SJC-13297

ERIK TENCZAR & another[1] vs. INDIAN POND COUNTRY CLUB, INC.

Plymouth. October 7, 2022. - December 20, 2022.

Present (Sitting at Plymouth): Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Trespass. Real Property, Trespass, Easement. Easement. Practice, Civil, Instructions to jury, Waiver, Directed verdict, Judgment notwithstanding verdict. Waiver.

Civil action commenced in the Superior Court Department on July 13, 2018.

The case was tried before William M. White, Jr., J., and motions for judgment notwithstanding the verdict and for a new trial were heard by him.

The Supreme Judicial Court granted an application for direct appellate review.

John B. Flemming (Leon C. Nowicki also present) for the defendant.

Robert W. Galvin (Anthony J. Riley also present) for the plaintiffs.

Michael H. Brady, of Virginia, & Thomas K. McCraw, Jr., for National Golf Course Owners Association, Inc., amicus curiae, submitted a brief.

[1] Athina Tenczar.

KAFKER, J. After purchasing a home next to a golf course in a subdivision subject to various covenants and restrictions regarding the operation of the golf course, the plaintiffs, Erik and Athina Tenczar, sued the golf course, Indian Pond Country Club, Inc. (Indian Pond), in trespass when their home was hit by errant golf balls. The jury awarded them $100,000 for property damage and $3.4 million in emotional distress damages. The court also entered an injunction forbidding operation of the course in a manner that allows golf balls on the property.

We conclude that the trial judge erred when he did not interpret the documents creating the covenants and restrictions as a whole and in light of attendant circumstances. When read as a whole, the documents provide that the plaintiffs' home was subject to an easement allowing for the "reasonable and efficient operation" of a golf course in a "customary and usual manner." As the jury were not instructed accordingly, and the failure to give the instruction was prejudicial, the verdict must be reversed and the injunction lifted. We decline, however, to direct a verdict in the defendant's favor, as we cannot decide as a matter of law that the operation of the fifteenth hole and the number of errant shots hitting the plaintiffs' home was reasonable. With golf, some errant shots, way off line, are inevitable, but a predictable pattern of

errant shots that arise from unreasonable golf course operation is not. In the instant case, a properly instructed jury are required to resolve whether the operation of the fifteenth hole, including the number of errant shots hitting the plaintiffs' home, was reasonable.[2]

1. Background. The subdivision in Kingston where the plaintiffs live consists of homes on both sides of Country Club Way, which rings a golf course. The subdivision developer, Indian Pond, built the golf course in 1999 and 2000.[3] By the time the golf course opened in 2001, Indian Pond had already sold a few of the residential lots surrounding the golf course. It continued to sell lots over the following years. Lot 4-80, which would become the plaintiffs' home, was sold in 2014.

a. Declaration and amendment. The town planning board endorsed the subdivision plan on September 22, 1998, which was subsequently recorded. On January 5, 1999, Indian Pond recorded a declaration of covenants and restrictions (declaration), which set out certain "covenants, restrictions, conditions and agreements" for the subdivision. Two provisions are relevant

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[2] We acknowledge the amicus brief submitted by National Golf Course Owners Association, Inc.

[3] Frederick Tonsberg developed the community and operated the golf course through two companies, High Pines Corp. and Indian Pond Country Club, Inc. (collectively referred to here as "Indian Pond").

here. First, paragraph 16, entitled "Golf Course Lots," articulated a "perpetual right and easement" on "[a]ny lot adjacent to or in close proximity to golf course areas" for golfers to have "reasonable foot access . . . to retrieve errant golf balls on unimproved areas of such residential lots." Second, paragraph 20 provided that Indian Pond retained "the right to create, operate and maintain a golf course and country club facilities . . . on all portions of the land . . . other than" forty-eight specified lots (which would be those developed first). As lot 4-80 was not one of the specified lots, it was subject to this right.

On January 19, 2001, Indian Pond recorded an amendment to the declaration (amendment). By this time, the golf course had been constructed and briefly opened, and additional lots adjacent to the course were being sold. The amendment applied to sixty-one lots adjacent to and in close proximity to the golf course, including lot 4-80, labeling these additional lots as "golf course lots" and subjecting them to paragraph 16 of the original declaration; the amended declaration also provided that golf course lots are subject to Indian Pond's "right to reserve or grant easements for the benefit of the owner of the golf course for the reasonable and efficient operation of the golf course and its facilities in a customary and usual manner." In addition, lot owners were restricted from building pools or

having swing sets, play sets, or clotheslines without Indian Pond's consent, and were required to "minimize any adverse impact to the golf course" when doing work on the lots. The developer also reserved the right to "maintain, replace, remove or add to the vegetation on the golf course lots in those areas in close proximity to the golf course."

Indian Pond sold lot 4-80 to Spectrum Building Co., Inc. (Spectrum), on March 7, 2014, which built a house on the lot. Spectrum oriented the house so that the garage -- the side with the fewest windows -- faces away from the tee. The back side, facing the fairway, has approximately sixteen to eighteen windows, and the side of the house facing the tee has five. Spectrum did not install impact-resistant windows, as used elsewhere in the subdivision, and removed trees between the house and the golf course during construction.[4]

Spectrum sold the lot to the plaintiffs on April 27, 2017. Both deeds referenced the recorded plan and expressly incorporated "restrictions and easements of record" that were "in force." In addition, the sale contract released Spectrum from liability for "occurrences that are the natural result of residing adjacent to a golf course including but not limited to errant golf balls."

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[4] There are over fifty other homes directly abutting the golf course, many of which are also built along fairways.

b. The design and operation of the fifteenth hole and errant golf balls. Lot 4-80, the plaintiffs' home, is located off the fairway of the fifteenth hole of the golf course. The fifteenth hole, like the rest of the course, was designed by a golf course architect named Damian Pascuzzo. At the tee, players first hit down to a landing area at a lower elevation. Then, there is a "dogleg left," meaning that the hole is situated to the left of the landing area. Lot 4-80 is at a sharper angle left from the landing area than the hole. If, at the tee, a golfer tried to cut the corner and hit directly toward the hole, an errant shot (241 yards from the championship tee, 217 yards from the member's tee, and 192 yards from the middle tee) could hit the house. There is a bunker (that is, a sand trap) located to the left of the landing area to discourage golfers from cutting the corner. In addition, trees form a buffer between the fairway and the house. However, many of the trees have been removed since the course was designed, and because the fairway slopes down from the tee, the treetops and the tees are at a similar elevation, thereby reducing somewhat the trees' efficacy as a buffer.

At trial, the parties introduced conflicting testimony regarding the design and operation of the course. The golf course architect explained that "there's no building code in golf course architecture, unlike traditional architecture, so

designers rely on experience and information from other designers and what is published." He further testified that "the [fifteenth] hole was designed properly within modern design standards." He, like the plaintiffs' expert, referenced and relied on a book by Dr. Michael Hurdzan, setting out a "safety cone" analysis, a method of assessing safe distances for a golf course. The architect explained that he used standards that would keep everything 165 feet left of the center line and 185 right of the center line to establish a reasonable safety zone.[5] The architect further explained that these standards were consistent with the safety cone analysis developed by Hurdzan, which defined the safety zone via two rays extending out at a fifteen-degree angle from the tee (centered on the middle of the fairway). Although the house did not exist at the time the architect designed the fifteenth hole, it was built further than 165 feet left of the center line and, thus, according to the architect, within a reasonable safety zone.

The plaintiffs' expert, a golf course accident investigator, drew the opposite conclusion, testifying that the house was not within the safety zone, relying on the same

[5] As both experts testified, there is a larger buffer on the right because more golfers are right-handed than left, and they are more likely to hit off line via a "slice" to the right than a "hook" to the left.

research from Hurdzan.[6] The plaintiffs' expert had expanded the cone from fifteen degrees to eighteen degrees, to take into account changes in golf technology in the thirty years since the book was written that increased the length of golf shots and their likely dispersion. The expert further testified that, according to Hurdzan, eighty percent of shots typically fall within the safety cone.

The experts also disagreed on the other aspects of the design and operation of the course. The plaintiffs' expert testified that due to the "visual cues off of the tee" and "lack of barriers," most golfers aimed to cut or hit close to the corner, inconsistent with the original design of the hole. He further testified that the golf course website "recommends that players aim at the first sand trap bunker that's on the left side of the fairway." The golf course architect testified to the contrary, explaining: "We provided a nice, big, generous, open landing area in the corner . . . to the right side of the fairway away from the bunkers, because that's where we wanted them to aim."

[6] According to the golf course architect, the plaintiffs' expert incorrectly drew a center line assuming golfers would aim toward the left, rather than the intended landing area.

At trial, the plaintiffs testified that 651 golf balls had hit the property since 2017, breaking eight windows and damaging the house's siding and a railing on the deck.

After the lawsuit was commenced, Indian Pond implemented a number of remedial measures suggested by the original course architect after he was consulted about the dispute.[7] Indian Pond planted three arborvitae trees on the left side of each tee box and angled the boxes to the right. To signal golfers to hit to the intended area, it put a barber pole in the middle of the fairway, moved the out-of-bounds marker on the left side of the dogleg further to the right, away from the plaintiffs' home, and expanded the right side of the landing area. Indian Pond did not, however, install protective netting at the tee boxes, suggested by a contractor hired by the plaintiffs. In addition, it did not plant trees along the cart path or move the members' tee further back, as the course architect suggested, or move the tees to force players to hit toward the right, as the plaintiffs' expert suggested.

The effect of Indian Pond's remedial measures was as follows. In 2018, before the measures were implemented, 130

[7] The parties agreed to these measures in lieu of a ruling on a motion for a preliminary injunction that the plaintiffs had filed before the 2019 golf season. The agreement was in place during the 2019 season, but the plaintiffs found the measures ineffective, so in 2020, the court ruled on the motion (denying it, as discussed infra).

balls were found on the property, thirty of which struck the house. After, in each of the next three years, between eighty-nine and ninety-nine balls were found on the property, nine to thirteen of which had struck the house.

c. Procedural history. On July 13, 2018, the plaintiffs sued Indian Pond for equitable relief and money damages. After the 2019 golf season, the plaintiffs requested a preliminary injunction to prevent play on the fifteenth hole until Indian Pond implemented additional remedial measures, such as installing netting or reconfiguring the hole. The motion judge denied the request on May 26, 2020. In doing so, she found that Indian Pond "expressly reserved the right to create and operate a golf course on the land within the subdivision," explaining that the golf course was meant "to operate as the centerpiece of the subdivision."[8] A single justice of the Appeals Court affirmed the denial.

The case was tried in the Superior Court from November 29 to December 6, 2021, on the trespass claim. After the first day of trial, the plaintiffs sought a ruling from the judge (via a motion in limine, which Indian Pond contested as premature) that Indian Pond did not have an easement for golf ball intrusions on

[8] The motion judge correctly found that the amendment created an easement "for the benefit of the golf course for 'reasonable and efficient operation of the golf course . . . in a customary and usual manner'" (quoting amendment).

the plaintiffs' improved property. The attorney for Indian Pond responded, "No. 1, . . . the declaration and covenants and easements and the amendment as a matter of law do establish the right of the country club to conduct the operation of the country club in a normal way." He further explained, "No. 2, if there is some ambiguity [in the language], then recourse can be [had] to the attend[ant] circumstances existing at the time the declaration was completed." The judge denied the motion but indicated that he would revisit the issue later in the trial.

On December 2, the judge revisited the motion and determined that Indian Pond did not have an easement pertaining to the improved areas of the property, based on the "plain language" of the documents. The judge focused only on one provision, the easement regarding ball retrieval, which allowed golfers to retrieve golf balls from the unimproved but not the improved portions of the plaintiffs' property. He did not address any other provision, most notably the language providing for reasonable operation of the golf course. Indian Pond noted its objection, explaining its reasoning, including that the court should consider not only the language of the declaration and amendment but also attendant circumstances, and further stating that it would be moving for a directed verdict after the close of evidence. In the motion, Indian Pond argued that it had "specifically reserved the right . . . to operate a golf

course" via the declaration and amendment. Because "[e]rrant golf ball shots are a natural occurrence in the game of golf," Indian Pond argued, the plaintiffs were precluded from bringing a trespass claim as a matter of law. The judge denied the motion.[9]

On the last day of trial, Indian Pond made a written request for a jury instruction. Its requested instruction stated that "the [d]eclaration . . . and the [a]mendment to the [d]eclaration ha[ve] been presented into evidence. The meaning of these documents and what rights, if any, are established by them presents a matter of law for the [c]ourt, and only the [c]ourt, to decide." Therefore, it proposed to instruct the jury, "[Y]ou cannot consider the terms of the [d]eclaration or its [a]mendment or any testimony given by any witness concerning the meaning of the documents." At a sidebar discussion before closing arguments, the trial judge indicated that he would give the jury an instruction that he had "determined that the easement was only extended to the unimproved portions of the property." The defendant's attorney did not further object, but clarified: "So I just want to be sure that I know that I'm not supposed to argue it -- argue the meaning of the easement.

[9] After the close of the plaintiffs' evidence, Indian Pond had moved for a directed verdict on similar grounds, which the court denied before ruling on the motion in limine.

That's my understanding. . . . I just want to confirm that." The judge responded, "Correct."

The judge did not give the instruction during the jury charge at first. In a second sidebar discussion, counsel for Indian Pond asked what the judge planned to do regarding an instruction about the covenants and restrictions. The judge told counsel that he would tell the jury that there was a "right to retrieve" golf balls. Although somewhat unclear, counsel for Indian Pond seemed to ask whether "that [was] all," but did not object. Then, the judge told the jury that "there is an exhibit, which is the covenants and restrictions document which you've heard a lot of testimony about . . . and you can read it to make the determination as to what . . . significance you want to give it." He stated that it provides a right "for golfers to be able to retrieve golf balls from the unimproved portions of the lots," but that "you have to make the determination" regarding "the improved portions of lots." There were no instructions regarding the course operation easement, discussed infra. Indian Pond did not object.

The jury returned a verdict of $100,000 for property damage and $3.4 million for emotional distress. Evidence of emotional distress was from the plaintiffs' testimony. Erik Tenczar testified to the mental exhaustion of worrying about golf ball strikes and his children's safety, and his observations of his

wife's "hopeless[ness]" and his children's fear, stress, and nervousness. Athina Tenczar testified that golf ball strikes interrupted her work calls and woke up her children during naps, describing the golf balls as "scary" and "chaotic." Her expectations of being able to use the outdoor space at her home were unfulfilled. In addition, the jurors saw a video recording (without audio) that Athina recorded on her cell phone, showing her crying while talking to golfers who had just broken a railing on the deck. The court entered judgment on the verdict. In addition, the court enjoined Indian Pond from "operating its golf course in any manner" that allows golf balls to go onto the plaintiffs' improved property.

Indian Pond timely moved for judgment notwithstanding the verdict (judgment n.o.v.), renewing its motion for a directed verdict. It argued that it had reserved an "easement to operate a golf course" via the declaration and amendment, which permitted errant golf balls to enter the plaintiffs' property. In addition, it moved for a new trial (and, in the alternative, for a remittitur of damages), arguing that damages were not supported by the evidence admitted at trial. The court denied all three motions. In denying the motion for judgment n.o.v., the trial judge explained that from "a plain reading of the covenants and restrictions," Indian Pond's easement "extended only to the unimproved portions" of the property.

Indian Pond filed a timely notice of appeal. This court granted Indian Pond's request for direct appellate review.

2. Discussion. Indian Pond argues that the trial judge erred by failing to find that it "reserved the right to operate a golf course in a normal manner on properties adjacent to the golf course," which includes "the right to have errant golf balls enter the lots." Indian Pond contends that the judge incorrectly interpreted the declaration and amendment because he focused only on the ball retrieval easement and did not consider the other covenants or examine attendant circumstances to ascertain the drafter's intent. Indian Pond argues not only that the jury instructions regarding the easement were incorrect but also that its motion for a directed verdict and motion for judgment n.o.v. should have been allowed. In addition, Indian Pond challenges the amount of damages awarded.

The legal rights of the respective parties set out in the declaration and amendment are questions of law, which we review de novo. Martin v. Simmons Props., LLC, 467 Mass. 1, 8 (2014); Trace Constr., Inc. v. Dana Barros Sports Complex, LLC, 459 Mass. 346, 351 (2011). We conclude that the documents grant Indian Pond two relevant easements: one for reasonable operation of the golf course, which includes the flight of errant balls; and another for golfers to retrieve their balls from the unimproved but not improved portions of the plaintiffs'

lot. The trial judge, however, misconstrued the declaration and amendment by instructing only on the ball retrieval easement and not on the easement providing for the reasonable operation of the golf course. Because the result of the trial "might have differed absent the error" in jury instructions, a new trial is required. Blackstone v. Cashman, 448 Mass. 255, 270 (2007).

a. Waiver. Before addressing the jury instruction error, we determine whether, as the plaintiffs argue, Indian Pond waived the issue by failing to object to the instructions ultimately given at trial. We conclude that there was no waiver. A party objecting to a jury instruction must "clearly bring the objection and the grounds for it to the attention of the judge," but this "rule may be satisfied in various ways." Selmark Assocs., Inc. v. Ehrlich, 467 Mass. 525, 547 n.37 (2014), quoting Rotkiewicz v. Sadowsky, 431 Mass. 748, 751 (2000). See Devaney v. Zucchini Gold, LLC, 489 Mass. 514, 523 n.19 (2022) (defendant preserved argument despite failure to make postcharge objection to jury instructions).

Here, the judge was clearly "on notice" of the contested issue and the defendant's position, as the waiver rule requires. Selmark, 467 Mass. at 547 n.37. During its opening remarks, throughout trial, and in multiple motions, the defendant argued that the declaration and amendment gave Indian Pond the right to operate a golf course over the plaintiffs' property in a

reasonable manner. The defendant also repeatedly argued that errant shots are a natural occurrence in the game of golf. The defendant further attempted to explain to the court that the declaration and amendment must be construed in light of attendant circumstances, establishing its right to operate a golf course in a reasonable manner, including errant shots. Although there was confusion on the part of both parties and the judge about what was a question of law for the judge to decide and what were questions of fact for the jury, the clear thrust of the defendant's argument was that the relevant documents and attendant circumstances provided it with a right to reasonably operate a golf course, which, as explained infra, is a correct interpretation of the law that the judge ignored in both his legal interpretation and his instructions to the jury.

The judge ultimately instructed the jury only on the ball retrieval easement, although he referenced the declaration and amendment. Although the defendant did not object to the final instruction, as counsel for Indian Pond candidly disclosed at oral argument, he "had given up" by that point, after having received a number of adverse rulings on the matter throughout the trial. Perceived futility or not, the "better practice" would have been to place on the record a final objection to the instructions. Rotkiewicz, 431 Mass. at 751. Nonetheless, we conclude that the defendant had sufficiently explained and

argued its position that the declaration and amendment (interpreted in light of attendant circumstances) had provided it with the right to reasonable operation of the golf course so as to preserve and not waive its objection when the judge ignored this correct interpretation of the law in his final instructions.

b. Course operation easement. We now turn to the easements that Indian Pond reserved when it sold the residential lots. "An easement is an interest in land which grants to one person the right to use or enjoy land owned by another." Commercial Wharf E. Condominium Ass'n v. Waterfront Parking Corp., 407 Mass. 123, 133 (1990) (Commercial Wharf), S.C., 412 Mass. 309 (1992). "Where an easement is created by deed . . . its meaning, 'derived from the presumed intent of the grantor, is to be ascertained from the words used in the written instrument, construed when necessary in the light of the attendant circumstances.'" Chamberlain v. Badaoui, 95 Mass. App. Ct. 670, 674 (2019), quoting Patterson v. Paul, 448 Mass. 658, 665 (2007). See Sheftel v. Lebel, 44 Mass. App. Ct. 175, 179 (1998).

Paragraph 20 of the 1999 declaration, by its explicit terms, reserved the right of Indian Pond to operate a golf course "on all portions of the land" shown on the plan, "other

than those expressly subjected to [the] [d]eclaration."[10] The only lots "expressly subjected" to the declaration were those forty-eight lots enumerated in the declaration's fourth prefatory paragraph.[11] As the plaintiffs' lot was not among that set, the plain language of the declaration provided that Indian Pond retained an easement to operate its golf course that extended over the plaintiffs' property. Indeed, at that point, prior to the amendment, the lot could essentially be included as part of the golf course itself.

The 2001 amendment reflected changes in the golf course and the subdivision. By this time, the golf course was constructed and in the process of opening, and additional lots were being sold. The amendment applied to sixty-one lots adjacent to and in close proximity to the golf course, including lot 4-80. Instead of essentially being held in reserve to be included as part of the golf course pursuant to paragraph 20 of the original

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[10] Although the language of paragraph 20 does not call the retained right an easement, it plainly describes one. See Commercial Wharf, 407 Mass. at 133-134 (finding easement where "Declaration grants to the developer [and its successors] the right to use a portion of the land owned by [the grantee] for a specific purpose" and noting that "the label placed upon the interest in the Declaration is not controlling").

[11] The specified lots were those that were first developed. Nineteen of them directly abut the golf course, and the other twenty-nine are across Country Club Way.

declaration, they were now being considered "golf course lots" pursuant to an amended paragraph 16.

Consistent with that change, the amendment refined the course operation easement in respect to these abutting lots. It did so by providing that the golf course lots are "subject to" Indian Pond's "right to reserve or grant easements for the benefit of the owner of the golf course [over these lots] for the reasonable and efficient operation and maintenance of the golf course and its facilities in a customary and usual manner."[12] This differed, at least in its extent, from the declaration's paragraph 20, which provided Indian Pond the right "to create, operate and maintain a golf course . . . on all portions of the land," including what was then lot 4-80. This language allowed Indian Pond to operate the golf course on the plaintiffs' lot, which was obviously not possible once the lot was sold. In light of the express language in the amended paragraph 16 and these "attendant circumstances," Patterson, 448 Mass. at 665, we read the amendment to "reserve" paragraph 20's course operation easement in regard to these golf course lots

[12] The amendment also effected a number of other restrictions designed to fine-tune the relationship between the now-operational golf course and the adjacent residential lots. For example, the course retained some control over vegetation on golf course lots, above-ground swimming pools were not allowed on any golf course lots, and owners of golf course lots adjacent to the golf course were not allowed to build in-ground swimming pools.

but to limit its scope to "reasonable" operation of the course in a "customary and usual manner."[13]

Pursuant to amended paragraph 16, lot 4-80 and the other abutting golf course lots were thus subject to the reasonable operation of the golf course. Thus, if the errant shots that hit the plaintiffs' home were the result of reasonable golf course operation, they were within Indian Pond's rights.[14]

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[13] We do not read the "right to reserve" language in paragraph 16 as providing Indian Pond with only an option (a right to create an easement in the future) rather than a right to an easement for the reasonable operation of the golf course. Indian Pond already had provided for an easement to operate a golf course pursuant to paragraph 20, so there was no need for an option to create a right it already had. The last provision in the 2001 amendment also stated that all other terms in the declaration, including paragraph 20, remained in effect. As the easement rights that could be granted pursuant to an option under paragraph 16 were already provided by paragraph 20, this would render the reasonable golf course operation option in paragraph 16 essentially superfluous. Estes v. DeMello, 61 Mass. App. Ct. 638, 642-643 (2004), quoting Jacobs v. United States Fid. & Guar. Co., 417 Mass. 75, 77 (1994) (in interpreting deed, "[a]n interpretation which gives a reasonable meaning to all of the provisions . . . is to be preferred to one which leaves a part useless or inexplicable").

[14] To be sure, an easement where the scope is explicitly defined by "reasonable operation" is atypical. It is more usual to define a specific location for a permitted activity, like a right of way for beach access. See, e.g., Mazzola v. O'Brien, 100 Mass. App. Ct. 424, 427 (2021). However, we interpret an easement to "give effect to the express or implied intent of parties contracting for or acquiring an interest in land." Taylor v. Martha's Vineyard Land Bank Comm'n, 475 Mass. 682, 690 n.17 (2016), quoting Bateman v. Board of Appeals of Georgetown, 56 Mass. App. Ct. 236, 239 (2002). Here, the express intent was to create an easement for reasonable golf course operation.

Although the language used in the relevant provision is the focal point of our inquiry, our interpretation is confirmed by other provisions in the documents and the attendant circumstances. Patterson, 448 Mass. at 665. The declaration provides that "the [d]eveloper[,] in addition to the creation of a residential community[,] intends to create, operate and maintain a golf course with country club facilities on a portion of the subject premises." Via the amendment, the developer expressly reserved other rights over the plaintiffs' property, including the right to remove or add vegetation and to prevent swing sets and play sets, all of which serve and protect its operation of a golf course. See Commercial Wharf, 407 Mass. at 132 ("The remainder of the Declaration is indicative of the developer's intent . . ."). The recorded plan is as described in the declaration, depicting numerous subdivided lots on a road labeled "Country Club Way," with one large parcel in the center, suitable for a golf course. See Reagan v. Brissey, 446 Mass. 452, 459 (2006) (details depicted in plan referenced in deed significant to determination of grantor's intent to create easement).

Indian Pond's course operation easement necessarily extends to some number of errant golf balls going onto the servient property. See Commercial Wharf, 407 Mass. at 138 ("When an easement is created, every right necessary for its enjoyment is

included by implication"). Errant golf balls are a natural and inevitable -- and, thus, "customary and usual" -- part of the game of golf, and that includes golf balls well off the intended line. Despite the best intentions of golfers, mishits are common. See Mazzuchelli v. Nissenbaum, 355 Mass. 788, 788 (1969) ("a golf ball when hit by a club constitutes a peril to anyone within its range in any direction"); Katz v. Gow, 321 Mass. 666, 667 (1947) ("It is common knowledge that a golf ball does not always fly straight toward the intended mark . . ."); Patton v. Weston Country Club Co., 18 Ohio App. 2d 137, 139 (1969) ("It is generally known that the average golfer does not always hit the ball straight"). Errant golf balls are to golf what foul balls and errors are to baseball. They are a natural part of the game. They demonstrate the difficulty and challenge of the sport even for the very best players. Despite practice, instruction, technological improvements, and even good golf course design and operation -- disputed in the instant case -- golf shots go awry, as a matter of course.

Any ambiguity in the scope of this provision is informed by the attendant circumstances. See Commercial Wharf, 407 Mass. at 132 ("To the extent that there remains any doubt [in the interpretation of an easement], we think that the actions of the parties clarify the arrangement"); Chamberlain, 95 Mass. App. Ct. at 674, quoting Patterson, 448 Mass. at 665 (easement is

"construed when necessary in the light of the attendant circumstances"). Any golf course operated in the "customary and usual" manner will result in some errant shots. Neither golfers nor course operators can wholly prevent them, as both experts here testified.

More particularly, the golf course lots, including the lot at issue, were built adjacent to the golf course. As the plaintiffs' contract with Spectrum cautioned them, errant golf balls are the "natural result of residing adjacent to a golf course."

Thus, the declaration and amendment, their context, and the attendant circumstances, including the natural consequences of golf course operation, show that Indian Pond retained an easement for those golf ball intrusions onto plaintiffs' property that resulted from the reasonable operation of the golf course. The jury should therefore have been presented with this easement and instructed according to its terms. Instead, they were instructed only on the ball retrieval easement discussed infra. This was clear error.

c. Ball retrieval easement. Instead of reading the declaration and amendment as a whole, the trial judge ignored the provisions discussed supra and focused exclusively on the ball retrieval easement: "The 'golf course lots' are also subject to . . . [t]he perpetual right and easement for the sole

and exclusive use of providing reasonable foot access for golfers to retrieve errant golf balls on unimproved areas of such lots."

This easement serves a narrower and more specific purpose than the course operation easement discussed supra. It allows golfers to retrieve out-of-bounds balls on unimproved property, while protecting homeowners' enjoyment of their houses and yards. Golfers can enter part of the plaintiffs' property, but not all of it. This balances the golfers' and homeowners' rights, recognizing that golfers will try to retrieve golf balls if they see them, even if the balls are out of bounds. Cf. World Species List -- Natural Features Registry Inst. v. Reading, 75 Mass. App. Ct. 302, 307 (2009), quoting World Species List -- Natural Features Registry Inst. v. Reading, 15 Land Ct. Rep. 606, 609 (2007) (describing easement that "represents a compromise between the desired uses of the easement property -- an open meadow for a view on the one hand and the potential restoration to a natural landscape on the other").

Reading this provision in isolation, the trial judge concluded that this easement alone governed the flight of errant golf balls as well as their retrieval. The judge apparently reasoned that if golfers were permitted to retrieve errant balls only on unimproved portions of the plaintiffs' property, the

errant balls themselves were only permitted there as well. This inference is not reasonable. While golfers can control where they walk to retrieve an errant ball, they cannot control where they hit their errant balls. See, e.g., Mazzuchelli, 355 Mass. at 788; Katz, 321 Mass. at 667. Thus, the dividing line between improved and unimproved portions of the lot makes sense for ball retrieval, but not ball flight.

Reading the documents as a whole, the ball retrieval easement confirms our interpretation of the reasonable course operation easement described supra. Implicitly, the language suggests that balls will go into the improved portions of the lot as well, but that golfers cannot retrieve them there. It is reasonable to retrieve them from the unimproved but not the improved portions of the property. The ball retrieval easement reinforces our understanding of Indian Pond's intent -- that it sought to create a residential subdivision with a golf course as its centerpiece and impose a series of servitudes for the reasonable and efficient operation of a golf course for the benefit of the course and its members, while respecting the rights of the homeowners on the residential lots abutting the course.

The trial judge thus erred in interpreting the ball retrieval easement in isolation and applying it alone to the flight of errant golf balls as well as their retrieval. His

instructions should have also focused on the easement governing the reasonable operation of a golf course, as discussed supra.

d. The failure to give the instruction. Having determined Indian Pond's rights and the legal errors in the jury instructions, we turn to the issue whether the failure to give the instruction was prejudicial. See Blackstone, 448 Mass. at 270, citing Mass. R. Civ. P. 61, 365 Mass. 829 (1974) ("An error in jury instructions is not grounds for setting aside a verdict unless the error was prejudicial -- that is, unless the result might have differed absent the error"). See also Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 118-119 (2000) (analyzing remedy for erroneous jury instructions in terms of prejudice); S. Solomont & Sons Trust, Inc. v. New England Theatres Operating Corp., 326 Mass. 99, 110 (1950) ("substantial rights of the plaintiffs are not injuriously affected if the course taken reaches the inevitable result of the case"). We conclude that the error was prejudicial because the course operation easement was relevant and applicable to the complained-of conduct, including at least some errant shots.

In the instant case, the failure to give an instruction addressing the reasonable course operation easement was clearly prejudicial. The reasonableness of the operation of the fifteenth hole was in dispute, but the jury were not instructed properly on how to decide that question, including how to

evaluate errant shots. Instead, the jury were only instructed about the ball retrieval easement, which was misleading in isolation.

More specifically, the easement at issue allows reasonable but not unreasonable operation of a golf course. The question then becomes whether the operation of the fifteenth hole, including the number of errant shots hitting the plaintiffs' home, was reasonable. The disputed question is not whether golfers will hit errant shots. They will certainly do so. Rather, the question is whether the operation of the fifteenth hole was reasonable, given not only the inevitability of some widely errant shots but also the number of shots hitting the plaintiffs' home. Although a golf course operator cannot reasonably prevent all widely errant shots from hitting a home next to its course, it can reasonably prevent a predictable and steady stream of shots from hitting such a home.

Whether the operation of the fifteenth hole was inside or outside the range of reasonableness was a question for the jury to decide based on proper instruction. This is because "[t]he question of reasonableness is a mixed one of fact and law . . . to be passed upon by the jury, under the direction of the court in matter of law." Fifty Assocs. v. Tudor, 6 Gray 255, 260 (1856) (discussing easement for light and air in city tenement). More particularly, the scope of the easement right at issue,

based on the declaration and amendment, is a question of law, and whether the scope was exceeded is a question of fact. See Johnson v. Kinnicutt, 2 Cush. 153, 157-158 (1848) (whether easement was obstructed "depends on facts, which must first be inquired into and settled by a jury"); FOD, LLC v. White, 99 Mass. App. Ct. 407, 413 (2021) (whether change in development of parcel would overburden easement was question of fact); Tindley v. Department of Envtl. Quality Eng'g, 10 Mass. App. Ct. 623, 628 (1980) ("reasonableness of [easement's] use was a question of fact and created a triable issue which the affidavits did not obviate" [citations omitted]). Thus, the jury should have been instructed to decide whether the course was reasonably operated with respect to the fifteenth hole. See Johnson, supra (determining as matter of law that easement granted "suitable and convenient way," but requiring jury to decide whether it was obstructed). Reasonableness inquiries are well within the wheelhouse of jurors, who decide such questions as a matter of course in negligence cases. See, e.g., Reardon v. Country Club at Coonamessett, Inc., 353 Mass. 702, 704 (1968) (evidence sufficient to permit jury finding that golf course operator failed to exercise reasonable care).

In the instant case, despite the absence of a relevant instruction, this key issue was hotly contested. The golf course architect and the plaintiffs' golf course accident expert

gave directly contradictory testimony. One concluded that the course was designed and operated according to modern golf course standards, and the other contested that determination. In particular, they disagreed about whether the house was inside or outside the safety zone. The plaintiffs' expert also opined that "[t]he basic geometry of the hole, the visual cues off of the tee, and the lack of barriers or other techniques to protect the home meant that the [plaintiffs] were going to experience frequent invasion of golf balls striking their home and landing in their yard." The defendant's expert disagreed, explaining how the wide landing area and placement of the bunkers directed the golfers to aim to the right-side landing area, not to cut the corner, and that a line of trees buffered the plaintiffs' house to some extent.[15]

The reasonableness of the defendant's response to the golf ball strikes was also contested. Although the plaintiffs testified that Indian Pond did not respond to their complaints before they commenced the case, during litigation, the club made several alterations suggested by the course architect to encourage players to hit to the intended area on the right.

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[15] The architect did testify that "the daily mowing patterns had changed" the alignment of the tees with the center line of the hole and that too many trees had been removed from the fairway: "in a perfect world, . . . somebody wouldn't have cleared . . . as many trees as they did along the left side of the fairway."

These changes reduced the number of balls hitting the house from thirty in 2018 to around ten in each of the next three years, and the total number of balls on the property from 130 to around one hundred. The plaintiffs' expert testified that he had no objections to the architect's suggested mitigation measures, but he thought that they "didn't go far enough."

Despite attempts by plaintiffs' counsel to suggest that the number of balls hitting the home alone was enough to determine reasonableness, neither party's expert examined the issue of ball strikes in isolation. The golf course architect rejected "a rule of thumb" regarding ball strikes and testified: "as far as I know, there's nobody in the golf industry that has any sort of standard about what is acceptable and what's unacceptable." The plaintiffs' expert did not opine on the number of acceptable or unacceptable strikes but rather focused on the frequency of ball strikes caused by the house's position inside the safety cone.[16]

In sum, the reasonableness of the golf course operation, including the reasonableness of the number of errant shots hitting the plaintiffs' home, was the subject of significant

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[16] Both experts testified that the elimination of all errant shots is infeasible. The course architect explained: "When you are building a home adjacent to a golf course despite all the best intentions in the world, there's going to be a golf ball in your yard or hitting your house." The plaintiffs' expert agreed, "You may never do [one hundred] percent."

disputed testimony. The jury were not instructed on how to evaluate this testimony, so their verdict cannot stand.

e. The defendant's request for a directed verdict. By the same token, Indian Pond is not entitled to a directed verdict or judgment n.o.v. As discussed in detail supra, there was a disputed issue of fact regarding whether the golf course was reasonably operated with respect to the fifteenth hole. Although some widely errant golf balls are inevitable in the game of golf, we cannot conclude that the number of errant balls hitting the house or the yard was reasonable as a matter of law.

As we have previously cautioned, "this court cannot assume the function of a Robert Trent Jones" and decide on our own the proper standards of golf course design and operation in the face of disputed expert testimony. Fenton v. Quaboag Country Club, Inc., 353 Mass. 534, 539 (1968). Because the jury were improperly instructed, and there is a disputed factual question regarding the reasonableness of the operation of the fifteenth hole, given the number of errant shots hitting the plaintiffs' home, a new trial is required.

f. The golf cases. Finally, we briefly address the other golf cases cited by the parties and conclude that they are readily distinguishable. The two Massachusetts cases cited by the plaintiffs, Fenton and Amaral, involved golf courses abutting neighboring homes, but the homes were not part of

golfing communities or subject to easements allowing the operation of the golf course. See Fenton, 353 Mass. at 538 (finding errant balls to be trespass in absence of any easement permitting intrusion); Amaral v. Cuppels, 64 Mass. App. Ct. 85, 91 (2005) (same). As the Appeals Court in Amaral explained, "To the extent that the ordinary use of the defendants' golf course requires land beyond the course boundaries to accommodate the travel of errant shots, it is incumbent on the defendants to acquire either the fee in the additional land itself, or the right to use the additional land for that purpose." Amaral, supra. Here, Indian Pond reserved an easement providing for the reasonable operation of a golf course. Unfortunately, the jury were not instructed regarding this easement.

The Georgia case relied on by the defendant is also distinguishable on its face. In that case, the easement expressly permitted "golf balls unintentionally to come upon [each] Lot" and provided that "[u]nder no circumstances shall the . . . Golf Course Owner . . . be held liable for any damage or injury resulting from errant golf balls or the exercise of these easements." DeSarno v. Jam Golf Mgt., LLC, 295 Ga. App. 70, 71 (2008). We have no such express, wide-ranging language regarding errant golf balls here. There is no express easement addressing and allowing errant golf balls or one protecting the

golf course owner from any damage or injury resulting from the errant golf balls.

Thus, in the instant case, we are presented with an undecided issue. We have a home subject to an easement providing for the "reasonable and efficient operation" of a golf course in the "customary and usual manner," and a disputed question not presented to the jury: whether the operation met that standard, given the number of errant shots hitting the home.

3. Conclusion. The judgment of the Superior Court, including the permanent injunction, is vacated, the verdict is set aside, and the case is remanded for a new trial.[17] If the

[17] As we are setting aside the jury verdict, we need not consider the defendant's arguments that the jury's award of $3.4 million for emotional damages was excessive. However, we do note that the plaintiffs provided mostly general and often metaphorical accounts of their emotional harm ("a nightmare," "a living hell," and so forth) and no specific evidence of physical symptoms, diagnosis, treatment, or other expert testimony on the matter. At least in the context of discrimination cases, we have not required proof of "physical injury or psychiatric consultation" to sustain "an award of emotional distress damages." Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997), quoting Buckley Nursing Home, Inc. v. Massachusetts Comm'n Against Discrimination, 20 Mass. App. Ct. 172, 182 (1985). However, the amount of the verdict must still be supported by the evidence. See DaPrato v. Massachusetts Water Resources Auth., 482 Mass. 375, 393 (2019), quoting Labonte, supra ("It is an error of law for a court to allow an award of damages for emotional distress that is 'greatly disproportionate to the injury proven or represented a miscarriage of justice'"). See, e.g., Labonte, supra at 824-825 (requiring remittitur of award of $550,000 in emotional damages where plaintiff sought treatment for depression after discriminatory firing, but

case is retried to a jury, the jury shall be instructed on the easements as a whole, and not on the ball retrieval easement alone, as it was in this case. This will require the jury to determine whether the easement allowing for "the reasonable and efficient operation and maintenance of the golf course and its facilities in a customary and usual manner" encompassed the particular operation of the fifteenth hole, including the inevitable errant shots that golfers hit while playing the hole.

So ordered.

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subsequently improved). See also Fenton, 353 Mass. at 539 (upholding $2,650 in damages for emotional harm caused by trespass of errant golf balls for over ten years).