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SPORTS FACILITIES
How the law affects the sports facilities industry and the LAW

New York Appeals Court Affirms Assumption of Risk Case, Involving Playing Surface

By Carla Varriale of Havkins Rosenfeld Ritzert & Varriale

In Siegel v. Albertus Magnus High School et al., the issues on appeal involved the application of assumption of the risk to the facts of the case, and whether contractual indemnity should have been granted based upon the facts and the agreement (a license).

Carla Varriale

Briefly, plaintiff slipped and fell on white or cream-colored "cushiony" tile covering a metal drainage gate located on a grassy field on the grounds of Albertus Magnus College in Rockland County. Plaintiff was a volunteer assisting the coaching staff of the New City Generals baseball team (the "Generals") during batting practice. Plaintiff slipped and fell on the tile as he attempted to retrieve a foul ball and sustained personal injuries.

The Supreme Court correctly granted summary judgment based on assumption of the risk since that doctrine encompasses risks associated with the construction of the playing field and any open and obvious conditions on it (such as the tile). Furthermore, the Appellate Division, Second Department held that a plaintiff need not have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results.

Applying the case law to the facts of the case, the Appellate Division reasoned that this plaintiff in particular was aware of and appreciated the risk of injury (he had visited the field at least three prior time and had sat along the third-base foul line, which was close to the accident site). The court also noted that the cream-colored tile was in stark contrast with the grassy area and constituted an open and obvious condition. Plaintiff failed to raise a triable issue of fact in opposition to the motion for summary judgment with respect to his knowing, voluntary assumption of an obvious risk.

Of further interest was the Appellate Division's decision regarding the enforceability of the contractual indemnification clause. The Appellate Division, Second Department held that the school defendants established that the plaintiff's accident (which occurred on the warning track during a practice) triggered the indemnification clause with the Generals as set forth in their license agreement to use the baseball field. The Generals were, therefore, required to indemnify Albertus Magnus for "any and all liability and injuries which occur or arise out of the General's use of the fields while organizational games, practices and events...including reasonable attorney's fees."

Although the Generals had argued that the indemnification clause was void pursu-

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THIS ISSUE

Attorney 'Mistake' Leads to Mistrial in Lawsuit Against Chiefs

An alleged mistake made by a plaintiff's attorney has led to the dismissal of a claim brought by an NFL fan, which claimed that the Kansas City Chiefs were liable for the injuries he suffered when trying to break up a fight between fans at a 2013 Chiefs game at Arrowhead Stadium.

The Kansas City Star reported that during the trial, the Chiefs called a defense expert witness. "On cross-examination, (the plaintiff's) attorney asked about an event at Arrowhead Stadium that happened after (the plaintiff's) injuries," according to the paper. "The question was heard by the jurors. The Chiefs' lawyers objected, and moved for a mistrial. ... Judge Roger Prokes immediately halted the trial, and heard arguments on whether the question would affect the ability for the Chiefs to get a fair trial." A couple days later, the judge declared a mistrial.

A sports law expert familiar with the case told Sports Litigation Alert that the judge's decision about the "mistake" was unusual, and wondered whether the court's rationale was based on reasons that did not pertain to the actual transgression.

The plaintiff in the case was Adrien Caye. He alleged in his compliant that when he tried to break up a fight between two men, he was attacked moments before security personnel arrived at the scene. Caye fell down a flight of concrete steps, shattering both wrists, according to court documents.

Caye's lawyers reportedly argued that the crowds at Chiefs home games have "a history of being unruly, threatening and violent." Still, the team "did not provide adequate security or crowd control at Arrowhead."

In the 2014 lawsuit, the plaintiff alleged that "the patrons of Kansas City Chiefs' games are provided with alcohol and an environment exists in which confrontation, assaults, and other related behaviors take place."

Prior to the mistrial, Chiefs attorney Fritz Riesmeyer pointed out that the team employs hundreds of off-duty Kansas City police officers and deputies with the Jackson County Sheriff's Office as well as employs a private security company at each home game.

Key Takeaways

While we often examine the play on the field and following the rules, the same applies in court. Rules are there for a reason and no matter how good a case might be for either side, not following the rules will always get you in trouble with a judge. GF

SPORTS FACILITIES and the LAW

EDITOR IN CHIEF

Gil Fried, Esq.
Chair and Professor
Sport Management Department
College of Business
University of New Haven
300 Boston Post Road
West Haven, CT 06516
(203) 932-7081
gfried@newhaven.edu

MANAGING EDITOR

Holt Hackney, Esq.
Hackney Publications
P.O Box 684611
Austin, Texas 78768
hhackney@hackneypublications.com

Please direct editorial or subscription inquiries to Hackney Publications at: P.O. Box 684611, Austin, TX 78768, info@hackneypublications.com

ADVISORY BOARD

Prof. Paul Anderson
Director, National Sports Law Institute & Sports Law program
Marquette University Law School
paul.anderson@marquette.edu

Dr. Herb Appenzeller
From The Gym To The Jury, Inc.
appeninc@gmail.com

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Attorney at Law
Winstead PC
dbraham@winstead.com

Shane Beardsley
Senior Director - Events & Operations
Harbor Yard Sports & Entertainment - Webster Bank Arena
shane.beardsley@harboryardse.com

Helen Durkin, J.D.
Executive Vice President of Public Policy
International Health, Racquet & Sportsclub Association
had@ihrsa.org

James H. Moss, Esq.
www.recreation-law.com
jim@rec-law.us

John M. Sadler
Sadler & Company
(803) 254-6311
john@sadlerco.com

Todd Seidler, Ph.D.
Professor and Chair
Health, Exercise and Sports Sciences
University of New Mexico
Email: tseidler@unm.edu

Russ Simons
Chief Listening Officer
Managing Partner
Venue Solutions Group

Carla Varriale, Esq.
Havkins Rosenfeld Ritzert & Varriale, LLP
Carla.Varriale@hrrvlaw.com

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Iowa Supreme Court Weighs the Role of 'Custom' in Premises Liability Case Involving Foul Ball

The Supreme Court of Iowa has reversed, in part, the finding of a jury that a high school was liable for an injury that occurred when a foul ball struck a baseball player, who was standing in the dugout.

While concluding that the high school "owed a duty of care to the player and substantial evidence supports the jury verdict," it also found that "the district court abused its discretion in not allowing the high school to present evidence of custom (and that it) erred when it failed to instruct the jury on the player's failure to maintain a proper lookout." Thus, it remanded the case to the district court for a new trial.

Plaintiff Spencer Ludman graduated from Muscatine High School in May 2011. That summer, he was a member of the school's baseball team. On July 7, 2011, Ludman traveled with his team to play a baseball game against Davenport Assumption High School (DAHS).

The visiting team's dugout was located on the first-base side of the field, 30 feet from the first-base foul line. The visitor's dugout was 35 feet and five inches long, seven feet wide, and two steps below the playing field. There was a fence in front of the majority of the visitor's dugout, 25 and a half feet in length, extending from the ground to the ceiling of the dugout. At each end of the visitor's dugout, there was a five-foot-wide opening in the fence to allow players access between the field and the dugout. There was a bench in the visitor's dugout positioned behind the fence, and it had two levels on which the players could sit.

At the top of the fifth inning, Muscatine was batting and Ludman was in the visitor's dugout with his teammates and coaches. There were two outs, and the current batter had two strikes. Ludman was due to bat after the current batter and the batter on deck. As it became unlikely he would bat that inning, Ludman grabbed his glove and hat in preparation to retake the field. After retrieving his glove and hat, he turned to watch the game and found room to stand in the south opening of the dugout, farthest from home plate.

Ludman watched the pitcher throw the ball to the batter. He heard the bat hit the ball and was looking to see where the ball went. He saw the ball in his peripheral vision before the line-drive foul ball entered the south opening of the dugout and struck him in the head. Assumption's coach saw Ludman react and try to defend himself from the ball. However, witnesses described the time from the moment the ball hit the bat until it hit Ludman as a split second.

The line-drive foul ball fractured Ludman's skull. An ambulance took him to Genesis Medical Center in Davenport, and thereafter, a helicopter transported him to the University of Iowa Hospitals and Clinics (UIHC) for treatment. Ludman's hospitalization at the UIHC lasted for 12 days before he was able to go home. After his discharge, Ludman received speech therapy, motor skills therapy, and treatment for depression and anxiety. In March 2012, he began having seizures, requiring anti-seizure medication. He also continued to deal with post-traumatic stress symptoms, depression, and behavioral issues.

On April 5, 2013, Ludman filed a premises liability action against DAHS, alleging negligence,

a) In building, maintaining, and using a baseball facility for high school baseball games, which failed to conform to accepted standards of protection for players;

b) In failing to erect a protective fence/screen between home plate and the dugout where players were expected to emerge from the dugout in preparation for going to bat; and

c) Knowing the visitor's dugout was extremely close to home plate, failing to take reasonable steps to prevent foul balls from entering the dugout at high speed and causing injury.

DAHS denied the claims of negligence in its answer to the petition and asserted several affirmative defenses, including the contact-sports exception to negligence, assumption of the risk, the plaintiff's negligence, and comparative fault pursuant to Iowa Code chapter 668. Thereafter, DAHS filed a motion for summary judgment, alleging the contact-sports exception applied; and thus, it owed no duty to Ludman because getting hit by a foul ball is inherent in the sport of baseball and he assumed the risk of getting hit by a foul ball. The court denied the motion for summary judgment.

Shortly before trial, DAHS filed a second motion for summary judgment, arguing that it was entitled to summary judgment under the inherent-risk doctrine and on the basis that there are no accepted standards for high school baseball dugouts. Again, the motion was denied.

On June 22, 2015, a jury trial commenced. On June 30, 2015, the jury returned a verdict in favor of Ludman. DAHS appealed.

While "taking into consideration all reasonable inferences that a jury could fairly make, Ludman presented sufficient evidence to give rise to his negligence claim against (DAHS)," wrote the court.

Next the court addressed whether the district court erred in barring DAHS from presenting evidence concerning the custom and standard practice in the design and construction of dugouts at schools throughout the Mississippi Athletic Conference.

After examining case law and the expert testimony that was presented, the court found that "the testimony was sufficient for the jury to consider if (DAHS) was not negligent due to the custom of the community.

"Evidence of custom is not conclusive on

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Court Weighs the Role of 'Custom' in Premises Liability Case

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(DAHS's) lack of negligence. See Bradshaw v. Iowa Methodist Hosp., 251 Iowa 375, 385, 101 N.W.2d 167, 173 (1960). It is still up to the jury to weigh the evidence of custom against the other evidence in the record and ultimately determine the issue of negligence based on the facts and circumstances of the case," wrote the high court. "Accordingly, we find the district court abused its discretion by not allowing the evidence of custom."

Next, the Supreme Court considered whether the district court "should have permitted a jury instruction on proper lookout 'as there was competent evidence at trial that Ludman voluntarily placed himself in an unprotected area of the dugout and then failed to watch as the batter swung and struck the ball that subsequently hit him.' We measure whether a person maintains a proper lookout by what an ordinarily reasonable and prudent person would do under the same or similar circumstances. Coker v. Abell-Howe Co., 491 N.W.2d 143, 150 (Iowa 1992)."

On this point, the high court found that Ludman was at least partly responsible, noting that "a reasonable person could find he failed to follow the ball from the pitcher to the batter's bat and therefore, failed to maintain a proper lookout. Under the law of proper lookout, a jury could have decided Ludman was not 'being watchful of the movements of one's self in relation to the things seen' by failing to follow the ball, and that constituted negligence. See Coker, 491 N.W.2d at 150. We also cannot say the court's failure to give this instruction did not prejudice (DAHS). Accordingly, based on Ludman's testimony regarding his lookout, it was error for the court not to instruct the jury on proper lookout."

Spencer James Ludman v. Davenport Assumption High School; S. Ct. Iowa; No. 15-1191, 895 N.W.2d 902; 2017 Iowa Sup. LEXIS 61; 6/2/17

Attorneys or Record: (for appellant/cross-appellee) Thomas M. Boes of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines. (for appellee/cross-appellant) Steven J. Crowley and Edward Prill of Crowley, Bünger & Prill, Burlington.

Key Takeaways

I have felt for years that that the 7-out-of-10 rule was an appropriate approach to show what is an industry standard/custom/practice. If 70% of the baseball stadiums in the Mississippi Athletic Conference have similar dugouts or opening exposing players to possible line drives, then that should be considered the practice in that area-unless such custom is so obviously dangerous or wrong. GF

Detecting a Concealed Weapon or Threat Is Not Easy, Even for Experienced Police Officers

Detecting potential threats is part of the job for police officers, military personnel and security guards. Terrorist attacks and bombings at concerts, sporting events and airports underscore the need for accurate and reliable threat detection.

However, the likelihood of a police officer identifying someone concealing a gun or bomb is only slightly better than chance, according to new research from Iowa State University (ISU). The results, published in the journal Law and Human Behavior, found officers with more experience were even less accurate. Dawn Sweet, an adjunct assistant professor of communication studies and psychology, says the findings do not point to weaknesses in the officers' abilities, but rather highlights the need for better research and training.

"We expect police officers to do something that is very difficult and challenging without giving them the tools they need to do the job," Sweet said. "The training officers receive is not research based, but based on anecdotes and cues that we don't know to be reliable. There needs to be evidence these cues work, and we lack that evidence."

That is why Sweet and Christian Meissner, a professor of psychology, designed the first experimental study (explained below) of threat detection. By replicating how people behave when concealing a weapon or other item, researchers assessed detection accuracy and recorded behavioral cues that study participants used to make their decisions. The work is ongoing with the goal of developing a standardized approach to evaluating behaviors that predict if someone is concealing a weapon or dangerous device, and therein poses a threat.

Our Body Will Betray Us

It is clear to Sweet and Meissner that existing threat detection techniques are not working. They point to a recent report from the U.S. Government Accountability Office that found indicators the Transportation Security Administration is using are ineffective at detecting airport security threats.

ISU researchers say there is no definitive cue of concealment, and several variables can complicate the issue. Context is important because behaviors vary depending on the situation. For example, a person trying to sneak a can of beer into a football game will act differently than a person carrying a bomb in a backpack. Meissner, who studies interrogation techniques, says officers cannot solely rely on behavioral cues.

"We want investigators to identify those aberrant behaviors with the understanding that such behaviors may not automatically signal a threat. Using strategic interview techniques, the officer can engage the person to better understand the situation," Meissner said. "In many situations, simple elicitation would lead the officer or investigator to understand the root cause of the unusual behavior or anxiety."

Researchers know there is a link between nonverbal behaviors and cognitive function, and that our bodies give off subconscious signals when we are trying to conceal something. For example, if a man denies having a gun when asked by a police officer, his hand might touch or his eyes might look at the part his body where he is concealing the weapon, said Sweet, whose work focuses on nonverbal communication.

"We don't know that looking or touching are accurate, reliable predictors, but they're ways our body may relieve the stress and tension of suppressing thoughts about what we're trying to conceal," Sweet said. "Because of our body's inability to conceal truth for long periods of time, it's going to leak out. Our body is an extraordinarily leaky communication channel."

Through their ongoing work, researchers want to determine if there are other ways to trigger those signals. For example, a woman trying to get a gun inside a courthouse will anticipate interactions or things that may happen as she goes through security, they said. But what happens if her routine is interrupted?

"If someone is concealing something and you throw them off script, you may be able to induce what we call cognitive load – you burden them psychologically or cognitively," Meissner said. "Then the question is, will we see more diagnostic cues – either behavioral or verbal – when someone engages them?"

Is He Carrying a Gun?

For this study, Sweet and Meissner recorded videos of three different scenarios to replicate behavior when a person is hiding a gun or an unstable device in a backpack. The researchers recruited police officers and college students to participate in the study for comparison. In all three scenarios, officers had a similar accuracy rate as the students.

The first experiment used videos of a man walking into a courthouse. Study participants had to determine if the man had a gun. They were also asked to list indicators about the man's behavior used to make their decision. Overall, both groups performed greater than chance. However, participants had higher accuracy identifying when the man did not have a gun. The rate of accuracy was much lower when the man was concealing.

For the second experiment, participants watched several videos of three men walking through a crowd and were asked to decide if one of the men was concealing a device in his backpack. Again, overall accuracy in determining threat was greater than chance. In 73 percent of the trials, participants correctly identified whether the group had a concealed object. However, when it came to identifying the person concealing the object, accuracy dropped to 44 percent.

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Midland College Softball Team Pushes Forward in Title IX Case

By Dr. Linda Van Drie Andrzjewski, Wilmington University

On April 26, 2017, Midland College (TX) head softball coach, Tommy Ramos, filed a Title IX lawsuit in the U.S. District Court against the junior college over discrepancies between the men's and women's athletic programs, specifically the softball and baseball programs. In his lawsuit, Ramos wants "general compensatory damages to the softball program;" a statement that "the discrepancies between the baseball and softball programs at Midland College violate Title IX;" and "an injunction requiring Midland College to immediately address and substantially equalize these discrepancies" (Kahn, 2017). Ramos has been the head coach of the softball program for 19 years since the team started. The team has played on-campus since 2012. While the field is in "decent shape," the team lacks facilities. An undersized portable shed is used as the team's locker room that has one bathroom. The locker room has been frequented by rodents, snakes, and broken into by other people. The bleachers only seat 25 people. Conversely the baseball team uses the former minor-league team's stadium with lights and indoor batting cages. It has a locker room complete with leather chairs and a training room. In addition to the concerns about the discrepancies between the two facilities, Ramos claims there are also inequalities in how Midland funds men's and women's recruiting, and transportation budgets, as well as the general support programs receive from the administration.

Supposedly Ramos has a difficult relationship with Midland College president, Steve Thomas, who arrived nine years ago. Prior to Thomas's arrival, the previous administration had promised to improve the softball field when it moved on-campus. The improvements would include a locker room and better seating. However, when Thomas arrived, the plans slowed. Finally in 2015, a permanent bathroom structure with two toilets was added outside the softball field, but that was the extent of the improvements.

Before filing a lawsuit, Ramos originally went to the institution's human resources director, Natasha Morgan, about his concerns. He explained that because the baseball team had lights and softball did not, practices had to be cut shorter or held earlier, causing students to miss classes. According to Ramos, he did not get very far. Things between Ramos and the president seemed to get worse. When Thomas attended a softball game on occasion, he would sit in the visitor's bleachers.

But Can You Compare?

While looking at the two programs from the outside, it appears that the softball team is being treated unfairly in this case. However, in the Midland case, the courts will have to look at the entire athletic program, not just softball and baseball, to see if there are discrepancies program-wide. In this case, Midland College has three men's programs—baseball, basketball, and golf—and three women's programs—softball, basketball, and volleyball. Other teams' budgets would have to be analyzed to determine if there are discrepancies program-wide.

Tammie Jimenez, Midland's volleyball coach, claims she does not have major budget concerns overall. However, she has to fundraise "aggressively to come up with basic expenses like travel, while the men's program does not" (Kahn, 2017). She is not sure if the institution provides the men's teams with bigger budgets or because the men's teams are able to associate with wealthier supporters. Jimenez also stated she was denied the opportunity to use the facility for private lessons and clinics while the baseball coaches are able to do so.

Player Support

In support of their coach filing a lawsuit, members of the softball team wrote a letter to the president detailing some of the horrors they have been dealing with at the facility. They included the time they walked into the locker room to find a six-foot long snake, only to be laughed at by the facilities manager and told it was not poisonous so they should not worry about it. They mentioned the fact that the locker room cannot be secured properly, causing break-ins, where they have lost thousands of dollars of equipment. They stated they have had an infestation of scorpions in the locker room leading them "to keep all of [their] equipment on the bench to prevent any players from getting stung" (Kahn).

After Ramos filed his suit in April, Midland College filed a motion three weeks later to dismiss it on the grounds that Ramos lacked legal standing. They cited previous cases, including Pederson v Louisiana State University, arguing that Ramos, as the coach, is not personally impacted by the conditions at Midland College, and therefore the case lacks subject matter jurisdiction. In June, a judge agreed and Ramos was told he did not have standing. He is likely filing a motion to reconsider. To counter the dismissal, three softball players currently on the roster are joining the lawsuit. The concern with having current players on the lawsuit is with Midland being a junior college, the students do not spend more than two years there. The three students on the suit may be gone by the time the case goes to trial and will no longer have standing, requiring the team to start all over again with new plaintiffs. Currently, a trial date is scheduled for September, 2018.

References:

1. Kahn, A. (2017). Rats, snakes, and scorpions: The unthinkable treatment of one softball team and the Title IX lawsuit to fight back. Retrieved from: http://www.excellesports.

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Court Denies 49ers Motion to Dismiss ADA Claim

A federal judge from the Northern District of California has denied a motion for summary judgment filed by the Forty Niners Football Company, LLC (owner of the San Francisco 49ers) and the City of Santa Clara, which had asked the court to dismiss a claim brought by Abdul and Priscilla Nevarez, alleging a violation of the Americans with Disabilities Act (ADA).

By way of background, the Nevarezes, and Sebastian DeFrancesco, sued the Forty Niners; Forty Niners SC Stadium Company, LLC; Forty Niners Stadium Management Company, LLC; the City of Santa Clara; the Santa Clara Stadium Authority. They claimed that, on several occasions, they visited the stadium for events, but discovered that the stadium was not fully accessible to disabled individuals.

The alleged lack of accessibility was problematic as Abdul Nevarez's right leg is amputated above the knee, and he suffers from significant nerve damage in his left leg and left arm. Nevarez requires the use of a wheelchair for mobility. Priscilla Nevarez is not disabled, but she accompanies her husband to activities like football games. Together, they attended four games between 2014 and 2016.

On each occasion, the Nevarezes faced alleged barriers in terms of accessing the stadium because of Abdul 's disability. Examples they cited included:

- not being able to locate elevators at the stadium;
- a suite at the stadium lacking accessible seating for Nevarez;
- a [delete] difficulty for the Nevarezes to access the stadium from the stadium's parking lots;
- security checkpoints that were not large enough for Nevarez's wheelchair;
- the stadium's box office ticket window was not accessible to Nevarez;
- the Nevarezes had difficulty purchasing tickets for accessible seating in advance of events; and
- the Nevarezes had difficulty obtaining sufficient companion seating to allow Nevarez to sit together with his family and friends.

In late 2016, the Nevarezes sued, naming the Forty Niners Football Company, LLC; Forty Niners SC Stadium Company LLC; the National Football League; the City of Santa Clara; the Santa Clara Stadium Authority; and Ticketmaster LLC as defendants.

Then, last spring, the plaintiffs amended the complaint and alleged violations of Title II and Title III of the Americans with Disabilities Act of 1990 (ADA).

The Forty Niners Football Company, LLC and the City of Santa Clara moved to dismiss, which led to the instant opinion.

They argued specifically that Mrs. Nevarez lacked standing to sue under the ADA. In addition, they moved to dismiss portions of the claims related to the Unruh Act because the plaintiffs "failed to timely exhaust their state administrative remedies."

Concerning the ADA, the court considered Mrs. Nevarez' argument that she had standing for disability discrimination under the ADA because of the concept known as "associational discrimination." Glass v. Hillsboro Sch. Dist. 1J, 142 F. Supp. 2d 1286, 1288 (D. Ore. Apr. 12, 2001).

Specifically, she alleged that "she wishes to access and enjoy the Stadium with her husband, but that she is not able to do so because of the Stadium's architectural barriers, which have caused her to experience 'frustration, emotional distress,' and 'physical exhaustion.' These allegations are sufficient to show that Mrs. Nevarez, specifically, has suffered a separate and distinct injury from the injury suffered by Mr. Nevarez."

Abdul Nevarez, ET AL. v. Forty Niners Football Company, LLC, et al.; N. D. Cal.; Case No. 16-CV-07013-LHK, 2017 U.S. Dist. LEXIS 121030; 8/1/17

Attorneys of Record: (for plaintiff) Adam Brett Wolf, Catherine M. Cabalo, Sarah S Colby, Peiffer Rosca Wolf Abdullah Carr & Kane, San Francisco, CA; Andrew Paul Lee, Goldstein, Borgen, Dardarian & Ho, Oakland, CA; Guy Burton Wallace, Schneider Wallace Cottrell Konecky Wotkyns LLP, Emeryville, CA; Jennifer Ann Uhrowczik, Schneider Wallace Cottrel Konecky Wotkyns LLP, Emeryville, CA; Linda Mary Dardarian, Goldstein Borgen Dardarian & Ho, Oakland, CA; Raymond Alexander Wendell, Goldstein Borgen Dardarian Ho, Oakland, CA. (for defendant 49ers) Maria M Lampasona, Lombardi Loper & Conant, LLP, Oakland, CA. (for defendant Ticketmaster Entertainment, Inc. et al.) Gregory F. Hurley, LEAD ATTORNEY, Michael Chilleen Sheppard, Mullin, Richter & Hampton LLP, Costa Mesa, CA.

Midland Team Pushes Forward in Title IX Case

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com/news/womens-sports-title-ix-lawsuit/
2. Kahn, A. (2017). Update: Midland College softball players join Title IX lawsuit. Retrieved from: http://www.excellesports.com/news/midland-college-softball-players-title-ix/

Key Takeaways

While most Title IX cases would not find their way into a sport facility law publication, there are still cases out there with disparate facility arrangements. While Title IX has moved mainly to cover unequal financial support or coach's salaries, genders being treated differently based on the type and quality of sport facilities is still a key Title IX test. Men's and Women's facilities do not need to be identical, but need to be substantially comparable and any significant disparity should be addressed with a detailed plan. GF

Court Affirms Assumption of Risk Case, Involving Playing Surface

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ant to New York General Obligations Law Sections 5-321 and 5-322.1, the Appellate Division, Second Department held that those arguments lacked merit.

The subject agreement with the Generals constituted a license and not a lease agreement and, therefore, Section 5-321 was not applicable.

Section 5-321 is a frequent provision invoked in order to avoid the effect of exculpatory clauses. Here is its straightforward text:

§ 5-321. Agreements exempting lessors from liability for negligence void and unenforceable

Every covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable. (emphasis added)

Next, Section 5-322.1 was likewise inapplicable because the agreement with the Generals was not a maintenance or a construction contract. Here is the text of Section 5-322.1:

§ 5-322.1. Agreements exempting owners and contractors from liability for negligence void and unenforceable; certain cases

1. A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable; provided that this section shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by an admitted insurer. This subdivision shall not preclude a promisee requiring indemnification for damages arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of a party other than the promisee, whether or not the promisor is partially negligent.

2. A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith, purporting to condition a subcontractor's or materialman's right to file a claim and/or commence an action on a payment bond on exhaustion of another legal remedy is against public policy and is void and unenforceable; provided that this subdivision shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by an admitted insurer.

3. The provisions of this section shall only apply to covenants, promises, agreements or understandings in, or in connection with or collateral to a contract or agreement, as enumerated in subdivision one hereof, entered into on or after the thirtieth day next succeeding the date on which it shall have become a law. (emphasis added).

This case was interesting, not only because the question of whether a plaintiff assumes the risk of injury associated with the conditions of field or a playing surface comes up so often, but also because it underscores the importance of contracts and indemnification clauses and understanding when they (and exculpatory clauses) are enforceable. This is a good reminder, in particular regarding the lease/license distinction.

Detecting a Concealed Weapon or Threat Is Not Easy

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In the final experiment, researchers told participants that one of the two men walking through a crowd was concealing a device. Their task was to determine which one. While overall results were the same, researchers did notice a difference based on officer experience. Less experienced officers were more accurate. Researchers attribute the difference to officer bias based on their job-related knowledge and encounters.

Key Takeaways

While some organizations try to solve security related concerns with number (warm bodies) the key is not just the appearance of safety (enough uniformed security personnel), but also having well trained personnel. Constant training (as mentioned on the next page) is important to make sure personnel are properly trained. This is especially true with sworn officers. While the Police Academy or other training program prepares them for certain tasks, basic crowd management is often not part of any such training (you need to distinguish between crowd control tactics and crowd management strategies). GF

DIGEST

Training. Training, Training

I wrote several months ago an article for Facility Manager an article focused on training and the need for better training. When I say better training that includes appropriate training, frequent training, reinforcement of the training, and testing employees to make sure they are in fact able to execute what they learned. Appropriate training, as envisioned by military related examples, is not just annual or semi-annual training, but daily training. Learning and being ready for a job is not a static process. Training entails providing basic information and then challenging people with different scenarios to put their training to work.

This process has been reinforced over the years by some of the cases I have handled. One case involved an usher who testified that he left his post to go outside the stadium and buy some food at a local venue, but was only gone for around five minutes. The facts in the case showed that he was gone for over 20 minutes and a fight had occurred during his absence-and the ambulance had come and taken the injured party away, all while he was gone. This is an issue of training, understanding rules, and making sure managers are monitoring what is going on so they can remedy potential problems or terminate employees. The concept was recently reinforced when I was at an NFL stadium. I was hanging around the parking lot before the game just watching. I was looking at the independent parking lot monitoring company's employees. They were driving around in carts. Some were focused at their assigned task(s). Others were talking on their phone (being held in one hand) and then steering with their other hand. Some were eating from a plate (requiring great coordination using a fork while driving). Others were gathered around a tent watching video games. All I can talk about is the fan perception of such sites. Maybe the employees were not violating any rules, but the public perception and risk perspective were very visible. I would suggest using secret shoppers outside and inside a facility to see if employees/independent contractors are doing their job. Training programs should be re-evaluated to make sure they comply with any contracts and industry best practices. Employees could be trained several times during a year to make sure they are well prepared to do their job and need to know that they will be evaluated on a frequent basis (and such evaluations documented and put into their file). Training does not need to be just in a large setting before a season begins. There are numerous self-paced training programs and other educational tools that can help make all employees better employees. GF

Alcohol Helping to Lower Stadium Arrests

I was recently re-reading an article the other day from 2014 discussing colleges weighing whether they were going to sell alcohol at sporting events. The article was highlighting how West Virginia implemented in stadium beer sales in 2011 and generated upwards of $500,000 in new revenue. At the same time, the university saw fewer incidents of rowdy fan behavior outside the stadium. One innovative approach undertaken back then was SMU where students over age 21 were given a wristband with three pull tabs. One tab was to be torn off each time the person purchased a beer-thus the student would possibly be limited to a maximum of three beers (except if someone bought a beer for them). The concern was always about the atmosphere inside the stadium and if alcohol sales would lead to more arrests/violence.

The evidence from at least one major university has shown that in-stadium alcohol sales can actually reduce the number of incidents. In 2014 the Ohio State University had 269 alcohol related incidents at home football games. In 2015 that number dropped to 175. However, after alcohol sales were allowed that number plummeted to just 61 incidents (7 home games) in 2016. This included 26 arrests in the stadium, 25 ejections, six arrests outside the stadium, and four citations. In 2015 alcohol sales were only allowed in the suites and there were 85 ejections. Thus, through providing the opportunity to purchase alcohol inside the stadiums there wasn't the same pressure before a game for people to drink as much as possible to avoid coming to a game where they would not have access to alcohol. One strategy used by the university and its concessionaire, Levy Restaurants, was that students in the South Stands could only purchase one drink per ID. The university generated $1,166,497 from beer sales in 2016 and those funds helped fund four new full-time university police officers.

I do not think that alcohol sales are a panacea or magic wand that will make facilities safer. Alcohol sales, in conjunction with a comprehensive safety program, should not increase the risk of alcohol related incidents. A safety program could include training (Such as TEAM, TIPS, PMI), appropriate policies/procedures, appropriate staffing, and related components. GF

In the News

A 78-year-old woman died in a bathroom stall at Life Time Fitness Club in Burr Ridge, IL. That is not the unusual part of the story. The club member was possibly in the stall for two days before she was noticed. Another gym member alerted staff that the woman had been in the bathroom for at least two hours. This was on July 14, 2017 and the deceased had entered the gym on July 12th. There was no indication from the club as to why their employees did not notice the victim's car parked in the same spot for several days or why the bathroom stalls were not monitored (other than patron privacy concerns). Lifetime Fitness indicated that the club

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closes three hours a day, but is staffed 24-7. As such, there is no final walk through to clean and check places like the bathrooms.

http://chicago.cbslocal.com/2017/09/20/body-found-health-club-bathroom-stall/

A mother is suing the Aaron Family Jewish Community Center of Dallas, alleging her 14-year-old daughter was molested and raped by a fitness center employee. According to the story and lawsuit, the Center was informed about the employee's inappropriate activity by several members of the Center. Furthermore, two other girls also told the Center's staff that he had sexually harassed them. Allegedly, nothing was done about the employee's behavior and no investigation was launched according to the lawsuit. The lawsuit also claims the employee, whose job was to assist with fitness center equipment, was unlicensed and unqualified to be a personal trainer.

This case raises the critical issue of employee background checks, but also having a system to allow complaints and monitoring various conduct-and then a thorough investigation of any major issues. Legal counsel should always be advised when complaints of this nature are raised.

https://www.dallasnews.com/news/news/2017/07/26/jewish-community-center-lawsuit

Michigan State Attorney General, Bill Schuette, filed a class-action lawsuit in September against Family Fitness for allegedly charging customers hundreds or thousands of dollars when they canceled their memberships. The chain has 14 clubs in western Michigan and the Attorney General's office had received 286 complaints so far in 2017 before a cease and desist order was filed against the chain. The suit also charged the chain with violating several provisions of the Consumer Protection Act, including:

Consumers won drawings for free memberships, only to find out, when collecting prizes, that there are monthly costs.

Those who win drawings are not notified they are subject to a sales presentation when collecting prizes.

Family Fitness misrepresents costs, lengths of contracts and consumers' rights to cancel.

Family Fitness has apparently been telling customers they must sign new membership agreements to remove earlier debts that put them into collections.

Unfortunately, cases like this can give the entire industry a black eye. Care should be taken when constructing gym membership agreements to comply with all applicable laws and to avoid onerous penalties.

http://www.mlive.com/news/grand-rapids/index.ssf/2017/09/family_fitness_in_class-action.html

