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1997 Survey of Rhode Island Law: Cases: Tort Law

Vicki J. Ray
Roger Williams University School of Law

Tort Law. *Emerson v. Magendantz*, 689 A.2d 409 (R.I. 1997). The Rhode Island Supreme Court adopted the limited-recovery rule to compensate the parents of a child born after a negligently-performed sterilization procedure.

The Rhode Island Supreme Court confronted an issue of first impression. The court accepted two questions of law certified by a superior court judge: (1) whether a cause of action exists for a negligently performed sterilization procedure, and, if so, (2) then what is the appropriate measure of damages.

FACTS AND CASE TRAVEL

The plaintiffs, Diane Emerson (Diane) and Thomas Emerson (collectively the Emersons), filed a complaint alleging negligence in the performance of a sterilization procedure. The defendant, Dr. Henry Magendantz (Dr. Magendantz), filed a motion to dismiss pursuant to Rule 12(b)(6) of the Rhode Island Superior Court Rules of Civil Procedure.[1]

The facts, as summarized from the pleadings and documents submitted to both the superior and supreme courts, are as follows. For financial reasons, the Emersons decided to limit their family to one child.[2] Diane chose to have a tubal ligation.[3] Dr. Magendantz performed the procedure on January 10, 1991. Despite the sterilization procedure, Diane became pregnant. On January 11, 1992, Diane gave birth to Kirsten, a child alleged to have congenital problems.[4] Another physician performed a second tubal ligation subsequent to Kirsten's birth.[5]

The Emersons filed suit in Rhode Island Superior Court in March of 1994. They alleged that Dr. Magendantz's negligent tubal ligation proximately caused Kirsten's birth, and that the defendant did not properly inform Diane nor obtain her consent before surgery.[6] Additionally, the Emersons sought recovery for

1. Emerson v. Magendantz 689 A.2d 409, 410 (R.I. 1997).
2. *See id.*
3. *See id.* A tubal ligation is the ligation of the fallopian tubes to prevent passage of the ova from the ovaries to the uterus used as a method of female sterilization. *See* Merriam Webster's Collegiate Dictionary 1270 (10th ed. 1995).
4. *See Emerson*, 689 A.2d at 410. The congenital problems are only generally described in the complaint. *See id.*
5. *See id.*
6. *See id.*

physical pain due to the unexpected pregnancy and the second tubal ligation for Diane, mental suffering and loss of wages.[7] Further, the Emersons asserted, as a result of the defendant's negligence, they were obligated to bear the cost of the medical care and maintenance of Kirsten.[8]

Dr. Magendantz filed a motion to dismiss. In response, the superior court judge certified two questions of law to the Rhode Island Supreme Court. The questions were: (1) does a cause of action exist under Rhode Island law when a physician negligently performs a sterilization procedure and the patient subsequently becomes pregnant and delivers a child from that pregnancy? and (2) if so, then what is the appropriate measure of damages?[9]

ANALYSIS

The question whether a cause of action exists when a physician negligently performs a sterilization procedure and the patient subsequently becomes pregnant and delivers a child posed an issue of first impression in Rhode Island.[10] The court analyzed thirty-five decisions by courts that have considered this question.[11] Only one state's court of last resort refused to recognize a tort cause of action in this situation.[12] Nevertheless, the Nevada Supreme Court hinted that a breach of warranty action may exist.[13]

Approximately thirty-five jurisdictions have recognized a tort cause of action for the negligent performance of sterilization procedures performed on the husband or wife, for which recovery would be allowed under state law.[14] This substantial majority of jurisdictions persuaded the court that negligent performance of a sterilization procedure is a tort for which recovery is allowed. Prior to this,

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7. *See id.* at 410-11.
8. *See id.* at 411.
9. See *id.* at 410.
10. *See id.* at 411.
11. *See id.*; *see, e.g.*, Boone v. Mullendore, 416 So. 2d 718 (Ala. 1982); Wilbur v. Kerr, 628 S.W.2d 568 (Ark. 1982); Pitre v. Opelousas Gen. Hosp., 530 So. 2d 1151 (La. 1988).
12. *See* Szekeres v. Robinson, 715 P.2d 1076, 1079 (Nev. 1986).
13. *See id.*
14. *See id.*; *see, e.g.*, University of Arizona Health Sciences Ctr. v. Superior Ct. of Arizona, 667 P.2d 1294 (Ariz. 1983); Ochs v. Borrelli, 445 A.2d 883 (Conn. 1982); Jones v. Malinowski, 473 A.2d 429 (Md. 1984); Burke v. Rivo, 551 N.E.2d 1 (Mass. 1990); Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977); Marciniak v. Lundborg, 450 N.W.2d 243 (Wis. 1990).

a cause of action for pregnancy resulting from a failed sterilization procedure did not exist in Rhode Island.[15] Thus, the court answered the first certified question affirmatively.[16]

Having found that a cause of action existed, the court analyzed the second certified question—the extent of the measure of damages. In this analysis, the court scrutinized the various remedies that courts across the nation have constructed. Three general types of remedies exist as compensation for negligent sterilization procedures which result in pregnancy: (1) the limited-recovery remedy, (2) full recovery with benefit offsets and (3) full recovery without benefit offsets.[17] The first type of remedy is the limited-recovery, which has been adopted by thirty jurisdictions.[18] Under the limited-recovery rule, courts typically grant plaintiffs compensation for the medical expenses of the unsuccessful sterilization procedure, the medical and hospital costs of the pregnancy, the cost of an additional sterilization procedure and loss of wages. Generally, medical expenses for prenatal care, delivery and postnatal care are included. Occasionally, courts grant damages for an emotional-distress claim due to the unexpected pregnancy and loss of consortium.[19]

The second and third types of remedies allow recovery for the cost of child-rearing as an element of damages.[20] Two methods exist for computing such a cost. Using a cost/benefit analysis, the

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15. The issue of whether to award damages for the birth of a healthy child was unknown to the common law. *See Emerson*, 689 A.2d at 414 n.2.

16. *See id.* at 411.

17. *See id.*

18. *See, e.g.*, Garrison v. Medical Ctr. of Del., Inc., 581 A.2d 288 (Del. 1990) (holding that parents may be able to recover damages for extraordinary expenses of caring for, maintaining and educating child with Down's Syndrome where health care providers were negligent in performing and timely reporting prenatal chromosomal study); Pitre v. Opelousas Gen. Hosp., 530 So. 2d 1151 (La. 1988) (granting expenses of pregnancy and delivery, mother's pain and suffering, loss of consortium and emotional distress for pregnancy resulting from failed sterilization, and intimating that proof of foreseeable risk of birth defects might result in greater damages); Kingsbury v. Smith, 442 A.2d 1003 (N.H. 1982) (referring to the case as "wrongful birth" case, but the child was healthy); Hitzemann v. Adam, 518 N.W.2d 102 (Neb. 1994) (granting prenatal and delivery medical expenses, emotional distress, loss of wages, pain and suffering, and loss of consortium); Crawford v. Kirk, 929 S.W.2d 633 (Tex. App. 1996), *reh'g denied* (holding parents of a normal, healthy child born after a failed sterilization procedure may recover damages for their actual medical expenses incurred as a result of the failed procedure).

19. *See Emerson*, 689 A.2d at 412.

20. *See id.*

first method balances the benefits derived by the parents against the cost of child-rearing. The benefits of the birth of a healthy child can be economical or emotional.[21] The second method, adopted by New Mexico and Wisconsin, allows for full recovery, without offsetting the economic or emotional benefits derived from the birth of a healthy child.[22] These two courts apply traditional tort principles which allow recovery for all damages reasonably foreseeable that result from negligent performance of a sterilization procedure.[23]

New Mexico analyzed section 920 of the Second Restatement of Torts which advocates consideration of the benefits conferred in mitigation of the damages. That court denied recovery for emotional distress. That same court denied any offset of emotional benefits derived from having a healthy child,[24] as did Wisconsin.[25]

Faced with the choice of limited recovery, full recovery with benefits and full recovery without benefits, the Rhode Island Supreme Court decided to adopt the limited-recovery rule, except for the element of emotional distress.[26] The court reasoned that it is impossible to establish with reasonable certainty whether the birth of a particular healthy child economically or emotionally damaged his or her parents. The court relied on decisions that refused to predict the measure of damages for emotional distress or child rearing of a normal, healthy baby.[27] These courts cast the

21. *See id.*; *see, e.g.*, University of Ariz. Health Sciences Ctr. v. Superior Ct., 667 P.2d 1294 (Ariz. 1993); Ochs v. Borrelli, 445 A.2d 883 (Conn. 1982); Burke v. Rivo, 551 N.E.2d 1 (Mass. 1990).

22. *See Emerson*, 689 A.2d at 412; *see, e.g.*, Lovelace Med. Ctr. v. Mendez, 805 P.2d 603 (N.M. 1991); Marciniak v. Lundborg, 450 N.W.2d 243 (Wis. 1990).

23. *See Emerson*, 689 A.2d at 412.

24. *Lovelace*, 805 P.2d at 613-14 (concluding that applying emotional benefits to economical loss was not comparing analogous benefits).

25. *Marciniak*, 450 N.W.2d at 249 (declining to offset economic benefits because they were deemed to be insignificant).

26. *See Emerson*, 689 A.2d at 412.

27. *See id.*; *see, e.g.*, Johnson v. University Hosp. of Cleveland, 540 N.E.2d 1370, 1377 (Ohio 1989); *Marciniak*, 450 N.W.2d at 249; McKernan v. Aasheim, 687 P.2d 850, 855 (Wash. 1984) (en banc).

damages as "an exercise in prophesy"[28] in a contravention of public policy.[29]

Additionally, the Rhode Island Supreme Court concluded that public policy precludes granting child-rearing costs where a healthy child is born and the parents did not opt for adoption.[30] The court was persuaded that the parents' decision to forego adoption was evidence that the benefit of retaining the child outweighed the economic costs of child rearing.[31]

If the child is born with congenital defects, as a result of an unwanted pregnancy due to a negligently-performed sterilization procedure, then the court recognized that the financial and emotional drain associated with raising such a child is often overwhelming to the affected parents.[32] The court determined that it would follow the reasoning adopted by the Florida Supreme Court in *Fassoulas v. Ramey*.[33]

In *Fassoulas*, Mr. and Mrs. Fassoulas (Plaintiffs) had two children with severe congenital defects. They subsequently decided not to have any more children. Mr. Fassoulas had a vasectomy. Despite the vasectomy, the Plaintiffs had two more children.[34] One of the children had a correctable birth deformity. The Florida court denied recovery for child-rearing expenses for a normal healthy child because a parent cannot be said to have been damaged by the birth and rearing of a normal, healthy child.[35] However, in the case of a physically or mentally-handicapped child, the court should allow special medical and educational expenses, in addition to normal rearing costs.[36]

The Rhode Island Supreme Court adopted the *Fassoulas* holding. However, it added the following. A physician performing a sterilization procedure, who knows or should know, by reason of statistical information or experience, that parents have a reason-

28. *See Emerson*, 689 A.2d at 413 (quoting Coleman v. Garrison, 349 A.2d 8, 12 (Del. 1975)).

29. *See id.*; *see, e.g.*, Rieck v. Medical Protective Co., 219 N.W.2d 242 (Wis. 1974) (citing Shaheen v. Knight, 11 Pa. D. & C.2d 41 (1957)) (superseded by Marciniak v. Lundborg, 450 N.W.2d 243 (Wis. 1990)).

30. *See Emerson*, 689 A.2d at 412-13.

31. *See id.* at 413.

32. *See id.* at 414.

33. *See id.* (citing Fassoulas v. Ramey, 450 So. 2d 822 (Fla. 1984)).

34. *Fassoulas*, 540 So. 2d at 822.

35. *See id.* at 823-24.

36. *See id.* at 824.

able expectation of giving birth to a physically or mentally-handicapped child, may be liable for the entire cost of raising such a child.[37] The court noted that the extraordinary costs of maintaining a handicapped child would not end at the child's majority, nor would the physician's liability necessarily end at that point.[38] The parents have incurred a continuous obligation to expend monetary resources for the medical care and maintenance of the child. Where the child is mentally or physically handicapped, that fact should also entitle the parents to compensation for emotional distress.[39]

Dissent

Justice Bourcier, joined by Justice Flanders, concurred as to the first certified question.[40] Thereafter, however Justice Bourcier vigorously dissented with respect to the court's holding on the second certified question.[41] The crux of Justice Bourcier's argument was that the true legal nature of the within cause of action was "nothing more and nothing less than a medical malpractice cause of action."[42] He would permit recovery for all of the negligent defendant's reasonably foreseeable and proximately-caused injuries and damages.[43] Additionally, Justice Bourcier voiced concern that the majority was denying a woman's constitutional right not to have children.[44]

The majority responded that the constitutional rights regarding contraception and abortion, referred to by the dissent, inhibit governmental agencies from interfering with the exercise of such rights.[45] The majority believed that these cases have "little if any relevance to our determining a measure of damages for a negligent act performed by a physician."[46]

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37. *See Emerson*, 689 A.2d at 414.
38. *See id.*
39. *See id.*
40. *See id.* at 415 (Bourcier, J., dissenting).
41. *See id.* at 415-23.
42. *Id.* at 415 (quoting Miller v. Johnson, 343 S.E.2d 301 (Va. 1986)).
43. *See id.*
44. *See id.* at 416-417 (citing *Eisenstadt v. Baird*, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973)).
45. *See Emerson*, 689 A.2d at 414 n.2.
46. *Id.*

Justice Bourcier also noted that the majority's measure of damages created a suspect classification, which discriminated against victims of medical malpractice.[47] The majority responded that this accusation was unfounded, as suspect classifications are those based upon race, alienage or national origin.[48]

CONCLUSION

A cause of action exists when a physician negligently performs a sterilization procedure, with resulting pregnancy and childbirth. Parents may recover the medical expenses of the ineffective sterilization procedure, medical and hospital costs of the pregnancy, expenses of a subsequent sterilization procedure, loss of wages, loss of consortium to the spouse arising out of the unwanted pregnancy, and medical expenses for prenatal care, delivery and postnatal care. In the event that the child is born with congenital defects, full recovery is allowed, with physician liability continuing beyond the child's majority.

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47. *See id.* at 418-20.
48. *See id.* at 414 n.2.

Tort Law. *Hennessey v. Pyne*, 694 A.2d 691 (R.I. 1997). A golfer's errant tee shot that veered off the playing course and struck a resident on an abutting property gave rise to issues of material fact regarding whether the golfer hit the tee shot negligently, whether the golfer failed to adequately warn the resident and whether the resident assumed the risk of injury, thereby rendering summary judgment disposition improper.

FACTS AND TRAVEL

The plaintiff, Eileen Hennessey (Hennessey), owns a condominium in North Providence, Rhode Island. The Louisquisset Golf Club operates a golf course on the property abutting the property on which Hennessey's condominium is situated. Specifically, her backyard sits approximately fourteen feet from the left boundary of the golf club's eleventh hole fairway, a dogleg left.[1]

On a Sunday morning in mid-September of 1993, Hennessey stood outside her condominium in her garden. While Hennessey was in her garden, Michael Pyne (Pyne), the assistant golf-pro at Louisquisset Golf Club, hit a golf ball from the tee at the eleventh hole. The ball veered to the left of the golf club's playing area and struck Hennessey in the head while on her property, thereby injuring her. No evidence exists that Pyne yelled "fore!"[2]

Hennessey sued Pyne, as well as the Louisquisset Country Club Condominium Association and its executive board.[3] She alleged that Pyne was liable for (1) nuisance, (2) assault and battery, (3) loss of consortium and (4) negligence. A Rhode Island Superior Court judge dismissed each of Hennessey's four claims against Pyne pursuant to Pyne's motion for summary judgment. Hennessey appealed this dismissal to the Rhode Island Supreme Court.[4] On appeal, the supreme court considered whether the superior court's summary-judgment dismissal of Hennessey's claims against Pyne was proper.[5]

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1. *See* Hennessey v. Pyne, 694 A.2d 691, 693 (R.I. 1997).

2. *See id.* at 694.

3. This case involves only Hennessey's appeal regarding those causes of action brought against Pyne. *See id.* at 694-95.

4. *See id.* at 695.

5. *See id.*

BACKGROUND

To establish liability in a negligence cause of action, the plaintiff must, as a threshold matter, show that the defendant owed the plaintiff a duty of care.[6] In determining whether such a duty of care exists, the Rhode Island Supreme Court has employed a functional, ad-hoc approach.[7] Factors germane to this determination include the parties' relationship,[8] the scope and the burden of the defendant's obligation,[9] public-policy concerns[10] and notions of fairness.[11] At bottom, however, the touchstone of the existence of a duty is the extent to which the risk of injury is foreseeable.[12]

In addition, the plaintiff can establish negligence by showing that the defendant failed to adequately warn him or her of the impending harm.[13] With respect to golf, the general failure to warn rule is that in hitting a shot, a golfer "must, in the exercise of ordinary care, give an adequate and timely warning to those who are unaware of his or her intention to play and who may be endangered by the play . . . . [T]his duty does not extend to those persons who are not in the line of play if danger to them is not to be anticipated."[14]

Finally, in order to establish an assumption of the risk defense, a defendant must show "that plaintiff knew of the existence of a danger, appreciated its unreasonable character, and then voluntarily exposed himself to it."[15] The court will analyze this de-

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6. *See id.* at 697 (citing Kenney Mfg. Co. v. Starkweather & Shepley, Inc., 643 A.2d 203, 206 (R.I. 1994)); Ferreira v. Strack, 636 A.2d 682, 685 (R.I. 1994); Rodrigues v. Miriam Hosp., 623 A.2d 456, 460 (R.I. 1993). This determination is a question of law reserved for the court. *See* Mallette v. Children's Friend and Serv., 661 A.2d 67, 69 (R.I. 1995); Banks v. Bowen's Landing Corp., 522 A.2d 1222, 1224 (R.I. 1987).

7. *See Kenney*, 643 A.2d at 206; *Ferreira*, 636 A.2d at 685 & n.2.

8. *See Kenney*, 643 A.2d at 206.

9. *See id.*

10. *See* Rock v. State, 681 A.2d 901, 903 (R.I. 1996).

11. *See id.*

12. *See* Splendorio v. Bilray Demolition Co., 682 A.2d 461, 466 (R.I. 1996); Builders Specialty Co. v. Goulet, 639 A.2d 59, 60 (R.I. 1994) ("The 'risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension.'") (quoting Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 100 (N.Y. 1928) (Cardozo, C.J.) (emphasis omitted)).

13. *See* Ludwikoski v. Kurotsu, 875 F. Supp. 727, 731 (D.R.I. 1995).

14. *Id.*

15. Drew v. Wall, 495 A.2d 229, 231 (R.I. 1985) (citing Rickey v. Boden, 421 A.2d 539, 543 (R.I. 1980)).

fense from a subjective perspective, determining what the plaintiff actually "saw, knew, understood, and appreciated at the time of his injury."[16]

ANALYSIS AND HOLDING

Justice Flanders authored the opinion for the supreme court.[17] The court outlined the three causes of action on which the superior court granted summary judgment: nuisance, assault and battery, and negligence.[18] The court affirmed the superior court's dismissal of the nuisance claim[19] as well as the assault and battery claim.[20] However, the supreme court reversed the superior court's dismissal of the negligence claim.[21]

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16. Labrie v. Pace Membership Warehouse, 678 A.2d 867, 872 (R.I. 1996) (citing *Drew*, 495 A.2d at 231-32; Filosa v. Courtois Sand & Gravel Co., 590 A.2d 100, 103 (R.I. 1991)).

17. Hennessey v. Pyne, 694 A.2d 691 (Flanders, J., joined by Weisberger, C.J. Lederberg & Bourcier, JJ.)

18. *See id.* at 693.

19. *See id.* at 695 (citing Hydro-Manufacturing, Inc. v. Kayser-Roth Corp., 640 A.2d 950, 957 (R.I. 1994) (holding that a person is liable for nuisance if he uses his property in an unreasonable manner so as to "materially interfere[ ] with a neighbor's physical comfort or . . . use of . . . real estate"). The court held that Pyne was not liable for nuisance because his use of the golf course's property was not unreasonable and he was not Hennessey's neighbor in the typical sense of the word. *See id.*

20. Hennessey waived her right to appeal the trial court's finding as to assault because she did not raise it in her brief. *See id.* at 695. Additionally, a person is liable for battery when he or she acts in such a manner that "was intended to cause, and in fact did cause, 'an offensive contact with or unconsented touching of or trauma upon the body of another, thereby generally resulting in the consummation of the assault." *Id.* at 696 (quoting Picard v. Barry Pontiac-Buick, Inc., 654 A.2d 690, 694 (R.I. 1995) (citing Proffitt v. Ricci, 463 A.2d 514, 517 (R.I. 1983))). However, the plaintiff does not have to establish that the defendant intended to injure the plaintiff if he or she can establish that the "defendant willfully set[ ] in motion a force that in its ordinary cause cause[d] the injury." *Picard*, 654 A.2d at 694. Pyne did not intend offensive contact here, and the golf ball did not hit Hennessey "in its ordinary course." *Hennessey*, 694 A.2d at 696. Therefore, the superior court finding here was proper. *See id.*

21. *See Hennesey*, 694 A.2d at 697-700. The court also dismissed the plaintiff's husband's claim for loss of consortium. "[A] claim for loss of consortium is a separate and distinct cause of action" from the action which the injured plaintiff may bring. *Id.* at 696 (quoting Normandin v. Levine, 621 A.2d 713, 716 (R.I. 1993)). Consequently, in order for a party in the trial court to preserve an issue relative to loss of consortium on appeal, the party must traverse the appellate process independent of the primary complainant. Here, the rightful appellant regarding the loss of consortium relative to Hennessey's injuries is her husband. Because he did

Negligence

With respect to the negligence claim, the court first noted that the superior court judge granted Pyne's motion for summary judgment because he opined that Pyne did not have a duty of care to Hennessey.[22] In so doing, the court noted some of the superior court judge's reasoning, namely, that the facts that Hennessey lived next to a golf course, was aware of the likelihood of golf balls landing in her yard—as it had occurred several times previously—and did not see Pyne tee off, coupled with the fact that Pyne did not see Hennessey in her yard when he teed off, demonstrated that Pyne did not possess a duty of care to Hennessey.[23]

The supreme court disagreed with the superior court judge's conclusion and reasoning. The court held that a golfer does owe a duty of care to those people residing on property abutting a golf course who the golfer knows are within the reasonable striking distance for the shot which he or she is taking.[24] The court outlined the rule in such cases—the fact that a person was struck by a golf ball does not necessarily constitute negligence; however, a golfer has a duty to exercise reasonable care as to those people who the golfer knows are within striking distance for the shot he or she is

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not appeal independently and did not move to bring his appeal jointly, he waived his right to appeal. *See id.* & n.14.

22. *See id.* at 695 n.11 (quoting Hennessey v. Pyne, C.A. No. 95-687) (R.I. Super. Ct.).

23. *See id.*

> [Hennessey] resides adjacent to the golf course and had prior to the incident giving rise to this litigation, become aware that golf balls were coming into her yard with, 'an unfortunate frequency,' . . . . This has been going on for some time and she had, again, prior to this instance or incident, complained to the golf course to do something about this. However, . . . at the time in question, . . the golfer couldn't see her. [And s]he couldn't see the golfer.
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> I don't believe in this set of circumstances, that this golfer owed her a duty. He didn't know she was there, and she was—and voluntarily placed herself into a position that she knew would be a receptacle from time to time for errant golf shots. . . . He had no reason to believe that his shot would go the way that it did, and that it would have an impact on this woman.

Id. at n.11.

24. *See id.* at 697.

taking.[25] Accordingly, the salient question becomes whether Pyne breached that duty of care.[26]

In order to answer this query, the fact finder must first consider several preliminary circumstances: (1) whether Pyne was aware of the proximity of Hennessey's condominium to the fairway on which he was playing; (2) whether Pyne was aware that golfers consistently hit Hennessey's condominium with golf balls; (3) whether Pyne was aware of Hennessey's ostensibly consistent complaints regarding the golf shots that hit her condominium and (4) whether Pyne was aware of the advantage he could attain by driving the golf ball as close to Hennessey's condominium as possible to play the dogleg hole. These circumstances, again integral to the determination of the negligence claim, present questions of material fact. By definition, then, summary judgment is an improper means of disposing of these issues.[27]

Next, the court considered Pyne's alleged failure to warn Hennessey. Generally, the court stated, the rule is that a golfer, "in the exercise of ordinary care,"[28] must warn others who may be harmed by his or her golf shot to the extent that such warning is reasonable. However, the court continued, this obligation to warn does not extend to those individuals not in the line of play to whom injury is unlikely.[29] Because it was so close to the course, Hennessey's property served as a depository for innumerable errant golfers' golf balls.[30] In addition, Pyne apparently was aware of Hennessey's presence on and around the course.[31] As a result, a genuine issue a material fact existed as to whether "Pyne knew or should have known that Hennessey was potentially in the foreseeable zone of danger and whether Pyne should have anticipated the

25. *See id.* at 698 (quoting Ludwikoski v. Kurotsu, 875 F. Supp. 727, 731 (D. Kan. 1995)); *see also id.* ("'If in sight of a residence a player makes such a poor shot . . . and injury results to someone having no connection with the game, a cause of action seems established against such a player.'") (quoting Nussbaum v. Lacopo, 265 N.E.2d 762, 769 (N.Y. 1970) (Bergan, J., dissenting)).

26. *See id.*

27. *See id.* at 698.

28. *Id.*

29. *See id.* at 698 (quoting *Ludwikoski*, 875 F. Supp. at 731).

30. *See id.* at 698 ("[T]he propinquity of [Hennessey]'s property to the course—coupled with the proclivity of a driven golf ball to go astray—virtually ensured that [Hennessey]'s condominium would receive its share of mishit balls unless preventative measures were taken.").

31. *See id.*

danger to Hennessey and taken reasonable steps to avoid or lessen that danger."[32] Therefore, a jury finding, and not summary judgment, is the proper method for determining the issue of Pyne's failure to warn.[33]

Assumption of the Risk

With respect to Pyne's assumption of the risk defense, the court set forth the Rhode Island rule: a tortfeasor may escape or diminish liability if the defendant creates "an unreasonable risk of injury."[34] In addition, the court outlined the elements of such a claim. The defendant must show that the "plaintiff 'knew of the existence of a danger, appreciated its unreasonable character, and then voluntarily exposed himself [or herself] to it.'"[35] The court concluded that the trial judge incorrectly disposed of this issue on summary judgment.[36] The court reasoned that, although Hennessey was aware of the general risk of being struck with golf balls, she was not aware of the particular risk of being hit by Pyne at the time in question.[37] Additionally, Hennessey's acceptance of the risk may have been involuntary because she may have had no reasonable alternative to exercise her privilege to stand on her own property. Furthermore, the availability of the assumption of the risk defense does not purport to extend golfers the right to banish Hennessey to home confinement whenever they intend to tee off.[38] Finally, Hennessey was not participating in nor observing the golf game. As a result, the issue whether Hennessey assumed the risk of being struck by golf balls when she "tarried" in her garden presents an issue for a jury, rather than disposal on summary judgment.[39]

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32. *Id.* at 698-99 (footnote omitted).

33. *See id.*

34. *Id.* at 699 (quoting Labrie v. Pace Membership Warehouse, Inc., 678 A.2d 867, 872 (R.I. 1996)).

35. *Id.* at 699 (quoting *Labrie*, 678 A.2d at 872) (citing Loffredo v. Merrimack Mut. Fire Ins. Co., 669 A.2d 1162, 1164 (R.I. 1996) (stating that the court shall inquire into "what the particular individual in fact saw, knew, understood, and appreciated")).

36. *See id.* at 699-700.

37. *See id.*

38. *See id.* at 700.

39. *Id.* at 700-01.

CONCLUSION

The supreme court held that the trial judge improperly disposed of Hennessey's claim of negligence and improperly held that Hennessey assumed the risk of being hit by golf balls when in her garden. Specifically, the court held that a golfer owes a duty to abutting landowners within reasonable striking distance of his or her shot. Moreover, the facts here raise material questions of fact regarding whether this duty was breached. Finally, the issue of assumption of the risk presents an issue for the jury and should not be disposed of by summary judgment. The supreme court therefore sustained Hennessey's appeal as it related to these claims, and remanded them to the trial court for further proceedings.