ROBERT J. MCGUIRE	*	**NO. 2001-CA-0307**
VERSUS	*	**COURT OF APPEAL**
NEW ORLEANS CITY PARK IMPROVEMENT	*	**FOURTH CIRCUIT**
ASSOCIATION AND ABC INSURANCE COMPANY	*	**STATE OF LOUISIANA**
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 94-16491, DIVISION "I"
Honorable Kim M. Boyle, Judge Pro Tempore
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JOAN BERNARD ARMSTRONG

JUDGE
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(Court composed of Judge Joan Bernard Armstrong, Judge James F. McKay, III and Judge David S. Gorbaty)

GORBATY, J., DISSENTS, WITH REASONS.

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AFFIRMED.

This is a personal injury case. The plaintiff, Robert McGuire, was injured while jogging near a golf course in City Park in New Orleans when he was hit in the testicle by a golf ball driven from a nearby tee. He sued New Orleans City Park Improvement Association, which operates the golf course. The jury found the defendant negligent, the plaintiff comparatively at fault, and assessed the fault 40% to the defendant and 60% to the plaintiff. The defendant appeals and argues on appeal (1) that it was not negligent at all and (2) that the jury was clearly wrong-manifestly erroneous in awarding any damages for disfigurement. Because we find no error as to those two issues, we will affirm the judgment of the trial court. The plaintiff argues that the jury was clearly wrong-manifestly erroneous in finding him comparatively at fault. However, because the plaintiff neither appealed nor answered the defendant's appeal, we will not address the issue of the plaintiff's comparative fault.

Previously in this action, there was an appeal from a summary judgment which had been granted by the trial court in favor of the defendant. In that prior appeal, this court reversed that summary judgment and

remanded for further proceedings. A copy of the opinion ("McGuire I") in that prior appeal, which was unpublished, is attached hereto as an appendix because its rulings on issues of law are now the law of the case in this action, see, e.g., Pitre v. Louisiana Tech University, 95-1466 (La. 05/10/96), 673 So.2d 585, 589, and that opinion gives an overview of the facts of the case.

The defendant argues that, while the injury was foreseeable, its actions were reasonable in that it acted with reasonable care under the circumstances. Specifically, the defendant argues that it should have been obvious to the plaintiff that the road upon which he was jogging, Palm Drive, went through a golf course and that the plaintiff should have been aware of the possibility of being hit by a golf ball. Thus, the defendant argues, the plaintiff "assumed the risk involved with jogging on or near a golf course". Consequently, the defendant's argument continues, it had no duty to the plaintiff to take precautions such as placing warning signs, erecting barriers to keep stray golf shots off of the road or configuring the golf course differently. We disagree with the defendant's arguments for three reasons.

First, the cases relied upon by the defendant involve golfers injured

while playing golf or taking golf lessons and while on a golf course or driving range. See Crovetto v. New Orleans City Park Imrovement Ass'n, 94-1735 (La. App. 4 Cir. 03/29/95), 653 So.2d 752 (golfer hit by golf club at driving range); Baker v Thibodaux, 470 So.2d 245 (La. App. 4th Cir. 1985) (golfer on golf course hit by golf ball); Petrich v. New Orleans City Park Improvement Ass'n., 188 So. 199 (La. App. Orl. 1939) (golfer on golf course hit by golf ball). In the present case, the plaintiff was not a golfer and was not on the golf course. The limitations on the duties of golf course operators to those who are playing golf and on the golf course (or driving range) are not applicable to someone who is not even on the golf course much less playing golf.

Thus, the duty of the defendant, to a passer-by not playing golf and not on the golf course, is to exercise reasonable and ordinary care to keep the premises reasonably safe. E.g., Sutter v. Audubon Park Comm'n, 533 So.2d 1226 (La. App. 4th Cir. 1988), writ denied, 538 So.2d 597 (La. 1989). See also Mc Guire I, supra. This includes a duty to take reasonable precautions, e.g., warning signs, barriers or golf course configuration, against golf balls hitting non-golfers who are near but not on the golf course. See McGuire I,

supra (collecting cases from other jurisdictions). See generally Pitre, 673 So.2d at 590 ("A landowner owes a plaintiff a duty to discover any unreasonable dangerous condition and to either correct the condition or warn of its existence.")

Second, assumption of the risk as an absolute defense is no longer viable E.g., Joseph v. Broussard Rice Mill, Inc., 00-0628 (La. 10/30/00), 772 So.2d 94, 99. Instead, the defense of assumption of the risk is now "subsumed by comparative fault principles". Id. This brings us to our third and final reason for disagreeing with the defendant's liability argument. The defendant's argument focuses as much on the fault of the plaintiff as it does on the duty of the defendant. The fault of the defendant was taken into account by the jury when it assessed 60% comparative fault to the plaintiff. The defendant is arguing, in effect, that the plaintiff exercised such lack of care for his own safety that the jury erred in not assessing the plaintiff with 100% fault. The jury is accorded great deference in its allocation of comparative fault and its determination will not be disturbed unless it is clearly wrong-manifestly erroneous. E.g., Dupree v. City of New Orleans, 99-3651 (La. 08/31/00), 765 so.2d 1002, 1014-15. Considering the multiple

factors to be considered in assessing comparative fault, id., and the factual record below, we cannot say that the jury's allocation of fault was clearly wrong-manifestly erroneous.

The defendant's second argument on appeal is that it was error for the plaintiff to be awarded any amount for disfigurement (he was awarded $16,250.) "without corroborating evidence". The defendant elaborates by arguing that the plaintiff "never corroborated that [disfigurement] claim with any evidence other than his own testimony". The defendant cites no legal authority for the proposition that the plaintiff's own testimony, if found credible by the jury, is insufficient in itself to prove a claim of disfigurement. It is true that the plaintiff is not a medical expert, but he is capable of looking at his own scrotum and testicle and testifying to their appearance after the accident and resulting surgery. In any case, the medical record in evidence reflects that, as a result of the accident, half of the right testicle was removed. That is disfigurement.

For the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED.