctr.*, the plaintiff attended a golf exhibition featuring the well-known professional golfer, Tom Watson.[114] At the fifth hole, Watson hit his tee shot into the woods.[115] As the plaintiff watched Watson search for his ball, he heard someone shout "fore."[116] At that moment, a ball struck him in the

[108] *Grism*, 415 N.W.2d at 874.
[109] *Id*. at 875.
[110] 709 P.2d 32 (Colo. Ct. App. 1985).
[111] *Id*. at 34.
[112] *Id*. at 35.
[113] *Knittle*, 709 P.2d at 34. (The jury in this case also found by special verdict that the course owners, tournament sponsors and golf association were all negligent but that there negligence was not the cause of plaintiff's injuries).
[114] 499 A.2d 464 (Me. 1985).
[115] *Id*. at 466.
[116] *Id*.

chest, directly at the point where several months earlier an incision had been made to perform heart surgery.[117] At trial, the plaintiff and others testified that they were most interested in watching Watson and they did not realize that the other golfers intended to play their shots.[118] On appeal, the Maine Supreme Court found that the country club and tournament sponsor were required to use ordinary care to ensure that the premises were reasonably safe for the spectators, guarding them against all reasonably foreseeable dangers in light of the totality of the circumstances.[119] Therefore, the court held that there was sufficient evidence for a jury to determine whether it was reasonably foreseeable that the spectators would focus their attention on Watson and not pay attention to the other golfers and then determine whether the failure to warn that another player was about to attempt a shot exposed the plaintiff to an unreasonable risk of harm.[120]

Additionally, in *Duffy v. Midlothian Country Club*, plaintiff spectator was struck in the eye by a golf ball while she was eating at a designated concession area located between two fairways. [121] At trial, the jury found that the plaintiff's injuries were the result of the course owner's and the tournament sponsor's negligence.[122] On appeal, the defendants argued that they did not create any risks other than those inherent in the situation, which the plaintiff-spectator had assumed.[123] However, the court sustained the jury's finding that the concession area was negligently located and held both the owner and the sponsor liable for the plaintiff's injuries.[124]

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[117] *Baker*, 499 A.2d at 466.
[118] *Id*.
[119] *Id*. at 467.
[120] *Baker*, 499 A.2d at 468. (As an interesting side issue, the court also held that the jury was capable of making this determination without expert testimony).
[121] 481 N.E.2d 1037 (Ill. Ct. App. 1985).
[122] *Id*. at 1040.
[123] *Id*. at 1040-41.
[124] *Id*.

III. INJURED EMPLOYEES AS PLAINTIFFS

In a hybrid between the injured golfers and the injured spectators cases, there are a substantial number of cases where an employee is injured by an errant shot.[125] For example, In *Ramsden v. Shaker Ridge Country Club*, the plaintiff and the defendant were both caddies at the same course and were given permission to play a few holes on a slow afternoon.[126] Although the opinion is not clear how, the plaintiff was hit in the eye by a shot hit by the defendant.[127] The plaintiff subsequently brought suit alleging that the golf course was negligent in supervising its employees.[128] The trial court found for the plaintiff and awarded damages, but on appeal, the court found that the trail court's award of damages was improper given that there was no evidence that the course inadequately supervised its golf course or permitted immature and dangerous person to play golf thereon.[129]

The court in *McDonald v. Huntington Crescent Club, Inc.* provided a more detailed analysis in reaching a similar outcome.[130] In this case, a 16-year old caddy brought an action against a golf course after being hit in the head by a golf ball.[131] The plaintiff caddy first contended that the golf course had failed to properly instruct him regarding safety of the golf course.[132] However, the court rejected this argument finding that the fact that he had caddied on the course over 200 times was well acquainted with the game of golf, and common sense should have made him aware of the dangers of

[125] DeFonce v. K.S.B. Arrowwood Realty Corp, 615 N.Y.S.2d 87 (N.Y. App. Div. 1994).
[126] 259 N.Y.S.2d 280 (N.Y. App. Div. 1965).
[127] *Id*. at 282.
[128] *Ramsden*, 259 N.Y.S.2d at 282.
[129] *Id*. at 282-3.
[130] 152 A.D.2d 543 (N.Y. App. Div. 1989).
[131] *Id*. at 544.
[132] *Id*.

golf.[133] The plaintiff also argued that the golf course owed him a duty of constructing barriers to protect caddies from golf balls heading in their direction.[134] The court also rejected this argument finding that the golf course exercised the degree of care that a reasonable prudent golf course would have exercised under similar circumstances.[135] Finally, the plaintiff argued that since he was in the line of flight of the golf ball, the golfer owed him a duty to warn him before hitting the shot.[136] The court found that on the facts of the case, there was material issue of fact as to whether the golfer yelled the appropriate warning, "fore."[137]

Alternatively, in a rather severe case the plaintiff was caddying for his first time when he was hit in the temple by a golf ball while peering around a hedge where he had taken cover.[138] The plaintiff assured the golfers that he was fine, but was later taken to the hospital after the players observed him wondering aimlessly around the golf course.[139] At the hospital, it was determined that the plaintiff had a blood clot in his brain and immediate surgery was performed.[140] The plaintiff lived, but suffered severe mental and physical impairments, including epilepsy.[141] At trial, the jury found for the plaintiff against both the golf club and the individual golfer.[142] On appeal, the court upheld the jury's award, thus presumably finding that the country club failed to adequately advise

[133] *McDonald*, 152 A.D.2d at 544.
[134] *Id*.
[135] *Id*.
[136] *Id*.
[137] *Id*. For a similar case *see* Defonce v. K.S.B. Arrowwood Realty Corp., 615 N.Y.S.2d 87 (N.Y. App. Div. 1994).
[138] Gant v. Hanks, 614 S.W.2d 740 (Miss. Ct. App. 1981).
[139] *Id*. at 741-42.
[140] *Id*. at 742
[141] *Id*.
[142] *Id*.

the plaintiff as to the dangers of golf and that golfers owed the plaintiff a duty to warn him of the pending shot.[143]

IV. INJURED NON-PARTICIPANTS AS PLAINTIFFS

IV(a). Injured Non-Participants' Claims Against Golfers

A golfer never has a duty to warn people who are non-participants of the golf course.[144] Ironically, it is therefore theoretically more difficult for non-participants to recover from a golfer for his errant shot than it is be for someone who is actually golfing, watching, or working on the course. For example, in *Ronaldo v. McGovern*, the plaintiff was driving by the golf course when a golf ball hit her windshield causing it to shatter and injuring her.[145] The court first held that the golfer did not have a duty to warn the plaintiff of his errant shot because the plaintiff would not have been able to hear the warning and the accident could not have been prevented.[146] The court also held that the golfer was not liable for lack of due care because a golfer cannot be held liable for an unintentional bad shot.[147] The court further reasoned that for a theory of lack of due care to succeed, the plaintiff would have to show that the golfer "aimed so inaccurately as to unreasonably increase the risk of harm."[148]

In *Ludwikoski v. Kurotsu*, the court reached the same conclusion on a theory of negligence but also sought to recover on a theory of strict liability.[149] The plaintiff in this case was sitting by a golf course in a parked automobile when she was hit in the head by

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[143] *Gant*, 614 S.W.2d at 744.
[144] I use "non-participants" to refer to all people who are not golfers, spectators, or employees of the golf course.
[145] 587 N.E.2d 264 (N.Y. 1991).
[146] *Id*. at 266.
[147] *Id*. at 267.
[148] *Id*. (quoting Nussbaum v. Lacopo, 265 N.E.2d 762 (N.Y. 1970)).
[149] 875 F.Supp. 727 (Dist. Kansas, 1995).

a golf ball, causing serious eye injury.[150] Regarding the plaintiff's theory of general negligence, the court found since the plaintiff was not in the "foreseeable ambit of danger," she was not entitled to a warning.[151] The plaintiff also argued that golf was an abnormally dangerous activity and therefore the defendant golfer should be held strictly liable.[152] However, the court rejected this argument and found for the defendants.[153]

IV(b). Injured Non-Participants' Claims Against Golf Course Owners

It is somewhat easier for non-participant plaintiffs to recover from the golf course owners and operators. For example, in *Gleason v. Hillcrest Golf Course*, the plaintiff was traveling on a freeway when a golf ball hit the windshield of the car in which she was traveling and injured her.[154] Even though the court specifically referenced the fact that there was no evidence of golf balls frequently landing on the freeway, the court found that the risk of a ball striking a car was foreseeable.[155] Therefore, the court held that the golf course owners negligently operated the golf course and were therefore liable for the plaintiff's injuries.[156]

Similarly, in *Westborough Country Club v. Palmer*, a federal appellate court upheld a finding that a golf course was negligently operated by its owners.[157] The plaintiff in this case was driving on a road that passed through the golf course en route to the swimming pool when she was struck by golf ball.[158] The road ran through the fairway

[150] *Ludwikoski*, 875 F.Supp. at 729.
[151] *Id*. at 732.
[152] *Id*.
[153] *Id*.
[154] 265 N.Y.S. 886 (N.Y. App. Div. 1933).
[155] *Id*. at 896.
[156] *Id*. at 894.
[157] 204 F.2d 143 (8th Cir. 1953).
[158] *Id*. at 145-46.

at approximately sixty yards from the tee and golfers would normally drive their shots over the road.[159] Not surprisingly, the appellate court upheld that trial court's finding that the golf course was negligent in operating this hold in this manner finding that it was definitely foreseeable that someone driving on the road would be injured.[160]

However, in the very recent case of *McGuire v. New Orleans City Park Imp*. Ass'n, the Louisiana Supreme Court came to an opposite conclusion.[161] In this case, the plaintiff was jogging near a golf course when an errant golf ball landed in front of him, bounced up, and hit him in the groin.[162] Finding that the plaintiff had grown up and currently lived in the area, frequently jogged that route, knew the route traversed a golf course, and observed golfers as he was jogging that day, the court held that an adequate implied warning was provided to the plaintiff.[163] The court additionally found that since this was "an isolated incident of injury," the golf course was not being operated in a negligent manner. [164]

V. NEIGHBORS AS PLAINTIFFS

Golf courses are often located in residential or commercial neighborhoods and often have neighbors whose property abuts that of the golf courses.[165] These neighbors are often on the receiving end of mishit golf balls that may inflict personal injury, damage to property, or simply detract from the neighbors' ability to use and enjoy their land. Even in rural areas, the neighbors of golf courses are sometimes inconvenienced by errant golf balls landing on their property. Similar to the other classes of plaintiffs already

[159] *Palmer*, 204 F.2d at 146.
[160] *Id*. at 151.
[161] 835 So.2d 416 (La. 2003).
[162] *McGuire*, 835 So.2d at 418.
[163] *Id*. at 421.
[164] *Id*. at 422. For more examples, *see* Patton v. Westwood Country Club Co., 247 N.E.2d 761 (Ohio Ct. App. 1969); Welch v. City of Glen Cove, 708 N.Y.S.2d 475 (N.Y. App. Div. 2000).
[165] I will use neighbors in this section to refer to any occupier of land who sues a golf course.

examined, the neighbors in these cases often attempt to recover from both the individual golfers and the golf course owners. However, the theories upon which they attempt to recover are very different then those previously discussed.

V(a). Neighbors' Claims Against Golfers

The most common claims brought by neighbors against individual golfers are nuisance and trespass.[166] Nuisance is commonly defined as "an unreasonable interference with the use and enjoyment of land."[167] Trespass is often defined as "an actionable invasion of a possessor's interest in exclusive possession of land."[168] These claims can result from both golf balls being hit onto the neighbors' property as well as the golfers themselves going onto the neighbors property to retrieve their errant shots. Where neighbors seek to recover from the individual golfers, the courts often follow the same analysis as the cases in which the plaintiff is a non-participant.[169] That is, the golfer never has a duty to warn the neighbors because they are not in the zone of danger.[170] Therefore, the neighbors seeking to recover from an individual golfer must establish that the golfer hit the shot or entered onto the neighbors land either intentionally, recklessly, or negligently, depending on the jurisdiction.[171] For example, in *Nussbaum v. Lacopo*, a neighbor of a golf course was hit by a golfer's errant shot.[172] The New York Supreme

[166] Courts often fail to adequately distinguish between the two and it is often difficult to determine under which theory the case is being decided. *See e.g.,* Mish v. Elks Country Club, 1983 WL 1436, 1 (Pa. Commw. Ct. 1983); Fenton v. Quaboag Country Club, Inc., 233 N.E.2d 216 (Mass. 1968).
[167] JESSE DUKEMINER AND JAMES E. KRIER, PROPERTY, p. 35 (4th Ed. 1998).
[168] *Id*. at 35.
[169] Nussbaum v. Lacopo, 265 N.E.2d 762, 764 (N.Y. 1970).
[170] *Id*. at 766.
[171] Malouf v. Dallas Athletic Country Club, 837 S.W.2d 674, 678 (Tex. Crim. App. 1992).
[172] 265 N.E.2d 762, 764 (N.Y., 1970).

Court found that the errant shot was not intentional or negligent, but merely a bad shot.[173] The court also held that the golfer did not have a duty to shout the warning "fore" as the neighbor was not "in such a position that danger to them is reasonably anticipated" due to the neighbor's location and the barriers between the neighbor and the defendant.[174] As illustrated by this case, if the act is not intentional, it is very difficult for a neighbor to recover from an individual golfer.

V(b). Neighbors' Claims Against Golf Course Owners

However, it is often easier for the neighbors to recover from the golf course owners. It appears that most courts elect to decide these cases on a nuisance rather than a trespass theory. Although these two theories can be similar in certain circumstances, they are distinct theories of liability and should be clearly identified. Nonetheless, courts often fail to adequately distinguish the two theories or indicate upon which theory the courts are deciding the case. For example, *Fenton v. Quaboag Country Club, Inc*., the neighbors of a golf course alleged that approximately 250 golf balls per year fell onto their property for over 14 years. [175] The Massachusetts Supreme Court found that with a few exceptions, the great majority of the balls invading the neighbors' property were hit there unintentionally.[176] The court stated the neighbors were entitled to an "abatement of the trespasses" but employed a nuisance standard in upholding an injunction against the golf

[173] *Nussbaum*, 265 N.E.2d at 766-67.
[174] *Id*.
[175] 233 N.E.2d 216 (Mass. 1968).
[176] *Id*. at 218.

course.[177] Therefore, the court failed to specify upon which theory it was basing its opinion.

The court similarly failed to distinguish between trespass and nuisance in *Mish v. Elks Country Club*. [178] In this case, the court found that the errant golf balls intruding on a neighbor's land could be characterized as either a nuisance or a trespass.[179] The court purported, "although a nuisance and trespass are two distinct types of torts we do not have to select one or the other in order to proceed."[180] As in *Fenton*, it is unclear whether the court actually employed a nuisance or a trespass standard.

In addition to theories of nuisance and trespass, neighbors are also often successful in recovering from golf course owners on the theory of negligent design[181] or negligent supervision.[182] For example, the neighbors in *Malouf v. Dallas Athletic Country Club* sought to recover from a golf course on a theory of negligent design.[183] The neighbors argued that plants, which were planted to protect them, actually hindered their view of the green and thus increased the likelihood that they would be hit by an incoming ball.[184] The court rejected this argument and sustained the trial court's finding that the golf course was not negligently designed. In so doing, the court specifically noted that the golf course had done the following: (1) commissioned Jack Nicklaus[185] to redesign the course; (2) held meetings about the redesign, specifically in changing hole number six to

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[177] *Fenton*, 233 N.E.2d at 219. (Where the court wrote, "The standard is what ordinary people, acting reasonably, have a right to demand in the way of health and comfort under all the circumstances").
[178] 35 Pa. D & C.3d 435 (Pa. Commw. Ct. 1983).
[179] *Id*. at 435.
[180] *Mish*, 35 Pa. D & C.3d at 436.
[181] Malouf v. Dallas Athletic Country Club, 837 S.W.2d 674, 678 (Tex. Crim. App. 1992); Sierra Screw Products v. Azusa Greens, Inc**.**, 151 Cal. Rptr. 799 (Cal. Ct. App. 1979).
[182] Nussbaum v. Lacopo, 265 N.E.2d 762, 764 (N.Y. 1970).
[183] 837 S.W.2d 674, 678 (Tex. Crim. App. 1992).
[184] *Id*. at 677.
[185] Jack Nicklaus is one of the most famous professional golfers to ever play the game.

aim the golfer left; (3) moved the fairway approximately 20 to 30 yards left; (4) moved the tee box and changed its direction to point left; (5) moved the member's tees up and aimed left (6) added mounds, berms, and a sand bunker approximately one hundred yards from the tee box; (7) planted trees (8) moved all hazards from the left side to the right side; (9) planted six-foot tall Photinias.[186]

In *Sierra Screw Products v. Azusa Greens, Inc.*, a golf course appealed from a mandatory injunction requiring it to redesign and reconstruct the holes adjacent to the neighbors' property to the extent necessary to abate the private nuisance.[187] In this case, the neighbors purchased property adjacent to two holes from the golf course approximately five years before this litigation commenced.[188] In the sales contract, the golf course had committed to plant trees and erect a fence to protect the neighbors and their property.[189] The golf course did so, but the neighbors argued that this was inadequate to stop the nuisance and hence, the golf course was negligently designed.[190] On appeal, the golf course argued that the course was not negligently designed and was not operated in an unnecessary and injurious method so as to permit the trial court to enjoin the redesign, reconstructions, and maintenance of the golf course.[191] The appellate court disagreed however, and sustained the trial courts injunction ordering the golf course to redesign and reconstruct two of its holes.[192]

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[186] *Malouf,* 837 S.W.2d at 678.
[187] 151 Cal. Rptr. 799 (Cal. Ct. App. 1979).
[188] *Id*. at 801.
[189] *Id*.
[190] *Id*.
[191] *Id*. at 802-03.
[192] *Sierra Screw Products*, 151 Cal. Ct. App. at 806. (This apparently included the tee box, the fairway, and the green).

In *Nussbaum v. Lacopo*, the neighbor also commenced an action against the golf course on theories of nuisance, negligent design, and negligent supervision.[193] The New York Supreme Court rejected the neighbor's negligent design and nuisance arguments holding that a person who chooses to reside near a golf course, a very desirable location, "must accept the occasional, concomitant annoyances."[194] The court also agreed with the golf course's contention that the golfer's shot was unforeseeable given that is was so extraordinarily bad.[195] The court specifically noted that 20 to 30 feet of rough and a stand of trees 45 to 60 feet high, over which only one ball had ever passed, separated the fairway and the neighbor's property.[196] Thus, the court concluded that the neighbor's injury and the invasion of his land were "unforeseeable" and the golf course was therefore not liable either for nuisance or for negligent design.[197]

Another theory of liability raised by the neighbor in this case was negligent supervision.[198] In this case, the golfer was a trespasser on the golf course and had not paid to play.[199] The court held that the course was not negligent in its supervision of the trespassing golfer.[200] The court found that the course owners and operators had consistently chased trespassers off of the property and thus, the golf course exercised sufficient control over those persons permitted to play and did its best to prevent those who were not permitted to play.[201] The court therefore held that the golf course was subject to the general principle that a property owner is only liable for those risks

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[193] 265 N.E.2d 762 (N.Y. 1970).
[194] *Id*. at 765.
[195] *Id*. at 766.
[196] *Nussbaum*, 276 N.E.2d at 766.
[197] *Id*. at 767.
[198] *Id*. at 764.
[199] *Id*.
[200] *Id*. at 766.
[201] *Id*. at 764.

inherent in the performance of an actor permitted to use the land and not for collateral or causal negligence on the part of that actor.[202]

V(c). Defenses

Additionally, a golf course may assert defenses such as a prescriptive easement,[203] implied easement,[204] equitable estoppel,[205] that receiving a few golf balls on the neighbor's property is a natural consequence of living adjacent to a golf course,[206] and even that the cost to prevent the trespass or nuisance greatly outweighs the benefits to the neighbor.[207]

For example, in *MacDonald Properties, Inc. v. Bel-Air Country Club*, a golf course defensively asserted that it had acquired a prescriptive easement to hit and retrieve golf balls from the neighbors' property.[208] The court relied on the facts that the property in question had been used as a rough for over 40 years, several golf balls per day were hit onto the property and retrieved from the property with no objection from the neighbor owners, the deed by which the neighbors' ancestors in title acquired the property imposed building restrictions for the specific purpose of preserving the then existing use of the sixth fairway, and the neighbors did not erect permissive use signs or take other steps to

[202] *Nussbaum*, 265 N.E.2d at 765.
[203] MacDonald Properties, Inc. v. Bel-Air Country Club, 140 Cal. Rptr. 367 (Cal. Ct. App. 1977).
[204] Sierra Screw Products v. Azusa Greens, Inc., 151 Cal. Rptr. 799 (Cal. Ct. App. 1979).
[205] Geddes v. Mill Creek Country Club, Inc., 751 N.E.2d 1150 (Ill. 2001).
[206] Bechhold v. Mariner Properties, Inc, 576 So. 2d 921 (Fla. Dist. Ct. App. 1991).
[207] Weishner v. Washington County Golf and Country Club, 1979 WL 566 (Pa. Commw. Ct. 1979); Patton v. Westwood Country Club Co., 247 N.E.2d 761, (Ohio Ct. App. 1969). However, compare Sans v. Ramsey Golf and Country Club, 149 A.2d 599 (N.J. 1959).
[208] 140 Cal. Rptr. 367 (1977).

preserve their rights.[209] Therefore, the court held that the golf course had established a prescriptive easement and denied the neighbors' claims.[210]

Another affirmative defense used by golf courses is that of equitable estoppel. In the recent case, *Geddes v. Mill Creek Country Club, Inc.,* a golf course's neighbors brought an action against the golf course owner for intentional trespass and intentional private nuisance based on errant golf balls hit onto their property from an adjacent fairway of a golf course.[211] The Illinois Supreme Court held that the neighbors were equitably estopped from bringing these claims because they had negotiated with the golf course developer before the construction of the golf course and come to an agreement whereby the neighbors agreed to the placement of the fairway which resulted in the balls being hit onto their property.[212] The court also dismissed the neighbors' argument that they were not familiar with the game of golf and were unaware that golf balls may be hit onto their property.[213] The court found that it was a matter of common knowledge that golfers do not always hit their balls straight, that this proposition needed no supporting evidence or citation of authority, and that "this condition is as natural as gravity or ordinary rainfall."[214]

Although many other courts have found that receiving a reasonable number of golf balls on a golf course's neighbor's property is a natural consequence of living on golf course, the question of what constitutes "reasonable" has led to some litigation. For example, in *Bechhold v. Mariner Properties, Inc.*, the neighbors of a golf course had been

[209] *Bel-Air Country Club*, 140 Cal. Rptr. at 373-74.
[210] *Id.* at 374.
[211] 751 N.E.2d 1150 (Ill. 2001).
[212] *Geddes*, 751 N.E.2d at 1158.
[213] *Id*.
[214] *Id*.

finding approximately 12 golf balls per year for the last 5 years in their backyard. [215] However, after the redesign of the course, the fairway adjoining the neighbors' property was narrowed to approximately 50 yards, the number of invading golf balls increased to approximately 1,000 golf balls per year.[216] The court held that summary judgment for the golf course was improper as it was a jury question as to whether the golf course had taken sufficient precautions to relieve itself of liability.[217] The court specifically noted that the course had been redesigned to minimize the number of balls hit onto the neighbors' property by planting trees and shrubs to protect the property and posting a sign urging golfers to use "extreme caution" to avoid hitting balls at the neighbors' property.[218] The court also instructed the trial court that, "living on a golf course and living with golf balls necessarily go hand-in-hand."[219] However, the court specified that, "the issues here are whether the [neighbors] are being subjected to more than a reasonable exposure to golf balls and what steps, if any, would be appropriate to remedy this problem."[220]

Golf courses have also successfully argued that the benefits of relief sought by its neighbors are greatly outweighed by the costs to the golf course. For example, in *Weishner v. Washington County Golf and Country Club*, the court found that the neighbors were not entitled to force a golf course to relocate a fairway at a cost of at least $10,000 to $15,000.[221] The court relied on the fact that the golf course had been in existence for over 60 years, had not expanded its facility or frequency of use, the cost of the redesign plan proposed by the neighbors would be too expensive compared to the

[215] 576 So.2d 921, 922 (Fla. Dist. Ct. App. 1991).
[216] *Id*. at 922.
[217] *Id*. at 923.
[218] *Id.* at 922-23.
[219] *Bechhold*, 576 So.2d at 923.
[220] *Id*.
[221] 11 Pa. D & C.3d 458 (Pa. Commw. Ct. 1979).

benefit that the they would enjoy, and that the golf course had and was making a positive effort to reduce any hazard to the neighbors' property by relocating the tee and planting trees and shrubs to create a natural screen. The court also noted that houses adjacent to a golf course are very desirable and that the neighbors in this case "came to the nuisance" in purchasing their house. The court also advised the neighbors that they could supplement the natural screen by planting their own plants and trees.[222]

Similarly, in *Patton v. Westwood Country Club Co.*, the court found that a neighbor of a golf course was not entitled to an injunction restraining the golf course from operating in such a manner that the golfers' balls landed on the neighbor's property.[223] The court specifically noted that the neighbor knew that her property abutted the playing area of country club golf course when she bought property and constructed her house.[224] Additionally, the court considered the fact that the golf ball hazard had remained constant during the 11-year period which the neighbor had lived in her house.[225] Moreover, the golf course had made substantial changes in the configuration of a particular hole to lessen the hazard including changing the sprinkling system, moving the fairway, and planting twenty pine trees to form a barrier.[226] Finally, the court found that further modifications proposed by the neighbor would be of doubtful efficacy, would cost approximately $25,000, would ruin the character of the hole, and would not decrease the golf hazard to the neighbors.[227] Thus, by weighing the golf course's costs of the

[222] *Weishner*, 11 Pa. D & C.3d at 461.
[223] 247 N.E.2d 761, (Ohio Ct. App. 1969).
[224] *Patton*, 247 N.E.2d at 761.
[225] *Id*. at 764.
[226] *Id*.
[227] *Id*.

proposed changes against the neighbor's benefits, the court held that the costs greatly outweighed the benefits.[228]

However, golf courses have not always been successful in asserting this defense. In *Sans v. Ramsey Golf and Country Club*, the Supreme Court of New Jersey found that significant costs to a golf course were not outweighed by the benefits to the golf course's neighbors.[229] In this case, the problem was not golf balls but the actual golfers who frequently walked past the neighbors' home as they were golfing.[230] The court held that the neighbors' interest in not having so many golfers walking past their home was paramount and that a proper balance of equitable convenience could only be achieved by requiring the defendants to relocate the objectionable tees.[231]

In *Mish v. Elks Country Club*, the court similarly found that the benefits of a net to protect the neighbors' property outweighed the cost of erecting and maintaining a net.[232] The court specifically noted that, "the misplayed golf balls cause not only an obvious discomfort in the enjoyment of the [neighbors'] land, but also threaten the health and welfare of anyone who happens to be on [the neighbors'] property, along with the potential injury to the property itself."[233] Therefore, the court held that under the existing conditions, the plaintiff neighbors were entitled to the equitable relief of having a net erected and maintained.[234]

Although unsuccessful, other golf courses have asserted an implied easement as an affirmative defense. For example, in *Sierra Screw Products*, the court rejected a golf

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[228] *Patton*, 247 N.E.2d at 764.
[229] 149 A.2d 599 (N.J. 1959).
[230] *Id*. at 442.
[231] *Id*. at 449-50.
[232] 35 Pa. D. & C. 3d 435 (Pa. Commw. Ct. 1983).
[233] *Id*. at 438-39.
[234] *Id*. at 439.

course's argument that it had an implied easement for the golf balls to land on its neighbors' property.[235] The court found that even though the neighbors purchased the land from the golf course, were aware that the land was located next to a golf course, and knew that golf balls from the golf course landed on the property, an implied easement was not created.[236] However, in a fact that may distinguish this case from other future cases, the court noted that the sales contract required the sellers golf course to install fencing to reduce the number of golf balls that would land on the neighbors' property.[237]

The court also rejected the golf course's argument that since its property was zoned for the operation of a golf course, it cannot be held to constitute a private nuisance.[238] The defendants relied on a section of the California Code of Civil Code which precluded any use expressly permitted by the zone from being deemed a nuisance without evidence of the unnecessary and injurious methods of operation.[239] However, the court rejected this argument holding that that the operation of the golf course in its current condition was an "unnecessary and injurious method of operation" so as to permit the trial court to enjoin the maintenance of the golf course.[240]

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[235] 151 Cal. Rptr. 799 (Cal. Ct. App. 1979).
[236] *Id*. at 805.
[237] *Id*.
[238] *Id*. at 802.
[239] *Sierra Screw Products*, 151 Cal. Rptr. at 803. (The California Code of Civil Procedure §731a provides in pertinent part: "Whenever any city, city and county, or county shall have established zones or districts under authority of law wherein certain manufacturing or commercial or airport uses are expressly permitted, . . . no person or persons, firm or corporation shall be enjoined or restrained by the injunctive process from the reasonable and necessary operation in any such industrial or commercial zone or airport of any use expressly permitted therein, nor shall such use be deemed a nuisance without evidence of the employment of unnecessary and injurious methods of operation").
[240] *Id*. at 806.

CONCLUSION

Whether an injured plaintiff can maintain a successful claim against the injuring party for a golf-related injury depends in large part on the class into which the plaintiff falls and the class into which the defendant falls. Although different jurisdictions have created many different rules, the cases are generally in harmony. A person participating in the golf game as a player, spectator, or employee, is generally able to recover if they were in the zone of danger and the defendant did not warn or protect them. A non-participant and an adjacent neighbor are usually not able to recover from the individual golfer but may recover from the golf course if they can show that the golf course was unreasonable in failing to stop the golf balls or golfers from leaving the golf course.