

# THE DAILY RECORD

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## Trials & TRIBULATIONS

### 'Fore!' Maybe 'Caddyshack' had it right

One of the all time great movies is "Caddyshack," described on its movie poster as the "The Snobs against the Slobs!"

For those readers who have never seen this movie (if you do exist please call me to discuss your taste in movies), it takes place at a country club that is invaded by millionaire prankster Al Czervik, played by Rodney Dangerfield, and involves his hilarious interaction with the straight-laced co-founder of the club, Judge Elihu Smails, played by Ted Night.

One of the many classic scenes in the movie is when Al Czervik, on the first tee, hits his drive into the fairway and yells "Fore!" before his ball hits Judge Smails in the groin. Czervik then says "I shoulda [sic] yelled two."

You may be asking yourself, what does this have to do with the law? Two weeks ago, the New York State Court of Appeals found that a golfer did not have a duty to yell "Fore!" or otherwise warn players nearby, when firing off an errant shot that struck his playing partner in the eye. The court, in *Anand v. Kapoor*, 2010 NY Slip. Op. 09380 (Dec. 21, 2010), unanimously affirmed the Appellate Division, Second Department's decision and found that the injured golfer, Dr. Azad Anand, assumed certain risks — like being struck in the head with a golf ball by his partner and fellow doctor — when he voluntarily played golf.

#### Facts

Dr. Anand, a Long Island doctor, was playing with fellow doctors and friends Dr. Kapoor and Dr. Verma on the morning of Oct. 19, 2002, at the Dix Hills Park Country Club in Nassau County, *Anand v. Kapoor*, 61 AD3d 787 (Second Dept. 2009). During their play on the first hole, and after each member of the threesome had hit two shots, they separated and walked toward their respective balls.

Dr. Anand testified at his deposition that as soon as he located his ball on the fairway (a place that is foreign to my golf game) and turned around to assess where the other members of his group had gone, he was struck by the defendant's "shanked" ball. Dr. Anand estimated that he was approximately 15 to 20 feet in front of the defendant when the defendant hit the ball, but admitted that it was customary for members of the same golfing party to stand behind other players when they were hitting the ball, *Id.* at 788.



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Daily Record  
Columnist

Dr. Verma, the witness, testified that the plaintiff's ball was about 20 feet in front of the defendant at the time of the accident, and the plaintiff was at an angle of approximately 50 degrees away from the direction of the green where the defendant was directing his shot. In contrast, the defendant testified that the plaintiff was standing at a considerably greater distance in front of him when the shot was hit, and was at an angle of approximately 60 to 80 degrees away from his intended line of flight.

The defendant admitted that he did not actually know where either the plaintiff or the witness was prior to hitting the ball, but did not see anyone standing between his ball and the hole when he approached to make his shot. While playing his ball from the rough, the defendant "shanked" his shot, which then hit the plaintiff who was standing to his right in the fairway.

The defendant maintained that he shouted out a warning to the plaintiff when he realized that the ball was headed in his direction, although the plaintiff and witness never heard the warning. The errant shot hit the plaintiff in the eye, detached his retina and left him blind in that eye.

After discovery was concluded, the defendant moved for summary judgment in his favor and argued that the plaintiff assumed the risk of being hit by a misdirected ball by voluntarily participating in the game of golf. The defendant further argued that, even assuming that a golfer owes a duty to another person to give a warning by yelling "Fore!" before hitting the ball, such a duty only exists when the other golfer is within the intended line of flight of the ball.

The defendant maintained that under the circumstances of the case, he had no duty to yell "Fore!" because the plaintiff was standing at an angle so far from the intended line of flight that he was not within the foreseeable ambit of danger.

In opposition, the plaintiff relied upon an affidavit of Golf Professional Thomas W. Tatnall, who opined that the defendant violated the "universally recognized" rules and procedures of the game by making a shot without first ascertaining that the other members of his group were not in a position to be struck by an errant ball, and by failing to give a warning before striking the ball. The expert theorized that if the defendant had taken the

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## Continued ...

time to ascertain the location of his playing partners and warned of his shot, the accident would not have occurred.

The expert further opined that, as set forth in *The Rules of Golf*, United States Golf Association, 2006, “players should not play until the players in front are out of range.” Further, “yelling fore” is simply a shorter way to yell, “watch out ahead or watch out before” and “allows golfers to be forewarned.”

## The decision

Nassau County Supreme Court Justice Joseph DeMarro granted the defendant’s summary judgment motion and dismissed the complaint on the grounds that the defendant was not negligent and that the plaintiff had, in any case, assumed the risk of injury by voluntarily playing golf.

On appeal, the Second Department acknowledged that there is authority which holds that “[a] golfer has a duty to give a timely warning to other persons within the foreseeable ambit of danger,” citing to the New York Court of Appeals decision in *Jenks v. McGranaghan*, 30 NY2d 475, 479 (1972). However, the Second Department affirmed 3 to 1, finding that the defendant could not be held liable even though he ignored the “universally recognized” custom of golfers yelling “Fore!” because the plaintiff was “at so great an angle away from the defendant and the intended line of flight that he was not in the foreseeable danger zone,” 61 AD3d at 789.

The dissenting justice disagreed, concluding that the defendant failed to make a *prima facie* showing that the plaintiff was not in the foreseeable ambit of danger because both golfers were on the same fairway. The majority countered that although the golfers were on the same fairway, the plaintiff was at so great an angle away from the defendant and the intended line of flight that he was not in the foreseeable danger zone.

The majority reasoned, “as the Court of Appeals explained in *Jenks*, while there is no fixed rule regarding the distance and angle which are considered within the ambit of foreseeable danger, if the distance and angle are great enough they are not within the danger zone as defined by previous cases,” *Id.* at 789. In *Jenks*, the Court of Appeals concluded that the injured plaintiff, who was standing on another tee about 25 yards away from the intended line of flight, was not within the zone of danger, 30 NY2d at 479.

In *Anand*, the Court of Appeals agreed with the majority of the Second Department’s decision and reasoned that a person who

“chooses to participate in a sport or recreational activity consents to certain risks that are inherent in and arise out of the nature of the sport generally and flow from such participation,” 2010 NY Slip. Op. 09380. A court evaluating the duty of care owed to a plaintiff by a participant in the sport must therefore “consider the risks that the plaintiff assumed” and “how those assumed risks qualified defendant’s duty to him.” However, a “plaintiff will not be deemed to have assumed the risks of reckless or intentional conduct or concealed or unreasonably increased risks,” *Id.*

In this matter, the defendant’s “failure to warn of his intent to strike the ball did not amount to intentional or reckless conduct, and did not unreasonably increase the risks inherent in golf to which Anand [plaintiff] consented. Rather, the manner in which Anand was injured — being hit without warning by a ‘shanked’ shot while one searches for one’s own ball — reflects a commonly appreciated risk of golf,” *Id.*

The court rejected predicating liability on whether the golfer yelled “Fore!” after hitting an errant shot because “it is inconsistent with the doctrine of primary assumption of the risk” as developed by the Court of Appeals since 1972.

## Conclusion

One could conclude that the court would only require a golfer to yell “Fore!” to others who are located on the same fairway and in the intended line of flight of a golf ball. Yet, at least in my golfing experience, it is players at risk from errant shots that travel into other fairways or outside one’s intended line of flight who are in need of a warning that an errant golf ball is coming their way.

Practically speaking, isn’t every golfer on a golf course within the zone of danger from errant shots and isn’t hitting a golf ball when unable to view your playing partners acting in a reckless manner? Don’t golfers expect that when an errant shot is hit — no matter the intended line of flight — that a player should yell “Fore!” in order to warn all golfers?

Apparently not, at least according to the Court of Appeals.

So, after all, Rodney was playing by the rules and following the law when he hit his tee shot, yelled “Fore!” and hit Judge Smails in the groin. Who knew?

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