MAY 2003 LAW REVIEW

JOGGER INJURED BY ERRANT SHOT FROM PARK GOLF COURSE

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In the case of *McGuire v. New Orleans City Park Improvement Association*, No. 2002-C-1401 (La. 01/14/03), plaintiff Robert McGuire was injured while jogging near one of New Orleans City Park's golf courses. Under the circumstances of this particular case, the state supreme court found that "City Park's golf course did not present an unreasonable risk of harm." As a result, the supreme court concluded City Park had no legal duty to provide additional protection or warnings to a non-golfer.

FACTS & PROCEEDINGS

On April 25, 1994, McGuire, and two of his friends were jogging on Palm Drive in New Orleans City Park near the Bayou Oaks Little Course. The Little Course is also called the South Course. As they were jogging on Palm Drive, after crossing the bridge near South Course Hole No. 3, a golf ball landed on the roadway in front of McGuire then bounced and struck him in the groin area, causing his right testicle to rupture. As a result of the injury, McGuire had surgery and a portion of his right testicle was removed.

An expert in golf course design and development testified that it was approximately 56 yards from Tee No.3 to the green and 170 yards from Tee No. 3 to the site of the accident. New Orleans City Park covers 1500 acres of land, and is the fifth largest urban park in America. It has four golf courses, with 22 miles of unrestricted public roadways, which is surrounded by golf tees and greens on both sides.

Following his injury, McGuire sued the operator of City Park, the New Orleans City Park Improvement Association (City Park). In his complaint, McGuire alleged that the City Park owed a legal duty to "warn non-golfers on Palm Drive of the danger of golf balls." Further, McGuire claimed City Park had a legal duty "to configure the golf course so that a danger was not created for non-golfers on Palm Drive, and to provide a protective barrier between the golf course and Palm Drive."

City Park denied any liability and filed a motion for summary judgment. In so doing, City Park asserted that McGuire had "jogged through the golf course between two clearly visible greens, which was not a hidden peril that required a warning or protective barrier." In addition, City Park claimed that "it was not reasonably foreseeable that a golfer would hit a ball so far to the right that a non-golfer would be injured." The trial court agreed and granted summary judgment in favor of City Park. McGuire appealed.

The appeals court found the trial court had erred in granting the City's motion for summary judgment. Accordingly, the appeals court ordered the trial court to conduct a full trial and allow a jury to determine whether City Park was negligent under the circumstances of this particular case.

Following a trial, the jury found City Park negligent and allocated 40% fault to City Park and 60% to McGuire. A judgment in excess of fifty thousand dollars was entered against City Park. City Park appealed.

The appeals affirmed the jury's findings and the judgment against City Park. In so doing, a majority on the appeals court held that "City Park owed a duty to a 'passer-by not playing golf and not on the golf course' to exercise reasonable and ordinary care to keep the premises reasonably safe and take reasonable precautions, such as: placing warning signs, posting barriers between the golf tee and the road, configuring the course differently, or closing Palm Drive to pedestrians and bicycle traffic near the golf course." The state supreme court granted City Park's petition to review this judgment.

UNREASONABLE OR OBVIOUS RISK?

As a general rule, the state supreme court noted that "landowners and land occupiers have a duty to refrain from acting negligently toward those they know or should have known will come onto their property." Moreover, when the landowner is a governmental agency or municipality operating a public park, there is a legal duty "to keep the premises in a reasonably safe condition for those using the park and to discover any unreasonably dangerous conditions on the premises and to either correct the conditions or warn of the danger." In so doing, the operator of a public park is required to "furnish equipment and services to prevent injury from conditions which foreseeably may cause injury." On the other hand, the state supreme court acknowledged that the operator of a public park "operator is not the insurer of its patron's safety, but is liable only for injuries resulting from its negligence."

As described by the court, an unreasonable risk is generally one which is not readily apparent and the potential for harm outweighs any social utility.

> Determining whether a risk is unreasonable requires a balance of the intended benefit of the thing with its potential for harm and the cost of prevention. Also, in determining negligence, we must consider the "obviousness" and the "apparentness" of the complained of condition. If the facts demonstrate that the complained of condition was obvious to all, the condition is not unreasonably dangerous and the defendant owes no duty to the plaintiff…
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> [T]o find negligence a risk must be both foreseeable and unreasonable. Ordinary care requires only that precautions be taken against occurrences that can and should be foreseen; it does not require that one anticipate unusual and improbable, though entirely possible happenings…
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> [T]he obviousness and apparentness of a potentially dangerous condition are relevant factors to be considered… [I]f the facts of a particular case show that the risk is obvious to all, then the risk is not unreasonably dangerous and the public entity does not owe a duty to the plaintiff.

As noted by the state supreme court, golf course owners in other jurisdictions "have been found liable to non-golfers under certain circumstances for failing to maintain the premises in a reasonably safe condition." Similarly, the supreme court examined this particular golf course to determine whether City Park presented an unreasonable risk that non-golfers jogging on adjacent roadways would be struck and injured by a golf ball. Specifically, the court considered whether the golf course presented an unreasonable or foreseeable danger to this particular non-golfer which City Park had a duty to protect or warn against.

In general, City Park conceded that it had a "duty to discover any unreasonably dangerous condition, correct it or warn others of the condition." However, under the circumstances of this case, City Park argued that it had "no duty to protect a non-golfer traveling the roads traversing the golf course against injury from an errant golf shot because the risk of a non-golfer getting struck by a golf ball was obvious, reasonable, and minuscule." Further, assuming there was some legal duty to warn under the circumstances of this case, City Park claimed it had fulfilled any duty by "adequately warning entrants to the park of possible golf activity, erecting signs regarding golfing, i.e., 'golfers only beyond this point,' 'golf cart crossings'." As a result, City Park contended that McGuire had "failed to prove that it acted unreasonably" under the circumstances of this case.

Given McGuire's "familiarity with the park and the golf course," the state supreme court found City Park "owed no duty to provide additional warnings."

> McGuire testified that he grew up near City Park, lived 13 years of his adult life a mile from City Park, had previously jogged that route, knew that the traversed a golf course, and observed golfers as he was jogging that day. This non-golfer therefore was warned and should have anticipated encountering golf balls when jogging near the vicinity of a golf course because the risk of injury was obvious and readily observable.

SOCIAL VALUE OUTWEIGHS RISK

The state supreme court also found "the remedies required by the court of appeal's ruling which included erecting barriers, reconfiguring the golf course, or closing off the street to non-golfers, i.e., pedestrians or bicyclists, would be prohibitive considering that this was an isolated incident of injury."

> With regard to erecting barriers, we note that: 1) barriers would be required on both sides of the road to effectively protect any non-golfers from an accidental injury; 2) high barriers would substantially interfere with the game of golf, and 3) the cost of the barriers would be unreasonable considering that there has been no reported accidental injury of this nature since City Park has existed.

> With regard to reconfiguring the park, Ronald Bernandi, City Park's head golf professional, Pat Dayton, the park's general manager and superintendent, and Mackel [expert witness of golf course design] all testified that the four golf courses have had the same layout for over 75 years. The designs have never been substantially altered or reconfigured because of any unreasonable danger to a non-golfer, and the safety measures are no different than at any other public golf course in the country. Dayton testified that the park is open 365 days per year and every year the park attracts approximately fourteen million visitors with no pedestrian injury reported. For this reason, we maintain that the foreseeability of an injury of this kind occurring is "practically nil."

Further, the state supreme court found that it would be "unreasonable to close off the road through the South Course to non-golfers because of an isolated incident to one person."

> Closing South Course's roads would mean all roads traversing the golf course would be closed to the public, depriving them of the park's enjoyment. Thus, these suggestions go beyond what would be a reasonable response when we consider the magnitude of the risk of injury to non-golfers.

According to the state supreme court, "a park is negligent if the magnitude of the risk of injury outweighs the public park's social value." Under the circumstances of this particular case, the state supreme court determined that "the social value to the public is much greater than the risk of harm to non-golfers."

> [T]he park's purpose is to provide the maximum recreation and leisure opportunities for the greatest number of people; City Park is an unfunded state agency, and golf is the largest single source of revenue. If the roads were closed to pedestrians, barricades erected, or the golf courses redesigned, the cost to the park will be prohibitive, golfing will end, and the park will have to close, resulting in harm to the public.

Based upon such evidence, the state supreme court agreed with City Park's contention that it owed no legal duty to protect McGuire against injury from a golf ball. In the opinion of the state supreme court, "this harm was ordinary and not unreasonable." Further, the court found McGuire "should have anticipated this danger" because he was "familiar with this area."

As a result, the state supreme court concluded that the jury and the court of appeal were clearly wrong in finding that City Park failed to exercise reasonable care to keep the golf course safe." Accordingly, the state supreme court reversed the judgment of the trial jury and the court of appeal and entered a judgment in favor of City Park, dismissing McGuire's lawsuit.