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COURT OF APPEALS
STATE OF NEW YORK

KATLESKI,

Appellant,

-against-

NO. 33

CAZENOVIA GOLF CLUB,

Respondent.

92 Court Street
Binghamton, New York 13901
March 12, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE WILSON: The first case on today's
2 calendar is Katleski v. Cazenovia Golf Club.

3 Counsel?

4 MS. ROSEN: Thank you. May it please the court.
5 Good morning, Your Honors. Kara Rosen with Edelman, Krasin
6 & Jaye, on behalf of the plaintiff-appellant, David
7 Katleski. I'd like to request two minutes for rebuttal,
8 please, Your Honor.

9 CHIEF JUDGE WILSON: That's fine.

10 MS. ROSEN: Thank you. So it is the appellant's
11 position here that there are triable issues of fact that
12 preclude summary judgment, as the plaintiff has raised
13 these issues of fact through plaintiff submissions. The
14 expert submissions in this case clearly differ. There are
15 contracting - - - contrasting opinions as to whether the
16 risk of being struck with a ball was unreasonably increased
17 at Cazenovia Golf Club. There are issues as to whether,
18 first - - -

19 JUDGE TROUTMAN: Do you agree that being struck
20 by a golf ball is a risk - - - playing on the golf course?

21 MS. ROSEN: Yes, it would be a risk, but it is
22 not permitted to be unreasonably increased. Right? So if
23 it is established to be an inherent risk, then that may
24 mean that there is no duty owed by the defendant. However,
25 when there is a question - - -

1 JUDGE SINGAS: How have - - - how has your
2 expert's submission demonstrated that that risk has
3 increased so much over what the normal range of maybe
4 getting hit by a golf ball is? I don't see any real
5 quantification in your expert submissions.

6 MS. ROSEN: In our expert submission, there is an
7 application of what is called the zone-of-danger test. And
8 this is very similar, if not exactly the same, as the
9 application applied by the defendant's expert, Mr. Jordan.
10 It basically determines what the probability is of balls
11 being in a certain area of play on the course.

12 So our expert was at this specific course, took
13 measurements of the course, identified the exact location
14 that the plaintiff was at, at the time, and then determined
15 that this safety assessment is one that needs to be done,
16 and that the risk of being struck in the location where Mr.
17 Katleski was, was unreasonably increased - - -

18 JUDGE HALLIGAN: So is the argument - - -

19 JUDGE GARCIA: So - - - so anytime somebody's hit
20 by a golf ball on a golf course, you can bring one of these
21 suits and then claim the golf course is negligently
22 designed or it enhances the risk.

23 MS. ROSEN: Well, if you're able to establish
24 that there is evidence that it was unreasonably increased
25 based on the negligent design, and I think that's - - -

1 JUDGE GARCIA: Doesn't that really get around our
2 entire policy of this? I mean, you go out on a golf
3 course, it's designed as it's designed. You see how the
4 holes are set up. You're a golfer. You - - - you know,
5 you take a risk of getting hit by a golf ball. But now you
6 get hit by a golf ball, and you say the course is
7 negligently designed.

8 MS. ROSEN: Well, the courses are designed as
9 they are designed, but that varies greatly from course to
10 course. Specifically here, we have a course that was - - -
11 was designed over a hundred years ago, and then a
12 modification - - -

13 JUDGE GARCIA: Well, people have been playing on
14 it a long time. You understand the risks. There's a mod -
15 - - so do you need the modification to bring this type of
16 suit?

17 MS. ROSEN: I think that it is very important
18 here that this course was modified. I think that Mr.
19 Jordan acknowledges that a contemporary safety assessment
20 should be performed when designing courses now. So the
21 question is - - -

22 CHIEF JUDGE WILSON: But what if - - - what if it
23 hadn't been modified and - - - there was an area on the
24 course that posed a great risk?

25 MS. ROSEN: I would argue, that based on Mr.



1 Eisenberg, our expert's, submission, there still should be
2 safety assessments, right, of a - - - of a historical
3 course without a modification - - -

4 JUDGE HALLIGAN: So is - - - is that your
5 complaint, that there was no safety assessment done, or is
6 your complaint and what you think your expert supports that
7 there's a question about whether the box was in fact placed
8 in an unsafe location. Those are different concerns.

9 MS. ROSEN: Well, initially, it's that a safety
10 assessment should have been conducted, that it was required
11 by industry standards, and it should have been conducted
12 here. And had it been conducted, then it would have shown
13 that there was an unreasonable risk that should have been
14 mitigated in some way.

15 JUDGE HALLIGAN: So is it your position that any
16 time a golf course is modified in any way, that there has
17 to be a safety assessment done, or there's some risk that a
18 case will proceed at least past this - - - this point?

19 MS. ROSEN: I think that a safety assessment
20 should be done when a course is designed. And in the - - -
21 the event that there is a situation where contemporary
22 guidelines for safety assessment were not in play because
23 it is a historical course, then those contemporary
24 guidelines should be applied when there is a modification
25 to that course, absolutely. A - - -

1 JUDGE CANNATARO: Do you - - -

2 JUDGE HALLIGAN: So it sounds like the answer is
3 yes, that in your view, that there is a negligence action
4 that lies anytime a golf course is modified, if there's not
5 a safety assessment done.

6 MS. ROSEN: I would say, yes, that there is an
7 industry standard that safety assessment should be done
8 upon modification.

9 JUDGE CANNATARO: And did I understand you to
10 argue further that your position would be that even if
11 there wasn't a modification, such as in a case like this,
12 there could still be a claim based on the absence of a
13 safety assessment being done?

14 MS. ROSEN: I think that a jury should be able to
15 consider whether the lack of a safety assessment
16 unreasonably increased the risk. I'm not saying that in
17 every situation, it does - - -

18 JUDGE CANNATARO: Does that apply to a one-
19 hundred-year-old golf course where maybe doing a safety
20 assessment wasn't the state of the art when it was built?

21 MS. ROSEN: I would say it should especially
22 include a historical golf course, where the technology has
23 changed so drastically from the time it was built - - -

24 JUDGE HALLIGAN: Well, that - - - that's a lot of
25 liability, right, that - - - that you're suggesting the

1 door should be open to. You're saying that, with respect
2 to any historical golf course, even absent a modification,
3 there should be a safety assessment done because - - - I -
4 - - I don't know much about golf. I don't know exactly
5 what you mean by the technology. I assume something about
6 the clubs, but you'll tell me. That - - - that's your
7 view?

8 MS. ROSEN: That the safety assessment should be
9 done at the very least to determine whether there are any
10 risks. But I'm saying there would only be liability if
11 those - - - there were risks that unreasonably increased
12 the risk - - -

13 CHIEF JUDGE WILSON: Could - - - could I ask you
14 then how your theory would apply to the golf ball and golf
15 club manufacturers? Because by making balls that travel
16 faster and farther, and by making clubs that hit the balls
17 farther, they've increased the risk, perhaps unreasonably.
18 How do you cabin your theory so that it reaches only the
19 golf course owner and not the golf club manufacturer?

20 MS. ROSEN: Well, I would say that it would be on
21 the golf course owner in the context of the design of the
22 course to account for those advancements - - -

23 CHIEF JUDGE WILSON: Well, that clubs are - - -
24 the clubs are being designed too. And why wouldn't it be
25 on - - - incumbent on the manufacturer not to design

1 equipment that can cause injuries on existing golf courses
2 that are a hundred years old?

3 MS. ROSEN: I would say - - - I don't have an
4 expert, you know, evidence on exactly that, but I would say
5 that in terms of the clubs - - -

6 CHIEF JUDGE WILSON: I'm not asking for expert
7 evidence. I'm asking why your legal theory doesn't apply
8 equally to the manufacturer.

9 MS. ROSEN: Because the way that the clubs are
10 used may pose a danger based on the way that the course is
11 designed. I don't think that the clubs - - -

12 CHIEF JUDGE WILSON: All right. There are two -
13 - - two contributing factors. Right? The - - - well,
14 three, really, the ball, the club, and the course. And I'm
15 not sure why you're pinning liability just on the course.

16 MS. ROSEN: Because I think the nature of the
17 course directly affects how the equipment is going to
18 increase that risk in terms of proximity, in terms of the
19 distance that the ball is going to travel, the speed that
20 the ball is going to travel. It differs - - -

21 CHIEF JUDGE WILSON: Those are - - - those are
22 functions of the manufacturers, right? The speed of the
23 ball and the - - - the strength of the club, force.

24 MS. ROSEN: Yes, but - - -

25 CHIEF JUDGE WILSON: Doesn't that unreasonably



1 increase the risk? I mean, if they were playing with the
2 old balls from, you know, 300 years ago in Scotland that
3 traveled only one hundred yards on a course that was
4 designed 300 years ago in Scotland, you're not going to
5 have this risk.

6 MS. ROSEN: Right. But I think it's on the golf
7 course owner - - -

8 CHIEF JUDGE WILSON: My question is why? Why not
9 on everybody?

10 MS. ROSEN: Well, I mean, I suppose - - - I don't
11 think that the equipment itself necessarily raises the
12 risk. I think it's the equipment's use in the way that the
13 course is designed that increases the risk - - -

14 JUDGE HALLIGAN: How - - - how does this
15 translate to other sports? So - - - so my understanding is
16 that tennis rackets are far more powerful than they were,
17 say, a hundred years ago. Right? So does that mean that
18 tennis court owners have an obligation to assess whether or
19 not there's sufficient safety precautions in place, because
20 the equipment used to play the sport has changed?

21 MS. ROSEN: I don't know that tennis equipment
22 does drastically change the risk of - - - of the ball.

23 JUDGE HALLIGAN: But if it - - - if - - - if it -
24 - - if it did, because there's more power in the racket
25 given the materials that it's made of and the way it's

1 strung, same thing - - - or with any other sport, for
2 example?

3 MS. ROSEN: I think that there should be an
4 assessment, but I think it differs from here because of the
5 nature of golf courses and how much they vary.

6 JUDGE CANNATARO: Yeah, I - - -

7 MS. ROSEN: Tennis courts, in my opinion, are - -
8 - are not in - - - from what I know of them, are generally
9 the same - - -

10 JUDGE CANNATARO: I think Judge Halligan's
11 question raises an important point that you just touched
12 on. In tennis, there's a regulation size court. A lot of
13 sports, there's a regulation size playing area. Here,
14 you're talking about a golf course, so I'm a little
15 concerned that every time the technology improves, you
16 know, balls are designed to fly further, clubs give you
17 better drives, we're going to - - - golf course owners are
18 going to have to reassess the adequacy of their playing
19 area, because they have to keep up with increased risk
20 caused by advanced technology. That seems very - - - you
21 know, on a - - - on an economic policy level, that seems
22 very wasteful to me.

23 MS. ROSEN: Well, right now they - - - you know,
24 from - - - from the defendant's position and what their
25 experts say, they don't have to do anything. Right. So I

1 think a small level of performing safety assessments to
2 make sure that courses that were built a hundred years ago
3 are still as safe as they were then - - -

4 JUDGE RIVERA: So in this case, given your - - -
5 let's talk about this case for a moment - - - in this case,
6 given your expert's opinion, what - - - what should they
7 have done? Is this just a question of some other barrier,
8 creating a different path for a golf cart and a human being
9 to take from one hole to the next, removing a hole so you
10 have greater distance. What - - - what is it that should
11 have happened?

12 MS. ROSEN: Right. It should have been placing a
13 barrier there to prevent balls from going in that
14 direction, or I would say not using the tee - - -

15 JUDGE TROUTMAN: Does it matter - - - in this
16 particular instance, your client noticed the risk before he
17 was hit; is that correct?

18 MS. ROSEN: Well, I don't know that he
19 specifically comprehended the risk here. Yes, noticed that
20 there was a structure that blocked visibility and lines of
21 sight. Was concerned that perhaps balls could bounce off
22 of that lightning shed that was within the line of sight -
23 - -

24 JUDGE TROUTMAN: Do you have to know of the exact
25 risk or be injured by the exact foreseeable risk?

1 MS. ROSEN: Well, I believe in the first
2 instance, that would be fine if that is the risk inherent
3 to the sport. But then when it - - - there becomes a
4 question of whether it was - - -

5 JUDGE TROUTMAN: Being hit - - - but being hit by
6 a golf ball on a golf course is an inherent risk, correct?

7 MS. ROSEN: Correct. But once it is shown, or
8 there is a question of fact raised as to whether that risk
9 was unreasonably increased, that is not something that the
10 plaintiff - - -

11 JUDGE TROUTMAN: Well, it - - - and it doesn't -
12 - - so in your assessment, it does not matter that he noted
13 that there was a risk here, and he chose to play anyway;
14 that doesn't matter?

15 MS. ROSEN: Not if it is established that it was
16 unreasonably increased, and I think that a jury should be
17 able to see that - - -

18 CHIEF JUDGE WILSON: So when - - - when you - - -
19 when you say unreasonably increased, what are you comparing
20 it to? And I can think of two things. One might be you're
21 comparing it to what the risk was on that golf course
22 previously, which maybe is what you're saying. But you
23 could also ask, is it - - - is it increased over the risk
24 that is inherent in playing golf, generally? And if you're
25 asking the latter question, it seems to me what you would

1 want to be looking - - - for as the comparison is, in how
2 many golf courses across the United States or across the
3 world are there situations where you can't see the tee box
4 on an adjacent fairway, where a ball might come into your
5 fairway and hit you without you being able to see the tee
6 box? And I don't think you have evidence to that if that's
7 the comparison.

8 MS. ROSEN: Well, I don't know that the main
9 focus here is not being able to see the tee box. I think
10 that's one of the factors - - -

11 CHIEF JUDGE WILSON: Uh-huh.

12 MS. ROSEN: - - - that is involved here. But it
13 also involves the - - - the proximity of the holes and how
14 much more probable it is that golf balls would land in that
15 area - - -

16 CHIEF JUDGE WILSON: But this - - - but - - - but
17 same question, really. I was giving you the tee box as an
18 example. Are we comparing it to the change on this course,
19 or when we're asking about inherency to the sport, what
20 we're comparing it to is golf courses, generally?

21 MS. ROSEN: I think that it is - - - that it is
22 both. And I think that in - - - in looking at it, you
23 know, these are - - - golf courses vary just like sports
24 and recreation activities vary when we're looking at the
25 assumption of risk doctrine. And I think here, when we're

1 looking at the factual circumstances of this case, there
2 are issues of fact raised as to whether there was an
3 unreasonable risk here, and I think that that then goes to
4 jury, whether it's - - -

5 JUDGE RIVERA: So how - - - how - - - just to be
6 clear, what's your argument for how they unreasonably
7 enhanced what is the inherent risk of getting hit by a golf
8 ball when you're on a golf course?

9 MS. ROSEN: It's the failure to perform safety
10 assessments on a historical course when a modification was
11 made and assessing those risks with an effort to mitigate
12 them or protect against them.

13 JUDGE HALLIGAN: But does his - - -

14 JUDGE GARCIA: So if they had done a safety
15 assessment here, then you don't have a case? No one - - -
16 let's say they do a safety assessment. They say this is
17 fine. Then what's your lawsuit?

18 MS. ROSEN: If they did a safety assessment here,
19 and they said this is fine, as the defendant's expert says
20 that they did, although albeit it was never done, right.
21 It was done after this.

22 JUDGE GARCIA: Let's just say - - - they did it,
23 and they say it's fine.

24 MS. ROSEN: And plaintiff's expert says it is
25 not.

1 JUDGE GARCIA: So it's a dueling safety
2 assessment case at that point.

3 MS. ROSEN: And it's a question of fact, and I
4 think that here - - -

5 JUDGE GARCIA: So anytime there's a modification,
6 someone can come in with a different safety assessment,
7 even if this one's done, and even if it says this is fine,
8 or they make modifications based on that assessment, then a
9 plaintiff can come in and say, no, that safety assessment
10 was no good.

11 MS. ROSEN: I think it varies on the factual
12 circumstances of each case. And I think here, the fact
13 that it is a historical course really does make a
14 difference.

15 JUDGE RIVERA: And does - - - and does the
16 industry mandate these safety assessments?

17 MS. ROSEN: I believe so. I think that that is
18 primarily a question whether the - - - there are industry
19 standards at all, which is also a question of fact. But I
20 would say, yes, I think there is most certainly enough here
21 to establish that there are.

22 CHIEF JUDGE WILSON: Thank you.

23 MS. ROSEN: Thank you, Your Honors.

24 MR. HUNT: May it please the court. Brad Hunt,
25 from Mackenzie Hughes, on behalf of the Cazenovia Golf

1 Club.

2 JUDGE TROUTMAN: Could you pick up on the last
3 thing? Are there established industry - - - industry
4 standards?

5 MR. HUNT: So first of all, there are no rules
6 that mandate safety assessments. As to whether there are
7 industry standards, there is a - - - what the plaintiff's
8 expert, Mr. Eisenberg, says in his - - - in his report and
9 affidavit is that there's an industry standard basically to
10 consider safety, to prioritize safety, to do a - - - to - -
11 - to look - - - to look at safety when you're managing a
12 golf course. What there is a - - - is not any evidence in
13 the record of is any substantive standard about how you
14 actually have to design golf courses, how close holes can
15 be to one - - - one another, where tee boxes can be placed,
16 whether barriers need to be placed.

17 JUDGE HALLIGAN: Is it your position that being
18 hit by a golf ball is always a risk inherent in the sport?
19 And no matter how the golf course is designed, that there's
20 no cause of action that lies.

21 MR. HUNT: It certainly is a generally - - - you
22 know, a risk inherent in the sport, as this court and the
23 Appellate Division recognized - - -

24 JUDGE HALLIGAN: But can there ever be an action,
25 inherently - - -



1 MR. HUNT: So I could - - - you know, we could
2 imagine cases where there could potentially be an action.
3 To give one - - - one example, if you take the example of
4 the Grady case, where I - - - you know, the baseball case
5 in which this case - - - court decided that there was an
6 issue of fact. That involved a drill that was really very
7 different from the natural and inherent nature of baseball.
8 You had two different balls in the infield going in
9 different - - -

10 JUDGE HALLIGAN: But - - - but if you're - - -

11 MR. HUNT: - - - directions. So in golf - - -

12 JUDGE HALLIGAN: If I can - - - can there ever be
13 a cause of action that lies based on the design of the golf
14 course, not something about a modification of the rules of
15 play, in your view?

16 MR. HUNT: I - - - so to give a - - - if you
17 consider this an issue of design of the golf course - - - I
18 can think - - - I guess I can think of two answers. One -
19 - -

20 JUDGE HALLIGAN: I guess I think it's maybe yes
21 or no.

22 MR. HUNT: Yes, I think it's possible.

23 JUDGE HALLIGAN: Okay.

24 MR. HUNT: I do think it's possible.

25 JUDGE CANNATARO: I mean, if this golf course

1 decided they wanted to do a twenty-three hole golf instead
2 of eighteen-hole golf - - -

3 MR. HUNT: Right.

4 JUDGE CANNATARO: - - - and they inserted a bunch
5 of new holes - - -

6 MR. HUNT: Right.

7 JUDGE CANNATARO: - - - and packed them all in
8 really tight, that would, would you not agree, unreasonably
9 increase the risk - - -

10 MR. HUNT: It could - - - it could potentially.
11 It - - - some - - - you know, I think there could - - -
12 there could potentially be a - - - be a case. But this is
13 a case where this is a very standard risk that has been
14 recognized by this court and by the Appellate Division in
15 golf.

16 JUDGE RIVERA: Does it matter that it's a
17 tournament? Does it matter at all?

18 MR. HUNT: That it's a tournament?

19 JUDGE RIVERA: Yeah.

20 MR. HUNT: I - - - no, I don't think that
21 matters. I mean, if anything, that underscores - - - you
22 know, the - - - the nature of the tournament underscores
23 that all the players, including this plaintiff, had
24 knowledge of the risk - - -

25 JUDGE SINGAS: Doesn't the - - - doesn't the fact

1 that it is a tournament make it more like Grady, because
2 you've altered the play. The rules have sort of changed.
3 The tee holes have changed. And why is this not Grady?

4 MR. HUNT: I - - - well, I really think it's more
5 - - - it's a - - - it's much more like the second case
6 decided with - - - with Grady, you know, in which it was a
7 basketball case involving, you know, a - - - the risk of
8 colliding with a - - - with objects near the court. And in
9 that case, you know, the coach actually changed the rules -
10 - -

11 JUDGE RIVERA: But what - - - what did you - - -
12 what was changed for purposes of the tournament?

13 MR. HUNT: I'm sorry?

14 JUDGE RIVERA: What was changed for purposes of
15 the tournament?

16 MR. HUNT: In the - - - the tournament, there are
17 more - - - there are more players. But really - - -

18 JUDGE RIVERA: More players, so more balls in
19 play - - -

20 MR. HUNT: But not - - -

21 JUDGE RIVERA: - - - less time between going up
22 to the tee.

23 MR. HUNT: I'm sorry?

24 JUDGE RIVERA: Is there less time between players
25 going up to the tee than might usually be the case when you

1 have tee time and so forth - - -

2 MR. HUNT: It's just more - - - more - - -
3 there's just more players, generally. So to the extent
4 that that has an impact, but it doesn't - - - it does not
5 alter the basic rules of golf. It's still - - - still golf
6 - - -

7 JUDGE RIVERA: Nothing else physically. It's
8 just more people on the course.

9 MR. HUNT: It's more - - - more people on the
10 course. And they - - - you know, they played the course -
11 - - I - - - the nine holes three - - - three different
12 times - - -

13 JUDGE RIVERA: Uh-huh.

14 MR. HUNT: - - - with different - - - you know,
15 different tee boxes designated for each - - - each of the
16 rounds, but it's still - - - it's still golf.

17 JUDGE HALLIGAN: What's your position - - -

18 MR. HUNT: They're still playing ordinary golf -
19 - -

20 JUDGE HALLIGAN: What's your position on the role
21 of the plaintiff's appreciation of the risk? Is your view
22 that that defeats a claim if he understood that he had some
23 concerns about the position of the - - - the tee box? How
24 does it factor into our analysis, in your view?

25 MR. HUNT: Well, I think it's less important than



1 the basic question of whether the risk is inherent in the
2 game of golf, which is what, you know, this court said in
3 Morgan, you know, knowledge plays a role, but inherency is
4 the sine qua non. And you know, I think in this case it's
5 clearly an inherent risk, and he clearly had knowledge. He
6 had played these very holes twice before the accident on
7 the same day. I mean, there's no - - - no question of
8 knowledge here. And there's - - -

9 CHIEF JUDGE WILSON: Well, would the result be
10 different if he were a novice?

11 MR. HUNT: I don't think it would. I don't think
12 it would because I think it's still - - - it's still an
13 inherent risk. But I think the fact that he wasn't a
14 novice just lends added - - - added weight to the fact that
15 this was a - - - was an assumed - - - was an assumed risk.

16 JUDGE SINGAS: Why isn't the zone-of-danger
17 analysis enough to raise an issue of fact?

18 MR. HUNT: Well, it doesn't - - - it doesn't go
19 to the material issue, which is whether - - - whether it's
20 an inherent risk in golf. You know, the - - - the - - - as
21 - - - as our expert said and - - - and really isn't
22 contradicted, you know, it happens that, you know,
23 sometimes golf - - - on - - - golf courses have adjacent
24 holes. Sometimes it is possible that balls can go into the
25 adjacent hole. They're not intended to go that way, but

1 they can, and that's part of golf. And their expert does
2 not rebut that - - -

3 JUDGE SINGAS: But it seems to be that your
4 position is no matter what happens, if you're on a golf
5 course and you get hit by a golf ball, you assume that
6 risk.

7 MR. HUNT: I - - - well, as I said before, I
8 wouldn't go that - - - quite that far, actually. I
9 wouldn't say no matter what happened. I - - - you could
10 imagine, you know, changing the - - - the course or the
11 rules in a way that it becomes not really inherently - - -
12 you know, it's not the same inherent game of golf. So I -
13 - - I would not go - - - go that far - - -

14 JUDGE RIVERA: But why isn't that the case, if in
15 a tournament you've got multiple players, that just would
16 not have been the case if it was a regular day on the golf
17 course?

18 MR. HUNT: It could absolutely be the case on a
19 regular day at the golf course that you have players on
20 hole 3 and players on hole 7, that - - - which is what
21 happened here. That happens all the time - - -

22 JUDGE RIVERA: Well, yes, of course, people are -
23 - - are playing the course, of course.

24 MR. HUNT: Right.

25 JUDGE RIVERA: But these multiple players at each

1 of these tees with a very short period of time between each
2 teeing up, that does seem to be different, no?

3 MR. HUNT: I don't think it is. It's just golf.
4 But you know, there's more on a particularly busy day - - -

5 JUDGE RIVERA: Twenty balls in the air as opposed
6 to two during the same period of time.

7 MR. HUNT: I'm sorry?

8 JUDGE RIVERA: Twenty balls in the air instead of
9 two during the same period of time, you don't think is a
10 difference? Or at least you don't think it's a difference
11 that matters - - -

12 MR. HUNT: But I don't think that makes a
13 difference at all. I mean, you know, the - - - the only -
14 - - you know, the only balls that are - - - are relevant
15 are - - - only two balls are going to be relevant, you
16 know, that could potentially be, you know, one on one
17 adjacent hole, one on the other - - -

18 JUDGE RIVERA: You know the statistics for
19 getting hit by a golf ball on a regular course? You don't
20 know?

21 MR. HUNT: I - - - I mean, I know some statistics
22 from - - - from this - - - from this case.

23 JUDGE RIVERA: Uh-huh.

24 MR. HUNT: You know, this - - - you know,
25 thousands of rounds have been played - - - played on this

1 course every year, including five - - - estimated 5,000,
 2 you know, from this particular tee box and to the
 3 recollection of the golf professional, Mr. Colligan, who
 4 was deposed in this case. You know, there are a couple
 5 instances, maybe two or three, in which a - - - a - - - a -
 6 - - a person has been hit by a golf ball in the history of
 7 - - - of this course, to his - - - to his recollection.

8 So I mean, it really was - - - it was a - - - and
 9 I - - - I don't use this in the statistical - - -
 10 statistical sense, but this was a one in - - - one in a
 11 million occurrence. I mean, this course has been played
 12 thousands of times over the course of a hundred - - - a
 13 hundred years, and to - - - to our knowledge, you know,
 14 there's no evidence in the record of another injury of this
 15 - - - this nature. It was tragic, but it was a - - - it
 16 was a freak occurrence.

17 JUDGE RIVERA: Uh-huh. Uh-huh.

18 MR. HUNT: And I - - - you know, I do think that
 19 this - - - this court's decision in - - - in Grady and in -
 20 - - yeah, really both Grady and Secky, case decided with -
 21 - - with Grady is - - - is right on point and strongly
 22 supports a summary judgment here.

23 You know, I actually think the risk at issue in
 24 the Secky case involving the basketball drill is - - - is
 25 quite analogous to this case. You know, that was a risk of

1 colliding with objects outside the court, which, you know,
2 for basketball, I think is similar to the risk of getting
3 hit by a wayward golf - - - golf ball on this course. And
4 - - -

5 CHIEF JUDGE WILSON: Well, those were objects you
6 could readily see. They were the bleachers, right, on the
7 side - - -

8 MR. HUNT: You could see, but the coach - - -

9 CHIEF JUDGE WILSON: - - - and here, the golf
10 ball is not something you can really see.

11 MR. HUNT: Not as - - - not as well. That's
12 true. But the - - - also the rules were, you know, clearly
13 changed in that - - - in that course - - - in that case so
14 that there were no out of bound lines. You know, you were
15 - - - and it was a rebound drill in which the players were
16 encouraged to go hard - - - go hard for the - - - the
17 rebounds, but it was still the basic risk of colliding with
18 objects near the court, which is comparable, I think, to
19 the - - - the basic risk that, you know, a wayward shot can
20 - - - can - - - you know, on very rare occasions strike a
21 person. And - - - and you know, there was no - - - there
22 was no modification to the natural inherent nature of golf
23 here that I think is in any - - - comparable at all to, you
24 know, the drill that was set up in the Grady baseball case.

25 And I really think if you look, if you compare



1 the - - - the expert affidavits here, I mean, clearly they
 2 do disagree in some respects, but the - - - the
 3 disagreements don't go to - - - in - - - the inherency of
 4 the risk. You know, our expert, Mr. Jordan, explains it in
 5 some detail that this is a classic course constructed a
 6 hundred years ago, similar to other classic courses in this
 7 region and throughout the world, including Saint Andrews in
 8 Scotland, which have similar features including lack of
 9 visibility of adjacent holes. And you know, every - - -
 10 you know, other courses have actually much higher risk than
 11 - - - than this particular hole on this course where it
 12 sometimes - - -

13 JUDGE CANNATARO: Can I - - -

14 MR. HUNT: Yes?

15 JUDGE CANNATARO: I'm sorry - - - can I ask you -
 16 - - a question that was asked of your adversary.

17 MR. HUNT: Yes.

18 JUDGE CANNATARO: If you're talking about the
 19 safety of - - - of the playing area, as we are here, why is
 20 it inappropriate in - - - in a assumption - - - or at least
 21 in the area of sporting activities - - - why would it be
 22 inappropriate to have experts opine on the design safety
 23 aspect of the playing area? Because that does seem to be,
 24 in some conceptual sense, a little bit outside the
 25 parameters of the risk inherent of the game that we're

1 talking about.

2 MR. HUNT: Yeah. Well, I think the - - - I mean,
3 I think opining as to the safety of the risk, I - - - have
4 - - - has to be - - - has - - - such opinions have to be
5 delivered, I think, in the context of the question of
6 whether - - - whether it's an inherent risk, because
7 otherwise you're basically treating it like an ordinary
8 negligence case. And the whole idea of the assumption of
9 risk doctrine that this court has, you know, sustained for
10 a long, long time is that assumption of risk cases are - -
11 - are not just ordinary negligence cases.

12 JUDGE CANNATARO: So I'm - - - I'm still trying
13 to understand your position. So does that preclude the
14 classical battle of the experts, or does it just affect the
15 way we weigh expert opinion when we're talking about
16 sporting activity?

17 MR. HUNT: I - - - I think I'm trying I'm trying
18 to answer your question, so I hope I - - - I will. I think
19 it - - -

20 JUDGE CANNATARO: I'm sure you are. I'm just not
21 understanding the answer - - -

22 MR. HUNT: Yeah. Yeah. Yeah. No, I think it
23 shapes the - - - the nature of what the battle should be.
24 I think we would have a different - - - we might have a
25 different case if plaintiff's expert here had, you know,

1 talked about other courses and the extent to which, you
2 know, this course - - - you know, the - - - the purported
3 risk on this court are - - - are different from - - - from
4 what's inherent in - - - in other courses. He really
5 didn't do that. If you read his affidavit, he didn't do
6 that. He says - - - he uses the term industry standards
7 many times in - - - in his report that's around page 2100
8 in the record. But all the industry - - - supposed
9 industry standards he cites are just saying you should
10 consider safety. There's nothing substantive about how a
11 course should be designed.

12 And furthermore, I would also note that there's
13 nothing in the record, I believe, that really supports a
14 finding that safety wasn't considered in the modifications
15 here. You know, this is a course that's a hundred years
16 old. There's no evidence as to what was considered when it
17 was designed.

18 The two modifications we're talking about, one
19 was installation of a lightning shed at some point. As our
20 expert pointed out, it's a lightning shed. The whole point
21 is to provide safety for - - - you know, for players. So
22 it's clear that they didn't just set this building down in
23 there without thinking of safety. It was - - - you know,
24 it was per - - - per se a safety consideration.

25 And the other modification was creating the new

1 tee box, which was done - - - you know, there's not a lot
2 of evidence as to, you know, the process under which that
3 was done, apart from that it was done to account for the
4 fact that players hit the ball farther now. And as our
5 expert, you know, explained in his affidavit, you know, one
6 consequence of balls going farther is that from this very,
7 you know, hole, hole 3, balls - - - they - - - yeah,
8 there's the possibility that balls can go not just to hole
9 7, where Mr. Katleski was, but to a couple other holes, 4
10 and 5. And you know, the - - - the placement of a tee box
11 further back actually decreases that possibility and you
12 know, in our expert's view, made it - - - made it more - -
13 - more safe. But there's no - - - so there's really not
14 any evidence that - - - that safety wasn't considered here
15 in the course of any modifications.

16 And there's also no evidence, I would - - - I
17 would say that - - - that a modification actually would
18 have made a difference here. You know, the tee box - - -
19 you know, it's true that there's no - - - there's limited
20 visibility of the adjoining fairway from this tee box, but
21 there's nothing in the record to show that, you know,
22 players on a tee are going to - - - to wait and you'll
23 avoid hitting a ball because there are players on the
24 adjoining fairway. That's not where they're trying to hit
25 the ball. And our expert explained that, and their expert

1 doesn't - - - doesn't rebut that. You know, that's not how
2 people play golf. They try to hit the ball down the middle
3 of their own - - - of their own hole. And you know, on
4 very rare occasions, a ball can go so awry that it will
5 travel to an adjoining hole, but that's an inherent risk of
6 golf, and it's been recognized as such for a - - - for a
7 long time.

8 CHIEF JUDGE WILSON: Thank you, Counsel.

9 MR. HUNT: Thank you.

10 MS. ROSEN: Thank you. So I just want to first
11 address that this particular tee box was not used very
12 often at all. The day of this tournament, it was the first
13 time that the plaintiff had ever even known that there was
14 a tee box there. And it was only played once earlier that
15 day because of the location of the markers earlier on.

16 I'll also say that whether the plaintiff is able
17 to assume the risk is not in play when there is a question
18 as to whether the risk has been unreasonably enhanced.
19 They're not able to assume those risks. And I do think
20 that this case is more akin to Grady and is also
21 distinguishable from both Secky and from Bukowski, in terms
22 of the fact that, in those cases, there was nothing that
23 could have been done to unreasonable - - - to unreasonably
24 increase the risk, in Bukowski of getting hit with a line
25 drive, and in Secky of - - - of colliding with an open and

1 obvious bleacher in the location. So I think there is a
2 fundamental distinction there.

3 I also wanted to point to the fact that there is
4 nothing in the record that safety was considered at any
5 time in the history of this course. There was no safety
6 committee. There were no design consultants ever brought
7 in at any point. There were no architects ever brought in
8 at any point - - -

9 JUDGE TROUTMAN: Are there industry standards
10 that require that type of action?

11 MS. ROSEN: Certainly. I think that, you know,
12 in our submissions, it is well established that there is a
13 custom and practice that safety should, at the very least,
14 be considered during the operation of a golf course. And I
15 think that that's important also to look at the - - - the
16 policy considerations just with respect to the assumption
17 of risk doctrine. I think here, the competing policy
18 considerations of what happens if there is absolutely no
19 possibility of civil liability in an industry that - - -

20 JUDGE RIVERA: Does - - - does it matter that
21 it's a tournament, or that - - - that has no part in the
22 analysis?

23 MS. ROSEN: I think it does matter that it's a
24 tournament. I think that they - - -

25 JUDGE RIVERA: How so?

1 MS. ROSEN: I think that they were playing
2 additional holes. There were more players on the course.
3 They moved this tee specifically for the tournament when
4 they rarely used the tee, so it was now in play under these
5 type of situations. And certainly, this tournament was not
6 one that was contemplated when the course was built, and
7 there's no evidence that there was. So they're also using
8 the course in a different way than when it was initially
9 designed.

10 CHIEF JUDGE WILSON: You say more players on the
11 course. Can you explain that?

12 MS. ROSEN: So they were all starting at the same
13 hole, so there would have been a shotgun start in the way
14 that it was made - - -

15 CHIEF JUDGE WILSON: Right. But - - - but when
16 you're - - - when you start - - - I mean, if you go to a
17 regular golf course, there'll be a first tee time, right?
18 Maybe it's at 8 - - - 7 a.m., let's say. But by the time
19 you get to 10 a.m., every hole is being played, right?
20 There's somebody because the people start, but there are
21 people who are - - - they've moved - - - somebody is on 18,
22 somebody's on 17, somebody's on 16. For the bulk of the
23 day at a golf course, at least a golf course that is not
24 essentially abandoned, all the tees are filled, and you're
25 frequently waiting for the group ahead of you to finish.

1 So I'm not sure why there's more people playing this course
2 at any given time.

3 MS. ROSEN: I think for this particular course,
4 because there was a tournament, there were more people than
5 there usually would have been for this particular course.

6 CHIEF JUDGE WILSON: But when you say more
7 people, that could be more people who - - - oh, you're
8 saying that often at this course there were vacant holes,
9 so people typically - - - this course, not all the holes
10 were occupied because the course wasn't that popular.

11 MS. ROSEN: Correct. Or that this tournament was
12 a big event for the course, so it would have been
13 completely full - - -

14 JUDGE HALLIGAN: Does the record tell us that
15 specifically?

16 MS. ROSEN: It tells us that this was a
17 tournament that was popular, and there would have been a
18 large amount of people. I think, more important to the - -
19 - to the tournament aspect, rather than the amount of
20 people on the course, while I do think it's a factor, is
21 the use of the tee that day and how it was moved.

22 CHIEF JUDGE WILSON: Thank you.

23 MS. ROSEN: Thank you, Your Honors.

24 (Court is adjourned)

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C E R T I F I C A T I O N

I, Christian C. Amis, certify that the foregoing transcript of proceedings in the Court of Appeals of Katleski v. Cazenovia Golf Club, No. 33 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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