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IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

SEVERINO U. ALFOREZA, JR., **Plaintiff,** v. **SAIPAN LAULAU DEVELOPMENT INC., dba LAOLAO BAY GOLF RESORT, DAEWOO ENGINEERING AND CONSTRUCTIONS CO. LTD., and JOHN JONES, jointly and severally,** **Defendants.**	**CIVIL CASE NO. 11-0174** **ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT:** **(1) GRANTING DEFENDANT JONES' MOTION FOR SUMMARY JUDGMENT;** **(2) DENYING PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT;** **(3) DENYING DEFENDANT SLDI & DAEWOO'S MOTION FOR SUMMARY JUDGMENT; AND** **(4) DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

THIS MATTER came before the Court on September 4, 2014 at 1:30 p.m. in Courtroom 223A on the parties' cross-motions for summary judgment. Severino U. Alforeza, Jr. ("Plaintiff") was represented by Joe Hill, Esq., while Defendants Saipan Lau Lau Development ("SLDI"), Daewoo Engineering and Construction Co. ("Daewoo") were represented by Colin Thompson, Esq., and John Jones ("Mr. Jones") was represented by Steven Nutting, Esq.

Based upon the Court's review of the parties' filings and arguments made during the above-mentioned hearings, the Court issues the following order.

II. BACKGROUND

This case revolves around a personal injury claim of a construction worker hired by a golf course that was struck by a golf ball in the chest caused by an errant shot from a golfer playing on the course that day.

A. FACTUAL BACKGROUND

First, it is undisputed that Defendants SLDI and Daewoo have under lease, possessed, owned, managed, operated, and developed a thirty-six hole commercial golf course property known as Laolao Bay Golf Resort located in Kagman, Saipan, CNMI. Further, it is undisputed that SLDI's stock is now owned in whole by Daewoo, making them a single entity for the purposes of determining liability.

In December 2007, SLDI and Daewoo entered into an agreement for a major renovation and construction project entitled "Construction Work Contract." Under this contract, more than one hundred workers would be needed and were ultimately brought on the project. On the day in question, Plaintiff was completing work at an excavation for a sewage treatment facility near and adjacent to the West Course 17th hole tee, as an employee of Marianas Star Corporation, the subcontractor who was selected to complete work associated with the Construction Work Contract. The sewage construction site was located far left of the green, outside the boundaries of the course and without any warning as to the proximity of the site to the green. A fence had been erected to enclose the construction area, and the site featured loud noise due to the heavy equipment being operated there. It is undisputed that Plaintiff was an invitee on SLDI's golf course property, for the known purpose of doing construction work as an employee of a designated subcontractor.

On or about July 18, 2009, Defendant John C. Jones was a business invitee and customer playing the game of golf at the Lau Lau Bay Golf Resort. Jones was playing in a "foursome" with three other individuals, one of whom is known to be Mr. Robert Hudkins. There is no evidence that

Mr. Jones was drinking, or under the influence of any alcohol or other drugs and mediation at the time. Further, Jones was, and remains to this day, an amateur golfer, who possesses only limited and questionable skills at the game.

At some point in time on the above date, Mr. Jones was playing from the tee box at the 17th hole of the West Course at Lau Lau, a par 3 hole in which the green was located approximately 180 yards in front of the tee box. While teeing off from the 17th hole tee box, Mr. Jones hit an errant shot, resulting in an accidental and unintentional "pulling" of the golf ball to his left, after which the ball traveled at a high rate of speed to the far left of the green he was aiming for. After striking the ball, Mr. Jones saw that the ball was headed for the construction site, and after seeing several workers within the fenced construction area, Mr. Jones and his fellow golfers yelled the appropriate "FORE!" warning. However, likely due to the distance to the construction site, the noise of the heavy equipment being operated there, and the distraction of the work itself, Plaintiff and his co-workers were unable to hear the warnings given by Mr. Jones and the other golfers in his foursome.

No warning signs or notices were placed around the course or construction site, or otherwise made known to golfing customers, of the increased danger and possible injury arising from the close proximity of the on-going and simultaneous operation of the daily golf course play and construction site. It is undisputed that SLDI and Daewoo comply with OSHA standards for work place safety, and Plaintiff was the first and last construction worker to be hit by an errant golf ball during the construction of the sewage treatment facility east of the 17th hole tee box.

The errant golf ball ultimately struck one of the workers at the construction site, and the worker immediately fell to the ground. Plaintiff claims he was struck by the golf ball in his left chest area near his heart, after which he was knocked breathless to his knees on the ground in a folded-up, crouched position, in which he remained for some time. Mr. Jones recalls that the ball appeared to strike Plaintiff's upper torso, and that Plaintiff returned to his feet shortly thereafter.

Plaintiff's co-workers eventually helped him to his feet and assisted in holding him up until they took him to a nearby construction-work storage area.

After around fifteen minutes, an OSHA representative named Mike Fejeran took Plaintiff to Daewoo's office at the SLDI project site, and after about 15-20 minutes, Plaintiff claims the pain grew so bad that he asked Mr. Fejeran to call 911. Mr. Fejeran refused to call 911 and instead told Plaintiff to wait because a van would be arriving shortly to bring him to CHC, the island's lone hospital. After about 30 minutes, the van arrived and took Plaintiff to the hospital, after which he checked himself into the emergency room area without any assistance by SLDI's employees. Plaintiff claimed he was left alone at the hospital until his wife or supervisor arrived despite the fact that it was difficult for him to talk or communicate due to the severe pain.

Plaintiff was examined by Dr. Tony Stearns in connection with his injuries sustained in this case, as he complained of a number of symptoms he claims occurred as a result of being struck by the golf ball in the chest, including but not limited to: an inguinal hernia, chest pain, insomnia, dizziness, back pain, blurred vision, shakiness, and difficulty breathing. Dr. Stearns opined to a reasonable degree of medical certainty that: (1) Plaintiff has a well healed right inguinal hernia scar from his surgery in 2009, and has no current hernia on his right or left side; (2) Plaintiff's complaints of the remaining symptoms are stress-induced, and not related to the golf ball incident; (3) Plaintiff's persistent chest and right inguinal pain have no logical medical explanation to connect them with being hit by a golf ball in the chest four years prior to the examination; (4) Plaintiff has normal motor and sensory abilities in his lower extremities; and (5) Plaintiff's right inguinal hernia is not related to the golf ball incident of July 18, 2009. (Def. Daewoo & SLDI's Mot. for Summ. J., Decl. of Tony Stearns, at ¶¶ 5, 6, 7, 8, 10, 11, 18, 25, 28, and 29.)

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B. PROCEDURAL BACKGROUND

1. Plaintiff's Motion for Partial Summary Judgment

On December 23, 2013, Plaintiff moved for Partial Summary Judgment, claiming that: (1) Plaintiff was an employee of the independent contractor hired for the construction project, and thus was an invitee of the premises when his injury occurred; (2) SLDI owed Plaintiff a duty to make the premises reasonably safe; (3) Daewoo assumed the same duty of care by the terms of its own contract with SLDI; and (4) Plaintiff should be able to recover damages for loss of consortium.

On June 27, 2014, Daewoo and SLDI filed an Opposition to Plaintiff's Motion for Partial Summary Judgment, arguing that: (1) Daewoo did not assume a duty of reasonable care as to Plaintiff because the operative terms of the construction contract simply obligate Daewoo to SLDI in the event SLDI is found liable for injuries caused by Daewoo; (2) Plaintiff must prove a separate negligence claim as to each defendant; and (3) while Plaintiff may have a claim for damages due to loss of consortium, any request for damages is inappropriate at the summary judgment stage. Further, SLDI admitted that it owed Plaintiff a duty of due care to Plaintiff as an invitee independent contractor working on a construction project for SLDI.

Defendant Jones neither opposed Plaintiff's motion for Summary Judgment, nor did he file the necessary motion to join Defendant SLDI and Daewoo in their Opposition. Defendant Jones instead filed his own motion as set forth below.

On August 15, 2014, Plaintiff filed a reply to SLDI and Daewoo's Opposition, claiming that: (1) Plaintiff's motion should be granted because SLDI and Daewoo have not shown a genuine issue of material fact remains for trial; (2) Daewoo, as a general contractor, owes a duty to provide employees of its subcontractors with a reasonably safe place to work; (3) Daewoo and SLD I failed to provide Plaintiff with a reasonably safe place to work due to the lack of safety protection and warnings at the construction site; (4) Defendants knew or should have known that there was an

increased risk and danger arising from their joint and mutual decision to allow construction work and simultaneous commercial play and recreational use of the golf course grounds; and (5) liability for loss of consortium may be determined separately from the Court's award of damages, if any.

2. Defendant/Cross-Claim Plaintiff Jones's Motion for Summary Judgment

On December 20, 2013, Defendant Jones filed his own Motion for Summary Judgment, arguing: (1) a golfer is not liable for injury to a third party caused by an errant golf shot without a showing of intentional or reckless misconduct; (2) parties assume the risk of injury by an errant golf ball while on a golf course; (3) Jones is not subject to strict liability for his actions as golf is not an inherently dangerous activity; and (4) the fact that Plaintiff was not playing golf at the time of his injury has no bearing on liability because negligence or recklessness is determined by the actions of the golfer and not by the status of the plaintiff.

3. Plaintiff's Cross-Motion for Summary Judgment

On January 6, 2014, Plaintiff opposed Defendant Jones' Motion for Summary Judgment and simultaneously filed his own cross-motion for Summary Judgment. Plaintiff argued therein that: (1) primary assumption of the risk does not apply to the present circumstances because Plaintiff was not a participant or spectator of the recreational activity being played; (2) secondary assumption of the risk cannot prevent liability for Plaintiff's injuries because Plaintiff is unfamiliar with the game of golf and is thus unaware of any risk of injury inherent in its play; (3) a trier of fact could reasonably conclude that Defendant Jones was negligent and breached his duty not to unreasonably cause injury to Plaintiff because Jones himself admitted that he was unaware of any threat of possible injury to anyone working at the construction site due to its distance from the intended target of his shot, and that he does not believe Plaintiff or other workers at the site could hear the appropriate warning made after he realized he hit an errant shot to the far left of his target; and (4) Jones' motion for summary judgment should be denied because there are questions of material fact

that cannot be resolved at this stage and must be determined by the trier of fact.

4. Daewoo & SLDI's Motion for Summary Judgment

On December 23, 2013, Defendants Daewoo and SLDI filed a Motion for Summary Judgment, claiming primarily that Plaintiff cannot present sufficient evidence to establish that Defendants are liable for negligence, and, alternatively, seeking partial summary judgment with respect to Plaintiff's claim for punitive damages and any damages or liability connected with Plaintiff's inguinal hernia. Defendants claim that punitive damages are unavailable because there is no evidence that Defendants' conduct was outrageous due to an evil motive or reckless indifference to the rights of others, and that Defendants' medical expert's opinion clearly opines that Plaintiff's right inguinal hernia was not related to the golf ball incident of July 18, 2009.

On June 27, 2014, Plaintiff filed an Opposition to Defendants Daewoo and SLDI's Motion for Summary Judgment or Partial Summary Judgment on the issues of causation and punitive damages. Plaintiff alleged that: (1) SLDI owed him a duty to exercise reasonable care in maintaining its premises in a reasonably safe condition and to give him warning of latent and concealed perils; (2) SLDI owed him a duty to exercise reasonable precaution to protect him against injury through the negligent or wrongful acts of other invitees on the premises where SLDI had reasonable cause to anticipate such negligent and wrongful acts and the probability of injury resulting therefrom; (3) SLDI is liable for the physical harm caused to Plaintiff by known or obvious dangers on its premises since it had reason to expect that Plaintiff's attention may be distracted and he would not discover such an obvious danger or fail to protect himself against it; (4) SLDI and Daewoo breached the duty of care owed to Plaintiff because (a) the fence that allegedly surrounded the construction site was inadequate to protect against errant flying golf balls, (b) a feasible alternative existed in the form of a net of sufficient height being placed around the construction site, (c) SLDI made a conscious business decision to allow regular play over its

courses while construction was ongoing, and (d) SLDI and Daewoo failed to provide prior warning to Plaintiff or Defendant Jones of the increased risk of danger created by conducting construction activities concurrently with regular golf play.

Furthermore, Plaintiff claims that Defendants' conduct was outrageous because SLDI's agents unreasonably exacerbated and prolonged Plaintiff's condition, pain and suffering when they failed to provide proper, adequate, and timely emergency attention, and in delaying the transportation of Plaintiff from the site of the injury to the island's sole hospital. Lastly, Plaintiff argues that as Defendants' medical expert's preferred testimony was based solely on a single page hospital ambulance form and a Workers' Compensation Commission physician's report form, the Court should disqualify his testimony and strike or exclude his medical opinion from the record as conclusory and biased toward the Defendants. Plaintiff also alleges that his own expert's opinion contradicts Defendant's expert's opinion as to the causation of his injury.

Defendants SLDI and Daewoo replied to Plaintiff's Opposition, arguing that: (1) the fact that Plaintiff was hit by the golf ball does not impute liability on the owner or operator of the course for failure to adequately protect him from risk of injury; (2) SLDI and Daewoo did not breach their duty of care to Plaintiff because the construction site was not in the line of play, a safety fence surrounded the workers, and the chance of an errant shot hitting a worker was extremely remote; (3) punitive damages are unavailable because Defendants' actions were not outrageous due to an evil motive or reckless indifference for the rights of others; and (4) Defendants' medical expert's opinion refutes Plaintiff's claim that he suffered an inguinal hernia because he was hit in the upper chest area with a golf ball, and thus damages related to such an injury should be dismissed.

III. LEGAL STANDARD

The Commonwealth Rules of Civil Procedure provide for summary adjudication when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." NMI R. Civ. P. 56(c); *Commonwealth Development Authority v. Tenorio*, 2004 MP 22. In considering the motion, the court views facts and inferences in the light most favorable to the non-moving party. *Century Ins. Co. v. Hong Kong Ent. Invs., et. al.*, 2009 MP 4 ¶ 14, citing *Estate of Mendiola*, 2 NMI 223, 240 (1991); *Aplus Co. v. Niizeki Int'l Saipan Co.*, 2006 MP 13 ¶ 10.

A party moving for summary judgment "bears the initial responsibility of informing the [] court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrates the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *see Furuoka v. Dai Ichi Hotel*, 2002 MP 5 ¶ 22, citing *Santos v. Santos*, 4 NMI 206, 210 (1995). The movant must show the absence of evidence to support the nonmoving party's case. *Id.* at 325; *see Furuoka*, 2002 MP 5 22 (specifying that "[i]f a movant is the defendant, he or she has the […] duty of showing that the undisputed facts establish every element of an asserted affirmative defense."). "Once the moving party satisfies the initial burden, the non-moving party must respond by establishing that a genuine issue of material fact exists." *Id.* ¶ 24. However, "[i]f the non-moving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law." *Id.*

In shouldering its burden, the opposing party may not simply rely upon the pleadings but must tender evidence of specific facts in the form of affidavits, and/or admissible evidence. NMI R. Civ. P. 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, n. 11 (1986). A disputed fact is considered material "if its determination may affect the outcome of the case." *Triple J Saipan, Inc. v. Agulto*, 2002 MP 11 ¶ 8 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986)).

Once the movant has discharged its burden, the burden of production shifts to the nonmoving party. *Roberto,* 2002 MP 23 ¶ 17. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). A party opposing a properly supported motion for summary judgment "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (citation omitted).

To establish a genuine issue, the nonmoving party must assert sufficient factual indicia for a reasonable trier of fact to sustain a finding in their favor. *Castro v. Hotel Nikko Saipan, Inc.*, 4 NMI 268, 272 (1995). "Both the 'quantum and quality of proof' is to be considered, and 'the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 254 (1986)). "If the evidence set forth by the non-moving party is 'merely colorable . . . or [was] not significantly probative . . . summary judgment may be granted.'" *Eurotex, Inc. v. Muna*, 4 NMI 280, 284 (1995) (citing *Anderson*, 477 U.S. at 249-50).

A fact is material when it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "The substantive law will identify which facts are material." *Anderson*, 477 U.S. at 248. Thus, summary judgment is appropriate when, "viewing the evidence in the light most favorable to the nonmoving party, there are no genuine questions of material fact and the court correctly applied the underlying substantive law." *Campbell v. PricewaterhouseCoopers, L.L.P.*, 642 F.3d 820, 824-25 (9th Cir. 2011). An issue of material fact is genuine if it has a real basis in the record, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586-87 (1986), or when " a reasonable jury could return a verdict for the nonmoving party" on the question, *Anderson*, 477 U.S. at 248. However, conclusory

allegations are not sufficient to defeat a motion for summary judgment. *Cabrera v. Heirs of De Castro*, 1 NMI 172, 176 (1990). In determining motions for summary judgment, the court will construe the evidence and inferences drawn therefrom in favor of the non-moving party. *Rios v. Marianas Pub. Land Corp.*, 3 NMI 512, 518 (1993).

Where parties file cross-motions for summary judgment, however, a court must determine whether either of the parties deserves judgment as a matter of law on facts that are not disputed. Fed. R. Civ. P. Rule 56; *First American Title Ins. Co. v. Lane Powell PC,* 764 F.3d 114 (1st Cir. 2014); *U.S. ex rel. Jones v. Brigham and Women's Hosp.*, 678 F.3d 72 (1st Cir. 2012). When cross-motions for summary judgment are brought, a court must view each motion separately, perusing the record through the standard summary judgment prism. *Gonzalez-Droz v. Gonzalez-Colon*, 660 F.3d 1 (1st Cir. 2011); *Del Gallo v. Parent*, 545 F. Supp. 2d 162 (D. Mass. 2008) (stating "[w]hen deciding cross-motions for summary judgment, the court must consider each motion separately, drawing inferences against each movant in turn.").

The mere fact that the parties make cross-motions for summary judgment does not necessarily mean that there are no disputed issues of material fact and does not necessarily permit the judge to render judgment in favor of one side or the other. *Stevens v. Optimum Health Institute--San Diego*, 810 F. Supp. 2d 1074 (S.D. Cal. 2011). In fact, in ruling on cross-motions for summary judgment, the court will not assume the absence of any genuine issues of material fact; rather, where genuine issues of material fact exist, the court will deny summary judgment for both parties and the case shall proceed to trial. Fed. R Civ. P. Rule 56(c); *Bacon v. City of Richmond,* 419 F. Supp. 2d 849 (E.D. Va. 2006); *Parks v. LaFace Records,* 329 F.3d 437, 66 U.S.P.Q.2d (BNA) 1735, 2003 FED App. 0137P (6th Cir. 2003) (stating "[p]arties' filing of cross-motions for summary judgment does not necessitate granting of summary judgment for one side or the other; genuine issues of material fact may still exist.").

IV. DISCUSSION

The Court will address each of the claims presented on the parties' cross motions for summary judgment in turn, including Plaintiff's negligence claim against Mr. Jones personally, as well as his negligence claim against SLDI and Daewoo as course owners. The relevant issues addressed below include: (1) whether Mr. Jones had a duty to warn Plaintiff of his impending shot and thus breached that duty because he knew or should have known that the noise from the heavy equipment on the construction site made it impossible to hear his warning; (2) whether Plaintiff necessarily assumed the risk of an errant shot striking him while he worked on a construction site located on or near a golf course; (3) whether Mr. Jones's conduct was reckless or intentional, thus giving rise to liability notwithstanding any evidence of negligence; (4) whether Defendants can be held strictly liable for Plaintiff's injuries because the game of golf is an inherently dangerous activity; and (5) whether SLDI and/or Daewoo can be held liable for Plaintiff's injuries under the theory that they were negligent in failing to install warnings on the course indicating the proximity of the construction site and any potential danger caused by errant shots hit by patrons of the course; (6) whether Plaintiff could recover damages on an alternative theory that SLDI and Daewoo's conduct was outrageous in their treatment of Plaintiff after he sustained his injury; and (7) whether the declarations of Tetsuya Matsunaga and Dr. Tony Stearns should be stricken from the record as conclusory and not bearing on summary adjudication.

A. PLAINTIFF'S NEGLIGENCE CLAIM AGAINST GOLFER

First, the Court will address Plaintiff's negligence claim as against Defendant Jones, the golfer who hit the errant shot that ultimately struck Plaintiff.

In order to state a claim of negligence, the plaintiff must allege that: (1) a duty was owed; (2) that duty was in fact breached; (3) that the breach was both the cause-in-fact and proximate cause of the plaintiff's injuries; and (4) that there was resulting damage. *Jenks v. McGranaghan*,

285 N.E. 2d 876 (N.Y. App. 1972); *Boozer v. Arizona Country Club*, 434 P.2d 630 (Ariz. 1967).

The Court addresses each element in turn, with the applicable substantive law analysis contained within.

1. Duty to Warn Foreseeable Plaintiffs Within Zone of Danger

First, the Court will determine whether Defendant Jones owed Plaintiff a duty to warn him of his intent to the hit the ball or the impending impact once he realized he had shanked his shot.

Generally, in dealing with personal injury cases dealing with golfers who hit errant shots, a golfer has a duty to warn others who are within the zone of danger of the ball, also referred to as the "ambit of danger" or, in the vernacular of the sport, "the line of play." *See Cook v. Johnston*, 688 P.2d 215, 216 (Ariz. Ct. App. 1984). In determining whether a duty exists, courts have found the following three-part balancing test to be a helpful tool: (1) the relationship between the parties; (2) the reasonable foreseeability of harm to the person injured; and (3) public policy concerns. *Webb v. Jarvis*, 575 N.E.2d 992 (Ind. 1991). In the context of the game of golf, the relationship between the parties and the foreseeability of harm are the operating factors, as public policy concerns over the utility of the sport are constant.

Here, Plaintiff was not another golfer involved in play with Defendant Jones, but rather an employee of the subcontractor hired to work on a sewage construction site located in the general vicinity of a particular hole on the golf course. While this fact is not determinative, it does provide some instruction for the Court in establishing the duty owed to Plaintiff.

In *Rinaldo v. McGovern*, a golfer was not held liable in negligence for failure to warn motorists when a golfer accidentally missed the fairway and instead sent the ball soaring off the golf course onto an adjacent roadway where it struck the windshield of plaintiff's automobile because any warning given would have been futile. The court reasoned that "[w]hatever extent of a golfer's duty to other players in the immediate vicinity of the golf course, golfer ordinarily may not

be held liable to individuals located entirely outside the boundaries of the golf course who happen to be hit by a stray, mishit ball." *See Rinaldo v. McGovern,* 78 N.Y. 2d 729, 587 N.E.2d 264, 579 N.Y.S.2d 626 (N.Y. 1991).

The key facts in *Rinaldo* were the fact that the plaintiff was not another player on the course and that any duty to warn could not have been breached due to the distance to the roadway where any warning given would not be heard. These facts speak to the foreseeability of any harm to the person injured, where the specific facts regarding the relationship between the parties are necessarily related to the distance between them and any awareness of the possibility of injury.

Thus, a golfer only has a duty to warn others that he intends to hit the ball when (1) others are in the zone of danger, and (2) they are unaware the golfer intends to hit the ball and the golfer knows or should know of their unawareness. There is no duty to warn where the other player is not in or near the intended line of flight or when the other player is aware of the imminence of the intended shot. *See Cook v. Johnston,* 688 P.2d 215, 216 (Ariz. Ct. App. 1984). As there is no dispute as to whether Plaintiff was aware Defendant Jones intended to the hit the ball, the Court will focus on the first prong, that is, whether Plaintiff was within the zone of danger such that Defendant Jones owed him a duty to warn.

In the Court's review of similar and related cases, the Court recognizes that two specific variables – the plaintiff's proximity to and angle away from the defendant golfer – are determinative as to whether a duty to warn exists. Although no exact angle or distance has been established as the line upon which liability in negligence sits, even a cursory review of related cases illustrates a general pattern amongst plaintiffs in a direct line of play who were able to recover, those at a great distance from the line of play who were unable to recover, and those at such a wide

angle away from the intended flight path that they were considered outside the zone of danger.[1]

Here, the evidence presented illustrates the configuration of the particular locations of the tee box where Defendant Jones hit his shot, the intended green and hole, and the sewage construction site where Plaintiff was working when hit by the errant shot. First, it is undisputed that the sewage construction site was in the intended flight path of the ball. Each party has stated that the fenced construction site was wide left of the fairway and the green where Defendant Jones was aiming his shot. While the precise angle or distance between the construction site, Defendant Jones, and his intended target is unknown at this stage, it is undisputed that the green of the par 3, 17th hole was approximately 180 yards in front of the tee box, and the construction site was wide left of the same green and the fairway leading to it. Thus, on these limited facts, the Court may infer that the distance and angle between Defendant, his intended target, and the construction site was large enough to obviate any duty to warn, as Plaintiff was outside the zone of danger as contemplated by the courts cited above. The construction site was not in the direct line of play of the golfers, nor was it within a close proximity such that Plaintiff could be considered within the ambit of danger or any risk of injury from the normal course of play. Furthermore, even if Defendant Jones did owe a duty to warn those who were within the zone of danger, any such duty would have been obviated by the undisputed fact that the construction site was mired with the drone of heavy construction equipment being operated in connection with the sewage project Plaintiff was hired to work on.

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[1] Compare *Brooks v. Bass et al.*, 184 So. 222, 1938 La. App. LEXIS 409 (Oct. 31, 1938), *writ of certiorari denied by Supreme Court* (Nov. 28, 1938) (50 men laboring on course constructing a lagoon between two holes, golfers forced to play over lagoon in direct line of play of workers) with *Anand v. Kapoor*, 61 A.D.3d 787, 789-90 (N.Y.A.D. 2 Dept., 2009) (plaintiff was at so great an angle away — at least 50 degrees — from the defendant and the intended line of flight that he was not within the foreseeable danger zone); *Cook v. Johnston*, 688 P.2d 215, 216 (Ariz. Ct. App. 1984) (plaintiff sitting in golf cart thirty yards to right of line of play); *Jenks v. McGranaghan*, 285 N.E. 2d 876, 878 (N.Y. App. 1972) (holding that since injured plaintiff was standing on another tee about 25 yards away from the intended line of flight, he was not within the zone of danger); *Rose v. Morris*, 97 Ga. App. 764, 104 S.E.2d 485 (holding that since plaintiff was located 17 degrees away from the intended line of flight, defendant owed no duty to the plaintiff to give warning of his intent to hit ball).

That is, as in *Rinaldo*, notwithstanding any warning Defendant Jones shouted after realizing his shot was headed toward the site, Plaintiff would not have been able to hear such a warning and thereafter be able to protect himself from impending injury. *See Rinaldo v. McGovern*, 78 N.Y. 2d 729, 587 N.E.2d 264, 579 N.Y.S.2d 626 (N.Y. 1991) (golfer was not held liable in negligence for failure to warn motorists when golfer accidentally missed the fairway and instead sent the ball soaring off the golf course onto adjacent roadway where it struck the windshield of plaintiff's automobile because any warning given would have been futile). Thus, the Court holds that Plaintiff was not only outside the zone of danger, as he was at such a great distance away from the intended target, but also that any duty to warn of impending injury would have been obviated by the loud noise which enveloped the construction site on which Plaintiff was working.

However, other courts have held that the appropriate zone of danger encompasses a wider range than simply the intended flight path of the ball. For example, courts have considered the defendant golfer's reputation for shanking shots or even the immediately preceding shots as evidence that the zone of danger is wider than simply the intended target of said inexperienced golfer. *See, e.g.*, *Bartlett v. Chebuhar*, 479 N.W. 2d 321 (Iowa 1992) (golfer hit two previous shots to right of intended target, struck plaintiff in the eye upon shanking third shot); *Cook v. Johnston*, 688 P.2d 215, 216 (Ariz. Ct. App. 1984) (zone of danger widened because defendant golfer complained of frequently shanking shots and sought professional help to correct the issue).

Here, though, the Court finds no evidence at this stage that Defendant knew or should have known he would hit an errant shot which put Plaintiff in harm's way, regardless of his distance or angle from the tee box or targeted green. While the Court recognizes both that Defendant Jones is an amateur golfer — as most who play for recreation are — it cautions Plaintiff, who is admittedly inexperienced and unfamiliar with the game of golf, that even the most talented and skillful players do not hit perfect shots at every hole.

In fact, courts have gone so far as to recognize that "[s]hanking the ball is a foreseeable and not uncommon occurrence . . . The same is true of hooking, slicing, pushing, or pulling a golf shot." *Thompson v. McNeill*, 559 N.E.2d 705, 709 (Ohio 1990). Similarly, the court in *Rabinowitz v. Roland Stafford Golf School* acknowledged that "[a]lthough shanking a shot at a ninety degree angle is very unusual, it does happen on rare occasions but is nevertheless a shot clearly unintended. Since there is no evidence to suggest that [the Defendant] had a duty to warn Plaintiff or that [the Defendant] failed to exercise due care in aiming his golf ball so as to create an unreasonable risk of harm to Plaintiff, it is difficult to conceive of any theory under which [the Defendant] would be responsible for the injuries suffered by Plaintiff." 596 N.Y.S.2d 991, 993 (N.Y. Sup., 1993).

The logical extension of this principle indicates that the zone of danger should not be held to encompass the entirety of the course, to include workers or bystanders outside of the boundaries of the course, simply because precision and accuracy are a difficult feat to achieve for even the most experienced or professional golfers. Thus, the Court holds that the zone of danger is not widened by any previous play or the particular skill level of Defendant Jones on the day in question, and reinforces its holding that Plaintiff was outside the ambit of danger due to the distance of the construction site from the tee box and targeted green.

Thus, the Court concludes that notwithstanding the applicability of any affirmative defense on Defendant Jones' behalf, Defendant Jones cannot be said to owe a duty to warn Plaintiff of the increased possibility of impending injury. Furthermore, the Court holds that even if Defendant did owe Plaintiff a duty to warn, he did not breach such a duty because he claims to have shouted the appropriate warning after realizing his errant shot was headed toward the construction site where

the attention of the workers was focused elsewhere.[2] Lastly, the Court holds that regardless of whether Defendant did, in fact, shout the appropriate warning, any duty to warn was obviated by Plaintiff's distance from the intended target and the likely overshadowing noise of the heavy equipment actively operated at the sewage construction site.

2. Affirmative Defense: Assumption of Risk

Next, the Court will assess Defendant Jones' claim of assumption of the risk as an affirmative defense to Plaintiff's claim of negligence related to Jones' alleged duty to warn.

Assumption of risk bars plaintiffs from recovering for injuries resulting from known dangers where plaintiff carries on with his or her course of conduct despite knowledge of the same. This principle may be logically applied to the game of golf such that Plaintiff is prevented from recovering for injuries resulting from actions and events incident to the game of golf due to its very nature of foreseeable potential injury.

Two forms of assumption of risk exist: implied and explicit. Here, there is no dispute that Plaintiff did not explicitly assume any risk of injury inherent in working on a sewage construction site adjacent to a golf course, whether by his own employment contract, any oral agreement, or unspoken understanding. Defendant Jones seeks to employ a theory of applied assumption of the risk in order to impute the necessary knowledge and appreciation of the increased risk of injury to Plaintiff's decision to work on the construction site.

Plaintiff's assumption of risk is derived from the conduct of the parties. *Duffy v. Midlothian Country Club*, 481 N.E.2d 1037 (Ill. App. Ct. 1987). However, two theories of implied assumption of risk exists as well: primary and secondary. Primary implied assumption of risk is applied to

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[2] It is worth noting that although Plaintiff does not affirmatively admit that Defendant Jones or the other golfers in his group on the day in question shouted the appropriate warning, Plaintiff does admit that it is entirely possible that Defendant Jones or the other golfers present did so, but that Plaintiff was unable to hear his shouts over the drone of the construction equipment.

situations where a plaintiff assumes known risks inherent in his own course of conduct, not those created by the defendant's negligence. *See id*. at 1041; *see also Morgan v. Fuji Country USA*, 40 Cal. Rptr. 2d 249, 251 (Cal. Ct. App. 1995). Secondary implied assumption of risk occurs when plaintiff implicitly assumes the risks created by the defendant's conduct. *Id*.

The Court will assess Defendant Jones' application of the principle of implied assumption of risk under the primary theory first, and subsequently address whether secondary assumption of the risk may apply in these particular circumstances in the following section.

As to primary implied assumption of risk in the specific context of the game of golf, courts have acknowledged that the risk of injury even without any wrongdoing or negligence is inherent in the centuries-old sport itself. The *Thompson* court reasoned that "[b]ecause of the great likelihood of these unintended and offline shots, it can indeed be said that the risk of being inadvertently hit by a ball struck by another competitor is built into the game of golf. Despite the marvelous advances in golf equipment over the course of the past half-century, the following words still ring true:

> It is well known that not every shot played by a golfer goes to the point where he intends it to go. If such were the case, every player would be perfect and the whole pleasure of the sport would be lost. It is common knowledge, **at least among players**, that many bad shots must result although every stroke is delivered with the best possible intention and without any negligence whatsoever. *Benjamin v. Jernberg*, 102 Pa.Super. 471, 157 A. 10, 11 (1931).

Thompson v. McNeill, 53 Ohio St.3d 102, 104, 559 N.E.2d 705, 707 (Ohio 1990) (emphasis added).

Further, the court in *American Golf Corp. v. Superior Court* recognized specifically that:

> Golf is an active sport to which the assumption of the risk doctrine applies. Hitting a golf ball at a high rate of speed involves the very real possibility that the ball will take flight in an unintended direction. If every ball behaved as the golfer wished, there would be little 'sport' in the sport of golf. That shots go awry is a risk that all golfers, even the professionals, assume when they play. Errant golf shots may strike a fixed object, such as a rock, tree or fence, ricochet, and strike another player.

79 Cal.App.4th 30, 37-38, 93 Cal. Rptr. 2d 683 (Cal. App. 2000).

However, it is clear that this principle ordinarily applies in circumstances involving one golfer causing injury to another golfer on the same or adjacent hole or course. *See, e.g., Ramsden v. Shaker Ridge Country Club*, 259 N.Y.S. 2d 280 (N.Y. App. Div. 1965) (plaintiff and defendant are both caddies at the same course and given permission to play a few holes on a slow afternoon); *McDonald v. Huntington Crescent Club, Inc.*, 152 A.D. 2d 543 (N.Y. App. Div. 1989) (rejecting argument that the course failed to properly instruct a 16-year old caddy hit in head by a golf ball regarding the safety of course because he had caddied over 200 times and was well-acquainted with the game such that he was aware and appreciated dangers of the game); *Rinaldo v. McGovern*, 587 N.E. 2d 264 (N.Y. 1991); *Lexington Country Club v. Stevenson*, 390 S.W.2d 137 (Ky. 1965); *Kirchoffner v. Quam*, 264 N.W.2d 203 (N.D. 1978); *Westborough Country Club v. Palmer*, 204 F.2d 143 (8th Cir. 1953).

Here, Plaintiff was an employee of the subcontractor hired by the course to complete its sewage construction project. There is no dispute as to whether Plaintiff is or was a fellow golfer who is familiar with the sport and actively engaged in its play when his injury occurred. Thus, while the Court recognizes the principle of assumption of risk as it applies to the game of golf, it rejects Defendant Jones' application of the principle to Plaintiff, who could not have known that he was at any risk of injury working on a construction site at a great distance from a hole on a golf course. Further, Plaintiff could not have appreciated any such risk due to his limited knowledge of the sport and the distances and speeds reached by certain shots in golf.

Thus, the Court acknowledges that the widely known game of golf carries with it an inherent risk of injury without any negligence or wrongdoing whatsoever, yet that knowledge of the increased risk of injury cannot reasonably be imputed to Plaintiff in these circumstances. The Court

therefore rules against Defendant Jones' employment of the affirmative defense of assumption of risk in his instant motion for summary judgment.[3]

3. No Evidence of Intentional or Reckless Misconduct

The Court now addresses Defendant's argument that there must be some showing of intentional misconduct or merely reckless conduct in order for Plaintiff to recover on a negligence theory.

Courts have found that a golfer is ordinarily "only liable for intentional misconduct or reckless conduct outside the range of ordinary activity involved in the sport." *Halwa v. Cedar Fair*, 126 Cal. Rptr. 3d 341, 359-60 (Cal. App. 6 Dist., 2011); *see also Alexander v. Tullis*, WL 763088, *2-3 (Ohio App. 11 Dist., 2006); *Gray v. Giroux*, 730 N.E. 2d 338 (Mass. App. Ct., 2000); *Hathaway v. Tascosa Country Club, Inc.*, 846 S.W.2d 614, 616-17 (Tex. App. Amarillo, 1993); *Monk v. Phillips*, 983 S.W.2d 323 (Tex. App. Fort Worth, 1998); *Welch v. Young*, 950 N.E.2d 1283, 1287 (Ind. App. 2011); *Pfenning v. Lineman*, 947 N.E. 2d 392, 398 (Ind. 2011); *Anand v. Kapoor*, 877 N.Y.S.2d 425, 427-28 (N.Y.A.D. 2 Dept., 2009); *Dilger v. Moyles*, 54 Cal. App. 4th 1452 (Cal. App. 1997). Furthermore, "[i]ntentional or reckless misconduct . . . must be understood in the context of the rules of the sport. *See Marchetti v. Kalish*, 53 Ohio St.3d 95, 559 N.E.2d 699 (1990). If, for example, a golfer knows another is within the line of flight of his shot, and fails to offer the customary warning of "fore," liability might accrue. Such conduct could amount to reckless indifference to the rights of others." *Thompson v. McNeill*, 53 Ohio St.3d 102, 104, 559 N.E.2d 705, 707 (Ohio 1990).

Moreover, the court in *Dilger v. Moyle* refused to find liability even where the defendant golfer breached his duty to warn due to risks inherent in the sport, finding that "a participant owes

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[3] This point is, however, moot, as the Court has ruled above that Defendant Jones owed no duty to warn Plaintiff, and in the alternative, Defendant's attempts to warn would have been futile and thus he did not breach such a duty.

no duty to co-participants unless he 'intentionally injures another player or engages in reckless conduct that is totally outside the range of the ordinary activity involved in the sport.'" 54 Cal.App.4th 1452, 1456, 63 Cal. Rptr. 2d 591(Cal. App. 1997). Relevantly, the court also held that "[w]e do not believe the failure to yell 'fore' is that reckless or intentional conduct. . . ." *Id.* at p. 1456.

The Court agrees that in the absence of intentional misconduct or reckless conduct, it would be theoretically difficult for any plaintiff to recover for his or her injuries on a theory of negligence alone, outside of the victim falling within the zone of danger by being directly in the line of play and the defendant golfer failing to warn the victim of his impending shot with the appropriate "Fore!" "Intentional or reckless misconduct . . . must be understood in the context of the rules of the sport." *See Marchetti v. Kalish*, 53 Ohio St.3d 95, 559 N.E.2d 699 (1990). In such a case where the plaintiff does fall within the line of play or applicable ambit of danger, the defendant golfer swings his club despite knowledge of the plaintiff victim's location or proximity to his intended line of play, and subsequently fails to exclaim the widely recognized warning, a court may find intentional or reckless misconduct in the defendant golfer. *See Thompson v. McNeill*, 53 Ohio St. 3d 102, 104, 559 N.E.2d 705, 707 (Ohio 1990) (holding that such conduct could amount to reckless indifference to the rights of others). Such a finding may also make available recovery of punitive damages in order to deter similar future courses of conduct by the defendant. However, some courts have even held that the failure to yell "Fore!" cannot be considered intentional or reckless misconduct unless the defendant golfer's conduct falls completely outside of the ordinary activity involved in the sport. *Dilger v. Moyle*, 54 Cal.App.4th at 1456.

Here, however, no single fact exists which would suggest to the Court that Defendant Jones or the other golfers at play the day of Plaintiff's injury were engaged in intentional misconduct or reckless conduct. Even if Plaintiff could be considered within the zone of danger, any warning

given by Defendant Jones would not have been heard by Plaintiff. Lastly, the Court takes notice of Defendant Jones' actions immediately after, finding only that they preclude any finding of malicious or intentional behavior designed to harm Plaintiff.

Thus, the Court entertains the theory, for the sake of argument, that plaintiffs injured by errant golf shots must make a showing of intentional or reckless misconduct, and consequently finds that Defendant Jones engaged in no such course of conduct such that he would be liable under a theory of negligence. Further, as a finding of intentional or reckless misconduct is necessary to award punitive damages, the Court hereby grants Defendant Jones' motion for summary judgment as to punitive damages.

4. Strict Liability Does Not Attach Because Golf is Not Inherently Dangerous

The Court now examines Plaintiff's claim that Defendants should be held strictly liable for Plaintiff's injuries because the game of golf is inherently dangerous.

As an initial matter, in the Commonwealth, the Restatement of Laws serves as the substantive law in the absence of statutory or customary law. 7 CMC § 3401; *Ito v. Macro Energy, Inc.*, 4 NMI 46, 55 (1993). As there are no controlling substantive law cases in the CNMI involving strict liability being applied to the game of golf, the Court will draw from the Restatement (Second) of Torts and relevant case law from other jurisdictions which the Court deems to be persuasive or helpful in identifying and applying a particular test.

Generally, § 519 of the Restatement (Second) of Torts provides: "one who carries on an abnormally dangerous activity is subject to liability for harm to the person, land, or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm, [and t]his strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous." R.2nd of Torts, § 519. Furthermore, the test for determining whether an activity is abnormally dangerous is established by § 520 of the Restatement (Second) of Torts, in

which the following factors are to be considered: (a) existence of a high degree of risk of some harm to the person, land or chattels of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; (f) extent to which its value to the community is outweighed by its dangerous attributes. R.2nd of Torts, § 520(a-f).

Although the Court recognizes some risk of potential injury inherent in the game of golf, courts have held, and this Court agrees, that the sport is not inherently dangerous such that strict liability would attach to Plaintiff's injuries. *See Townsley v. State*, 6 Misc.2d 557, 164 N.Y.S.2d 840, 841 (1957) ("Golf does not present a high degree of risk of harm, nor is there a strong likelihood that the harm that does result from golf will be great. Clearly the vast majority of golf shots, including those that are hit in a faulty manner, do not cause substantial injury."); *Ludwikoski v. Kurotsu*, 840 F. Supp. 826, 828-29 (D. Kan., 1993) (citing *Falls v. Scott*, 249 Kan. 54, 60, 815 P.2d 1104, 1110 (1991)) (holding that "[a]n activity is not abnormally dangerous simply because it may possibly produce injury."). These principles are considered in the context of the sport itself, where the ability to eliminate risk of injury due to user error or even freak accident is next to impossible. Thus, these three factors weigh against the application of the theory of strict liability to Plaintiff's injuries.

Furthermore, as mentioned in the next section below, and as extensively discussed above, although errant shots are commonplace in the game of golf, the value of the sport to the community exceeds any risk of injury that may occur during ordinary play. Here, Defendant Jones was teeing off from the tee box of the 17th hole of the golf course, not shooting from some unordinary location away from the green or fairway in order to receiver and return to normal play. Defendant Jones was playing the game of golf — albeit as an amateur — as it was meant to be played, where errant shots

come to be expected and no golfer is perfect. Nothing in the record suggests that Defendant's conduct — or any conduct germane to the game of golf in general, for that matter — is abnormally dangerous such that the application of strict liability is necessary in order to ensure a plaintiff's recovery. In fact, the vast majority of games of golf played by its participants end without incident. The mere possibility of injury due to the mechanics of the sport and its evolution due to the advancement of technology which allow for longer distances and higher speeds does not persuade the Court to apply such a finite legal theory to a widely popular sport. Moreover, plaintiffs injured by participants in the sport may still recover under theories of intentional torts or negligence, where such recovery relies upon proof of intentional or reckless conduct.

Therefore, the Court refuses to apply the theory of strict liability to the game of golf in these circumstances, the mere possibility of injury does not mean the sport is inherently dangerous.

5. Public Policy Concerns

Lastly, the Court addresses certain public policy concerns which persuade the Court from ruling against defendant golfers who find themselves in similar situations, where the plaintiff's injury is not the result of the defendant's intentional or reckless conduct.

The *Digger* court opined that "[h]olding golfers liable for missed hits would only encourage lawsuits and deter players from enjoying the sport." *Digger v. Moyles*, 54 Cal. App. 4th at 1455. This Court agrees with this sentiment, especially given the popularity of the sport and great social utility the game of golf has signified for centuries. If courts consistently held golfers liable for errant shots in the absence of intentional or reckless misconduct, as in this case, a wave of lawsuits would clog up court systems in geographic areas where golf is the primary recreational activity, especially those which attract amateur players who have little to no control over their own shot. Such a result would also drive golf courses out of business, as potential customers would be driven away due to potential liability for errant shots made while at play. As golf represents a traditional

social pastime and has provided centuries of enjoyment for a wide range of players — of all ages, nationalities, and skill levels — the Court would be remiss to puncture the sport's balloon of innocent and unadulterated entertainment, friendly competition, and, for some, infatuation.

In conclusion, the Court finds no material issue of fact that would need to proceed to a jury, as well as no liability in negligence by Defendant Jones. The Court also grants his motion for summary judgment as to Plaintiff's negligence claim against him. Thus, the Court hereby dismisses Defendant Jones from being a party to the instant case. Moreover, this would necessarily render Defendant Jones cross-claim against the golf course owner and Plaintiff's employer moot as to any damages Defendant Jones may have owed Plaintiff.

B. PLAINTIFF'S NEGLIGENCE CLAIM AGAINST GOLF COURSE OWNER

The Court now addresses Plaintiff's negligence claim against the owner and operator of the golf course, as well as Defendants Daewoo and SLDI's motion for summary judgment as to causation, the availability of punitive damages, and damages for loss of consortium.

1. Duty to Invitee to Make the Premises Reasonably Safe

First, the Court finds it necessary to assess Plaintiff's argument that Defendants Daewoo and SLDI were negligent in failing to make both Defendant Jones and Plaintiff aware of the heightened degree of risk necessarily involved with workers located on a construction site adjacent to a golf course.

A golf course's duty to exercise reasonable care in order protect its players and employees comes from the parties' statuses as business invitees, whether that is due to an employment contract or a payment for services rendered upon entering for play on the course. Restatement (Second) Torts, § 332 provides: "(1) An invitee is either a public invitee or a business visitor; (2) A public invitee is a person who is invited to enter or remain on land as a member of the public for the purpose for which the land is open to the public; (3) A business visitor is a person who is invited to

enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land." R.2d of Torts, § 332 (1965).

Here, as an employee of an independent contractor, Plaintiff enjoys the status of an invitee of the owner of the premises on which he is working. *See Bozung v. Condominium Builders, Inc.*, 711 P.2d 1090, 1093 (Wash.Ct.App.1985); *Sullivan v. Shell Oil Company*, 234 F.2d 733, 738 (9th Cir. 1956) (stating that "[e]mployees of an independent contractor . . . are on the premises by the owner's invitation express or implied . . ."). Nevertheless, it is undisputed, and in fact Defendants admitted, that Plaintiff enjoyed the status of an invitee while working on the sewage construction project on the golf course on the date in question.

Thus, as an invitee, Plaintiff argues that Defendant SLDI owed him a duty to make its premises reasonably safe. The law is clear that "[a] proprietor of a business is under an affirmative duty to make the premises reasonably safe for use by invitees. . ." *Martinez v. Asarco Inc.*, 918 F.2d 1467, 1471 (9th Cir. 1990) (citation omitted). Specifically, Restatement (Second) of Torts § 343 provides: "[a] possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he: (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger. R.2nd of Torts § 343 (1965). Furthermore, Restatement (Second) of Torts § 343 A illustrates precisely what that duty entails, providing: "(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness."

Moreover, Plaintiff claims that Defendant SLDI "should anticipate the harm despite

[Plaintiff's] knowledge or obviousness," arguing that Defendant SLDI is liable since it has reason to expect that the invitee's [Plaintiff's] attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it." R.2nd of Torts, § 343A, cmt. f.

Plaintiff argues that his attention at the time he was struck was directed at and focused on the careful lowering down of approximately 20-feet long metal rebars down to his fellow workers below reaching up for them from the bottom of the approximately 20-feet deep sewage treatment facility-excavation hole, and thus Defendants should have warned him of or prevented any risk of injury unknown to Plaintiff while he was distracted. There is no dispute that Plaintiff was, in fact, distracted and generally unaware of activity of the golfers on the course adjacent to the construction site. However, Plaintiff argues that, even if he knew golfers were playing on the hole nearby, Defendants should have anticipated them long before work on the sewage construction project began. The Court accepts this argument for the sake of the following analysis, insofar as the Court is charged with determining whether Plaintiff's negligence claims against Defendants Daewoo and SLDI could survive a motion for summary judgment.

2. Disputed Material Fact: Adequacy of Protective Fence as Evidence of Breach

Plaintiff supports his claim that Defendant breached its duty to make the premises reasonably safe by claiming that the fence which was constructed around the site of the sewage construction project was inadequate to protect the subcontractor's employees working there on the day in question. Courts have addressed this particular issue before, with mixed results. *See McDonald v. Huntington Crescent Club, Inc.*, 152 A.D. 2d 543 (N.Y. App. Div. 1989) (rejecting the plaintiff's argument that course owed him a duty of constructing barriers to protect caddies from golf balls heading in their direction, and finding that the golf course exercised the degree of care that a reasonable prudent golf course would have exercised under similar circumstances.).

Here, Plaintiff alleges that the fence surrounding the site was only five (5) feet tall, or the approximate height of the Plaintiff himself. Defendants do not submit any evidence of the height, length, arrangement, or any other characteristics of the fence on which Plaintiff rests his entire claim. In fact, it is worth noting that any mention of the fence is mysteriously absent from all of Defendants' moving papers. It is abundantly clear to the Court that the height of the fence is a material, legally operative and potentially dispositive fact which is in dispute and should be left to the province of the jury to determine. This alone is enough for the Court to deny Defendants' motion for summary judgment, as such a fact would likely come to light at trial as part of the presentation of evidence.

Alternatively, even if the Court were presented affirmative, undisputed evidence regarding the characteristics of this particular fence which surrounded the construction site, such evidence would only be considered as proof of whether or not Defendants breached their duty to make the premises reasonably safe. "Whether a defendant has breached its duty is a question of fact." *American National Bank & Trust Co. v. National Advertising Co.*, 149 Ill. 2d 14, 15, 29, 594 N.E.2d 313 (1992). The trier of fact must determine whether the Moving Defendants took any safety precautions and, if so, whether the measures were adequate to satisfy their duty of reasonable care. *See id.* at 29-30. Thus, such a determination is exclusively the responsibility of the trier-of-fact, and the Court is obliged to deny Defendants' motion for summary judgment at this stage.

The same could be said for the arguments regarding: (1) causation, which necessarily involve conflicting testimony of medical experts who have examined Plaintiff and opined on the causation of his injuries; (2) punitive damages surrounding Defendants' treatment of Plaintiff following his injuries and involving his subsequent transport to the hospital; and (3) damages for loss of consortium based upon Plaintiff's wife allegedly leaving him due to his inhibited sexual performance and inability to work as a result of his injuries. The Court holds that these few issues

are material issues of fact that must be left for a jury to determine at trial.

Therefore, the Court hereby denies both Defendant and Plaintiff's respective motions for summary judgment, and leaves the issues of whether the particular characteristics of the alleged protective fence breached Defendant's duty to make the premises reasonably safe for its invitees to be determined at a later date by a trier-of-fact.

III. PLAINTIFF'S MOTION TO STRIKE OR EXCLUDE EXPERT TESTIMONY

Lastly, the Court addresses Plaintiff's motion to strike or exclude Defendant's expert's testimony, which was filed concurrently with the instant motion for summary judgment.

Plaintiff argues that Defendants SLDI and Daewoo's accompanying declarations in support of their motion for summary judgment are "replete with evidentiary and procedural defects and thus must be stricken in accordance with NMI R. Civ. P. Rule 56(e). Specifically, Plaintiff claims that the declarations of both Tetsuya Matsunaga and Dr. Tony Sterns are conclusory and not sufficiently specific to raise the fact issue they purport to address, and thus must be stricken from the record or excluded from being introduced as evidence at trial.

First, regarding Mr. Matsunaga's declaration and the safety policies and practices of Defendants SLDI and Daewoo, Plaintiff claims that Mr. Matsunaga's Declaration contains portions which are not based on his personal knowledge, immaterial to the issues presented, are conclusory or legal arguments or conclusions. Thus, Plaintiff claims, Matsunaga's Declaration "was nothing more than a sworn denial of plaintiff's claims and could not support summary judgment." *See Anderson v. Snider*, 808 S.W.2d 54, 55 (Tex. 1991) (per curiam); *see also Rylan Group, Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996) (holding that conclusory statements in a declaration or affidavit will not support a summary judgment); *Foster v. Weber*, 518 So.2d 857 (Fla. 5th DCA 1991) (holding that conclusory affidavits are insufficient to support or oppose motions for summary judgment).

In essence, Plaintiff asserts that Mr. Matsunaga has no knowledge or expertise on which to base his assessment of Plaintiff's claims regarding whether Defendants Daewoo and SLDI acted outrageously or with reckless indifference to others in their treatment of Plaintiff or the design of the golf course. However, the Court recognizes that Mr. Matsunaga could declare or testify as to Defendants Daewoo and SLDI's state of mind, and whether they had any evil motive to harm Plaintiff in their treatment of Plaintiff following his injury or in the design or actions involving designing or operating the golf course.

The Court further recognizes that Mr. Matsunaga's declaration stating that Defendant's Daewoo and SLDI "never acted in an outrageous manner toward the plaintiff" and they "did nothing to justify the imposition of punitive damages" are legal conclusions on which Mr. Matsunaga has no knowledge, experience or expertise to base them on. However, as the Court denied both Defendants Daewoo and SLDI's Motions for Summary Judgment, as well as Plaintiff's own motion for summary judgment, the Court holds that while these portions of Mr. Matsunaga's Declaration likely exceed the acceptable boundaries of legal declarations, striking them would effectively be moot at this stage. The Court does, however, caution Defendants Daewoo and SLDI to inspect the declarations they submit in the future to ensure compliance with the rules of civil procedure and relevant case law regarding legal declarations and their contents, in particular Com. R. Civ. P. 56(c).

Second, Plaintiff argues that Defendants Daewoo and SLDI's medical expert's own declaration, that of Dr. Tony Stearns, is also conclusory because it "lacks a demonstrable and reasoned basis on which to evaluate his opinion that the golf ball incident was not the case of Alforeza's hernia." *See Jennings v. Palomar Pomerado Health Services, Inc.*, 114 Cal. App. 4th 1108, 1116 (2003) (holding that "[w]hen an expert's opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate

conclusion, that opinion has no evidentiary value because an "expert opinion is worth no more than the reasons upon which it rests."). Dr. Stearns opined that "Mr. Alforeza's complaint of insomnia, dizziness, back pain, blurred vision, shakiness and difficulty breathing are all stress induced symptoms," and that "[i]t is my opinion, to a reasonable medical certainty, that these symptoms are not related to the golf ball incident." (Stearns' Declaration, at ¶ 7.) Further, Dr. Stearns opined that "[i]nguinal pain from a hernia typically heals without residual symptoms such as chest pain," and that "[i]t is highly unlikely that [Plaintiff] would have persistent right inguinal pain four years after an inguinal hernia repair." (*Id*. at ¶ 18.) Lastly, Dr. Stearns opined that it is his "diagnosis . . . that [Plaintiff] has a well healed repaired right inguinal hernia," and that he finds "no logical medical explanation to connect the right inguinal hernia to the 'golf ball to the chest' incident." (*Id*. at ¶ 26-28.)

Here, the Court holds that while Dr. Stearns' opinion is conclusory, the Court cannot, in good conscience, find that Dr. Stearns did not reach this opinion to a reasonable medical certainty by way of his own independent examination of Plaintiff following the golf ball incident, combined with relevant background information concerning his previous surgery and the initial assessment of the employees of the hospital once Plaintiff arrived. The opinions of medical experts are, by design, conclusory, as they are using all the relevant information available to them about the condition they were hired to assess and then supplying the Court with a conclusion that is based upon facts and the expert's skills, knowledge, and expertise. Thus, the Court refuses to strike pertinent expert testimony which may be crucial to Plaintiff's recovery of damages at trial.

In conclusion, the Court denies Plaintiff's motion to strike or exclude the preferred testimony and declarations of Mr. Matsunaga and Dr. Tony Stearns as conclusory.

V. CONCLUSION

In view of the foregoing, the Court HEREBY:

(1) GRANTS Defendant Jones' motion for summary judgment;

(2) DENIES Plaintiff's cross-motion for summary judgment;

(3) DENIES Defendants SLDI and Daewoo's motion for summary judgment, or partial summary judgment on the issues of causation and damages;

(4) DENIES Plaintiff's motion for summary judgment; and

(5) DENIES Plaintiff's motion to strike the declarations submitted in support of Defendants SLDI and Daewoo's motion for summary judgment.

A **Status Conference** is scheduled for **December 30, 2014** at **1:30 p.m.** in **Courtroom 223A.**

SO ORDERED this 22nd day of December, 2014.

/ s /
David A. Wiseman, Associate Judge