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SPORTS FACILITIES

How the law affects the sports facilities industry and the LAW

Oakley v. Madison Square Garden: Second Circuit Gives Oakley 2nd Chance

By Jeff Birren, Senior Writer

In February 2017 former New York Knicks player Charles Oakley went to a Knicks game at Madison Square Garden. He sat close to the court, and the game was soon secondary. MSG's security asked Oakley to leave and when he did not immediately do so, he was suddenly on the floor, twice, handcuffed, taken out, and arrested. That evening and the next day, the Knicks released certain statements about Oakley that did not cast him in a positive light. What followed was a criminal conviction of Oakley, and Oakley's civil lawsuit against Knicks owner James Dolan, Madison Square Garden and related entities. The case was assigned to Judge Richard Sullivan. He was subsequently elevated to the Second Circuit but kept the case

These pages previously discussed the incident and the District Court's grant of a motion to dismiss the entire case ("*Sports Litigation Alert,* "Charles Oakley & the New York Knicks: Classic Don't Invite 'Ems" (4-10-20)). Oakley appealed and the appeal was argued to the Second Circuit on September 25, 2020. The Circuit recently issued two rulings (*Charles Oakley v. James Dolan In His Individual Capacity, In His Professional Capacity, MSG Networks, Inc., Madison Square Garden Company, MSG Sports & Entertainment, LLC,* U.S. Court of Appeals, Second Circuit, Docket No. 20-642 ("*Oakley*") (11-16-20)). This article will not repeat the prior article's lengthy facts but will only focus on those relied on by the Second Circuit in the two decisions.

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Grappling With Legal Issues as New Virus Wave Impacts Play

By Brian G. Remondino, Esq. and Joseph E. Samuel, Jr., Esq., of Montgomery McCracken Walker & Rhoads LLP

In the Spring 2020 edition of *Sports Medicine and the Law*, we discussed the potential implications of resuming athletic activity in the wake of COVID-19.[1] At that time, all major American sports leagues and most sports leagues around the world had shut down to prevent the spread of the virus. While the world deals with the dramatically increased spread of the COVID-19 pandemic this fall and winter, athletic institutions must remain vigilant and stay informed about legal issues that may arise and new formal guidance that applies now that competition, in many instances, has resumed. This article serves as an update to our earlier discussion and will analyze new issues that have arisen in the latter half of 2020.

Return-to-Play Update

Since the release of our Spring 2020 article, all five major American sports leagues (the NFL, NBA, MLB, NHL, and MLS) returned with a modified version of their respective seasons. The NBA, NHL, and MLS (at least initially) competed in a "bubble" where teams were sequestered to play in specific centralized locations. The NFL and MLB allowed teams to host games at their home stadiums, although fan attendance was limited by state and

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1 *See* "Resuming Play After COVID-19: Potential Liability & Best Practices for Leagues, Teams, Coaches, and Athletic Trainers," *Sports Medicine and the Law*, Spring 2020.

Court Dismisses Plaintiff's ADA Claim Against Superdome

A federal judge of the Eastern District of Louisiana has dismissed the claim of a quadriplegic, who sued the owners and operators of the Mercedes-Benz Superdome, alleging violations of the Americans with Disabilities Act and/or the Rehabilitation Act.

On June 14, 2018, Shelby Bailey filed a complaint, naming SMG, the operator of the Superdome, and Kyle France, in his official capacity as chairman of the Board of Commissioners of the Louisiana Stadium & Exposition District, as defendants.

Bailey, who sought declaratory and injunctive relief, relies on an electric wheelchair for mobility. He has been a Saints season ticket holder for over 30 years. Bailey alleged that prior to 2011, his seat was located on a wheelchair accessible raised platform in the 100 Level section of the Superdome. He alleged that in 2011, the defendants began extensive renovations on the Superdome and reconfigured the accessible seating section for patrons with disabilities. As a result of the renovations, the wheelchair accessible seating at the Superdome was moved to other positions where the views are obstructed by barriers and other patrons or players standing during the game, or the seating is not fully accessible by wheelchair, according to the complaint. Further, Bailey alleged that the defendants have been on notice of ongoing accessibility issues for many years. He also alleged that in 2008 the United States Department of Justice conducted an inspection of the Superdome and issued a report detailing violations of ADA regulations.

On December 13, 2019, the court granted in part and denied in part SMG's motion for judgment on the pleadings. Important to Bailey, it concluded SMG could conceivably be held liable as an operator of the Superdome because SMG controls modification of the Superdome and could cause the Superdome to comply with the ADA. It also found that the plaintiff's claims for injunctive and declaratory relief were timely because the complaint was filed within one year of SMG allegedly denying the plaintiff "the full and equal enjoyment" of a place of public accommodation.

Bailey responded with a motion on December 31, 2019, arguing that he is entitled to summary judgment as to the following alleged violations of the alteration requirements of the ADA: (1) sightline obstructions at 100 Level, Row 1; (2) sightline obstructions at 100 Level, Row 36; (3) inadequate amount of accessible seating at the 100 Level; (4) making the Superdome less accessible to individuals with mobility-related disabilities; (5) making the 200 Level less accessible; and (6) failure to provide sufficient accessible seating stadium wide.

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SPORTS FACILITIES and the LAW

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San Francisco Giants Outfielder's Concussion Lawsuit Raises Question of Stadium Liability–Again

By Eugene Egdorf, Senior Counsel, Shrader Associates

On April 24, 2018 San Francisco Giants' outfielder Mac Williamson found himself tracking down a routine fly ball that was moving toward foul territory. Unfortunately for Williamson, he lost his balance, tripped over the bullpen mound, and crashed headfirst into the outfield wall. Williamson suffered serious concussion symptoms. Though he eventually returned to the field for 23 games, his season ended upon a diagnosis of post-concussion syndrome. Williamson never recovered, and was soon out of baseball, his career over. He has now brought a lawsuit in San Francisco Superior Court against China Basin Ballpark Company, the operator and owner of Oracle Park, home of the Giants.

Sports fans have long recognized that injuries are a part of the game. We collectively hold our breath when there is a hit over the middle on the gridiron, or a defender takes a hard charge under the basket, or when a shortstop has his legs taken out as a runner looks to break up a double play. But in recent years, an alarming trend is developing, where athletes suffer serious injuries not from a collision with another player, but due to the conditions of their stadiums or playing surfaces on which the games are played.

In December 2011 Houston Texans' punter Brett Hartmann suffered a career-ending knee injury when his foot was caught in an exposed seam of Reliant Stadium's turf tray system. In prior years, several players suffered significant injuries related to the Texans' turf, prompting cries for a change. The author represented Hartmann, whose case eventually settled. While Hartmann's suit was pending, Philadelphia Eagles' linebacker DeMeco Ryans stepped in another seam and tore his Achilles' tendon, ending his career. His lawsuit remains ongoing. The NFL utilized a different field when Houston hosted Super Bowl LI, and subsequently the tray system was replaced by an artificial playing surface.

More recently Reggie Bush was awarded $12.5 million by a St. Louis jury for a knee injury resulting from slipping on exposed concrete out of bounds close to the playing surface. Notably, there had been prior injuries related to the concrete, yet the stadium operators never remedied the danger.

Williamson's is not the first such baseball player lawsuit. In 2018 Dustin Fowler, playing in the first inning of his major league debut for the New York Yankees in Chicago, collided with an unpadded metal electrical box. Fowler ruptured his patellar tendon and yes not returned to the diamond. He never even had the opportunity to bat a single time before his career was seemingly ended. His lawsuit remains ongoing after a judge refused to refer the case to arbitration.

At the time of Williamson's injury, few teams had their bullpens in the playoffs area. Several other players had tripped over the bullpen mounds, though fortunately none had suffered major injuries. The Giants subsequently relocated the stadium bullpens to the outfield.

Premises claims are never easy, and certainly even less so for a professional athlete. Ryan's lawsuit has bogged down because of the contested issue of the applicability of the players' collective bargaining agreement and whether the case should proceed in arbitration. CBA's often pose an insurmountable hurdle to players bringing lawsuits. But a ruling in Fowler's lawsuit will certainly be cited by Williamson's counsel. The federal judge in Chicago hearing the case ruled that the CBA did not preempt Fowler's claims and he could proceed with his negligence theory in district court.

Nevertheless, CBBC will certainly raise a number of other defenses to Williamson's claims. As in many premises claims, CBBC will contend that the alleged danger was open and obvious. This is particularly applicable to Williamson, who was in his 4th season for the Giants and had played in many games at his home stadium. Wisely, Williamson did not sue the Giants or MLB, rendering a workers' compensation defense inapplicable and improving the likelihood of defeating a motion to compel arbitration under the CBA, or otherwise seeking to make the CBA Williamson's exclusive remedy.

Even if Williamson can meet his burden on liability, damages will be a hotly contested issue. As with most MLB players, Williamson's contract was guaranteed for injury. So, he has not lost any salary under his player contract. Thus, the real dispute will center around future losses: what would Williamson have earned with subsequent contracts? His lawyers will of course submit evidence of how well Williamson was playing in 2018, how contracts continue to explode in value, and how even marginal players achieve grand paydays. CBBC, of course, will argue that Williamson was a platoon player who had no real future in baseball. Undoubtedly, executives of the Giants, Williamson's employer, will support CBBC by denigrating Williamson's future prospects as part of the never-ending players v. management game.

This case will have significant pre-trial discovery and evidentiary issues. Those rulings could be significant not just for Williamson's cases, but this type of litigation in general. As such, it will be one to watch closely over the next several months. ●

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Facial Recognition at Sports Venues: Enhancing the Gameday Experience While Minimizing Liability

By Jeffrey N. Rosenthal & David J. Oberly

Facial recognition technology has rapidly transformed—and enhanced—the consumer experience across numerous industries. This includes travel, hospitality, retail, and healthcare, to name a few. Notably, facial recognition is also making its way into the stadiums, arenas, and ballparks of professional sports franchises nationwide.

As sports venues embark on a widespread facial recognition rollout, states and cities from coast to coast—as well as federal lawmakers in Washington D.C.—are attempting to enact strict laws regulating the use of this next-generation technology. Further complicating matters, facial recognition is also emerging as the next major target of bet-the-company biometric privacy class action litigation.

To limit the potential for expansive liability, while encouraging fan participation and consumer confidence, professional sports teams (and the venues they call home) should implement robust, flexible biometric privacy compliance programs. These programs need to maintain ongoing compliance with today's rapidly expanding body of law to avoid being on the receiving end of a potentially devastating biometric privacy class action lawsuit.

Facial Recognition Technology Explained

Facial recognition technology involves the use of facial "biometrics"—*i.e.*, the individual physical characteristics of a person's face—to digitally map one's facial "geometry." These measurements are then used to create a mathematical formula known as a "facial template" or "facial signature." This stored template/signature is then used to compare the physical structure of an individual's face to identify that individual.

Current & Future Uses Facial Recognition Technology at Pro Sports Venues

Biometrics is nothing new to professional sports teams and their home stadiums, arenas, and ballparks. Currently, the most common form of biometrics used at sports venues is fingerprint biometrics. This is driven in large part by the recent partnership between Major League Baseball ("MLB") and biometrics technology vendor CLEAR—whose biometric screening technologies are also commonly seen in airports around the world. This partnership has brought dedicated biometric security lanes—which use fingerprints to verify ticketed fans for a frictionless fan entry process—to most MLB ballparks.

At the same time, other professional sports franchises have started to integrate facial recognition systems into the operations of their home venues as well.

Significantly, while fingerprint scanners currently dominate the market, facial recognition is poised to become the most popular form of biometrics at sports venues due to the rapidly increasing demand in contactless biometric solutions.

The Role of Facial Recognition in Combatting COVID-19 on Gameday

As the country prepares to shift back to its "old normal" after the current pandemic subsides, many organizations are looking to implement risk mitigation measures designed to combat the spread of COVID-19. This is especially important for professional sports teams, as stadiums, arenas, and ballparks may present a problematic environment for the spread of COVID-19 due to the close proximity of spectators.

Enter facial recognition. At this time, many teams and venues are considering integrating facial recognition into their operations in direct response to the current pandemic—as this technology possesses the ability to be deployed in several ways to prevent COVID-19 transmission on gameday.

Most importantly, facial recognition can play a significant role in getting fans into the stadium in a way that minimizes the risk of contracting the virus. With facial recognition, fans are offered a completely contactless way of having their ticket validated. Facial recognition can also be combined with other technologies—like contactless infrared thermal temperature scanners—at venue entrances to detect potentially infected fans before they enter the venue and can spread the virus to others.

But the benefits of facial recognition in the fight against COVID-19 do not stop at the ticket gate.

Once inside the stadium, facial recognition can facilitate a contactless method of purchasing food and drinks, as well as when purchasing merchandise at the pro shop. Similarly, this technology can eliminate many commonly-encountered touch points for venue employees as well, such as by swapping out traditional employee swipe cards or numeric key locks with systems controlled by facial recognition software—which not only offers a contactless method of access control, but also offers significant security enhancements.

Ultimately, facial recognition will play a supporting—if not significant—role in the safe return of fans to in-person professional sporting events by minimizing the health risks associated with COVID-19.

Legal Landscape

In response to concerns regarding the ability of companies to use facial recognition biometrics in a safe and responsible manner, lawmakers around the nation have sought to closely regulate this technology.

First, lawmakers have enacted targeted biometric privacy laws that address the col-

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lection and use of facial template data by business entities. Currently, three states—Illinois, Texas, and Washington—have such laws on the books.

Overall, Illinois' Biometric Information Privacy Act ("BIPA") is considered the most stringent. Under BIPA, a private entity cannot collect or store facial template data without first providing notice, obtaining written consent, and making certain disclosures. BIPA also contains a private right of action provision that permits recovery of statutory damages between $1,000 and $5,000 by any "aggrieved" person, which has generated a tremendous amount of class litigation from consumers alleging mere technical violations.

Second, new state consumer laws include facial template data (and other forms of biometric data) within their definition of covered "personal information." State legislators have also amended their data breach notification laws to add facial template data to the types of "personal information" which, if compromised, triggers breach notification obligations by impacted entities.

Several other states are attempting to enact new legislation of their own directly targeting facial recognition technology. For example, currently pending in the Pennsylvania state legislature is the proposed Consumer Data Privacy Act ("CDPA"), which, if enacted, would impose a wide range of requirements and limitations over the use of facial template data. The CDPA would also mandate *immediate* compliance as soon as the bill is enacted. Similarly, pending is the proposed New York Biometric Privacy Act which, if passed, would impose obligations identical to those found in Illinois' BIPA.

Federal lawmakers have also targeted facial recognition. In August 2020, Senators Jeff Merkley (D-OR) and Bernie Sanders (I-VT) introduced the National Biometric Information Privacy Act of 2020 (S.4400), which would impose requirements similar to, but stricter than, BIPA from coast to coast.

Compliance Tips: How Pro Sports Teams/Venues Can Stay a Step Ahead of Biometric Privacy Compliance

Pro sports teams have already been the target of class action litigation under today's biometric privacy laws. As just one example, in early 2020, the Chicago Blackhawks were hit with a BIPA class action lawsuit stemming from the team's use of facial scanning technology at home games.

From a broader perspective, while relatively few biometric privacy laws are in existence today, the nation is likely to see a flood of new regulation governing the col-

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lection/use of biometric data in the future. This is especially so as lawmakers resume their normal activities after spending much of their time in 2020 on pandemic-related matters, and as companies rely more heavily on biometrics to leverage the health benefits these contactless technologies provide.

Pro sports franchises and venues that take proactive steps to build out their biometric privacy compliance programs—especially those that may not yet be subject to state-specific biometric privacy laws—can get a step ahead on the anticipated facial recognition laws that will likely be put in place.

Professional teams and their venues should consider the following:

- **Early Involvement of Biometric Privacy Counsel:** Consult with experienced biometric privacy counsel well before any type of facial recognition technology is implemented to ensure compliance with today's constantly-evolving biometric privacy legal landscape.
- **Privacy Policy:** Develop a publicly-available, detailed facial recognition-specific privacy policy that includes, at a minimum, clear notice that facial template data is being collected, as well as additional information regarding the purposes for which facial template data is used and the team's/venue's schedule and guidelines for the retention and destruction of this data.
- **Written Notice:** Provide written notice—before any facial template data is collected—which clearly informs individuals that facial template data is being collected, used, and/or stored by the company; how that data will be used and/or shared; and the length of time over which the team/venue will retain the data until it is destroyed.
- **Written Release:** Obtain a signed written release from all individuals prior to the time any facial template data is collected that permits the team/venue to collect/use the individual's biometric data and disclose this data to third parties for business purposes.
- **Opt-Out:** Permit fans to opt out of the collection of their facial template data.
- **Data Security:** Maintain data security measures to safeguard facial template data from unauthorized access, disclosure, or acquisition.
- **Arbitration Provisions in Ticket Contracts:** Include mandatory arbitration provisions and class action waivers in all ticket contracts requiring fan disputes or claims that may arise under biometric privacy or similar laws must be resolved through binding, individual arbitration, and not in court, to limit biometric privacy class action litigation risk.

The Final Word

Biometrics has already transformed the fan experience on gameday. Moving forward, continued advancements in facial recognition technology, combined with the growing need for contactless biometric solutions, will drive rapid, widespread implementation of facial recognition software at stadiums, arenas, and ballparks around the country.

As biometrics becomes more popular, the scope of liability stemming from its use is also rapidly expanding as cities, states, and Congress seek to impose rigorous mandates and limitations on the use of facial biometrics.

Professional sports teams currently using, or contemplating the use of, this game-changing technology—even those whose home venues are located in parts of the nation where no biometric privacy regulation currently exists—are strongly encouraged to take a proactive stance and develop/implement biometric compliance programs that encompass the practices and principles described above. ●

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The Second Circuit's First Opinion *(Oakley I)*

This opinion only dealt with the causes of action for assault and battery, specifically, "the allegations of unreasonable force applied by security personnel endeavoring to remove a spectator from a sports arena" (*Oakley I* at 2). Oakley claimed that Dolan "constantly disrespected" him and had "security harass him" (Id. at 4). He alleged that within minutes of taking his seat, "Dolan directed security 'to forcibly remove' Oakley from his seat" and that he was ordered to leave "without explanation." Oakley asserted that he "peaceably returned to his seat" and "merely sought an explanation for why he was being treated differently than every other fan who had attended" the game (Id. at 4/5). He was then shoved to the ground. He "got back to his feet" and "the security guards further escalated the confrontation by physically grabbing Mr. Oakley to forcibly compel him to leave." Oakley "pushed their hands away in self-defense" but within "seconds" he "was forcibly turned around so his back faced security, grabbed by six officers and thrown to the ground." They denied his requests to stand up but put him "into restraints and the security guards roughly threw him out of the Garden" (Id. at 5). Oakley further alleged that the defendants "greatly exceeded the amount of force that was necessary in the situation" (Id. at 5/6).

His assault allegations included assertions that the defendants "intentionally" placed Oakley in "imminent fear of harmful and/or offensive conduct" and that the tortious conduct caused him to suffer harm and the harm "continues" (Id. at 6). Oakley made similar assertions in his battery claim.

The Circuit's Analysis

To "defeat a motion to dismiss" the "plaintiff must allege 'enough facts to state a claim [for] relief that is plausible on its face'" and "a court must accept as true all factual allegations in the complaint and draw all reasonable inferences in favor of the plaintiff" (Id. at 7). A property owner "has the right to use reasonable force to eject a trespasser from its premises" but the use of "unnecessary force or evidence of intent to injure…removes the privilege." The Circuit stated that Judge Sullivan "understood Oakley's claim to be that 'the guards' use of force was unreasonable because he did 'nothing wrong and simply wanted to watch the game in peace'" (Id. at 8). The District Court determined that "nowhere does Oakley allege that the guards intended to injure him" nor

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did the amended complaint include an "allegation that the force used by Garden officials was unreasonable" nor that it "was excessive" (Id. at 9).

The Circuit reviewed the dismissal *de novo* "to determine whether the amended complaint" alleged "enough facts to state a claim" that was "plausible on its face." The Court spent over a page citing the alleged facts alleged, including the allegations that the security guards "grabbed him," "pushed him to the ground," and "forcibly shov[ed] [him] to the ground" (Id.). The Court quoted further allegations, including the claim that the actions "greatly exceeded the amount of force that was necessary" and that it "clearly exceeded the bounds of reasonable behavior" (Id. at 10.)

The Court noted that the District Court "appears to have somewhat misunderstood Oakley's allegations, deeming him to argue 'that any use of force was unreasonable, because it was unreasonable to ask him to leave in the first place'" (Id. at 10/11). Although "Oakley did contend (incorrectly) that the act of removal was unnecessary, his additional, and actionable, claim was that the security guards used excessive force in accomplishing the removal" (Id. at 11).

The Court distinguished a case cited by the District Court that "is significantly different from Oakley's case." That decision was from a motion for summary judgement, and it dealt with an arrest. Here the security guards "were not trying to handcuff a person whom they had authority to arrest; his arrest occurred later, outside the arena." In these situations, "the question of whether the use of force was reasonable under the circumstances is generally best left for the jury to decide" (Id. at 12), (citation omitted). This is also true "in the arrest context" where "the reasonableness of the force used is often a jury question" (Id.), (citation omitted). "These principles apply with even greater force at the motion to dismiss stage, where a court must assume the truth of the plaintiff's allegations and avoid resolving factual disputes." Therefore, "the judgment is reversed as to the causes of action for assault and battery" and "the case is remanded for further proceedings" (Id.).

The Second Circuit's Second Opinion *(Oakley II)*

The Circuit released a second decision that has the same case name, number, and date. This shorter opinion is labeled "Summary Order" and the front-page states that summary orders "do not have precedential effect" but may be cited (*Oakley II* at 1). Prior to dealing with the merits, the Court stated that the District Court dismissed a claim for abuse of process, but Oakley

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did not challenge that on appeal (Id., FN 2). The Court also noted that Oakley had appealed the District Court's denial of leave to further amend his pleadings. This was denied because the Court held that the assault and battery claims were adequately pled and the Court affirmed "the dismissal of most claims in this Order" (Id., FN 3). The Circuit then turned to the appeal of the other dismissed claims.

The Court reviewed the dismissal *de novo*, and it had to "assume the truth of all of the allegations and draw all reasonable inferences from those allegations in the plaintiff's favor" (Id at 2/3), (citation omitted). Oakley's claim for defamation was for "falsely accusing him of being an alcoholic" and "of having committed the serious crime of assault against members of the public" in various tweets and an interview given by Dolan. Oakley pled a claim of slander against all of the defendants for injurious spoken words and for libel against MSG (Id. at 4).

Oakley is a public figure, and thus had to plausibly allege that the defendants acted with "actual malice." The Circuit agreed with the District Court that "the amended complaint lacks sufficient allegations from which to infer that Defendants know or recklessly disregarded that their statements about Oakley's drinking were false." Those statements included Dolan's comments that "witnesses at the Garden claimed Oakley had appeared to be impaired; that Oakley said on television that he had been drinking before the incident; and that Dolan questioned on ESPN whether Oakley might 'have a problem,' and 'we don't know, right.'" The Knicks also tweeted that Oakley "might need 'help.'" The "critical question is the *state of mind* of those responsible for the publication'" (emphasis in the original). However, the "amended complaint contains insufficient allegations that Defendants knew or recklessly disregarded that they were false, as is necessary to establish actual malice" (Id.).

The same fate met Oakley's "false accusations of assault" (Id. at 5). Those allegations did not "adequately plead that these statements are per se actionable or resulted in special damages." Only four types of claims are "per se actionable under New York law." Those are imputing unchastity to a woman, asserting that the plaintiff has a "loathsome disease" (neither are present here), statements that injure him in his profession or charge the plaintiff with a serious crime.

The amended complaint did "not identify what Oakley's cognizable trade is." The "complained-of charges of abusive behavior bear only on his general character and not on his ability to perform his job."

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Furthermore, the defendants did not state that Oakley had "committed a serious crime" nor did the statements "support an inference that Oakley's actions amounted to a criminal assault." Some of the statements referenced his arrest, but "they also suggest that the only consequence for the incident should be a focus on Oakley's well-being, not any legal consequences that usually attend a serious crime."

In the "absence of per se actionability, Oakley must instead plead that the statements result in special damages, or 'actual losses' that were specifically and 'casually related to the alleged tortious act'" (Id. at 6). The amended complaint did not do so, but instead the statements as pled "were tied to Oakley's theory" about "false accusations" regarding "his alcoholism, not about his alleged commission of assault." Thus, the defamation "allegations fail to state a claim under New York law" and the Circuit affirmed the dismissal of those claims.

Oakley's Claim for Denial of Public Accommodation

The District Court dismissed Oakley's claims that the defendants violated both the ADA and the New York state law equivalent "'by denying him access to the Garden based on their perception that he suffers from alcoholism,' a protected disability." However, Oakley failed "to plead plausibly that the Defendants acted against Oakley as a result of his perceived alcoholism, as opposed to his alleged *inebriation at that time* and the resulting disruption" (Id.) (emphasis in the original). The amended complaint "at most" speculated "after the fact that Oakley had a problem with alcohol." To the staff, "Oakley appeared 'impaired' because he had been drinking" prior to the incident, but there were no allegations that "Defendants believed, let alone discriminated against him because they believed, that Oakley was an alcoholic" (Id. at 7).

The Claim for False Imprisonment

Oakley sought "reinstatement" of this claim but "only to the extent that the public accommodation claim is reinstated." For 'the public accommodation claim to be viable" he "must allege" that the defendants' "confinement of him was not 'privileged.'" Oakley's "theory" is that the guards' "detention was not privileged when Defendants acted for unlawful discriminatory reasons, (that is, on the basis of his alcoholism) in violation of the ADA and NYSHRL. Because we affirm the dismissal of those claims" the Court affirmed the dismissal of the false imprisonment claim.

Conclusion

This was a great result for Oakley. The opinion dealing with the assault and battery claims cited a case that stated that "the reasonableness of the force used is often a jury question" and thus summary judgment may not be forthcoming.

During the motion to dismiss, videos of the incident were submitted by the MSG defendants. The District Court did not consider the videos then, (*Oakley I* at 7, FN 3), but they may be admitted on a motion for summary judgment. Those videos could change everything but at this distance it is impossible to know what the impact might be. However, the videos could lead to some extremely difficult deposition questions for the parties. Irrespective of right and wrong, Dolan, MSG and their insurance companies are going to soon have some interesting conversations regarding the best way to proceed. ●

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local social distancing guidelines, which, in many cases, resulted in no fan attendance at all.

The bubble models were widely praised for their effectiveness—the NBA, for example, was able to complete its season and playoffs without a *single* reported positive test of COVID-19.[2] Although the MLB was able to finish its season, and the NFL season continues as this article goes to print, both leagues were and continue to be plagued with game postponements and other difficulties, as players and staff contracted and spread the virus. Of particular note, the NFL's Steelers-Ravens game scheduled for Thanksgiving night was pushed to the following Wednesday afternoon due to a virus outbreak, marking only the second Wednesday NFL game since 1950,[3] and, in the same week, the Denver Broncos became the first team to start a non-quarterback at the position since 1965 because all of the quarterbacks on their roster were disqualified from play due to the league's COVID-19 protocols.[4]

2 *See* "Lakers Win NBA Finals; No Coronavirus Cases Reported in Bubble," NPR (Oct. 12, 2020), https://www.npr.org/2020/10/12/923064484/lakers-win-nba-finals-no-coronavirus-cases-reported-in-bubble.

3 *See* "Ravens-Steelers game could help make NFL history by being played on a Wednesday," CBS Sports (Dec. 1, 2020), https://www.cbssports.com/nfl/news/ravens-steelers-game-could-help-make-nfl-history-by-being-played-on-a-wednesday/.

4 *See* "Why did the Broncos play without a

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Some collegiate sports have resumed as well, including Division I football and basketball. Not all activity has resumed, however, as the NCAA's Divisions II and III canceled all of their fall 2020 championships. Other Division I sports have resumed or been canceled on a school-by-school basis. Like the MLB and NFL, collegiate sports have been plagued by postponements and cancellations, and several teams across the country have experienced major outbreaks. At least 17 student-athletes and 13 staff members for the Wisconsin Badgers, for example, tested positive for the virus in October and November, causing the team to miss several games in an already shortened Big 10 season,[5] and some of college football's biggest names—including Clemson's Trevor Lawrence, the presumptive number one pick in next year's NFL draft, and Alabama's Coach Nick Saban—have missed games after testing positive.

NCAA Guidelines

In order to support teams and schools that have resumed play, the NCAA has issued (and routinely updated) guidance documents that must be followed.[6] While these documents were initially released as nonmandatory guidance that contained permissive language such as "may" and "might," the NCAA has since clarified that they are "considered requirements for institutions that elect to continue with any competition occurring in the fall."[7]

The guidance notes that "[a]symptomatic spread of COVID-19 is of significant concern among the college sport environment because, like the broader student body, it is largely composed of younger adults (18-29 years of age). Even if these individuals remain asymptomatic or are minimally symptomatic after being infected with [the virus], they are still capable of spreading the virus that causes COVID-19."[8] The guidance goes on to describe in detail the applicable CDC guidelines.

quarterback? Where the NFL stands in its COVID-19 battle, what's next," ESPN (Nov. 30 2020), https://www.espn.com/nfl/insider/story/_/id/30417807/why-did-broncos-play-quarterback-where-nfl-stands-covid-19-battle-next.

5 *See* "Wisconsin football's COVID-19 outbreak slowing, active cases down to 14," Wisconsin State Journal (Nov. 8, 2020), https://madison.com/wsj/sports/college/football/wisconsin-footballs-covid-19-outbreak-slowing-active-cases-down-to-14/article_199b99db-6cab-5104-8e46-42fd237090fc.html.

6 *See* "Resocialization of Collegiate Sport: Developing Standards for Practice and Competition, Second Edition," NCAA (Nov. 13, 2020), https://ncaaorg.s3.amazonaws.com/ssi/COVID/SSI_ResocializationDevelopingStandardsSecondEdition.pdf.

7 "Requirements for Each Division Related to the Conduct of Fall Sports and Championships: FAQs," NCAA (Aug. 11, 2020), http://www.ncaa.org/sport-science-institute/requirements-each-division-related-conduct-fall-sports-and-championships-faqs.

8 *See* supra note 3 at 5.

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Importantly for athletic institutions, the guidance emphasizes outdoor practice where possible. "When outdoor training is not feasible, or for indoor sports, it is important to mitigate risk with masking whenever feasible, including during training."[9]

The NCAA also recommends working in "functional units" during practice or other team activities. A "functional unit" is described as two to 10 or more individuals, all members of the same team, who consistently work out and participate in activities together. "This means that if an individual from one of those units does become infected, the entire team may not be impacted, and contact tracing may be more manageable than it would be otherwise in the event of an infection."[10] The guidance further suggests the use of electronic whistles or whistle covers during practice, "as a strategy to avoid the deep breath and force burst of droplet-filled air that result from the use of a traditional whistle."[11]

Interestingly, the NCAA guidance ranks each sport based on its "current transmission risk," with each sport listed as either Low, Intermediate, or High. Sports labeled as Low-risk include golf, outdoor track, and tennis, while the Intermediate category includes baseball, field hockey, and indoor track.[12] The High-risk category includes both football and basketball, yet, as discussed above, play has resumed for both of these sports, at least in Division I.

Collegiate conferences and individual schools have also developed their own COVID-19 protocols of varying degrees of strictness, which include testing, cardiac screening, return to play, quarantine, and other safety guidelines.[13]

9 *Id.* at 9.
10 *Id.* at 14.
11 *Id.*
12 *Id.* at 19.
13 *Compare,* "SEC Medical Guidance Task Force Requirements for COVID-19 Management: Fall Sports," (Nov. 18, 2020), http://a.espncdn.com/sec/media/2020/SEC%20Task%20Force%20Recommendations%20Fall.pdf, with "Everything you need to know about the Big Ten's COVID-19 protocols," (Nov. 11, 2020), https://www.nbcsports.com/washington/ncaa/everything-you-need-know-about-big-tens-covid-19-protocols.

Legal Developments Resulting from Return-to-Play

Our Spring 2020 article discussed the potential legal implications of resuming play in the wake of COVID-19, including the possibility of tort liability stemming from the spread of an infectious disease. It is true that cases asserting negligence based on the contraction of COVID-19 have been filed all across the United States, although they have tended to arise in the context of nursing homes,[14] prisons,[15] or private employers.[16] The authors of this article have yet to come across a case in which an athlete or employee has sued his or her team, school, or other institution based on a failure to properly contain the virus as athletic activity resumed.

This does not mean that litigation stemming from COVID-19 has not arisen between student-athletes and their schools. To the contrary, in one notable case, a group of Illinois high school student-athletes and their parents actually sued their local athletic association to *compel* the return of fall sports, arguing the decision did not comport with the association's own bylaws. Their request for a temporary restraining order was denied, however.[17]

14 *See, e.g., Parker v. St. Jude Operating Co.*, Complaint (Negligence, Negligence per se, and Statutory Elder Abuse), 2020 WL 2557150, at *1 (Or. Cir. May 19, 2020).
15 *See, e.g., Matter of Pauley*, 466 P.3d 245 (Wash. Ct. App. 2020).
16 *See, e.g., Segura v. Classic Southeast Texas, Inc.*, Plaintiff's Original Petition, 2020 WL 6787449, at *1 (Tex. Dist. July 8, 2020).
17 *See* "DuPage County judge denies parents a temporary restraining order against IHSA's Return to Play guidelines," Chicago Sun Times (Oct. 1, 2020, 4:33 PM), https://chicago.suntimes.com/high-school-sports/2020/10/1/21497633/ihsa-lawsuit-dupage-county-coronavirus-high-school-sports.

Similarly, in August a group of student-athletes at the University of Nebraska sued the Big Ten Conference, alleging tortious interference and breach of contract stemming from the Big Ten's decision (at least initially) to suspend the fall 2020 football season.[18] The Big Ten later changed course and decided to begin its football season in late October,[19] seemingly mooting the Nebraska student-athletes' case.

These cases suggest that, instead of facing litigation risk stemming from alleged negligence in retuning to play too quickly or without proper COVID-19 precautions, athletic institutions, at least in the short-term, are more likely to face litigation arising from decisions *not* to engage in certain activities, either on contractual grounds, tort grounds, or in an administrative law context. Nevertheless, because the long-term impact of COVID-19 is still unknown, particularly with respect to potential heart and lung damage, the possibility remains that negligence-based return to play cases will arise in the future. *Sports Medicine and the Law* will continue to monitor any developments surrounding COVID-19's impact on professional and collegiate athletics, whether they involve litigation, new regulatory guidance, or otherwise. ●

18 *See Snodgrass v. The Big Ten Conference, Inc.*, Complaint, 2020 WL 5076062, at *1 (Neb. Dist. Ct. Aug. 27, 2020).
19 *See* Adam Rittenberg and Heather Dinich, "Big Ten football to resume weekend of Oct. 24," ESPN (Sept. 16, 2020), https://www.espn.com/college-football/story/_/id/29897305/sources-big-ten-announce-october-return.

Court Reverses, Says Golfer Assumed the Risk of Slip and Fall

A New York state appeals court has reversed a trial court, reasoning that the doctrine of the assumption of the risk applied in a case involving a man who hurt himself during a round of golf and subsequently sued the golf course to recover damages.

Jeffrey D. Conrad claimed is his lawsuit that the injury occurred after he ascend a stairway used to access the tee box on the twelfth hole and then took a measurement from the tee box using his range finder. When he went to return to his golf cart to select a club, he stepped onto the landing at the top of the stairway, slipped on a wooden board, and fell, suffering severe injuries to both of his knees.

In response to the lawsuit, the golf facility and other defendants moved for summary judgment arguing that the plaintiff assumed the risks associated with playing golf. The trial court denied the motion, sparking the appeal.

The appeals court noted that the doctrine of assumption of the risk acts as a complete bar to recovery where a plaintiff is injured in the course of a sporting or recreational activity through a risk inherent in that activity, citing Turcotte v Fell, 68 NY2d 432, 438-439 [1986].

"As a general rule, participants properly may be held to have consented, by their participation, to those injury-causing events which are known, apparent or reasonably foreseeable consequences of the participation" (id. at 439, citing Maddox v City of New York, 66 NY2d 270, 277-278 [1985]). " 'It is not necessary to the application of assumption of [the] risk that the injured plaintiff 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' " (Yargeau v Lasertron, 128 AD3d 1369, 1371 [4th Dept 2015], lv denied 26 NY3d 902 [2015], quoting Maddox, 66 NY2d at 278). "The doctrine of primary assumption of the risk, however, will not serve as a bar to liability if the risk is unassumed, concealed, or unreasonably increased" (Ribaudo v La Salle Inst., 45 AD3d 556, 557 [2d Dept 2007], lv denied 10 NY3d 717 [2008]).

In the instant case, the defendants "established on their motion that the plaintiff was an experienced golfer who had played defendants' golf course several times in the past (see Kirby v Drumlins, Inc., 145 AD3d 1561, 1562 [4th Dept 2016])," wrote the appeals court. "Moreover, the defendants demonstrated that, at the time of the incident, the plaintiff knew that the course was still wet from rain that had just fallen, and that he was familiar with the stairway in question, having just used it moments before his accident. For those reasons, we conclude that the defendants met their initial burden by establishing that

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the plaintiff was aware of the risk posed by the stairway and assumed it (see id. at 1562-1563; Bryant v Town of Brookhaven, 135 AD3d 801, 802-803 [2d Dept 2016]; Mangan v Engineer's Country Club, Inc., 79 AD3d 706, 706 [2d Dept 2010])."

Furthermore, the plaintiffs failed to raise "a triable issue of fact" whether he was subjected to "unassumed, concealed or unreasonably increased risks" (Benitz v New York City Bd. of Educ., 73 NY2d 650, 658 [1989]; see Morgan v State of New York, 90 NY2d 471, 485 [1997]).

"Even assuming, arguendo, that the condition of the stairs was 'less than optimal' because anti-slip guards were not extended onto the portion of the landing where the plaintiff fell, that does not create an issue of fact under the assumption of the risk doctrine (Bukowski v Clarkson Univ., 19 NY3d 353, 356 [2012])," concluded the appeals court. ●

Jeffrey D. Conrad and Katherine M. Conrad v. Holiday Val., Inc.; Appellate Division, Fourth Department, N.Y.; Slip Op 05333; 10/2/20

Court Dismisses Plaintiff's ADA Claim Against Superdome

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The court denied summary judgment on some of the arguments, while declaring more evidence was needed on the others.

After considering the arguments, the court wrote in a lengthy opinion that Bailey "has failed to carry his burden of proving that (SMG and France) violated the Americans with Disabilities Act and/or the Rehabilitation Act.

"The court is mindful that this result leaves the plaintiff with 'limited seating choices . . . in less than ideal locations.' However, the dictates of the ADA do not require otherwise. Thus, the court's decision is compelled by the preceding findings of fact and conclusions of law, in particular, the structural limitations of the stadium's design, existing ADA regulations and guidelines, and case law."

The full opinion can be viewed here: https://casetext.com/case/bailey-v-bd-of-commrs-of-la-stadium-exposition-dist-5 ●

Bailey v. Bd. of Comm'r of the La. Stadium & Exposition Dist.; E.D. La.; CIVIL ACTION CASE NO. 18-5888 8; 9/4/20

