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Anand v. Kapoor

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I. INTRODUCTION

Duck hooks, banana balls, and shanks.¹ Ridiculously bad shots such as these have shamed many an unsuspecting golfer, even the vaunted Tiger Woods.² Amid the laughter and shame, one of these poorly hit shots can easily end up in a sand trap, the woods, or even in some poor fellow's living room.³ It is therefore quite obvious that a struck golf ball can wreak havoc as it is launched into the great unknown.⁴ It is this very uncertainty of the game that makes golf challenging, and even occasionally thrilling.⁵ Although wayward golf shots can, and do, result in serious injuries, golf cannot be categorized as a hazardous game. Over the centuries, a set of golfing etiquette rules has evolved that protects golfers from the inherent risk of getting walloped by a poorly struck shot, thereby greatly reducing the probability of injury.⁶

1. Terrible, yet common, golf shots include the "slice" (ball fades to the right for a right-handed player—an especially grotesque slice is referred to as a banana shot), "hook" (shot is pulled sharply left—a severe hook is called a "duck-hook"), and "shank" (ball is struck by the heel of the club and darts sharply right at a low trajectory). *Poor Golf Shots*, NCGOLFERS.COM (Oct. 7, 2007), <http://www.ncgolfers.com/north-carolina/355/poor-golf-shots/>. Possible causes of miserable shots such as these include lack of skill, lack of concentration, lack of hand-eye coordination, inebriation, worn club grip, slippery hands, trembling legs, distraction by course-dwelling critters, force majeure . . . well, you get the picture.
2. A memorable shank by Tiger Woods occurred at the 2007 British Open. *Errant Shot by Woods Hits a Spectator*, GOLF.COM (July 21, 2007), http://www.golf.com/golf/tours_news/article/0,28136,1645722,00.html. Jennifer Wilson required stitches after she was 'beaned' by Tiger's ball when he badly missed an approach shot. *Id.* Ms. Wilson was walloped in the head while watching the action at the par-five sixth hole at the Carnoustie Golf Club. *Id.* Her husband, Cecil Wilson, recounted the incident: "We were standing 30 yards short of the green and I said to Jennifer: 'Get your crash helmet on, Tiger's coming . . . I could not believe it when Jennifer then got 'clunked,' but he [Tiger] does go off line from time to time.'" *Id.* (quoting Cecil Wilson) (internal quotation marks omitted). Woods continued on to par the hole. *Id.* Cecil Wilson explained, "My wife did him a favor, she headed it back in for him." *Id.*
3. Who could forget the legendary scene in the cult classic golf movie *Caddyshack*, in which golf ace Ty Webb (played by actor Chevy Chase) badly shanks a shot through the window of assistant greenkeeper Carl Spackler's (played by actor Bill Murray) very humble abode? *CADDYSHACK* (Orion Pictures Corp. 1980). The ball comes to rest on a slice of pie atop Spackler's coffee table. *Id.* Webb proceeded to take a drop over his shoulder and played his next shot out through Spackler's other window. *Id.*
4. "[I]n some ways, hitting a golf ball can be more dangerous than firing a gun or throwing a stone since one is likely to have more control over the direction of a gunshot or a thrown stone than a golf ball." *Neumann v. Shlansky*, 294 N.Y.S.2d 628, 631 (Sup. Ct. Westchester County 1968), *aff'd per curiam*, 312 N.Y.S.2d 951 (App. Term 2d Dep't 1970), *aff'd*, 318 N.Y.S.2d 925 (2d Dep't 1971).
5. Such unpredictability inevitably leads to frustration. Throughout the annals of golf history, legendary professionals have reacted to their off-line shots with the occasional temper tantrum. Perhaps the most notorious was Thomas Henry Bolt, who won fifteen PGA Tour events, as well as the 1958 U.S. Open. A memorable photo shows Bolt getting ready to hurl his driver like a javelin into a water hazard at the eighteenth hole at Cherry Hills Golf Course during the 1960 U.S. Open. Bolt claimed he was trying to "clobber the noisy carp in the lake." Cliff Schrock, *Passings of 2008: Remembering Tempestuous Tommy, The Real McKay, Ol' Sarge and More*, GOLF DIGEST, Feb. 2009, at 162, available at <http://www.golfdigest.com/magazine/2009-02/passings>. One bit of advice from Mr. Bolt: "[A]lways throw the club ahead of you so you can pick it up on your way." *Id.* (internal quotation marks omitted). Bolt also "never threw a club that didn't deserve it." *Id.* (quoting Tommy Bolt) (internal quotation marks omitted).
6. Golf, unlike most sports, is not played under the watchful eye of a referee or umpire. Therefore, a golfer relies on his or her fellow golfers to abide by the rules of the game, thereby promoting safe play. Since 1897, the United States Golf Association (USGA) has teamed up with the Royal & Ancient Golf Club

Of paramount significance among these rules is the player's duty to immediately shout a warning when he or she plays a ball in a direction where there is a danger of hitting someone.⁷ To varying degrees, courts around the country have adopted the golfer's duty to warn, finding golfers who breach that duty liable because they unreasonably increase the risk of injury.⁸ As explained in past cases by the New York Court of Appeals, a golfer in New York "has a duty to give a timely warning to other persons within the foreseeable ambit of danger" prior to taking a shot.⁹

In *Anand v. Kapoor*, the New York Court of Appeals ("Court of Appeals") was presented with the question of whether a golfer owed a duty to provide warning of his intent to take a shot, and whether he can be held liable for his wayward shot for failure to do so.¹⁰ The court issued a terse, sixteen-sentence opinion in which it answered these questions in the negative, choosing to affirm summary judgment in favor of the defendant solely on assumption of the risk grounds.¹¹ The Court of Appeals declared the way in which the plaintiff was injured, getting hit by a shanked shot, to be "a commonly appreciated risk of golf."¹² In so ruling, the court effectively brushed aside the well-established rule in New York that, before hitting a ball, "[a] golfer has a duty to give a timely warning to other persons within the foreseeable ambit of danger" by yelling "fore."¹³ The Court of Appeals chose not to examine the New York Appellate Division, Second Department's ("Second Department") erroneous decision to affirm dismissal of the plaintiff's complaint despite unresolved

in St. Andrews, Scotland, to "write[], interpret[] and maintain[]" the rules of golf in order to "guard the tradition and integrity of the game." *Rules and Decisions*, USGA, <http://www.usga.org/Rule-Books/Rules-of-Golf/Rule-01/> (last visited Apr. 4, 2011). The two organizations have combined forces to write and implement *The Rules of Golf and Decisions on the Rules of Golf*. See *id.*

7. Other basic safety rules include: "[p]layers should ensure that no one is standing close by or in a position to be hit by the club, the ball or any stones, pebbles, twigs or the like when they make a stroke or practice swing"; "[p]layers should not play until the players in front are out of range"; and "[p]layers should always alert greenstaff nearby or ahead when they are about to make a stroke that might endanger them." *Golf Etiquette 101*, USGA, <http://www.usga.org/etiquette/tips/Golf-Etiquette-101/> (last visited Apr. 4, 2011).
8. See *infra* note 47 and accompanying text.
9. *Jenks v. McGranaghan*, 30 N.Y.2d 475, 479 (1972).
10. 15 N.Y.3d 946 (2010).
11. *Id.*
12. *Id.* at 948.
13. *Anand v. Kapoor*, 877 N.Y.S.2d 425, 427 (2d Dep't 2009) (alteration in original) (quoting *Jenks*, 30 N.Y.2d at 479), *aff'd*, 15 N.Y.3d 946. Shouting "fore" is just a simple way to yell "watch out ahead or watch out before." Affidavit of Golf Professional Thomas W. Tatnall para. 4(f), *Anand v. Kapoor*, No. 15942/05, 2007 WL 7308649 (Sup. Ct. Nassau County May 7, 2007), *aff'd*, 877 N.Y.S.2d 425, *aff'd*, 15 N.Y.3d 946 (No. 15942/05), 2007 WL 6890261. Such a warning cry forewarns golfers of incoming golf balls and impending danger. *Id.* The term may have evolved from the ancient term "forecaddie," a person who would accompany a group around the course who would often go forward in order to be in a position to pinpoint the location of the group's shots. *Id.* Golfers "universally understand that 'fore' means 'ahead' and is a warning to those ahead of the golfer who shouts it." *Id.*

material factual issues.¹⁴ By doing so, the Court of Appeals seemingly blessed the Second Department's improper ruling that, as a matter of law, the plaintiff did not stand within the foreseeable danger zone and had assumed the risk of his injury merely by participating in the game.¹⁵

This case comment contends that the decision to grant summary judgment for the defendant was improper because triable questions of fact existed as to whether the defendant unreasonably increased the risk of his playing partner's injury. More specifically, a jury question existed as to whether the defendant, who admittedly failed to ascertain the plaintiff's position before hitting and did not adequately warn the plaintiff of his impending shot,¹⁶ affirmatively created hidden risks of injury that the plaintiff neither appreciated nor consented to. The Second Department reached its erroneous decision to affirm dismissal of the complaint because it ignored material factual disputes in the trial record, misconstrued binding precedent, and relied on inapplicable cases. Furthermore, in affirming the Second Department's improper legal reasoning solely on assumption of the risk grounds,¹⁷ the Court of Appeals not only managed to confuse the discrete issues of negligence presented by the case, but also incorrectly expanded the controversial assumption of the risk defense to protect a golfer who carelessly created hidden risks of injury. In so doing, the court effectively gutted the player's duty to warn those that stand within the foreseeable zone of danger because the fair import of the court's ruling is that the player who stands outside of the intended line of flight can no longer recover for his or her injuries caused by an errant shot. As a result of the court's decision, golf in New York is sure to become a more hazardous pastime.

II. THE FACTS AND TRIPLE-BOGEY REASONING OF ANAND v. KAPOOR

The defendant, Anoop Kapoor, hit a golf ball that severely injured the eye of his playing partner Azad Anand, the plaintiff.¹⁸ As a direct result of the incident, Dr. Anand, a neuroradiologist, suffered "a ruptured globe of his left eye, with traumatic retinal detachment, causing permanent loss of vision in his left eye."¹⁹ Dr. Anand brought an action to recover damages for his injuries in New York State Supreme Court, Nassau County.²⁰ The plaintiff and the defendant, both doctors, had been friends for many years prior to the incident and were frequent golf partners.²¹ On the morning of October 19, 2002, the plaintiff and the defendant, along with their

14. See *Anand*, 877 N.Y.S.2d at 425.

15. See *id.* at 427–30.

16. See *id.* at 426–27.

17. See *Anand*, 15 N.Y.3d at 946–48.

18. *Anand*, 877 N.Y.S.2d at 426.

19. Brief of Plaintiffs-Appellants at 4, *Anand v. Kapoor*, 877 N.Y.S.2d 425 (2d Dep't 2007) (No. 2007-05606), 2007 WL 5515998.

20. *Anand*, 877 N.Y.S.2d at 426.

21. *Id.*

mutual friend Balram Verma, formed a threesome to play golf at Dix Hills Park Golf Course in Nassau County, New York.²² At the first hole, each of the three golfers hit two tee shots and then separated, heading off toward their respective balls.²³

There was a dispute in the record as to what occurred next.²⁴ The plaintiff testified at his deposition that, just as he located his ball on the fairway and turned around to see where the other members of his threesome had gone, he was struck by the defendant's misdirected ball.²⁵ The plaintiff estimated that he stood approximately fifteen to twenty feet ahead of the defendant when the defendant hit his wayward shot.²⁶ Balram Verma, the third member of the playing group, also testified at his deposition that the plaintiff's ball sat approximately twenty feet in front of the defendant's ball at the time of the incident. Additionally, he stated that the plaintiff stood at an angle approximately fifty degrees away from the defendant's intended target—the hole in the green.²⁷ In contrast, the defendant testified at his deposition that the plaintiff stood further ahead of him when he hit the errant shot, and was situated at a wider angle of approximately sixty to eighty degrees away from the defendant's intended line of flight.²⁸ The defendant also admitted that he “did not

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22. *Id.* There are two nine-hole golf courses located in the town of Dix Hills. *Flyover: Dix Hills Park Golf Course*, GOLF ON LONG ISLAND (May 15, 2009), <http://www.golfonlongisland.com/teebox/2009/05/flyover-dix-hills-park-golf-course.html>. The threesome in this case played the Dix Hills Park Golf Course, the shorter of the two courses. *Id.* The course is heavily wooded and incorporates many elevation changes. *Id.* The tall trees and hills combine to give each hole a “secluded feel that is uncommon on a typical nine-hole muni.” *Id.* The four par-fours on the nine-hole course are relatively short but still allow the player to occasionally hit his or her driver from the tee. *Id.*
23. *Anand*, 877 N.Y.S.2d at 426. The first hole at Dix Hills Park Golf Course is a short, 283-yard par-four hole that plays very slightly uphill. Two sand bunkers protect the right side of a small, relatively flat green. *Flyover: Dix Hills Park Golf Course*, *supra* note 22.
24. *Anand*, 877 N.Y.S.2d at 426–27.
25. *Id.* at 426. Under regular circumstances, golfers will advance down the fairway to their respective balls. The golfer who reaches his ball first and is the greatest distance away from the green will hit his shot after first determining the position of his fellow golfers. If they are in a position where a misdirected shot could hit them, he warns them that he is about to hit, most often by yelling “fore.” “This alerts [the golfer] to the potential danger” afoot and allows the golfer to duck or “take cover behind [his/her] bag or cart.” Affidavit of Golf Professional Thomas W. Tatnall, *supra* note 13, para. 5.
26. *Anand*, 877 N.Y.S.2d at 426. Plaintiff admitted that it was customary for members of the same golfing group to stand behind the one in the process of hitting the ball. *Id.* In his affidavit, golf professional Thomas W. Tatnall stated that plaintiff “had just determined the location of his ball and was correctly in the process of assessing his position as compared to the positions of his fellow players in order to determine who hit next.” Affidavit of Golf Professional Thomas W. Tatnall, *supra* note 13, para. 7. This course of action conformed with the rules and procedures universally recognized by golfers. *Id.*
27. *See Anand*, 877 N.Y.S.2d at 426. Although Balram Verma testified that the plaintiff was at an angle approximately fifty degrees away from the hole in the green where the defendant was aiming his shot, Verma also testified that there was an angle of only twenty degrees between defendant's ball and plaintiff's ball horizontally. *Anand v. Kapoor*, No. 15942/05, 2007 WL 7308649 (Sup. Ct. Nassau County May 7, 2007), *aff'd*, 877 N.Y.S.2d 425, *aff'd*, 15 N.Y.3d 946 (2010).
28. *Anand*, 877 N.Y.S.2d at 426–27. Furthermore, defendant also testified he did not know where plaintiff and Verma stood when he took the previous stroke. *Anand*, 2007 WL 7308649, at *2. According to plaintiff's counsel, “[p]laintiff testified that upon being struck by the ball, he saw Defendant 15 to 20

actually know” where either the plaintiff or Verma stood prior to hitting his ill-fated shot.²⁹ The defendant testified that he shouted a warning when he realized the ball was moving offline and directly towards the plaintiff; however, both the plaintiff and Verma testified that they did not hear any shout from the defendant.³⁰ All parties agreed that Dr. Anand was not in the intended line of flight of Dr. Kapoor’s shot.³¹

The defendant moved for summary judgment dismissing the complaint soon after depositions were completed.³² In support of his motion, the defendant contended that, even assuming a golfer owes a duty to shout a warning before hitting the ball, such a duty exists only when a person stands within the “intended line of flight of the golf ball.”³³ The defendant further argued that he owed no duty to yell “fore” because his deposition testimony, Verma’s deposition testimony, and a photograph recreating the respective positions of the three golfers prepared by plaintiff’s counsel each showed that the plaintiff stood at an angle “so far from the intended line of flight that he was not within the foreseeable ambit of danger.”³⁴ The plaintiff, in opposing the motion, argued the defendant violated the “universally recognized” rules and etiquette of golf in two ways.³⁵ First, the defendant took his shot without determining that his fellow golfers were not at risk of being hit by an errant ball.³⁶ Second, the defendant failed to provide adequate warning to his playing partners before taking that shot.³⁷ The trial

feet away.” Brief of Plaintiffs-Appellants, *supra* note 19, at 4. This is confirmed by Mr. Verma, who had seen that the plaintiff “stopped next” to his ball, which Mr. Verma testified was only twenty feet to the right and forward of the defendant’s ball. *Id.* In his affidavit submitted in opposition to the defendant’s motion, Mr. Verma described the location of the plaintiff’s ball as “approximately ten yards forward of Dr. Anand’s ball.” *Id.* The defendant testified that the plaintiff’s ball was ten to fifteen yards forward of his own and that thirty to forty yards separated the plaintiff’s ball from his own ball. *Id.*

29. *Anand*, 877 N.Y.S.2d at 427.

30. *Id.*

31. *See id.*; *see also Anand*, 15 N.Y.3d at 948.

32. *Anand*, 877 N.Y.S.2d at 427.

33. *See id.* On appeal, the defendant also made a primary assumption of the risk argument, maintaining that the plaintiff had “assumed the risk” of being hit by an errant shot simply by choosing to play golf. *See id.* The Second Department majority weighed in on New York’s primary assumption of the risk doctrine as articulated by the Court of Appeals: “The risks which participants in sporting or recreational activities are deemed to have consented to are those ‘commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation.’” *See id.* at 428 (quoting *Morgan v. State*, 90 N.Y.2d 471, 484 (1997)). However, as the majority noted, “[r]isks which fall outside the scope of the doctrine are those of reckless or intentional conduct, or concealed or unreasonably increased risks.” *Id.* at 428 (citing *Morgan*, 90 N.Y.2d at 485).

34. *Anand*, 877 N.Y.S.2d at 427.

35. *See id.*

36. *Id.*

37. *Id.* Plaintiff relied on the affidavit of golf professional Thomas W. Tatnall. Mr. Tatnall stated that, based upon all documents reviewed, defendant admittedly failed to both look for and warn his fellow players that he was about to hit the ball. Such failures, Tatnall opined, stand in “clear violation of the rules and procedures universally recognized in the game of golf.” Affidavit of Golf Professional Thomas W. Tatnall, *supra* note 13, para. 7. As set forth in the USGA *Rules and Decisions of Golf*, “If a player plays

court granted the defendant's motion for summary judgment, concluding that, because getting struck by a wayward ball is an "inherent risk" of the game of golf, this was simply a "terrible accident."³⁸ The court further determined that, because no one stood within either the intended line of flight or the foreseeable zone of danger when the defendant took his shot, no duty to warn was owed.³⁹

Anand appealed to the Second Department.⁴⁰ In a 3-1 ruling, the Second Department affirmed the trial court's order which granted the defendant's summary judgment motion.⁴¹ The majority held there was sufficient evidence in the record to establish, as a matter of law, that 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."⁴² Relying heavily on the New York Court of Appeals decision in *Jenks v. McGranaghan*,⁴³ the majority ruled that the defendant did not owe a duty to the plaintiff to warn of his impending shot and therefore cannot be held liable for his errant shot on that basis.⁴⁴

Justice Cheryl E. Chambers dissented from the majority's opinion.⁴⁵ She emphasized that, contrary to the majority's conclusion, the Court of Appeals in past cases did not limit the foreseeable zone of danger to the intended line of flight.⁴⁶ Justice Chambers explained that, while a minority of jurisdictions follow a rule that limits the duty to warn to only those located within the intended line of flight, New York does not subscribe to that view.⁴⁷ The dissent also distinguished *Jenks*, in which the Court of Appeals held that there is generally "no duty to warn persons not in the intended line of flight on another tee or fairway."⁴⁸ Justice Chambers argued that the defendant failed to make an initial showing that the plaintiff was not in the foreseeable

a ball in a direction where there is a danger of hitting someone, he should immediately shout a warning. The traditional word of warning in such situations is 'fore.'" *Rules and Decisions*, USGA, <http://www.usga.org/Rule-Books/Rules-of-Golf/Etiquette/> (last visited Apr. 3, 2011). Several other publications, including those intended for beginning golfers, provide similar admonitions. A good example is the pamphlet *A Summary of the Rules of Golf*, published by the Professional Golfers Association of America (PGA), which states: "Both in [p]ractice and [p]lay, always make sure that: [n]o one is near you when you swing the club [and n]o one is ahead of you where your shot might hit them." PROF'L GOLFERS ASS'N OF AM., *A SUMMARY OF THE RULES OF GOLF* (undated) 5, available at http://www.playgolfamerica.com/Graphics/info_devo/rules_of_golf.pdf (last visited Apr. 4, 2011).

38. *Anand*, 877 N.Y.S.2d at 427.

39. *See id.*

40. *Id.* at 426.

41. *Id.*

42. *Id.* at 427.

43. 30 N.Y.2d 475 (1972).

44. *Anand*, 877 N.Y.S.2d at 428.

45. *Id.* at 430 (Chambers, J., dissenting).

46. *See id.* at 431 (citing *Rinaldo v. McGovern*, 78 N.Y.2d 729 (1991)).

47. *Id.* (citing *Thomas v. Wheat*, 143 P.3d 767, 770 (Okla. 2006)).

48. *Jenks*, 30 N.Y.2d at 479 (emphasis added).

ambit of danger—not only because both golfers stood on the same fairway, but also because the actual distance and angle between the players at the time of the incident were disputed.⁴⁹ Therefore, the issue of whether the plaintiff “assumed the risk” of his injury may not be determined as a matter of law, but rather must be submitted to a jury.⁵⁰ Accordingly, the dissent would have denied summary judgment.⁵¹

The Second Department then granted plaintiff’s motion for leave to appeal to the New York Court of Appeals.⁵² The Court of Appeals, in a sixteen-sentence opinion, affirmed.⁵³ The court chose not to address the question of whether Dr. Anand, as a matter of law, stood within the foreseeable ambit of danger and was therefore owed a duty to be warned by Kapoor of his impending shot.⁵⁴ Rather, the court affirmed the decision to dismiss the complaint solely on assumption of the risk grounds.⁵⁵

This case comment contends that granting summary judgment for the defendant was improper because triable questions of fact existed as to whether the defendant unreasonably increased the risk of injury to his playing partner. More specifically, a jury question existed as to whether the defendant, who failed to ascertain the plaintiff’s position before hitting and did not warn the plaintiff of his impending shot,⁵⁶ affirmatively created hidden risks of injury to which the plaintiff neither appreciated nor consented to. The Second Department reached its erroneous decision to affirm because it ignored material factual disputes in the trial record, misconstrued precedent, and relied on inapplicable cases. Furthermore, in affirming the Second Department’s bad decision solely on assumption of the risk grounds,⁵⁷ the Court of Appeals not only managed to confuse the discrete issues of negligence presented by the case but also improperly expanded the controversial defense of assumption of the risk to protect a golfer who carelessly created hidden risks of injury. In doing so, the court all but eviscerated the golfer’s duty to warn others within the foreseeable zone of danger prior to taking a shot and absurdly ruled, indirectly, that a golfer cannot be held liable for taking a blind shot without first ascertaining the positions of his fellow playing partners so long as he ends up hitting a bad shot. As a result of the Court of Appeals’ misguided decision, golf in New York shall henceforth be a more hazardous game.

49. *Anand*, 877 N.Y.S.2d at 430 (Chambers, J., dissenting).

50. *Id.* at 432–33.

51. *Id.* at 433.

52. *Anand v. Kapoor*, 15 N.Y.3d 946 (2010).

53. *Id.*

54. *See id.*

55. *See id.*

56. *See supra* note 16 and accompanying text.

57. *See supra* notes 54–55 and accompanying text.

III. HOW THE SECOND DEPARTMENT WENT OUT OF BOUNDS BY MISCONSTRUING PRECEDENT

Because the Court of Appeals chose not to apply the foreseeable ambit of danger analysis to the defendant's conduct—instead analyzing the case as presenting only an assumption of the risk question⁵⁸—it is important to first understand the Second Department majority opinion, which provides context for what the Court of Appeals actually ignored, and in doing so what it actually held in its short opinion. Although the Second Department noted that the record contained conflicting evidence as to the location of the plaintiff in relation to the defendant at the time of the incident,⁵⁹ it nevertheless ruled that the record had sufficiently established, as a matter of law, that the plaintiff did not stand within the foreseeable danger zone.⁶⁰ While the majority casually mentioned the “foreseeable ambit of danger” language found in New York cases decided both before and after *Jenks v. McGranaghan*,⁶¹ the court failed to follow through with the proper analysis under this standard. This failure led to the majority's improper ruling that, despite the material dispute in the testimonies of the golfers regarding their relative positions when the incident occurred, the plaintiff was not in the foreseeable ambit of danger as a matter of law.⁶² The majority reasoned that the plaintiff stood outside the foreseeable danger zone because he was “at so great an angle away from the defendant and the intended line of flight.”⁶³ This flawed analysis led the majority to conclude that no duty to warn was owed,⁶⁴ and, in turn, to its decision to award summary judgment for the defendant.⁶⁵ Because the golfers stood on the same fairway, and both the actual distance and angle between the players at the time of the incident are disputed,⁶⁶ the question of whether the plaintiff stood within the foreseeable ambit of danger constituted a question of fact that must not be answered as a matter of law.

58. See *supra* notes 11–13.

59. See *Anand v. Kapoor*, 877 N.Y.S.2d 425, 426–27 (2d Dep't 2009), *aff'd*, 15 N.Y.3d 946.

60. *Id.* at 427.

61. Compare 30 N.Y.2d 475, 480 (1972), with *Nussbaum v. Lacopo*, 27 N.Y.2d 311, 318 (1970) (dismissing plaintiff's negligence and nuisance claims after a golfer struck a ball that injured a nearby homeowner despite defendant's failure to yell fore, based in part on a lack of foreseeability), and *McDonald v. Huntington Crescent Club, Inc.*, 543 N.Y.S.2d 155, 156 (2d Dep't 1989) (holding that, when plaintiff caddy was struck by defendant's ball, “[a] golfer has a duty to give a timely warning to other persons within a foreseeable ambit of danger and that duty extends to those in or near the intended line of flight” (citation omitted)), and *Richardson v. Muscato*, 576 N.Y.S.2d 721 (4th Dep't 1991) (holding that plaintiff golfer who was struck in the head with another golfer's ball when “in the vicinity of the 13th tee and about 20 to 25 feet from the 12th green” presented a question of fact as to whether he was injured within the foreseeable ambit of danger).

62. See *Anand*, 877 N.Y.S.2d at 426–29.

63. *Id.* at 427.

64. *Id.* at 428.

65. *Id.* at 430.

66. *Id.* at 426–27.

A golfer in New York owes a duty to exercise reasonable care to avoid injuring other players on the golf course.⁶⁷ Indeed, “all persons on the golf course have a right to rely on the players’ adherence to a standard of care, based upon the avoidance of reasonably foreseeable risks.”⁶⁸ Even elite professional golfers can succumb to the occasional hook or slice;⁶⁹ because of this, a golfer is forced to accept the risk that bad shots often carry the ball wide of the intended line of play and that a player would be at risk of being struck by bad shots.⁷⁰ Assumption of this risk, however, is a “question[] of fact in all but the clearest cases”⁷¹ because a participant “generally assumes the risks inherent in the sport, but . . . does not assume the risk of another participant’s negligent play which enhances the risk.”⁷²

The foreseeable ambit of danger standard has evolved in New York to protect golfers from unreasonable risk of injury on the golf course.⁷³ The New York Court of Appeals has explained in previous cases that “there is no fixed rule regarding the distance and angle which are considered within the ambit of foreseeable danger” on a golf course.⁷⁴ In applying this standard of care, New York courts have regularly engaged in detailed exploration and analysis of the facts and circumstances pertinent to the incident to determine whether a duty to warn was owed. Based on past New York cases, some of the facts relevant to this determination include the relative angle and distance between the players at the time of the incident,⁷⁵ the players’ “general knowledge of the golf course [and] the game of golf,”⁷⁶ whether the players are engaged in playing the same hole,⁷⁷ the probability that a warning would have been heard or

67. *Neumann v. Shlansky*, 294 N.Y.S.2d 628, 630 (Sup. Ct. Westchester County 1968), *aff’d per curiam*, 312 N.Y.S.2d 951 (App. Term 2d Dep’t 1970), *aff’d*, 318 N.Y.S.2d 925 (2d Dep’t 1971).

68. *Id.* at 632.

69. *Rinaldo v. McGovern*, 78 N.Y.2d 729, 733 (1991); *see also supra* note 2.

70. *Trauman v. City of New York*, 143 N.Y.S.2d 467, 471 (Sup. Ct. Bronx County 1955) (“[T]here is an abundance of authority throughout the country that participants must know that many bad shots carry the ball to the right or left of an intended line of play and that such a player would be endangered by such bad shots. This risk all golf players must accept.”).

71. *Jackson v. Livingston Country Club, Inc.*, 391 N.Y.S.2d 234, 235 (App. Term 4th Dep’t 1977) (citing *Wartels v. Cnty. Asphalt, Inc.*, 29 N.Y.2d 372 (1972); *Rossmann v. La Grega*, 28 N.Y.2d 300 (1971); *Stevens v. Cent. Sch. Dist. No. 1*, 270 N.Y.S.2d 23 (2d Dep’t 1966), *aff’d*, 21 N.Y.2d 780 (1968)).

72. *Jackson*, 391 N.Y.S.2d at 235 (citing *Stevens*, 270 N.Y.S.2d at 27). An example of such risk-enhancing behavior is a player’s failure to shout “fore” prior to taking a shot when someone else stands within the foreseeable zone of danger of being struck by that shot. *See Neumann*, 294 N.Y.S.2d at 632.

73. *See Neumann*, 294 N.Y.S.2d at 632; *see also McDonald v. Huntington Crescent Club, Inc.*, 543 N.Y.S.2d 155, 156 (2d Dep’t 1989); *Richardson v. Muscato*, 576 N.Y.S.2d 721 (4th Dep’t 1991).

74. *Jenks v. McGranaghan*, 30 N.Y.2d 475, 480 (1972).

75. *See Anand v. Kapoor*, 877 N.Y.S.2d 425, 427 (2d Dep’t 2009), *aff’d*, 15 N.Y.3d 946 (2010).

76. *See McDonald*, 543 N.Y.S.2d at 156.

77. *See Jenks*, 30 N.Y.2d at 478.

heeded,⁷⁸ whether the injured player had just left a place of safety,⁷⁹ course topography, ball lie, and even the foliage on the surrounding trees.⁸⁰ Another important consideration is the intended line of flight of the offending player's shot.⁸¹ As all golfers know, professional and amateur alike, a struck golf ball does not always cooperate with the player's objectives.⁸² Therefore, contrary to a minority of jurisdictions, the New York Court of Appeals has in past cases made a policy decision not to limit the foreseeable zone of danger to the intended line of flight of a player's shot.⁸³ Rather—according to this line of precedent—a golfer in New York owes a duty to provide a “timely warning,” not only to those who are in the intended line of flight, but also to “other persons within the foreseeable ambit of danger.”⁸⁴ In *Anand*, the Second Department effectively shrank the foreseeable zone of danger to cover only the intended line of a player's shot; it did so by failing to engage in the fact-sensitive analysis under the foreseeable zone of danger standard as mandated by past cases.

The Second Department began its analysis of the defendant's duty to warn by acknowledging the New York rule that “[a] golfer has a duty to give a timely warning to other persons within the foreseeable ambit of danger.”⁸⁵ As the majority explained: “[W]hile 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.’”⁸⁶ The majority cited to the New York Court of Appeals decision in *Jenks*, alone, for this proposition.⁸⁷ In *Jenks*, the Court of Appeals tackled the question of whether a golfer was negligent when he drove a ball from the eighth tee without advance warning to players standing near the ninth tee adjacent to the eighth fairway.⁸⁸ When the defendant in *Jenks* teed off, the plaintiff stood on another tee 150 yards away, approximately twenty-five yards from the intended line of flight.⁸⁹ Just as the defendant in *Jenks* hit his tee shot,

78. See *Rinaldo v. McGovern*, 78 N.Y.2d 729, 732 (1991).

79. See *Johnston v. Blanchard*, 301 N.Y. 599, 600 (1950).

80. See *Nussbaum v. Lacopo*, 27 N.Y.2d 311, 314 (1970).

81. See *Anand v. Kapoor*, 877 N.Y.S.2d 425, 429 (2d Dep't 2009), *aff'd*, 15 N.Y.3d 946 (2010).

82. See *supra* note 2.

83. *Anand*, 877 N.Y.S.2d at 431 (Chambers, J., dissenting) (citing *Simpson v. Fiero*, 260 N.Y.S. 323 (2d Dep't 1932), *aff'd*, 262 N.Y. 461 (1933)).

84. *Jenks v. McGranaghan*, 30 N.Y.2d 475, 479 (1972).

85. *Anand*, 877 N.Y.S.2d at 427 (alteration in original) (quoting *Jenks*, 30 N.Y.2d at 480) (internal quotation marks omitted).

86. *Id.* (quoting *Jenks*, 30 N.Y.2d at 480).

87. *Id.* The majority only cited to *Jenks* for this proposition of law, despite the fact that it describes the zone of danger as defined by previous cases. As mentioned above, New York courts have defined the zone of danger by taking detailed account of the facts and circumstances surrounding the golfers at the time of injury. See *supra* notes 75–81.

88. *Jenks*, 30 N.Y.2d at 478.

89. *Id.*

the plaintiff stepped out from behind a protective fence and was smacked in the eye by the ball, resulting in partial blindness.⁹⁰

In *Jenks*, the Court of Appeals noted the well-established rule in New York that “[a] golfer has a duty to give a timely warning to other persons within the foreseeable ambit of danger,”⁹¹ but the “mere fact that a ball does not travel the intended course does not establish negligence” because “[even] the best professional golfers cannot avoid an occasional ‘hook’ or ‘slice.’”⁹² The Court of Appeals then held that, because “there is no [general] duty to warn persons not in the intended line of flight *on another tee or fairway* of an intention to drive,”⁹³ there was therefore no duty to yell “fore” before hitting under these circumstances.⁹⁴ Because the defendant did not owe a duty to yell fore, the *Jenks* court therefore held that the defendant could not be held liable for failing to do so⁹⁵ and affirmed summary judgment for the defendant.⁹⁶

Anand can be distinguished from *Jenks* for several reasons. Unlike the golfers in *Jenks*, who were members of different playing groups located on different holes at the time of the incident,⁹⁷ the golfers in *Anand* played together as members of the same threesome and stood together in close proximity on the same fairway.⁹⁸ Because the golfers in *Anand* were playing together on the same fairway at the time of the incident, the *Jenks* rule that a golfer has “no duty to warn persons not in the intended line of flight *on another tee or fairway* of an intention to drive”⁹⁹ is inapplicable to the facts of *Anand* and beside the point. Moreover, that the golfers in *Anand* were playing the same fairway together at the time of the incident¹⁰⁰ also weighs on the related question of whether a proper warning would have been heard or heeded. The Court of Appeals addressed this very question in *Rinaldo v. McGovern* and found that “the duty to warn did not extend to persons outside the tee or fairway, on the ground that such persons in all probability would not have heard or heeded the warning.”¹⁰¹ Also bearing on this question are the material contrasts concerning the relative proximities and angles between the golfers in *Jenks* as compared to the golfers in *Anand*. In *Jenks*, when the defendant teed off, the plaintiff stood on another tee 150 yards away—approximately twenty-five yards from the intended line of flight—and had just

90. *Id.*

91. *Id.* at 479 (citing *Nussbaum v. Lacopo*, 27 N.Y.2d 311, 318 (1970); B. Finberg, Annotation, *Liability for Injury or Death on or near Golf Course*, 82 A.L.R.2d 1183, 1185 (1962)).

92. *Id.* (quoting *Nussbaum*, 27 N.Y.2d at 319).

93. *Id.* (emphasis added).

94. *Id.* at 480.

95. *Id.*

96. *Id.*

97. *Id.* at 478.

98. *Anand v. Kapoor*, 877 N.Y.S.2d 425, 426 (2d Dep’t 2009), *aff’d*, 15 N.Y.3d 946 (2010).

99. *Jenks*, 30 N.Y.2d at 479 (emphasis added).

100. *Anand*, 877 N.Y.S.2d at 426.

101. *Id.* at 431 (describing the findings in *Rinaldo v. McGovern*, 78 N.Y.2d 729, 732–33 (1991)).

stepped out from his position behind a protective fence.¹⁰² Though the relative positions of the golfers in *Anand* are disputed,¹⁰³ both the plaintiff and Balram Verma estimated that the plaintiff stood only five to seven yards in front of the defendant, at an angle of approximately fifty degrees when the errant ball was hit,¹⁰⁴ and plaintiff never stood behind a protective fence.¹⁰⁵ Because the plaintiff in *Anand* stood in such close proximity to the defendant on the same fairway when the ball was struck, the plaintiff most likely would have heard the defendant's warning and taken cover.

Furthermore, the Second Department misconstrued *Rose v. Morris*,¹⁰⁶ a Georgia case cited in *Jenks* for the proposition that because the plaintiff stood "at so great an angle away from the defendant and the intended line of flight that he was [therefore] not in the foreseeable danger zone" as a matter of law.¹⁰⁷ In *Rose*, the Georgia Court of Appeals held that the defendant was not negligent for failing to shout "fore," despite the fact that the plaintiff stood only seventeen degrees away from the defendant's intended line of flight.¹⁰⁸ Although the plaintiff in *Rose* stood at an angle just seventeen degrees away from the defendant, the golfers in that case were separated by 125 yards, were located on different fairways, and the plaintiff was located on another tee.¹⁰⁹ The Georgia Court of Appeals relied on all of these key factors, taken together, to hold as a matter of law that the defendant in *Rose* was not guilty of negligence in driving the ball as he did.¹¹⁰

In *Anand*, the testimony of both the defendant and Mr. Verma combined to establish that the plaintiff stood at least fifty degrees away from the defendant's intended line of flight at the time of the incident.¹¹¹ The majority reasoned that, because the fifty-degree angle in *Anand* is wider than the seventeen-degree angle in *Rose*, the plaintiff must have therefore stood outside the foreseeable ambit of danger as a matter of law.¹¹² Consequently, the court ruled the defendant owed no duty to the plaintiff to

102. *Jenks*, 30 N.Y.2d at 480.

103. *Anand*, 877 N.Y.S.2d at 426–27.

104. *Id.* at 426. Therefore, based on the testimony of the plaintiff and Verma, the distance between the golfers in *Jenks*, 150 yards, was at least twenty-one times greater than the five to seven yards that separated the golfers in *Anand*. *Id.*

105. In *Anand*, the evidence established that the plaintiff had stopped next to his own ball before being struck. *See id.* at 426–27. Thus, unlike in *Jenks*, there is no evidence that the plaintiff suddenly and unexpectedly moved from a position of safety to one of danger.

106. 104 S.E.2d 485, 488 (Ga. Ct. App. 1958).

107. *Anand*, 877 N.Y.S.2d at 427 (citing *Jenks*, 30 N.Y.2d at 479).

108. *Rose*, 104 S.E.2d at 488.

109. *Id.*

110. *Id.*

111. *Anand*, 877 N.Y.S.2d at 428. This testimony was supported by a photograph prepared by the plaintiff's counsel and submitted into evidence. *Id.*

112. *Id.*

warn him of his impending shot.¹¹³ In so ruling, the Second Department misconstrued *Rose* by ignoring several key facts that distinguish *Anand*. The holding in *Rose* does not stand for the proposition that the angle at which golfers stand in relation to one another is, alone, enough to determine as a matter of law that no duty to warn is owed.¹¹⁴ Much to the contrary, *Rose*, as cited in *Jenks*, holds that many factors are relevant in deciding whether a duty to warn is owed, including the distance and angle between the golfers and whether the golfers are playing on the same fairway.¹¹⁵

Not only did the Second Department err in its analysis of the golfer's duty to warn, but it also erred by not addressing the significance of the defendant's failure to check where his fellow playing partners stood prior to taking his ill-fated shot.¹¹⁶ More specifically, a reasonable juror could have found that the defendant's failure to ascertain his partners' positions prior to hitting amounted to affirmative risk-creating conduct, thereby unreasonably increasing the risk of the plaintiff's injury. By ignoring this material fact, the court chose not to follow the rules as laid out by the Second Department in *Neumann v. Shlansky*¹¹⁷ and the Court of Appeals in *Morgan v. State*.¹¹⁸

In *Neumann*, the Second Department affirmed the trial court's holding that "the shouting of 'fore' does not exculpate careless or reckless conduct" on golf courses in New York,¹¹⁹ and found that the foreseeable ambit of danger rule applies only to shots played under "non-negligent circumstances."¹²⁰ The *Neumann* court further explained that the "ordinary rules of negligence apply to games and in the playing of games as in other transactions in life a person must exercise reasonable care."¹²¹ Therefore, all persons on the golf course have a right to rely on a player's compliance with a standard of care based on the avoidance of reasonably foreseeable risks; the risks of accident in golf are such that "no one is entitled to take part in the game without paying attention to what is going on around and near him."¹²² The Court of Appeals expounded on *Neumann's* logic almost thirty years later in *Morgan v. State*,

113. *Id.*

114. See *Rose*, 104 S.E.2d at 488; *Jenks v. McGranaghan*, 30 N.Y.2d 475, 479 (1972).

115. See *Rose*, 104 S.E.2d at 488.

116. See *Anand*, 877 N.Y.S.2d at 427.

117. 294 N.Y.S.2d 628, 632 (Sup. Ct. Westchester County 1968), *aff'd per curiam*, 312 N.Y.S.2d 951 (App. Term 2d Dep't 1970), *aff'd*, 318 N.Y.S.2d 925 (2d Dep't 1971).

118. 90 N.Y.2d 471, 484–85 (1997).

119. *Neumann*, 294 N.Y.S.2d at 632.

120. *Id.*

121. *Id.* at 631.

122. *Id.* at 634. The *Neumann* court further stated that:

The risks attendant in the game of golf have long been recognized. As early as 1905 the Scottish court in *Andrew v. Stevenson* . . . stated that the risks of accident in golf are such, that no one is entitled to take part in the game without paying attention to what is going on around and near him.

Id. (citing *Andrew v. Stevenson*, (1905) S.L.T. 581, 582 (Scot.)).

in which it ruled that, “by engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation,”¹²³ but an “important counterweight to an undue interposition of the assumption of risk doctrine is that participants will not be deemed to have assumed the risks of reckless or intentional conduct or concealed or unreasonably increased risks.”¹²⁴

In *Anand*, the evidence was such that a reasonable juror could find that the defendant’s conduct unreasonably increased the inherent risks of golf faced by his playing partners because, prior to taking his shot, the defendant did not look to see where the other members of his threesome were located on the fairway.¹²⁵ The defendant virtually admitted that he did not pay attention to what was going on around him on the first hole at the time of the incident.¹²⁶ While he did not see anyone standing in the projected line between his ball and the hole when he made his ill-fated shot, the defendant admitted that he “did not actually know where either the plaintiff or Verma was prior to hitting the ball.”¹²⁷ Because the defendant did not bother to check where his playing partners stood, and at what angle, he could not have reasonably known whether they stood within the foreseeable ambit of danger of being struck by his shot. Furthermore, because each member of the threesome had played two balls off the tee on the first hole, the probability was elevated that a golfer in the group would be standing within the foreseeable ambit of danger surrounding the defendant’s blind shot.¹²⁸ Therefore, the defendant had no way of knowing which of the four balls his two partners were actually playing at the time of the incident because he did not bother to look. The defendant knew or should have known that, had his shot hit the plaintiff in the head from close range, it may have seriously injured or even killed him.¹²⁹ He knew or should have known that a golf ball can inflict serious injury because of the undisputed fact that a golf ball is a “dangerous missile” capable of inflicting severe harm no matter who hits it.¹³⁰ The defendant clearly owed a duty to the plaintiff to verify whether or not the plaintiff was standing outside of the foreseeable ambit of danger; yet the defendant made a conscious decision to take a blind shot in breach of his duty to exercise reasonable care, and injury resulted. The Second Department seemingly ignored this material fact in reaching its decision to affirm dismissal of the complaint.

123. 90 N.Y.2d 471, 484 (1997).

124. *Id.* at 485 (citations omitted).

125. *Anand v. Kapoor*, 877 N.Y.S.2d 425, 427 (2d Dep’t 2009), *aff’d*, 15 N.Y.3d 946 (2010).

126. *See id.*

127. *Id.*

128. *Id.* at 426.

129. *Neumann v. Shlansky*, 294 N.Y.S.2d 628, 634 (Sup. Ct. Westchester County 1968), *aff’d per curiam*, 312 N.Y.S.2d 951 (App. Term 2d Dep’t 1970), *aff’d*, 318 N.Y.S.2d 925 (2d Dep’t 1971).

130. *Id.* at 635.

IV. THE COURT OF APPEALS EVISCERATES THE FORESEEABLE ZONE OF DANGER TEST IN NEW YORK

The Court of Appeals dispatched a brief sixteen-sentence opinion to affirm the Second Department's decision in favor of the defendant.¹³¹ The court did not criticize the Second Department for failing to follow New York precedent regarding the golfer's duty to warn those within the foreseeable zone of danger.¹³² By not challenging the Second Department's failure to engage in a proper fact-sensitive analysis under the standard articulated in past cases, the court effectively allowed the foreseeable zone of danger to be whittled down to cover only the intended line of flight.¹³³ Although the court did not explicitly adopt the intended line of flight standard,¹³⁴ the inference to be drawn from its decision to affirm is that the foreseeable zone of danger now means nothing more than the player's intended line of flight; by holding that getting hit by "shanked" balls is an assumed risk of golf, the question of whether a player stands in the intended line of flight is all that remains to the analysis of a golfer's duty to warn.

The Court of Appeals focused its cursory analysis on the question of whether plaintiff assumed the risk of his injury.¹³⁵ The court began its analysis by reciting the rule, mentioned above, concerning the duty of care owed to a plaintiff by a co-participant in sport, as set forth in the landmark New York case *Morgan v. State*—namely, 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.'"¹³⁶ However, a plaintiff "will not be deemed to have assumed the risks of reckless or intentional conduct or concealed or unreasonably increased risks."¹³⁷ Nevertheless, the court chose not to apply this long-standing rule to the defendant's affirmative risk-creating conduct, including, most notably, his failure to check where his playing partners stood prior to hitting.¹³⁸ Instead, the court simply concluded, as a matter of law, that the defendant did not unreasonably increase the risk of injury because a "shanked" shot is always a commonly appreciated risk, regardless of the surrounding circumstances.¹³⁹ The court did not explain why the defendant acted reasonably under the circumstances—it provided no

131. *Anand v. Kapoor*, 15 N.Y.3d 946 (2010).

132. *See id.*; *see also* *Jenks v. McGranaghan*, 30 N.Y.2d 475, 479 (1972); *Nussbaum v. Lacopo*, 27 N.Y.2d 311, 318 (1970); *McDonald v. Huntington Crescent Club, Inc.*, 543 N.Y.S.2d 155, 156 (2d Dep't 1989).

133. *See Anand*, 15 N.Y.3d at 946–48 (2010).

134. *See id.*

135. *See id.*

136. *Id.* at 947–48 (quoting *Morgan v. State*, 90 N.Y.2d 471, 484 (1997)).

137. *Id.* at 948 (quoting *Morgan*, 90 N.Y.2d at 485).

138. *See Anand*, 15 N.Y.3d at 946–48; *Anand v. Kapoor*, 877 N.Y.S.2d 425, 427 (2d Dep't 2009), *aff'd*, 15 N.Y.3d 946 (2010).

139. *See Anand*, 15 N.Y.3d at 947–48.

analysis or rationale to support this determination.¹⁴⁰ Consequently, the inference to be drawn from the court's sweeping conclusion is that a golfer who takes a blind shot without first looking to see where his playing partners are standing does not unreasonably increase the risk of injury and therefore cannot be held liable for this seemingly negligent conduct. This is a dangerous result for golfers standing outside of the intended line of flight, who, as a result of this decision, will no longer be protected from fellow players who take blind, unannounced shots.

After the Court of Appeals concluded, as a matter of law, that the defendant acted reasonably under the circumstances, the court chose to affirm the Second Department exclusively on the grounds that plaintiff Anand assumed the risk of his injury.¹⁴¹ To that end, the court stated that "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."¹⁴² The court cited its decision in *Rinaldo v. McGovern*, alone, in support of this proposition.¹⁴³ However, not only was the assumption of the risk defense not the focus of *Rinaldo*, but that case is also easily distinguished from the *Anand* case.¹⁴⁴ The pertinent question in *Rinaldo* did not involve assumption of the risk at all, but rather "whether a warning, if given, would have been effective in preventing the accident."¹⁴⁵

In *Rinaldo*, the driver of a car was injured when an errant ball flew off of a golf course and crashed through the driver's windshield.¹⁴⁶ The driver brought an action in tort for negligence against the golfer; more specifically, for the defendant's failure to warn of his impending shot.¹⁴⁷ The Court of Appeals affirmed the lower court's decision granting summary judgment for the golfer because, based on the particular facts of *Rinaldo*, the court did not believe a warning would have prevented the accident.¹⁴⁸ The court saw no way that the golfer could have acted to minimize the chance of harm because, even if defendant had shouted "fore," the chances were remote that plaintiff would have heard the shouted warning.¹⁴⁹ In stark contrast to the parties in *Rinaldo*, the golfers in *Anand* were joined together as playing partners and stood in close proximity to each other on the same fairway.¹⁵⁰ Therefore, it was much more likely that the golfers in *Anand* would have heeded a warning cry, if one had been provided, and protected themselves. Therefore, the court's choice of *Rinaldo*

140. *See id.* at 946–48.

141. *See id.*

142. *Id.* at 948 (citing *Rinaldo v. McGovern*, 78 N.Y.2d 729, 733 (1991)).

143. *Id.*

144. *See Rinaldo*, 78 N.Y.2d at 732–33.

145. *Id.* at 732.

146. *Id.* at 731.

147. *Id.*

148. *Id.* at 732–33.

149. *Id.*

150. *Anand v. Kapoor*, 877 N.Y.S.2d 425, 426 (2d Dep't 2009), *aff'd*, 15 N.Y.3d 946 (2010).

alone to support its key proposition that the plaintiff assumed the risk of his injury is confusing because *Rinaldo* is a case about the duty to warn and its facts are easily distinguished from those of *Anand*. The court would have been better served by citing to another proposition found in *Rinaldo*: “The essence of tort liability is the failure to take reasonable steps, where possible, to minimize the chance of harm.”¹⁵¹ Checking to see where one’s playing partners are located prior to hitting most certainly seems like a reasonable step that the defendant in *Anand* could have taken in order to minimize the chance of harm to others. He carelessly failed to take this reasonable precaution.

In reaching its decision to affirm, the Court of Appeals did not mention that the defense of assumption of the risk is a “controversial one,” and that there is “significant disagreement” as to the role it should play in a negligence case.¹⁵² Over the years, the assumption of the risk defense has been widely criticized by many legal scholars and judges for its tendency to confuse the issues in a negligence case, namely the intertwined concepts of negligence, contributory negligence and assumption of the risk. Celebrated torts scholars Dean John W. Wade and Dean William L. Prosser have each pressed to curtail the use of the murky assumption of the risk defense.¹⁵³ Dean Wade wrote:

Accurate analysis in the law of negligence would probably be advanced if the term [assumption of the risk] were eradicated and the cases divided under the topics of consent, lack of duty and contributory negligence. The true issues would be more clearly presented and the determinations, whether by judge or jury, could be more accurately and realistically rendered.¹⁵⁴

Dean Prosser echoed this sentiment in his treatise on torts, in which he described the assumption of risk doctrine as “by no means a favored defense, and the whole tendency is to cut it down or even to abrogate it in some few types of cases.”¹⁵⁵ Furthermore, some courts have limited the assumption of risk defense only to cases

151. *Rinaldo*, 78 N.Y.2d at 733.

152. John W. Wade, *The Place of Assumption of Risk in the Law of Negligence*, 22 LA. L. REV. 5 (1961).

153. WILLIAM L. PROSSER, *HANDBOOK ON THE LAW OF TORTS* 456 (3d ed. 1964); Wade, *supra* note 152, at 5.

154. Barrett v. Fritz, 248 N.E.2d 111, 115 (Ill. 1969) (quoting Wade, *supra* note 152, at 14) (internal quotation mark omitted). John Webster Wade, a former professor and dean at the Vanderbilt University School of Law, was a “prolific scholar.” Ronald J. Rychlak, *Teacher, Lawyer, Scholar*, 65 MISS. L.J. 1, 1 (1995). Professor Wade co-authored successive editions of the definitive textbook on tort law and published nearly 100 articles on topics such as torts, restitution, and legal education. *Id.*

155. Barrett, 248 N.E.2d at 115 (quoting PROSSER, *supra* note 153, at 456). “William Lloyd Prosser is a giant of tort law.” Christopher J. Robinette, *The Prosser Notebook: Classroom as Biography and Intellectual History*, 2010 U. ILL. L. REV. 577 (2010). “Rarely in the history of American legal education has one author’s name been so clearly identified with his subject as the name of William L. Prosser is with the law of torts.” Craig Joyce, *Keepers of the Flame: Prosser and Keeton on the Law of Torts (Fifth Edition) and the Prosser Legacy*, 39 VAND. L. REV. 851, 852 (1986) (reviewing W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* (5th ed. 1984)).

stemming from employment or contractual relationships;¹⁵⁶ others “have not only rejected any expansion of the concept, but even overruled cases applying assumption of risk to negligence cases.”¹⁵⁷ The proper analysis in negligence cases, according to the high courts of Michigan, Illinois, and Washington, is one of contributory negligence rather than assumption of risk.¹⁵⁸

In *Anand*, the Court of Appeals ignored the controversy swirling around the assumption of risk defense and chose to invoke that doctrine alone to support its decision in favor of the defendant. In so doing, the court confused the separate issues of negligence that were presented by the case, including whether the defendant acted negligently, whether the plaintiff’s actions contributed to his injury, and whether the plaintiff, under the circumstances, had assumed the risk of that injury. The court failed to address each of these discrete issues in a cogent fashion, thereby forsaking the opportunity to provide New York golfers with a set of clear answers and rules regarding what does and does not amount to affirmative risk-creating conduct on a golf course. For example, the court failed to explain why, as a matter of law, the defendant acted reasonably under the circumstances despite his failure to ascertain the positions of his fellow playing partners before hitting.¹⁵⁹ The court also failed to explain why, despite the material dispute in the record regarding the players’ locations, the plaintiff stood outside of the foreseeable zone of danger as a matter of law.¹⁶⁰ Furthermore, the court failed to explain why the plaintiff might have contributed to his injury by walking ahead of the defendant, because it is common sense and a golf courtesy to stay behind someone when that person is making his stroke.¹⁶¹ Rather than parse each negligence-related issue in a coherent and logical way, the court instead chose to resolve all of those issues in one fell swoop by saying nothing more

156. *Barrett*, 248 N.E.2d at 115. Illinois case law, for example, limits the assumption of risk defense only to cases involving a contractual or employment relationship. *Id.* Also, the Michigan Supreme Court held in *Felgner v. Anderson* that “the doctrine of assumption of risk in this State properly is applicable only to cases in which an employment relationship exists between the parties, as well, perhaps, where there has been an express contractual assumption of risk.” 133 N.W.2d 136, 153 (Mich. 1965).

157. *Barrett*, 248 N.E.2d at 115. In *Feigenbaum v. Brink*, the Supreme Court of Washington ruled “the doctrine of assumption of risk is more applicable to those cases where the relationship of master and servant existed.” 401 P.2d 642, 645 (Wash. 1965).

158. In *Felgner*, the Michigan Supreme Court concluded that “[a]ssumption of risk should not again be used in this State as a substitute for, or as a supplement to, or as a corollary of, contributory negligence; . . . The traditional concepts of contributory negligence are more than ample to present that affirmative defense to established negligence acts.” 133 N.W.2d at 153–54. In *Feigenbaum*, the Supreme Court of Washington reasoned that “[o]ther jurisdictions treat the doctrine of assumption of risk as being included within the general concept of contributory negligence, and recognize that, for all practical purposes, the proper analysis is in terms of contributory negligence.” 401 P.2d at 645; *see also Barrett*, 248 N.E.2d at 115 (holding that evaluation of the intrinsic merits of the concept of assumption of risk indicates that no expansion of that concept in Illinois law is warranted).

159. *See Anand v. Kapoor*, 15 N.Y.3d 946 (2010).

160. *See id.*; *see supra* notes 74–84 and accompanying text.

161. *See supra* note 26; *see Anand*, 15 N.Y.3d at 946–48. The court chose not to address this issue of contributory negligence. *Id.*

than that the plaintiff had assumed the risk of his injury from a “shanked” shot merely by playing the game,¹⁶² even though the defendant created hidden risks of injury that the plaintiff did not appreciate nor consent to.¹⁶³ In the wake of the court’s decision, the foreseeable ambit of danger test has been wholly consumed by the defense of assumption of the risk, leaving only the intended line of flight analysis available for those injured by a golf shot. The end result is that a golfer in New York no longer owes a duty to those standing outside of the intended line of flight to provide warning of his intent to take a shot, and cannot be held liable for his wayward shot for not providing such warning.

V. CONCLUSION (THE 19TH HOLE)

There is long-standing precedent in New York holding that a golfer owes a duty to warn to those who stand within the foreseeable ambit of danger of his or her intention to hit the ball.¹⁶⁴ Contrary to a minority of jurisdictions, the New York Court of Appeals has, in past cases, chosen not to limit the foreseeable ambit of danger to the player’s intended line of flight.¹⁶⁵ In *Anand v. Kapoor*, the New York Court of Appeals was presented with the question of whether a golfer owed a duty to provide warning of his intent to take a shot, and whether he can be held liable for his wayward shot for failure to do so.¹⁶⁶ The court answered these questions in the negative, choosing to affirm summary judgment in favor of the defendant solely on assumption of the risk grounds.¹⁶⁷ The court declared, in simple fashion, the way in which the plaintiff was injured to be “a commonly appreciated risk of golf.”¹⁶⁸

The court chose not to examine the Second Department’s erroneous decision to affirm dismissal of the plaintiff’s complaint despite unresolved material factual issues.¹⁶⁹ By not addressing the shortcomings of the Second Department’s improper decision, the Court of Appeals allowed the foreseeable zone of danger to be whittled down to a nub by an intermediate appellate court holding contrary to binding precedent. In the process, the Court of Appeals not only managed to confuse the negligence issues presented by the case,¹⁷⁰ but also improperly expanded the controversial defense of assumption of the risk to protect golfers who carelessly create hidden risks of injury by taking blind shots. Golfers in New York beware: thanks to the Court of Appeals’ decision in *Anand*, not only is the player who stands outside of the intended line of flight foreclosed from recovering for injuries caused by an errant

162. See *Anand*, 15 N.Y.3d at 948.

163. See *supra* notes 35–37 and accompanying text.

164. See *Jenks v. McGranaghan*, 30 N.Y.2d 475, 479 (1972).

165. See *supra* note 26 and accompanying text.

166. See *Anand*, 15 N.Y.3d at 946.

167. See *id.*

168. *Id.* at 948.

169. See *supra* note 14 and accompanying text.

170. See *supra* notes 152–58 and accompanying text.

shot, but the player is also hereby deemed to appreciate, and consent to, hidden risks of injury created by careless players who take blind, unannounced shots. That is a good result for the wild player, but a poor one for the golfer who plays without a helmet and body armor.