To Be Submitted By:
Kara M. Rosen

New York Supreme Court

APPELLATE DIVISION — THIRD DEPARTMENT

Docket No.
CV-23-0642

DAVID KATLESKI,

Plaintiff-Respondent,

against

CAZENOVIA GOLF CLUB, INC.,

Defendant-Appellant,

and

JUSTIN HUBBARD and RICHARD HUBBARD,

Defendants.

BRIEF IN OPPOSITION TO NATIONAL GOLF COURSE OWNERS ASSOCIATION AS *AMICUS CURIAE*

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PRELIMINARY STATEMENT

Plaintiff-Respondent, David Katleski (hereinafter Plaintiff) submits this brief in response to the brief for National Golf Owners Association as *Amicus Curiae* (herein the "Association) in support of the appeal taken by Defendant-Appellant Cazenovia Golf Club, Inc. (hereinafter "CGC" or "defendant") from the Order of the Supreme Court, Madison County (McBride, J.) dated March 9, 2023, denying the defendant's motion for summary judgment (4).[1]

ARGUMENT

The Association's alleged interest in the subject appeal is grounded in the assertion that "the game of golf is a substantial contributor to the economic life of our nation." In fact, the Association claims that there are hundreds of billions of dollars directly attributable to private golf courses. The Association is made up of owners and operators who directly benefit from this revenue stream. The Association therefore submits their brief in support of the financial interests of its members.

Notably, the Association concedes that an owner of a golf course has the obligation to design a golf course to avoid unreasonably enhancing the risk that players will be hit by golf balls. Despite acknowledging this obligation, as well as the economic wealth of golf course owners and players, the Association argues that

[1] Numbers in parentheses refer to pages of the Record on Appeal.

neither the lower court, nor this Court, "should impose obligations on golf course owners and operators that are impracticable and cost prohibitive."

As has been briefed in full, and has been conceded by the Association and by CGC, golf course owners do have affirmative safety obligations with respect to their courses. The assumption of risk doctrine does not eliminate this legal duty. Rather, the applicability of the defense is determined by specific factual circumstances on a case-by-case basis. Where there are questions of fact, summary judgment is not appropriate.

Contrary to the position of both the Association and CGC, the lower court has not issued a general mandate that all golf courses shall have impenetrable barriers and better visibility between all holes. The lower court has not even issued a mandate that the subject golf course at CGC implement such precautions. Rather, the Association incorrectly conflates the lower court's finding that issues of fact preclude summary judgment in this matter, into the sweeping conclusion that the lower court's decision imposes a general duty on all golf courses to install barriers between holes. Then, without any evidence at all, the Association goes on to state that such a requirement would bankrupt golf courses such that golf would cease to exist.

First, the decision imposes no such general requirement, nor any requirement at all. Second, the dramatic assertion that the subject decision finding that a jury

should be entitled to make factual determinations with respect to this specific course, and this specific plaintiff, will result in the end of the game of golf is simply false.

Rather, the lower court determined that the plaintiff's expert opinions conflicted with the expert opinions submitted by CGC. The lower court therefore correctly determined that those conflicting opinions created issues of fact for a jury.

In further support of their brief, rather than addressing the record before this Court, the Association makes assertions concerning the use of netting on golf courses that were not before the lower court. CGC did not submit any expert opinion, or evidence, addressing the assertions raised by the Association for the first time on this appeal. It is therefore respectfully submitted that the opinion of counsel concerning netting requirements on golf courses should be disregarded by this Court.[2]

In any event, the Association concedes that nets are utilized between holes on certain golf courses. Further substantiating the admission that netting is utilized on golf courses in such situations where it may be necessary to ensure safety, the Association represents that said nets "need to be 10-150 feet high, unless placed

[2] *See Colgate-Palmolive Co. v. Erie Cty.,* 39 A.D.2d 641 (4th Dept. 1972)("an amicus curiae 'is not a party, and cannot assume the functions of one; he must accept the case before the court with issues made by the parties, and may not control the litigation. Nor may he introduce any issues; only the issues raised by the parties may be considered."); *See also East Williston v. Public Service Com.,* 153 A.D.2d 943 (2d Dept. 1989).

directly adjacent to a problematical tee and/or adjacent to an area frequently hit." Here, as has been previously set forth, the plaintiff has established that the subject tee was "problematic." 2111. The plaintiff has further established that the area in which the plaintiff was hit was frequently subject to errant shots. 512-513; 595; 600; 830-831; 916; 1030; 1032-1033; 1231; 1204.

However, despite the clear admission that nets are in fact generally utilized on golf courses, and may be required, the Association goes on to state that such nets are "not in keeping with the natural look of golf" and "environmentalists believe nets are harmful to birds." Notwithstanding the fact that these statements have no evidentiary value, nothing in these statements establishes that nets are not necessary at the subject golf course.

Furthermore, while counsel goes on to calculate the cost of netting to CGC, without any evidentiary basis whatsoever, this is not contained anywhere in the record because CGC did not submit any such calculation. [3]

It is once again respectfully submitted that the lower court correctly denied CGC's motion for summary judgment, as the plaintiff raised issues of fact, supported by expert opinion, as to whether CGC unreasonably increased the risk posed to the plaintiff. (11-12). The plaintiff's expert submission is not conclusory, nor does it lack probative value. Rather it specifically addresses the safety concerns that

[3] *See Colgate-Palmolive Co. supra.*

unreasonably increased the risk posed to the plaintiff, while noting the exact location of the parties, and relying upon, among other evidence, a site inspection with specific measurements. The plaintiff's expert did not set forth the sole opinion that the subject golf course should have been safer, or that the course was "suboptimal", but rather established that in negligently designing and maintaining the course, CGC unreasonably increased the risk posed to the plaintiff. This issue was therefore properly left for jury determination by the lower court.

In sum, after conflating and overdramatizing the decision of the lower court, the Association eventually concedes that the decision of the lower court simply allows the plaintiff's action to proceed to a jury. Neither the lower court, nor this Court, are imposing an inappropriate burden or unreasonable monetary costs on golf course owners and operators generally.

The argument set forth by the Association, and by CGC, is that the industry of golf, generating hundreds of billions of dollars, should be entitled to operate without any safety obligations, and should be immune from civil liability. This argument must be rejected as it is not sound public policy, nor does it align with the current state of the law concerning assumption of risk and motions for summary judgment.[4] The argument that the standard for summary judgment should be

[4] Both *Delaney v. MGI Land Dev., LLC,* 72 A.D.3d 1254 (3rd Dept. 2010) and *Stanhope v. Burke,* 2023 N.Y. Slip Op 05427 (3rd Dept. 2023) are distinguishable from the case herein. The plaintiff in *Delaney* made an argument that his golf cart

ignored, so that the economic interests of golf course owners may blanketly outweigh the safety concerns of players, must be rejected.

The lower court therefore properly determined that a jury is entitled to determine whether certain failures by CGC created an unreasonably increased risk to Mr. Katleski and whether they should be held liable for those failures.

Mr. Katleski has successfully opposed CGC's motion, raising issues of fact, where those facts are to be unequivocally viewed in the light most favorable to him.[5] To deny Mr. Katleski the right to proceed with his case, solely to protect the financial interests of golf course owners across the country, is not part of the summary judgment analysis.

The well settled summary judgment standards repeatedly upheld by this Court cannot be ignored in favor of the financial interests of the members of the Association, or of the game of golf generally. It is further fundamentally unfair to

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was blocked in and could not have been moved which was not supported by the record. There were no competing expert opinions. *Stanhope* involved a horseback riding incident and similarly did not have any expert submissions. *Secky v. New Paltz Central School Dist.,* 195 A.D.3d 1347 (3rd Dept. 2021) and *Grady v. Chenango Valley Central School Dist.,* 40 N.Y.3d 89 (2023) did not involve golf course design.

[5] *See Shapiro v. City of Amsterdam,* 96 A.D.3d 1211 (3d Dept. 2012); *Gronski v. County of Monroe*, 18 NY 3d 374 (3d Dept. 2011); *City Line Rent a Car, Inc. v. Alfess Realty, LLC*, 33 A.D.3d 835 (2d Dept. 2006); *Demshick v. Community Hous. Mgt. Corp.,* 34 A.D.3d 518, 520 (2d Dept. 2006); *Marine Midland Bank, NA v. Dino & Artie's Automatic Transmission Co.,* 563 N.Y.S.2d 449 (2d Dept. 1990).

assert that the specific facts here do not matter because of what the results *might* mean for the golf industry.

Simply put, there are clear questions of fact, raised by conflicting expert submissions, on the issue of whether CGC unreasonably increased the risk posed to the plaintiff at the subject golf course. The Order of the lower court should be affirmed.

CONCLUSION

For the foregoing reasons, the Order of the Supreme Court, Madison County (McBride, J.) dated March 9, 2023, denying the defendant's motion for summary judgment should be affirmed.

Dated: Westbury, New York
December 18, 2023

Respectfully submitted,

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Dated: Westbury, New York
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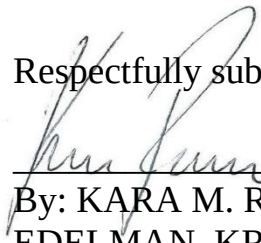
Respectfully submitted,



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