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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A25-1260**

Susan Neegard,
Appellant,

vs.

Valley Golf Association,
Respondent.

**Filed May 4, 2026
Reversed and remanded
Bratvold, Judge
Dissenting, Ross, Judge**

Polk County District Court
File No. 60-CV-24-490

Michael T. Andrews, ABST Law, Fargo, North Dakota (for appellant)

Christopher A. Wills, RGP Law, Ltd., St. Cloud, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Bratvold, Judge; and Florey,
Judge.*

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

Appellant's home sits on a lot abutting a golf course operated by respondent.
Appellant's complaint alleges property damage from golf balls hitting her home. After

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

discovery, appellant moved to amend her complaint to add a claim for punitive damages. Respondent moved for summary judgment, arguing mainly that appellant's claims were barred by express and implied primary assumption of the risk. The district court granted summary judgment and dismissed with prejudice appellant's negligence, nuisance, and trespass claims. Having dismissed appellant's claims, the district court also denied appellant's motion to amend the complaint to add a punitive-damages claim.

Appellant seeks review and contends that the district court erred in granting summary judgment. Appellant argues, based on disputed evidence, that a jury must determine whether respondent increased the risk of damage from golf balls hitting her property. Appellant also argues that the district court erred by denying her motion to add punitive damages.

Because the evidence submitted on summary judgment raised genuine issues of material fact, we reverse summary judgment and remand appellant's claims for trial. Because the district court did not consider the merits of appellant's motion to add punitive damages, we reverse the order denying appellant's motion to add punitive damages and remand for proceedings consistent with this opinion.

FACTS

The following summarizes the facts presented to the district court at summary judgment in a light favorable to appellant Susan Neegard as the nonmoving party.

Background on Neegard's Home and the Golf Course

Neegard bought a lot in East Grand Forks in 2014 and was the first owner of one half of a twin home on that lot. Neegard's lot abuts the Valley Golf Course (golf course),

which is operated by respondent Valley Golf Association (association), a Minnesota nonprofit corporation.

Neegard's home is part of the Waters Edge, Third Addition. The City of East Grand Forks initially owned this property and prepared the "declaration of restrictive covenants" (declaration) stating that the covenants would "run[] with the land when conveyed or deeded." Among other things, the declaration includes an easement "to permit the doing of every act necessary and proper to the playing of golf on the golf course adjacent to the lots of the subdivision which abut the golf course." At the time she closed on her lot, Neegard signed an "addendum to purchase agreement" that states "[b]uyer has received and reviewed bylaws, covenants, and restrictions." Neegard agreed in her deposition that she saw the declaration before she bought her house.¹

Neegard's property abuts the ninth hole of the golf course. The golf course was initially built in the 1970s. Following flood damage to the golf course, the association built the section of the course that includes the ninth hole that is at issue in this appeal. The ninth hole is par four and has a dog-leg left that plays close to 400 yards from the tee along the two fairway segments. Neegard's house sits on the hypotenuse between the tee box and the

¹ The City of East Grand Forks is not a party. Neegard does not dispute that the association may enforce the relevant provisions of the declaration at issue in this appeal.

ninth-hole green. The association's summary-judgment memorandum included an annotated image of the ninth hole and Neegard's property:



In March 2024, Neegard sued the association; her complaint alleges that golf balls hitting her home's roof and siding have damaged her property. The complaint also alleges that the association operates the ninth hole "in an unreasonable manner by facilitating numerous golf balls to enter onto, strike, or damage" her property and that the frequent golf-ball hits interfere with her "use and enjoyment" of her property and disturb her "right to exclusively possess her land."² The complaint seeks relief, including monetary damages, based on claims of negligence, nuisance, and trespass.

² While Neegard's complaint also alleges that golfers have repeatedly trespassed on her property while recovering balls, she appears to have abandoned this as a theory of liability against the association. On appeal, Neegard has pursued no relief related to the golfer-entry theory.

Following discovery, Neegard moved to amend the complaint to assert a claim for punitive damages. The association moved for summary judgment on all claims and opposed Neegard's motion to amend the complaint. Neegard opposed summary judgment, submitting evidence.

Neegard's Evidence About Golf-Ball Damage Complaints

Among other evidence, Neegard relied on letters sent to the association, including one written in August 2015 in which she complained that golf balls were damaging her "home due to golfers deliberately cutting the corner from the tee box to the green on hole #9." In 2016, Neegard's neighbors, who occupied the other half of Neegard's twin home, wrote to the association, stating that they were "having a significant problem with errant golf balls . . . hitting our properties." Golf balls were "hitting the building on a regular basis and causing significant damage."

In 2016, the association planted trees between Neegard's lot and the ninth hole, allowed grass to grow between the trees and Neegard's lot, placed out-of-bounds stakes on the cart path, and placed ropes near the grass between the trees and Neegard's lot. According to Neegard, golf-ball damage to her home continued.

In 2020, Neegard's next-door neighbors again wrote to the association, stating that they had experienced nearly being hit by golf balls, that many balls had landed on Neegard's lot, and that one ball recently hit the twin home and caused significant damage. The letter also stated, "We are pretty much prevented from using our patios or back yards for a large majority of the time." In August 2023, Neegard wrote to the association, again complaining of damage from golf balls hitting her home.

Neegard's Expert Report

Neegard also filed in district court a report written by her expert, a professional golfer with experience working for golf courses in Moorhead and Fargo; both courses were “positioned near homes,” and the expert “navigate[d] similar situations” involving golf-ball damage to homes. The report opined on “the factors contributing to the situation where property is damaged by golf balls [based on its position] next to hole #9 at Valley Golf Course.” The report stated that the expert considered “data from golf driving statistics,” applied it to the ninth hole, and recommended “[f]easible and effective remedies . . . to reduce the number of balls causing damage.”

The report described the ninth hole as “a severe ‘dogleg’ design resulting in almost a 90-degree angle at just 225 yards off the main teeing location.” The report also commented, “The hole plays close to 400 yards as designed but [plays] just 320 yards . . . if a player cuts the corner and plays the hole ‘as the crow flies.’” The report concluded that this design creates an “incentive to cut the corner.” Along with the design issue, the report identified “advances in equipment leading to greater distances[] and the reduction of golfers keeping an individual official score” as factors creating “an abnormal situation beyond what we normally encounter with golfers and homes on golf courses.” Based on the ninth hole’s design and data on average tee shots aimed at the green, the report estimated that “at least 10% of all right-handed tee shots aimed at the green fly in the direction of the [Neegard] home.” When left-handed golfers are included, the same percentage “would likely approach 15%.”

The report concluded that the ninth hole “is a flawed design resulting in an abnormal number of balls hitting adjacent property when compared to other golf holes designed near housing.” The report also opined that efforts to mitigate golf-ball damage related to the ninth hole would “effectively eliminate” or “at the very least significantly reduce the probability of a ball leaving the [golf] course boundary.” The report recommended mitigating with additional fencing or netting, planting additional trees, or relocating the ninth-hole “teeing area to straighten the golf hole, removing the incentive to cut the corner.”

Neegard’s Deposition Evidence

Neegard’s opposition memoranda also referred to deposition testimony by the association’s former general manager, current general manager, and chair of its board of directors. The former general manager acknowledged receiving a letter in 2016 from Neegard and her next-door neighbors complaining about golf-ball damage.

In his testimony, the current general manager agreed that it is “more dangerous” to live in Neegard’s house than in other homes on the golf course and that golfers “attempt to cut the corner” on the ninth hole. The current general manager also testified that the association was “well aware” of Neegard’s complaints of damage to her property.

During the board chair’s testimony, he agreed that, based on “common sense,” the frequency of golf balls hitting Neegard’s house is not “normal.” The board chair agreed that the “board of directors at least knew about this issue.” The board chair also agreed that, in response to Neegard’s complaints, the association “planted large trees next to Ms. Neegard’s property”; “allowed grass to grow”; “placed out-of-bound stakes just left of the

cart path”; and “placed ropes near the cart path.” The board chair acknowledged that the association took these steps “to prevent golfers from trying to cut the corner and drive the green.” The board chair agreed that Neegard’s problem persisted after these steps were taken.

The District Court’s Decision

After a hearing, the district court granted the association’s motion for summary judgment and dismissed all claims with prejudice. The district court determined that Neegard expressly and impliedly assumed the risk of golf balls on her property, barring her negligence claim; that interference with her property arose from activities “specifically addressed” in the declaration, preventing her nuisance claim; and that the declaration expressly permits golf balls to enter Neegard’s property, defeating the trespass claim. The district court also denied Neegard’s motion to amend her complaint to add a punitive-damages claim without considering the evidence submitted in support.

This appeal follows.

DECISION

A district court “shall grant summary judgment if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.” Minn. R. Civ. P. 56.01. The moving party has “the burden of showing an absence of factual issues,” and “the nonmoving party has the benefit of that view of the evidence most favorable to him.” *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017) (quotations omitted). “All doubts and factual inferences must be resolved against the moving party.” *Id.* (quotation omitted). To survive summary judgment, a “party need not

show *substantial evidence*.” *Schroeder v. St. Louis County*, 708 N.W.2d 497, 507 (Minn. 2006). Summary judgment “is inappropriate if the nonmoving party has the burden of proof on an issue and presents *sufficient evidence* to permit reasonable persons to draw different conclusions.” *Id.*

Appellate courts review a “grant of summary judgment de novo to determine whether there are genuine issues of material fact and whether the district court erred in its application of the law.” *Montemayor*, 898 N.W.2d at 628 (quotation omitted). Summary judgment is a “blunt instrument” and “should not be granted when reasonable persons could draw different conclusions from the evidence presented.” *Staub v. Myrtle Lake Resort, LLC*, 964 N.W.2d 613, 620 (Minn. 2021) (quotation omitted). “[W]eighing the evidence and assessing credibility on summary judgment is error.” *Jepsen v. County of Pope*, 966 N.W.2d 472, 492 (Minn. 2021) (quotation omitted).

We first consider whether summary judgment was appropriate because Neegard expressly assumed the risk of the hazard of golf-ball damage from the proximity of her lot to the golf course. Second, we analyze the parties’ arguments about whether summary judgment was appropriate based on the doctrine of implied primary assumption of the risk. Third, we examine whether the district court’s summary-judgment decision relied on additional grounds and determine whether those grounds support the decision to dismiss Neegard’s claims based on negligence, nuisance, and trespass. We conclude by turning to Neegard’s motion to amend her complaint to add punitive damages.

- I. Neegard expressly assumed the risk of “usual and normal hazards” due to golf-ball flight over and upon her property, but Neegard also presented evidence that the association was responsible for “abnormal hazards” that damaged her property; therefore, summary judgment was inappropriate.**

Neegard argues that the district court erred by concluding that she expressly assumed the risk of golf-ball damage. The relevant language of the declaration grants an easement “to permit the doing of every act necessary and proper to the playing of golf on the golf course adjacent to the Lots of the subdivision which abut the golf course.” The easement identifies permitted uses but also states these uses are not exclusive, and a catch-all phrase authorizes “common and usual activity”:

These acts shall include, *but not be limited to*, the recovery of golf balls within ten (10) feet of the lot line common to the golf course, *the flight of golf balls over and upon the Lots*, the use of necessary and usual equipment upon the golf course, the usual and common noise level created by playing the game of golf, *together with all other common and usual activity associated with the game of golf* and with all the normal and usual activities associated with the operation of a golf course.

(Emphasis added.) The same paragraph continues by the lot owner acknowledging the dangers inherent in a lot’s proximity to the golf course and assuming the risks of “usual and normal hazards”:

The owner of any Lot or the heirs, successors and assigns of such owner by accepting conveyance of a Lot acknowledges dangers inherent to persons and property posed by the proximity of a Lot to the golf course in the subdivision. By accepting conveyance of a Lot abutting the golf course the owner of such Lot assumes the risk of usual and normal hazards to abutting Lot owners by proximity to the golf course

(Emphasis added.)

The declaration therefore unambiguously provides an easement for “every act *necessary and proper* to the playing of golf on the golf course adjacent to the Lots” that abut the golf course. (Emphasis added.) Those acts “shall include but not be limited to,” among other things, “the flight of golf balls over and upon the Lots” in addition to “all other *common and usual activity* associated with the game of golf.” (Emphasis added.) Before applying this language to Neegard’s evidence,³ we recognize that an easement is “an interest in land possessed by another which entitles the grantee of the interest to a limited use or enjoyment of that land.” *Larson v. State*, 790 N.W.2d 700, 704 (Minn. 2010) (quotation omitted). An easement is interpreted the same way as a contract. *See Lindberg v. Fasching*, 667 N.W.2d 481, 487 (Minn. App. 2003) (stating that an “express grant creating [an] easement is a contract” and applying contract principles to interpret an easement), *rev. denied* (Minn. Nov. 18, 2003). If the terms of a contract are unambiguous, the language “must be given its plain and ordinary meaning.” *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346-47 (Minn. 2003) (quotation omitted).

The district court first determined that the easement unambiguously permits, among other things, the flight of golf balls over and upon Neegard’s property. The district court also concluded that the declaration put the owner “on notice” because it addresses the “dangers inherent to persons and property posed by the proximity” of the lot to the golf course and states that the owner “assumes the risk of usual and normal hazards to abutting

³ In support of their arguments on this issue, both parties rely on caselaw discussing how to interpret restrictive covenants. Because the relevant provision of the declaration states that it is an easement and the language permits uses of Neegard’s property in the game of golf and operation of the golf course, we apply caselaw interpreting easements.

lot owners by proximity to the golf course.” The district court concluded that Neegard “expressly assumed the risk of usual and normal hazards to abutting Lot owners by proximity to the golf course, based on the plain language” of the declaration.

Before analyzing the parties’ arguments, we first observe that the district court’s summary-judgment decision does not state whether express assumption of the risk eliminates all or only some of Neegard’s claims. The parties appear to assume that the district court applied express assumption of the risk to preclude all of Neegard’s claims, so we will likewise consider its application to all claims.

Neegard does not dispute that the declaration—along with the easement and assumption-of-the-risk provisions—applies to her property. Neegard briefly contends that the district court erred because the relevant language in the declaration is ambiguous. “The language of a contract is ambiguous if it is susceptible to two or more reasonable interpretations.” *Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 582 (Minn. 2010). But Neegard does not identify two or more reasonable interpretations of the relevant provisions, so we do not consider this argument further.

The association argues that the declaration is unambiguous but focuses on the easement. The association contends that, while the drafter of the easement “intended equipment and noise to be subject to the necessary, usual, and common restrictions, no such restriction was intended” for the flight of golf balls over and upon the property. We understand the association to argue that golf-ball flight need not be “necessary and proper” or a “common or usual activity” to be a permitted use. This argument is not persuasive for two reasons.

First, it is not a reasonable interpretation of the easement, which must be read in its entirety to give effect to all of its provisions. *See Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998) (“We read contract terms in the context of the entire contract and . . . interpret a contract in such a way as to give meaning to all of its provisions.” (citation omitted)). When the easement is read in its entirety, it unambiguously provides that a permitted use must be “*necessary and proper* to the playing of golf.” (Emphasis added.) Golf-ball flight “over and upon” the lots abutting the golf course is a permitted use, as is “all other *common and usual* activity associated with the game of golf.” (Emphasis added.) Thus, the easement identifies golf-ball flight over and upon abutting properties as a “necessary and proper” permitted use, along with other “common and usual” activity. As a catch-all phrase in a list of associated words, “common and usual” is read together with identified permitted uses in the declaration. *See Peterson v. City of Minneapolis*, 892 N.W.2d 824, 829 (Minn. 2017) (“[W]hen context suggests that a group of words have something in common, each word should be ascribed a meaning that is consistent with its accompanying words.” (quotation omitted)).

Second, the easement on which the association focuses does not address what damages, risks, or hazards are assumed by the lot owner. Without language in the declaration that provides certain risks are assumed, we would turn to the common law, which provides that an easement holder “must exercise” the right to use the easement “reasonably, without doing unnecessary injury” to the servient landowner’s “property or business.” *Giles v. Luker*, 9 N.W.2d 716, 718 (Minn. 1943). Caselaw has recognized that a “separate agreement” may govern the easement holder’s responsibility for damages. *See*

Matter v. Nelson, 478 N.W.2d 211, 214 n.1 (Minn. App. 1991) (stating that, under the common law, an easement holder is “responsible for any damage resulting from a failure to maintain or repair an easement, absent any separate agreement”); *see also Bergh & Misson Farms, Inc. v. Great Lakes Transmission Co.*, 565 N.W.2d 23, 26-27 (Minn. 1997) (discussing an easement holder’s liability for damages based on an agreement between the parties).

In short, while the association has an easement for the flight of golf balls over and upon Neegard’s lot, the common law provides that the easement itself does not foreclose a damage claim based on unreasonable or negligent use—absent separate language related to damages. In this case, the declaration includes separate language—the express assumption of the risk by abutting lot owners.

We therefore turn to the separate language in the declaration, which provides that an abutting lot owner “assumes the risk of usual and normal hazards . . . by proximity to the golf course.” This is the language on which the district court relied to grant summary judgment. Neither party contends that the assumed-risk language is ambiguous, and we conclude it is unambiguous.

Neegard contends that the district court determined “as a matter of law” that the damage to her property is due to “usual and normal hazards,” and that “this is not a disputed fact based upon the evidence in the record.” Neegard argues that this was error because her expert report is “sufficient to create a genuine issue of material fact” on whether the golf-ball damage to her property is a usual and normal hazard. She notes that the district court’s decision does not discuss the expert report, which opines “that Hole 9

is an *abnormal and unusual* situation beyond what is normally encountered by homeowners of lots abutting a golf course.”

The association responds that the expert’s opinion about an “abnormal number of balls” hitting Neegard’s property does not quantify “how many balls are hitting her property” or “how many golf balls normally hit a home on a golf course.” These may be points on which to cross-examine Neegard’s expert, but they are not dispositive of the summary-judgment issue. We view the report in a light favorable to Neegard, as we must on summary judgment. *See Montemayor*, 898 N.W.2d at 628. “Expert testimony at the summary judgment stage may create genuine issues of fact.” *Id.* (quotation omitted). We conclude that it does so here.

Neegard’s expert report not only states that the ninth hole “is a flawed design resulting in an abnormal number of balls hitting adjacent property when compared to other golf holes designed near housing,” but it also gives reasons for this conclusion. The report cites specific details about the layout of the ninth hole, “advances in equipment” that allow players to hit greater distances, a “higher number of left-handed players compared to other areas of the country” that “contribute[s] to the number of balls out of the field of play to the left,” and the “less formal trend in playing the game” that leads players to use “scramble formats” in which the score is not reduced by an out-of-bounds ball.⁴

⁴ The association argues that the ninth hole was built in 2003 and that it is “unclear” from the expert report “how the designer of the hole should have anticipated changes in how golf is being played . . . or homes being built by a developer 11 years later.” Again, these may be topics for cross-examination or jury argument but do not compel summary judgment. As the supreme court has explained, the association, as the moving party, has

Neegard also refers to the depositions of the association’s current and former general managers as well as its board president. These witnesses acknowledged that the amount of golf-ball hits to Neegard’s property is not “normal” and that her property’s location on the golf course is “more dangerous” than other abutting lots. The association responds by arguing that, when the testimony is read in context, the witnesses qualify or explain these statements with other testimony. But we will not weigh the evidence or determine witness credibility on summary judgment. *See Henry v. Indep. Sch. Dist. #625*, 988 N.W.2d 868, 880 (Minn. 2023) (stating that courts “do not weigh evidence or assess credibility at the summary judgment stage”).

We conclude that Neegard produced evidence that created a genuine issue of material fact about whether the repeated golf-ball damage to her home was abnormal or a “usual and normal hazard” based on the lot’s “proximity to the golf course.” As a result, whether Neegard expressly assumed the risk of the precise hazard that occurred here is a question of fact and the district court erred in granting summary judgment based on this issue.

II. Neegard’s negligence and nuisance claims are not barred by the doctrine of implied primary assumption of the risk as a matter of law.

We first discuss Minnesota law on implied primary assumption of the risk generally, then analyze caselaw applying the doctrine to golf-course injury claims, and finally consider caselaw establishing that, even when implied primary assumption of the risk

the burden to prove the facts are undisputed on the issue for which it seeks summary judgment. *See Schroeder*, 708 N.W.2d at 507.

applies to a sporting activity, the proprietor or operator of the venue may be liable in negligence.

The doctrine of implied primary assumption of risk provides that, when plaintiff and defendant “have voluntarily entered a [noncontractual] relationship in which plaintiff assumes well-known, incidental risks,” the doctrine “completely bars a plaintiff’s claim because it negates the defendant’s duty of care to the plaintiff.” *Soderberg v. Anderson*, 922 N.W.2d 200, 203 (Minn. 2019) (quotations omitted). “The doctrine of primary assumption of risk is part of our common law.” *Id.* at 202. In contrast, “[s]econdary assumption of risk is an aspect of contributory negligence, and is part of the calculation of comparative fault.” *Id.* at 203 (quotation omitted). Unlike secondary assumption of the risk, primary assumption of the risk is not an affirmative defense and applies “only in limited circumstances.” *Id.*⁵

The Minnesota Supreme Court has applied the doctrine of implied primary assumption of the risk to “inherently dangerous sporting events in which participants,” including spectators, “assume the risks inherent in the sport.” *Id.* at 203-04 (quotation omitted) (summarizing caselaw applying implied primary assumption of the risk to damage claims involving flying baseballs, flying hockey pucks, on-ice collisions in recreational figure skating, and spectator injuries from flying golf balls). But the supreme court stated

⁵ Neegard contends that any argument about her secondary assumption of the risk must be “submitted for determination to the factfinder.” We need not consider this argument because the application of secondary assumption of the risk is not before us. The district court discussed caselaw on secondary assumption of the risk but based its summary-judgment decision on express and implied primary assumption of the risk.

that it is “loathe to extend the doctrine of implied primary assumption” of the risk to additional activities.⁶ *Id.* at 205 (declining to extend primary assumption of the risk to recreational downhill skiing and snowboarding).

Primary assumption of the risk applies to golf-ball injuries in certain contexts. The supreme court has recognized that a spectator at a golf course assumes the risk of “the inherent dangers of the sport” when observing from an unprotected area; the course operator’s “only duty” is to provide a spectator “with a reasonable opportunity to view” the game “from a safe area.” *Grisim v. Tapemark Charity Pro-Am Golf Tournament*, 415 N.W.2d 874, 875 (Minn. 1987).⁷ This is similar to caselaw about the inherent risks assumed by a ballpark spectator. *See Aldes by Aldes v. Saint Paul Ball Club, Inc.*, 88 N.W.2d 94, 96-97 (Minn. 1958) (“Normally, the management’s duty to protect its patrons from thrown or batted balls ceases when it offers the spectators a choice between screened-in or open seats unless some reason exists requiring a fuller explanation of the perils involved.”).

⁶ The supreme court noted in *Soderberg* that “the nationwide trend has been toward the abolition or limitation of the common-law doctrine of implied primary assumption of risk.” *Id.* (collecting cases from other jurisdictions).

⁷ In *Grisim*, the supreme court upheld a district court’s decision to grant summary judgment in favor of a golfer for injuries to a golf-tournament spectator, concluding that the claim was “barred by the primary assumption of risk doctrine.” *Id.* The supreme court did not review the court of appeals decision to remand the spectator’s claims against the golf course for the jury to determine whether the golf course provided the spectator with “adequate protection.” *Id.*; *see also Grisim v. TapeMark Charity Pro-Am Golf Tournament*, 394 N.W.2d 261 (Minn. App. 1986), *rev’d in part*, 415 N.W.2d 874 (Minn. 1987).

But primary assumption of the risk does not bar all negligence claims against the operator or proprietor of a sports venue with inherent risks. On top of being required to provide a safe viewing area, the operator of a sports venue involving inherent risks may be liable for breach of a duty to “safely supervise . . . activities or to maintain the premises in a safe condition.” *Wagner v. Thomas J. Obert Enters.*, 396 N.W.2d 223, 226, 229 (Minn. 1986) (applying this standard to the proprietor of a roller-skating rink and affirming jury verdict of no negligence). And a spectator at a baseball game does not assume risks “arising from the proprietor’s negligence” in providing a safe viewing area. *Aldes*, 88 N.W.2d at 97.

Also, the sports-venue proprietor “may be negligent toward” a patron “by increasing the dangers to which [the patron] is ordinarily exposed and the negligent party will be liable for any injuries which are the natural and probable consequences of those acts.” *Id.* at 96; *see also Wells v. Minneapolis Baseball & Athletic Ass’n*, 142 N.W. 706, 707-09 (Minn. 1913) (ordering a new trial on an injured spectator’s negligence claim that the ballpark operator did not provide “a screen of sufficient size to give protection” and holding that the precautions the operator “should take to warn and protect” spectators from inherent dangers is “a question for the jury”). In sum, Minnesota has curtailed the application of primary assumption of the risk when a plaintiff presents evidence of the operator’s negligent supervision, maintenance, and other acts that increase the inherent risks a spectator assumes from flying balls.

With this background in mind, we consider the district court’s application of implied primary assumption of the risk to Neegard’s negligence and nuisance claims. The district

court determined that Neegard “impliedly assumed the well-known incidental risk that golfers and/or golf balls would enter her Property and her home would be hit by golf balls.”⁸ But the district court also recognized that “negligent maintenance and supervision of an inherently dangerous sporting event are not inherent risks of the sport itself,” citing *Soderberg*, 922 N.W.2d at 204. The district court granted summary judgment for the association after concluding that “there is no evidence” that the golf course was “designed or maintained so as to *increase* the assumed risks” to Neegard beyond “those inherent in the sport of golf.”

First, we observe that, even though no Minnesota appellate court has decided the issue, the parties and the district court assumed that implied primary assumption of the risk applies to the owner of a lot abutting a golf course. Neither party challenges this assumption

⁸ The district court cited no Minnesota law on this point and relied on an unpublished decision of the California Court of Appeals determining that the appellant, who occupied a home next to a golf course, impliedly assumed the risks analogous to those assumed by a golf spectator. *See Hernandez v. Ong*, No. D038200, 2002 WL 266864, at *4 (Cal. Ct. App. Feb. 26, 2002). The California Court of Appeals affirmed summary judgment in favor of the golf-course operator for personal injuries from an errant shot because the appellant “provided no evidence” that the golf course was “negligently designed or maintained.” *Id.* at *5.

Hernandez is not helpful because California precedent has held that an abutting lot owner’s injury claim against a golf course is subject to *secondary* assumption of the risk. *Morgan v. Fuji Country USA, Inc.*, 40 Cal. Rptr. 2d 249, 253 (Ct. App. 1995) (stating the applicable assumption-of-risk doctrine depends on the “relationship between the parties”; as between “co-participants” at a golf course, implied primary assumption of the risk applies; but as between a plaintiff and the owner and operator of a golf course, secondary assumption of the risk applies).

on appeal.⁹ Thus, we are not presented with, nor do we consider, whether the doctrine of implied primary assumption of the risk applies to the owner of property abutting a golf course. We consider only whether the district court erred in granting summary judgment in favor of the association based on the lack of evidence that the association increased the inherent risks of damage to property abutting a golf course, such as by negligent design and maintenance.

Second, Neegard produced evidence that the inherent risk of golf-ball damage to her property was increased by the association's negligent design and maintenance of the golf course. Neegard's expert report states that the "early bend in [the ninth hole] combined with the incentive to cut the corner . . . have created an abnormal situation beyond what we normally encounter with golfers and homes on golf courses." The report opines that the design of the ninth hole "falls short of understanding how golfers will play a golf hole" by failing to appreciate (1) advances in equipment that allow a player to drive a ball much farther and (2) no-penalty game formats that encourage golfers to attempt a corner-cutting drive over Neegard's property. The report states that "simple mitigations like netting and trees at the teeing area to more complete solutions like modifications to the design and playability of the [ninth] hole" would make a "vast difference in the number of balls hitting" homes that abut the golf course.

⁹ Neegard asserts that implied primary assumption of the risk does not "apply," but her argument focuses on whether the evidence supports the district court's conclusion, not whether the doctrine applies to her claims.

Neegard also relies on testimony of the association's current general manager, who acknowledged that golfers try to cut the corner on the ninth hole and agreed that it is "more dangerous" to live in a home on the ninth hole than at other properties abutting the golf course. It is undisputed that the association acted to mitigate the golf-ball hazards at the ninth hole, such as by planting trees next to Neegard's property. But Neegard testified that golf-ball damage continued after these steps. Similarly, the expert report opined that the association should undertake additional mitigation to address the increased risks at the ninth hole.

"[E]xcept where reasonable minds may not differ, what due care requires and whether it has been exercised is [a fact question] for the jury." *Ryan v. Griffin*, 62 N.W.2d 504, 507 (Minn. 1954). Neegard presented an expert opinion that the association created an "abnormal situation" for her home based on the design of the ninth hole that increased the inherent risks of damage to property abutting a golf course and that these heightened risks could be mitigated. We therefore conclude that the record evidence raised a genuine issue of material fact as to whether the association negligently designed or maintained the ninth hole. Thus, the district court erred in granting summary judgment for the association on Neegard's negligence and nuisance claims based on implied primary assumption of the risk.

III. The district court erred in dismissing Neegard’s negligence, nuisance, and trespass claims.

A. Negligence

“Negligence is generally defined as the failure to exercise such care as persons of ordinary prudence usually exercise under such circumstances.” *Domagala v. Rolland*, 805 N.W.2d 14, 22 (Minn. 2011) (quotation omitted). A negligence claim has four elements: “(1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, and (4) that the breach of the duty of care was a proximate cause of the injury.” *Id.* “Summary judgment is appropriate when the record lacks proof of any of the four elements of a prima facie case of negligence.” *Ironwood Springs Christian Ranch, Inc. v. Walk to Emmaus*, 801 N.W.2d 193, 197 (Minn. App. 2011) (quotation omitted).

The district court concluded that Neegard “has failed to present specific facts giving rise to a genuine issue for trial on a claim of negligence, including breach of a duty owed and the causal connection between [Neegard’s] injuries and [the association’s] allegedly negligent conduct.” Neegard contends that she produced evidence of “negligent operation and management” of the golf course causing damage to her property. The association argues that Neegard failed to offer evidence that the association “did something that a reasonable golf course operator would not do.”

First, as to breach of duty, primary assumption of the risk “completely bars a plaintiff’s claim because it negates the defendant’s duty of care to the plaintiff.” *Daly v. McFarland*, 812 N.W.2d 113, 119 (Minn. 2012). But, as discussed above, this doctrine does not negate a sporting venue’s duty to reasonably design and maintain the venue to

avoid increasing the risk of injury or damage. Neegard presented evidence that the association not only increased the hazard of golf-ball damage to her property due to its proximity to the ninth hole, but that it was also aware of the problem and failed to take reasonable steps to mitigate the damage, creating genuine issues of material fact on breach of duty. The expert report also refers to a golf course in Moorhead that has mitigated golf-ball damage to abutting property.

Second, as to causation, the district court did not analyze or even discuss Neegard's expert evidence on causation. The association argues that Neegard's causation theory amounts to "lack of a policy" and states that it is "not clear how the lack of a policy" resulted in golf-ball damage to Neegard's property. The association also argues that it "became aware of Ms. Neegard's complaints" and "immediately took steps to try and fix them."

This argument is unavailing because Neegard does not rely solely on "lack of a policy" related to golf-ball damage, although Neegard offers this as one explanation for the association's failure to mitigate damages. The association does not dispute that, while it took steps in 2016 to mitigate damage to Neegard's property, Neegard produced evidence that golf-ball damage has continued since 2016, and the association has taken no additional steps to mitigate damage. Neegard's expert report opines that an "abnormal number of balls" are hitting Neegard's home—despite the steps taken in 2016—and that reasonable mitigation would "effectively eliminate" damage.

In sum, because Neegard’s expert evidence creates a genuine issue of material fact on the association’s breach of duty and whether the breach caused damage to her property, summary judgment was not appropriate on Neegard’s negligence claim.

B. Nuisance

Minnesota statutes provide a cause of action for nuisance, defining it as “[a]nything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.” Minn. Stat. § 561.01 (2024) (nuisance statute). Section 561.01 authorizes remedies of damages, abatement, or an injunction. *Id.*

The district court granted summary judgment against Neegard on her nuisance claim, reasoning that the “activities for which [Neegard] claims nuisance are inherent when an individual chooses to live adjacent to a golf course.”¹⁰ The district court concluded that Neegard’s nuisance claim failed as a matter of law because the golf-ball hits to her home were “not material or substantial for an individual living adjacent to a golf course.” The parties analyze this issue in two steps, which we discuss in turn.

¹⁰ The district court also reasoned that the association’s “activities are specifically addressed” in the easement and therefore that Neegard “cannot show ‘wrongful conduct’” by the association. This issue has been discussed above, and we do not repeat the analysis underlying our conclusion that the easement permits golf-ball flight over and upon abutting lots as “necessary and proper” and “common and usual.” Neegard’s nuisance claim is based on the “abnormal” situation of her lot’s position near the ninth hole, resulting in an “abnormal number of balls hitting” her home, as discussed in her expert report. Thus, the easement and assumption of risk in the declaration does not bar Neegard’s nuisance claim as a matter of law.

Material and Substantial Interference

First, both parties agree that, to be actionable as a nuisance, the interference must be “material and substantial.” *Jedneak v. Minneapolis Gen. Elec. Co.*, 4 N.W.2d 326, 328 (Minn. 1942). Courts measure the degree of interference by the standards of ordinary people in relation to the area where they reside. *Id.* “Whether a private nuisance exists for which damages may be recovered by a private person presents a question of fact.” *Hill v. Stokely-Van Camp, Inc.*, 109 N.W.2d 749, 753 (Minn. 1961).

The association contends that, because Neegard’s property abuts a golf course, “it cannot be said that golf balls hitting her property . . . constitutes a substantial and material interference with her property.” But as discussed above, whether the evidence shows the golf-ball hits on Neegard’s property exceeded “usual and normal hazards” is a question of fact on which there is conflicting evidence.

The association also argues that Neegard failed to offer evidence of material and substantial interference as a matter of law because “the golf course was built and in operation for 11 years before Ms. Neegard built her home” and no evidence establishes “any issues” with the ninth hole until “Ms. Neegard’s home was built.” Neegard responds that when she moved into her home is immaterial to her nuisance claim. Neegard is correct that the “rights of habitation in residential districts” are generally “superior to the rights of trade or business therein” and it is “immaterial that the complaining party moved into the [residential] district subsequent to the establishment of the business complained of and with knowledge of its existence.” *Robinson v. Westman*, 29 N.W.2d 1, 4-5, 7-8 (Minn. 1947) (affirming nuisance judgment under section 561.01 and an order of “complete abatement”

as “within the discretion of the [district] court” when nearby residents sued the owners of a horse-riding stable for noxious odors, noises, and other unreasonable interferences with their property rights).

Wrongful Conduct

The association argues that “wrongful conduct” by the defendant is a required element of nuisance, and Neegard disagrees. The supreme court has explained that section 561.01 “defines a nuisance in terms of the resultant harm rather than in terms of the kind of conduct by a defendant which causes the harm.” *Highview N. Apartments v. County of Ramsey*, 323 N.W.2d 65, 70 (Minn. 1982). Courts do, however, require “some kind of conduct causing the nuisance harm which is ‘wrongful.’” *Id.* at 70-71.

“Used in this way, the word ‘wrongful’ is meant simply to limit the scope of nuisance liability to situations in which the defendant can be said to be at fault.” *Wendinger v. Forst Farms, Inc.*, 662 N.W.2d 546, 551 (Minn. App. 2003), *rev. denied* (Minn. Aug. 5, 2003); *see also Randall by James v. Village of Excelsior*, 103 N.W.2d 131, 134 (Minn. 1960) (“It is elementary that ‘nuisance’ denotes the wrongful invasion or infringement of a legal right or interest and comprehends not only such invasion of property but of personal rights and privileges and includes intentional harms and harms caused by negligence, reckless or ultrahazardous conduct.”). On the other hand, a defendant who is “doing as much as reasonably possible in the way of careful operation” can defeat a claim for nuisance. *Jedneak*, 4 N.W.2d at 329.

The association contends that Neegard offered no evidence of wrongful conduct by the association given the measures taken in 2016 “to discourage players from trying to cut

the corner [of the ninth hole] and drive the green,” which show that the association was “considerate of and responsive to Ms. Neegard’s complaints.” The association also maintains that extra measures, like redesigning the ninth hole, would be unreasonably expensive.

Neegard argues that the association knew of the increased hazard to her property and attempted but failed to correct conditions causing abnormal golf-ball damage to her property. Neegard’s expert report opined that adding fencing, netting, or trees near the ninth-hole tee area would “at the very least significantly reduce the probability of a ball leaving the course boundary.”

Because the record includes evidence that the association’s mitigation efforts in 2016 were inadequate, there is a genuine issue of material fact whether the association’s conduct was “wrongful.” *Id.* at 327 (affirming a nuisance judgment in favor of defendant power plant and holding in the syllabus that “[w]hether defendant was using the most efficient [mitigation] devices . . . was a question of fact”).¹¹ Based on this record and the disputed material facts, summary judgment was inappropriate on Neegard’s nuisance claim.

¹¹ In *Jedneak*, the plaintiffs sought an injunction and damages against a power plant, claiming that “cinders unnecessarily escape from defendant’s smokestacks onto plaintiffs’ premises, interfering with their physical enjoyment of life.” *Id.* A jury found for the power plant, and the plaintiffs appealed from the denial of their motion for a new trial. *Id.* The supreme court reviewed whether the district court improperly instructed the jury on the plaintiffs’ nuisance claim. *Id.* at 328. The supreme court affirmed and concluded that “the question of whether there are devices in common use which are more efficient in removing the objectionable material from smoke stacks . . . was properly resolved by the triers of fact.” *Id.* at 329-30.

C. Trespass

“Trespass encompasses any unlawful interference with one’s person, property, or rights, and requires only two essential elements: a rightful possession in the plaintiff and unlawful entry upon such possession by the defendant.” *Wendinger*, 662 N.W.2d at 550 (quotation omitted). The association does not dispute Neegard’s rightful possession of her property. Therefore, Neegard must prove unlawful entry by the association. Trespass does not require bodily entry by the defendant and “can include throwing or placing an object upon the property of another.” *Citizens for a Safe Grant v. Lone Oak Sportsmen’s Club, Inc.*, 624 N.W.2d 796, 805 (Minn. App. 2001) (quotation omitted) (recognizing that the “entry of bullets” from a shooting range “over and onto adjacent private property” may be unlawful entry and establish trespass).

The district court concluded that “the record does not give rise to a genuine issue of material fact” on Neegard’s trespass claim. The district court reasoned that the easement “expressly permits the flight of golf balls over and upon [Neegard’s] property.”¹²

Neegard maintains that the association’s operation of the ninth hole “results in tangible objects impermissibly being propelled, hit, or directed into” her property. The association urges us to conclude that summary judgment was appropriate because the easement allows “golfers to land golf balls on Ms. Neegard’s property.”

¹² The district court also concluded that there was “no evidence in the record to show that golfers are exceeding the allotted ten-foot easement when retrieving golf balls around [Neegard’s] property.” On appeal, Neegard does not contend that golfers retrieving balls committed trespass. Therefore, we need not discuss this issue.

As discussed above, the easement provides for the flight of golf balls over and upon Neegard's property as "necessary and proper" to or as a "common and usual activity" of playing golf. The easement, however, does not address any damages that may arise from golf-ball damage to Neegard's property. Under the common law, an easement holder "must exercise" their right to use the easement "reasonably, without doing unnecessary injury" to the servient landowner's "property or business." *Giles*, 9 N.W.2d at 718. Similarly, an easement holder is "responsible for any damage resulting from a failure to maintain or repair an easement, absent any separate agreement." *Matter*, 478 N.W.2d at 214 n.1. Here, the declaration separately provided that Neegard assumed the risk of "usual and normal hazards."

Neegard submitted evidence that the frequency of golf balls over and on her property exceeded "common and usual" activity and also provided evidence that the golf-ball damage to her property went beyond "usual and normal hazards." Thus, questions of material fact make summary judgment inappropriate. We therefore reverse and remand the grant of summary judgment on Neegard's trespass claim.

IV. Neegard's Punitive Damages Claim

Neegard moved to amend her complaint to assert a claim for punitive damages. In a memorandum accompanying the motion, Neegard contended that the association acted with "deliberate disregard and indifference to the high probability of injury" from errant golf balls, referring to evidence obtained in discovery. On appeal, Neegard maintains that she submitted evidence that respondent knew of a high probability of damage and injury

to appellant and her home by the frequency of golf balls hitting her property and that, despite this knowledge, respondent deliberately chose not to act.

The district court denied Neegard's motion to amend the complaint to add a punitive-damages claim because the association prevailed on summary judgment, resulting in the dismissal of all claims. Because we reverse the district court's grant of summary judgment on Neegard's claims in negligence, nuisance, and trespass, we also reverse the district court's order denying Neegard's motion to amend the complaint to add punitive damages and remand for a decision on the merits of her motion. *See, e.g., Bunkowske v. Briard*, 461 N.W.2d 392, 395 (Minn. App. 1990) (remanding a motion to amend a complaint to district court for consideration on the merits after concluding that the district court erred in granting summary judgment on the underlying claims).

In sum, summary judgment was not appropriate based on the record in this case. It is true that the declaration provides an easement for "necessary and proper" and "common and usual" golf-ball flight over and on Neegard's lot and that Neegard expressly assumed the risk of "usual and normal hazards" related to this easement. But record evidence raised genuine issues of material fact about whether the golf-ball damage to Neegard's property was abnormal due to the design and maintenance of the golf course. For similar reasons, the district court's summary-judgment application of implied primary assumption of the risk to owners with property abutting the golf course must be reversed. The additional reasons the district court articulated for dismissing Neegard's claims in negligence, nuisance, and trespass fail to account for disputed fact issues that cannot be resolved on

summary judgment. Finally, Neegard's motion to amend her complaint to add punitive damages must be decided on the merits.

We therefore reverse and remand for further proceedings consistent with this opinion. Nothing in this opinion should be understood to comment on the ultimate merits of Neegard's claims or the association's defenses.

Reversed and remanded.

ROSS, Judge (dissenting)

In the same year that Susan Neegard bought her property abutting hole nine on Valley Golf Association's golf course, Melky Cabrera crushed a three-run homer that broke the windshield of a car sitting on the lot just outside Fenway Park. Imagine the greater likelihood of breakage had the owner instead left her car inside the stadium just beyond the field of play, say, two feet outside the first base line. Where the car, or house, is situated, is almost all one needs to know to decide whether the owner who knowingly put it there has assumed the risk of damage in the ordinary course of the adjacent sporting activity.

I believe that Neegard expressly assumed the risk of damage resulting from golf balls landing on her dogleg-abutting property. I do not address whether she also implicitly assumed the risk, but I think that is equally clear. I am satisfied that buying a home abutting a golf course uniquely built in the flight path of properly played golf balls leaves the homeowner who has expressly assumed the risk of the hazard unable to pursue a tort claim against the golf course for the obviously foreseeable circumstance of balls hitting her house. And this assumption of risk is not eliminated because the house is hit more frequently than homes abutting non-dogleg holes. I therefore respectfully dissent from the majority's well-written opinion.

I believe that Valley Golf met its "burden of showing an absence of factual issues," *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017), and that the undisputed facts support the district court's summary-judgment decision. Before she bought the lot with its newly constructed home in 2014, Neegard could see that it sat precariously inside the elbow of a dogleg hole on the abutting golf course. This meant that

she knew the home sat in the path of any golf balls launched from the ninth-hole tee directly toward its corresponding green whenever ambitious golfers attempt to shortcut the dogleg. Neegard therefore knew that her home would be occasionally pelted by golf balls.

The majority correctly describes the relationship that the Neegard lot has with the ninth hole in geometric terms: “Neegard’s house sits on the hypotenuse between the tee box and the ninth-hole green.” It is commonly understood that golfers, acting properly within the rules of golf, have the option of playing the hypotenuse (the straight line from the tee to the green) to avoid the two longer legs of the fairway. This shortcutting option in any dogleg is an enticing part of the game. “Dogleg holes are risk-reward holes where playing more directly or cutting the corner of the hole is much riskier, usually due to a hidden hazard, but will get you much closer to the green.”¹ “One of the most common strategies for tackling a dogleg is to try and cut the corner—take a more direct line toward the green by driving the ball over the trees or hazards that block the corner.”² “If a turning

¹ Tom Goldsmith, *Golf Strategy: How to Play Dogleg Holes*, GolfX Sports Hub (Sept. 28, 2024), <https://www.golfx.ph/golf-strategy-how-to-play-dogleg-holes/#:~:text=Play%20a%20Dogleg%20Direct%20or%20Safe&text=If%20cutting%20the%20corner%20is,help%20players%20reach%20the%20fairway> [<https://perma.cc/ZG4G-BVZA>].

² *How to Navigate Doglegs Like a Pro: Your Guide to Tight Fairways*, GoGolf365 (Feb. 13, 2025), https://gogolf365.com/blogs/news/how-to-navigate-doglegs-like-a-pro-your-guide-to-tight-fairways?srltid=AfmBOorBL-c3BQJ_Up3PSm4oAkRzMWlekyN780uFAnKb8gxwHxGQw7gS [<https://perma.cc/PXR4-PV4R>].

point is closer to the teeing grounds, a longer hitter may attempt to cut the corner.”³ This is not the stuff of mere theory. Rory McIlroy, for example, cleared structures to reach the green from the tee two years ago at the Arnold Palmer Invitational: “The hole stretches 400-yards long and features a slight dog-leg moving from left-to-right. But McIlroy took that curve completely out of play, cutting the corner of the dog-leg with a sensational 365-yard drive that drop[p]ed just on the edge of the green and trickled [its] way on towards the hole.”⁴ Buying a house on the hypotenuse inside the elbow of a dogleg is like parking your car beside first base—the view is great, but the risk is obvious.

And even if Neegard knew nothing about the obvious nature of a dogleg and its hazards from a basic understanding of the game, Valley Golf’s recorded easement over her property expressly informed her of this risk before she bought the house. The easement plainly allows for “the doing of every act necessary and proper to the playing of golf on the golf course adjacent to” her course-abutting lot, and that use includes, “but [is] not limited to . . . the flight of golf balls over and upon the [lot].” Long before she purchased the lot, the golf course had already been established, including the abutting dogleg, and golfers had been playing it. By purchasing the lot encumbered by its golf-use easement,

³ Scott Macpherson, *The Dogleg*, Scott Macpherson Golf Design (June 2006), <https://www.scottmacphersongolfdesign.com/media-releases-more/articles/doglegs/> [<https://perma.cc/MW7S-AR4P>].

⁴ Ed Carruthers, *Rory McIlroy Unleashes Booming 365-yard Shot to Sensationally Drive the Green on the Par-4 10th Hole at the Arnold Palmer Invitational . . . While the Playing Group Ahead of Him Were Still Putting Out!*, Daily Mail (Mar. 10, 2024), <https://www.dailymail.co.uk/sport/golf/article-13179265/Rory-McIlroy-unleashes-booming-365-yard-shot-sensationally-drive-green-par-4-10th-hole-Arnold-Palmer-Invitational-playing-group-ahead-putting-out.html> [<https://perma.cc/AN4W-VUQB>].

Neegard expressly “acknowledge[d] dangers inherent to persons and property posed by the proximity of [her lot] to the golf course in the subdivision.” She therefore also expressly “assume[d] the risk of usual and normal hazards to abutting Lot owners by proximity to the golf course.”

The majority recognizes that “the association has an easement for the flight of golf balls over and upon Neegard’s lot” and that Neegard assumed the risk of “usual and normal hazards” from her lot’s proximity to the golf course. The majority nevertheless reverses summary judgment favoring Valley Golf, because it reasons that a fact dispute exists as to whether golf balls striking her property are doing so “negligently” or to an “unreasonable” degree. It so reasons based on the belief of Neegard’s expert witness, who opined that hole nine is a “flawed design.” And the expert believes hole nine has a design flaw chiefly because Neegard encounters golf balls more frequently than “what is normally encountered by homeowners of a lot abutting a golf course.” I disagree with the expert’s rationale, which leads me to disagree with the majority’s reliance on it.

Lost in this rationale is the undisputed fact that hole nine is the course’s *only* dogleg. Saying that the design of hole nine is flawed because Neegard’s abutting property has more encounters with golf balls than properties abutting non-dogleg holes is like saying the intersection of Kellogg Boulevard and Seventh Street is flawed because pedestrians standing in the middle of it have more encounters with cars than pedestrians standing on the sidewalk. Identifying the obvious difference creates no material fact dispute because Neegard chose to live on the one lot that, unlike every other property, sits directly in the line of golf balls hit from the tee box straight toward its corresponding green. Because no

other lot is similarly situated and Neegard assumed the risk of ball-flight hazards associated only with *her own* lot, the expert's flaw-in-design theory shanks into the bunker. The easement burdening Neegard's lot is not conditioned on whether her property "normally" or usually encounters golf balls by comparison to what other course-abutting lots might encounter. The frequency of balls hitting her property therefore is not an issue of *material* fact bearing on whether she assumed the risk of golf-ball damage.

Equally dispositive, the supposed flaw in the ninth hole as opined by Neegard's expert is not a flaw at all, but the very purpose of any dogleg design. The flaw is "the incentive to cut the corner," in the expert's view. This incentive—a normal part of the game of competitive golf—is one that the expert not surprisingly calculates to be acted on by 10 to 15% of golfers playing the ninth hole. The expert's structural solution to this supposed incentive flaw is for Valley Golf to "straighten the golf hole." *Straighten the hole?! The* other fix the expert offers for the supposed flaw is to add a barrier, like fencing or trees. It is certainly true that altering the rules to penalize golfers for attempting to cut the dogleg's corner, building obstructions to deter golfers from cutting the corner, or redesigning the ninth hole entirely so that there's no corner to cut, might reduce the number of balls hitting Neegard's roof. But these are solutions to a question irrelevant to the issue on appeal. Our question is not whether Valley Golf could reduce the risk of balls striking Neegard's property by redesigning its golf course or changing its rules. Our question is instead only whether Neegard assumed the risk of balls striking her home based on the course design and course rules that existed when she purchased the property and based on her having acknowledged the risk of "dangers inherent to persons and property posed by the proximity

of [her lot] to the golf course.” Because I believe that the answer to that question based on the undisputed facts is yes, I would affirm.