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SPORTS FACILITIES and the LAW

How the law affects the sports facilities industry

Clarity Is Key: Pre-Game Releases Must Use Clear, Conspicuous Language

By John Tyrrell

On January 6, 2021, a split panel of The Fourth District Court of Appeal for the State of Florida refused to revive a high school soccer player's negligence lawsuit against the School Board of Broward County ("School Board") after the trial court granted summary judgment. *Elalouf v. School Board of Broward County*, 4D19-3272 (Fla. 4th DCA 2021). The trial court found that a pre-game release precluded a negligence claim against the School Board.

In 2013, Appellant/Plaintiff Ethan Elalouf was a 15-year-old varsity soccer player at Western High School in Davie, Florida. In order to play, Elalouf and a parent/guardian were required to execute a one-page Florida High School Athletic Association ("FHSAA") Consent and Release from Liability Certificate ("Release"). The Release became the central issue in the case.

On December 9, 2013, Elalouf's team was playing a game at Piper High School in Sunrise, Florida. During the game, Elalouf was tackled by another player, causing him to be propelled a few feet off the soccer field. Elalouf slid through the grass and into the cement exterior of a sand pit used for track and field events. As a result, Elalouf alleged he sustained severe and permanent injuries to his wrist.

On December 8, 2017, Elalouf filed a lawsuit against the School Board seeking damages for the injuries he sustained. His one-count Complaint alleged that the School Board negligently maintained the Piper High School soccer field by allowing an improper structure (the concrete sand pit) to be too close to the soccer field and leaving it uncovered, unsecured, and

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Most Recent Challenge to the "Baseball Rule" Called Out

By Carla Varriale-Barker and Nathan J Law, of Segal McCambridge Singer & Mahoney, Ltd

The Court of Appeals for North Carolina is the latest court to uphold the specialized duty of care known as the "Baseball Rule." The Baseball Rule protects the owners and operators of baseball stadiums from negligence claims brought by spectators who are injured by misdirected baseballs (as well as bats and, depending on the jurisdiction, other promotional items) so long as the owner or operator provides an adequate number of protected seats.

In 2015, the DeBlasio family, originally from Pittsburgh, PA, moved to Durham, NC after the father was relocated for work. In August of that year, the father's company held a "meet-and-greet" picnic to celebrate the DeBlasio family's move and introduce the family to other area employees. The picnic took place at Durham Bulls Athletic Part, home of the Tampa Bay AAA minor league affiliate, Durham Bulls, during a game against the Pittsburgh Pirate AAA affiliate Indianapolis Indians. The family gathered in the Picnic Area of the ballpark, located at field level in the left field corner of the stadium, approximately 110 feet past protective netting that extended from home plate to the team dugouts. In the Picnic Area, three warning signs declared "PLEASE BE AWARE OF OBJECTS LEAVING THE PLAYING FIELD." During the game, the DeBlasio family's 11-year-old daughter – who herself was a softball player and admitted baseball fan, who attended Major League games in-person, and watched games on television – was struck in the face by a foul ball while chatting

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Paramedic Amends Complaint in Astros Dugout Concussion Case

Paramedic Brian Cariota, who was working in the dugout of the Houston Astros' post-season game at Minute Maid Park against the New York Yankees in October of 2019 when he was struck by a foul ball, amended his negligence lawsuit in December against the team.

Cariota reportedly removed that part of the complaint, which suggested that the lack of netting over the Astros dugout may have been related a desire by the ballclub to preserve sightlines for use in stealing other teams' signals.

Cariota sued the Astros after he was struck in the head. After the incident, he was rushed to the hospital where he was treated for a traumatic brain injury, brain bleed and facial fractures after the incident. His attorneys allege that he suffered permanent damage to his retina and will have lifelong vision issues and post-concussion syndrome. He is seeking $1,000,000 to cover his physical pain and mental anguish.

Cariota alleged in the lawsuit that the Astros should have installed protective netting in the dugout at Minute Maid Park. The Astros extended the protective netting at Minute Maid Park a few months earlier after a 2-year-old girl suffered a skull fracture when she was struck by a foul ball. Her family later said she has permanent brain damage. "Due to the dangerous condition created by a lack of netting to protect workers in the dugout, … Cariota suffered a serious injury when a foul ball struck above his left eye," according to the lawsuit. ●

Brian Joseph Cariota v. Houston Astros LLC, 80th state District Court, Harris County

PGA Cancels Plans to Host Event at Trump National

The Associated Press has reported that the PGA of America, the organization representing golf's teaching professionals, has opted out of its plans to host the 2022 PGA Championships at Trump National in Bedminster, New Jersey.

"We find ourselves in a political situation not of our making," Seth Waugh, the CEO of the PGA of America, told the wire service. "We're fiduciaries for our members, for the game, for our mission and for our brand. And how do we best protect that? Our feeling was given the tragic events of Wednesday that we could no longer hold it at Bedminster. The damage could have been irreparable. The only real course of action was to leave."

Waugh elaborated: "Our decision wasn't about speed and timing," Waugh said. "What matters most to our board and leadership is protecting our brand and reputation. ●

SPORTS FACILITIES and the LAW

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Mount Everest Guide Sued for Fraud and Breach of Contract

By Jon Heshka, Associate Professor at Thompson Rivers University

Mountains were formerly thought of as a refuge of scoundrels. From Warren Harding's iconoclastic first ascent of The Nose on El Cap in Yosemite to Osama Bin Laden hiding in the mountains in eastern Afghanistan, its reputation as a place unsullied by the constraints of civilization and untouched by the law has been challenged by lawsuits last year involving a mountain guide, a millionaire client, and the world's highest peak.

The client, Zachary Bookman, is a Yale and Harvard educated lawyer who clerked for the U.S. Court of Appeals for the Ninth Circuit and is the CEO of Silicon Valley technology company. The guide, Garrett Madison, says he's "America's premier Everest guide and climber."

Bookman paid Madison $69,500 to join a Mount Everest expedition that Madison was leading. Bookman alleges that Madison cancelled their September 2019 Mount Everest expedition because a member of the four-person team – the president of an outdoor company who was paying for or otherwise subsidizing the trip – was so out of shape that the trip was cancelled one day after the president quit. Madison is sponsored by the same company and endorses its gear.

Bookman filed suit in San Francisco County Superior Court in the spring 2020 seeking $100,000 in punitive and compensatory damages, claiming fraud as Madison didn't even try to summit Mount Everest and that Madison "represented that the summit of Everest was going to happen" and also that Madison breached an oral agreement made at Base Camp for a partial refund of $50,000 due to the expedition being cancelled.

Bookman claims it was largely an official expedition meant to test gear and take pictures as part of a photo shoot and that once its president and another client – who was also a sponsored climber with the same company – left, Madison had no real reason or the motivation to continue. Bookman also alleges that the Sherpas hired by Madison were "lazy and inefficient" and had not prepared the route through the Khumbu Icefall above Base Camp.

Madison disputes Bookman's allegations.

What is not disputed is that there was a gigantic serac, a freestanding column of glacial ice, looming about 2600 feet above the climbing route between Base Camp and Camp 1. It's estimated that the serac weighed 54 million pounds. In 2014, a serac collapsed on Mount Everest which triggered an avalanche that killed 16 Sherpas in the same area of the Khumbu Icefall.

Madison says the executive was in excellent physical shape and that he and the other client pulled out of the expedition because of his concerns about the serac. The executive has said they "chose safety over ego" and Madison has stated in court filings that it was a "no-brainer" to pause climbing after becoming aware of the serac and the danger it posed.

The decision by the executive and sponsored climber to cancel was made one day after being made aware of the serac. Bookman was not present when those two were making their decision.

The San Francisco County Superior Court granted Madison's motion to dismiss the suit because it lacked jurisdiction as his company is based out of Washington state.

In the fall 2020, Madison filed his own suit in King County Superior Court in Seattle seeking a declaratory judgment that Bookman assumed the risks associated with the expedition, has no right to a refund and that he should pay all of Madison's legal fees, expenses and costs.

The adventure industry is concerned and worried about this case. Notwithstanding the optics of the executive pulling out of the expedition and that Madison's decision to cancel it outright appears to have been hastily made (expeditions regularly wait out storms for days or even weeks), he has a strong case.

It is highly improbable that Madison would have ever made any sort of representation to Bookman about guaranteeing a summit attempt. Madison fulfilled his duty of care in his role as mountain guide by properly identifying and assessing the risk, communicating that risk to the clients, and making what seems like the reasonable call in the circumstances to not unnecessarily expose the clients to the very real chance of the serac collapsing and thereby killing them. Lastly, Bookman – a trained lawyer from an Ivy League law school who clerked for the Ninth Circuit – will likely be deemed to have understand what he signed and be bound by the contract which has an explicit no-refund policy which stated: "You are required to pay a $69,500.00 USD non-refundable, non-transferable full payment to reserve your space on the trip." Bookman also signed an Assumption of Risk and Release of Liability Agreement which stated that he was aware of the inherent risks and dangers involved, including but not limited to weather and forces of nature.

The case has not gone to trial and none of the charges have been proven in court. ●

Is It Time to Put Animal Mascots Out to Pasture? Recent Texas Longhorn Lawsuit Points in That Direction

By Carla Varriale-Barker

At a sporting event, mascots can be as controversial as they are popular. Some teams have been criticized for promoting racist and anti-indigenous tropes (such as the Atlanta Braves, the Cleveland Indians, the Washington Redskins, and the Kansas City Chiefs). Other teams have landed in the crosshairs of organizations, such as People for the Ethical Treatment of Animals for their use of live animal mascots. The use of live animals such as bulldogs, or even exotic animals like tigers and buffalo, at a sporting event implicates a gaggle of liability considerations for the teams, the venue, the owners of the animals, and the handlers of those animals.

The liability issues presented can be addressed within familiar tort law framework. However, there is a "deeper dilemma" of whether to recognize an animal solely as a "thing" or property. There is a developing body of law, described as animal law, that challenges the legal status of animals and advocates that they deserve to be treated as something other than property [1]

Notwithstanding these concerns, the presence of live animal mascots proliferates, often as a marketing tool.

However, a recent lawsuit illustrates the potential liability issues and risk considerations when a live animal mascot appears a t a sports event. In a perfect storm of facts, a beloved longhorn steer mascot for the University of Texas gored a photojournalist, Nicholas Wagner, at the Sugar Bowl game in Louisiana. Wagner was on the field taking photographs of the University of Georgia bulldog mascot, Uga. As Wagner was on one knee photographing Uga, he was gored by Bevo XV, the University of Texas longhorn steer mascot. The steer appeared to lunge in the direction of the bulldog (and patrons), taking his handlers with him and toppling barriers set up on the field. He then struck Wagner. Bevo XV rammed his long horns into Wagner's back twice, allegedly causing permanent injuries to Wagner's neck and back. The interaction was captured on video and went viral.

Bevo XV is a longhorn steer and a fixture at the University of Texas. At the time of the attack, he weighed more than 1800 pounds and had a formidable set of horns that spanned approximately six feet from tip to tip. Bevo XV has his own Twitter handle, @TexasMascot, and more than 27,000 followers. He is used in an array of marketing appearances (and has appeared in a Christmas special on the Longhorn Network). He is well known for his "hook 'em" horns, which underscores the fact that Wagner was injured in a goring incident.

Wagner later served a petition and request for disclosure against the Silver Spurs Alumni Association ("Silver Spurs") and John Baker and Betty Baker. Wagner seeks to recover damages for personal injuries he allegedly sustained when Bevo XV's handlers could not control him as he lunged at the bulldog mascot. In his petition, Wagner claims that the Silver Spurs handlers led Bevo XV to the field, untied him, and prodded him to turn toward Uga in what would have been a photo opportunity between the mismatched mascots. However, the faceoff never happened. As Wagner was on one knee taking photographs of the bulldog, Bevo XV charged through the portable barriers in the direction of the bulldog mascot, striking Wagner.

In the petition and request for disclosure, Wagner alleges several causes of action against Silver Spurs and the Bakers, which are discussed below. According to Wagner's attorney, John "Mickey" Johnson of The Powell Law Firm, discovery is in the early stages and he anticipates that depositions will proceed in the Spring of 2021. Presumably, discovery will focus on whether the Silver Spurs were negligent in their handling of Bevo XV and whether this negligence can be imputed to the Bakers, as the owners of Bevo XV. Discovery will also focus on whether Silver Spurs or the Bakers were on notice of Bevo XV's propensities and whether the attack was foreseeable or could have been prevented through the exercise of reasonable care under the circumstances.

A more philosophical question exists whether live animal mascots (particularly an 1,800-pound longhorn steer with questionable manners) should have been on the field at the Sugar Bowl game in the first place, along with spectators and venue employees.

Employee/Agency, Respondeat Superior and Vicarious Liability Against Defendants

Initially, Wagner asserted causes of action alleging employee agency, *respondeat superior*, and claims for vicarious liability against the Defendants. He contends all of the agents or employees of the Defendants were acting within the course and scope of their authority at all times relevant to his accident. He invoked "the doctrine of employee (sic)", agency, *respondeat superior*, vicarious liability, direct liability "and all other related theories of liability based on the employer-employee and or principal/agent relationship" of the defendants and their employees and/or agents.

This will require proof of the relationship among the Defendants and a discussion about whether the Bakers hired, supervised, retained, and controlled the Silver Spurs handlers.

Negligence

Wagner asserted a distinct cause of action for negligence against the Defendants. The petition states that he will show that at the time of the alleged accident, the Defendants were "guilty" of various acts of negligence "vicariously and directly" and each of the acts of negligence were a direct and proximate

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1 *See* https://www.nonhumanrights.org

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cause of this incident, damages and serious personal injuries sustained by the Plaintiff.

Wagner set forth a non-exhaustive list of the claimed negligence by the Defendants:

- failure to take proper safety precautions;
- use of faulty equipment;
- use of faulty tack;
- failure to conspicuously post warning of danger;
- a wanton and willful disregard of the effect of exposing Bevo XV to the UGA mascot knowing it would "spook" him;
- allowing the photographer, and other non-participants to participate in the meeting of the mascots when the person is not a participant to the farm animal activity complained of;
- failure to make reasonably prudent efforts to determine the ability of the Silver Spurs personnel to handle Bevo XV at the game; and
- committing an act in wanton and willful disregard for the safety of the participants.

Wagner contends this negligence was the direct and proximate cause of serious injuries to his neck and back and that these injuries have permanently impaired his abilities.

These liability issues will require evidence of the precautions and warnings, if any, that were in place at the time of the incident. Likewise, discovery and depositions will likely focus on whether there were prior instances of interactions between Bevo XV and Uga (or any other mascot) that would provide notice that Bevo XV would react the way that he did. The training and equipment provided to the Silver Spurs will also be scrutinized, particularly since the video indicates that the tack seemed insufficient when Bevo XV charged at Uga.

Gross Negligence

Similarly, Wagner asserted a cause of action for "gross negligence" against all the Defendants. Wagner posits that the on-field activities with Bevo XV involved an extreme degree of risk considering the probability, and the magnitude, of harm to the Plaintiff, when the Defendants had actual, subjective awareness of the risk yet still proceeded with a "conscious indifference" to the rights, safety, and welfare of Wagner.

Negligent Training and Supervision

Wagner asserted a cause of action for negligent training and supervision against the Silver Spurs and alleged that the Defendants John and Betty Baker negligently trained and supervised their employees and agents, including Silver Spurs, and knew they were

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not fit or competent but still allowed them to handle Bevo XV and then subsequently failed to supervise them. Wagner claims that their negligent supervision, training, and retention of Silver Spurs directly and proximately caused Wagner's injuries.

It is unclear if the Silver Spurs were, in fact, employees of the Bakers. But that is an important predicate for affixing liability based on the allegations set forth in the petition.

Negligent Entrustment

Lastly, Wagner asserted a cause of action for negligent entrustment against the Defendants John Baker and Betty Baker for "entrusting" their longhorn steer to the Silver Spurs handlers when they knew or should have known that the Silver Spurs handlers were "incompetent and reckless" and that their negligence caused the Plaintiff's injuries.

Wagner seeks monetary relief of more than $200,000 but not more than $1,000,000, including past medical care, lost earning capacity, and mental anguish. Exemplary damages are also sought because the severe injuries suffered by Wagner were caused by the willful acts, omissions, and gross negligence of the Defendants, so Wagner seeks exemplary as well as actual damages from Defendants.

Conclusion: More Than Liability Considerations

"Does an intelligent nonhuman animal who thinks and plans and appreciates life as human beings do have the right to protection of the law against arbitrary cruelties and enforced detention? This is not merely a definitional question, but a deep dilemma of ethics and policy that deserves our attention." -New York Court of Appeals Justice Eugene M. Fahey

The *Wagner* case illustrates numerous tort or liability reasons why the use of live animal mascots is ill-advised, even if marketable. The case is worth watching for that reason alone. However, there may be changing perceptions of the roles of animals and whether they should be used for entertainment or as mascots at all. Not unlike any other offensive mascot motif, the use of live animal mascots seems outmoded and exploitative. There are obvious concerns about the animals' well-being, particularly when they are exposed to lights, noise, crowds, and distractions that are not present in their normal habitat. There are also concerns, voiced by animal rights advocates, that it is simply wrong to use an animal for profit or entertainment at a sporting event. Whether based on tort law or the less traditional animal law considerations, it may simply be time to put live animal mascots out to pasture. ●

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PA Supreme Court Allows Snow Tubing Injury Case to Continue

By Shang Jiang

Skiing and snowboarding are relatively high-risk sport activities. So, it is important for people to raise the awareness of risk in sports. Building better sports insurance system and sports accident liability identification standards would benefit both the customers and corporations.

In December 2020, the Pennsylvania Supreme Court addressed these issues and ruled that the Superior Court's decision to grant summary judgment was wrong in a high-profile snow tubing injury case. As a result, the Pennsylvania Supreme Court reversed the order and remanded for further proceedings.

Ray Bourgeois and Mary Bourgeois (collectively the Bourgeoises) sued, alleging that Mr. Bourgeois, as a patron, was seriously injured at the end of the snow tube runs because of the negligence and recklessness of the employees from Snow Time, Inc., and Ski Roundtop Operating Corp. (collectively Ski Roundtop). The Bourgeoises contended that the trial court and the Superior Court failed to consider their expert reports and did not view the evidence in a light most favorable to them as the non-moving party. However, Ski Roundtop contended that the trial court considered the expert reports in the light most favorable to the plaintiff and concluded that the evidence was insufficient to support claims of gross negligence or recklessness. And the expert reports failed to produce evidence of an industry standard governing the use of mats at the base of the snow tubing hill. Ski Roundtop then alleged that the Superior Court was right to affirm the decision by trial court.

The Pennsylvania Supreme Court concluded that the Superior Court and the trial court failed to regard the experts' conclusions in the best interests of the Bourgeoises. The trial court explained its conclusion that the Bourgeoises did not provide sufficient evidence to prove gross negligence or recklessness. The trial court failed to consider the expert reports, and its conclusion also proved the lack of evidence on gross negligence and recklessness. Even though the expert reports raised serious issues of material fact on these claims, the trial court and the Superior Court ignored the opinions from two experts.

The Pennsylvania Supreme Court disagreed with Ski Roundtop's argument that the trial court opinion reflected its consideration of the experts' reports. Although Ski Roundtop believed that it was correct for the trial court to recite the standard of summary judgment accurately, its application of the standard was wrong. In addition, Ski Roundtop's argument that the expert reports were not more important or relevant than any other evidence was not convincing, because the experts' reports showed that there was a real problem of substantive facts that directly contradicted the disposition facts found by the trial court.

The trial court did not consider the expert reports and the Superior court failed to overthrow the decision by trial on this basis. As a result, the Pennsylvania Supreme Court concluded that both the trial court and the Superior Court had made a legal mistake in applying the summary judgment standard that required the court to view all evidence and all reasonable inferences in the best way for non-moving parties. The Supreme Court also concluded that the expert reports defined the duty or the standard of care for Ski Roundtop. The Superior court failed to evaluate this issue either.

The Pennsylvania Supreme Court stressed the principle that an actor whose affirmative conduct increases the risk of harm to has a duty to "exercise reasonable care to protect them against an unreasonable risk of harm arising from such that affirmative conduct". In this case, Ski Roundtop assumed the obligation to prevent their patrons from participating, clearing the run-out zone before they reached the mixing zone. In so doing, the court concluded that it had the responsibility to take reasonable care to protect its sponsors from unreasonable risks.

In addition, the industry standards cited in export's report was not intended to establish the duties of Ski Roundtop, but to explained how Ski Roundtop failed to fulfill their duties, that was, to take reasonable and prudent measures when snow tubing patrons reached the end of their runs. Even if the expert's conclusion was set aside, Ski Roundtop did not meet the normal standards of conduct for a tubing park operator. The other expert report also contained a number of other conclusions on how Ski Roundtop violated its duty of care in a gross negligent or reckless manner, because it knew or should have known that its intentional behavior increased the risk of harm to its patrons.

The Supreme Court concluded that "the existence of a duty is a question of law for the court to decide and the duty consists of one party's obligation to conform to a particular standard of care for the protection of another". The Superior Court largely disregarded the second expert's report because it did not propose any standard of care. However, that report contained a detailed analysis of the folded deceleration pad and concluded that Ski Roundtop should have known that the folded deceleration pad would make its patrons stop suddenly and increased their risk of serious injury, which was exactly what happened when Mr. Bourgeois's snow tube hit the folded pad.

The decision by Pennsylvania Supreme Court marks the latest entry in court rulings about the duty of care and is important for two reasons. First, reports and investigation opinions from accident liability identification professionals should be viewed and evaluated by the court more carefully. Second, companies and corporations should strictly follow the industry standards to fulfill their duty of care and train employees with comprehensive regulations and operation manuals to protect their patrons from unwanted risk and harm. ●

Shang Jiang is a doctoral student at Florida State University.

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unpadded so that students on the field could be injured.

On April 12, 2019, the School Board filed an Amended Motion for Summary Judgment, claiming that the Release signed by Elalouf and his father precluded the negligence lawsuit. The School Board centered its argument on *Krathen v. School Board of Monroe County*, 972 So. 2d 887 (Fla. 3d DCA 2007). In *Krathen*, the Third District Court of Appeal affirmed summary judgment in a negligence case brought by a high school cheerleader who was injured during cheerleading practice. The plaintiff in *Krathen* alleged that the school was negligent in conducting the practice without a coach being present and by failing to place protective mats on the floor to cushion impact. Similar to Elalouf, the high school cheerleader and her parent/guardian signed a FHSAA Release.[1] The Third District Court concluded that the "Release clearly and unambiguous indicates the intent to release the School Board from liability."

In response to the School Board's Motion, Elalouf countered that the Release did not release the School Board from its own negligence. He argued that the Release neither mentioned the word "negligence" nor explicitly released the School Board from its own negligence. Elalouf elaborated that leaving a cement barrier uncovered near the soccer field was a risk that could not be considered a natural part of the activity. After a hearing on the School Board's Motion on July 30, 2019, the trial court granted summary judgment, heavily relying on *Krathen*.

On appeal, Elalouf made two arguments. First, the trial court erred in granting summary judgment because the Release language was ambiguous and unenforceable. Second, the trial court erred in granting summary judgment because no policy reason was shown to treat the Release differently than a commercial pre-injury release executed by a parent/guardian on behalf of a minor, which is unenforceable in Florida.[2]

At the outset, the majority found that Elalouf did not preserve his two arguments in the trial court below and held that even if he had preserved his claims, his arguments were without merit. The majority began its analysis by looking at the language found in the Release. It noted that in the student acknowledgment section of the Release, Elalouf agreed to: "release and hold harmless [the school

1 There was a dispute in the trial court as to whether the FHSAA Release signed in *Krathen* was identical to the FHSAA Release signed by Elalouf. Neither party attached the release from *Krathen* as an exhibit to their pleadings.

2 *Kirton v. Fields*, 997 So. 2d 349 (Fla. 2008).

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board] of any and all responsibility and liability for any injury or claim resulting from such athletic participation. . . .” The parental consent section of the Release contained the same language. The Release also included a section within the parental consent section in bold-faced all capital letters stating the following:

> EVEN IF . . . THE SCHOOL DISTRICT . . . USES REASONABLE CARE IN PROVIDING THIS ACTIVITY, THERE IS A CHANCE YOUR CHILD MAY BE SERIOUSLY INJURED . . . BY PARTICIPATING IN THIS ACTIVITY BECAUSE THERE ARE CERTAIN DANGERS INHERENT IN THE ACTIVITY WHICH CANNOT BE AVOIDED OR ELIMINATED. BY SIGNING THIS FORM YOU ARE GIVING UP YOUR CHILD'S RIGHT AND YOUR RIGHT TO RECOVER FROM . . . THE SCHOOL DISTRICT . . . IN A LAWSUIT FOR ANY PERSONAL INJURY . . . THAT RESULTS FROM THE RISKS THAT ARE A NATURAL PART OF THE ACTIVITY. . . .

The majority held that, like *Krathen*, the language in the Release “clearly and unambiguously” released the School Board from liability for negligence claims. It also found that the sizing of the font in the Release did not change the meaning or render the release unclear or unambiguous. The majority then distinguished case law cited by Elalouf[3] regarding the effect of qualifying language in exculpatory clauses. Unlike the qualifying language found in the exculpatory clauses cited by Elalouf, the majority found the qualifying statements in the FHSAA Release “clearly warn that serious injuries can occur even if reasonable precautions are taken.” Finally, the majority cited to *Kirton* in dismissing Elalouf’s public policy-based argument. It found that the public policy reasons addressed in *Kirton* do not apply to non-commercial activity providers such as the School Board.

The dissenting opinion disagreed with

3 *Brooks v. Paul*, 219 So. 3d 886, 887 (Fla. 4th DCA 2017) (invalidating an exculpatory clause when disclaimer was qualified by a statement that the surgeon would “do the very best to take care of [the patient] according to community medical standards”); *Murphy v. Young Men’s Christian Ass’n of Lake Wales, Inc.*, 974 So. 2d 565, 566-68 (Fla. 2d DCA 2008) (finding ambiguity when the exculpatory clause excluded “any claims based on negligence” but also provided that YMCA would take “every reasonable precaution” and concluding that a reasonable reader might be led to believe that the waiver of liability extended only to claims for injuries that were unavoidable).

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the majority regarding whether Elalouf preserved his arguments on appeal. It found that Elalouf *did* preserve his argument that the Release was not clear and unequivocal. The dissent took issue with what it deemed to be qualifying language found in the Release between the capitalized bold-faced text and smaller lower-case text. Specifically, the dissent argued that:

> This qualifying language, which by its capitalization and size appears far more important than the small print language releasing liability, does not clearly absolve appellee from its own negligence, when that negligence is not a natural part of the activity and where the danger is not *inherent* in the sport. In this case, appellant was injured when he slammed into a concrete barrier only feet from the soccer field. This type of risk is not *inherent* in the sport, nor a natural part of the activity. Being hit by a defensive player is and sliding out of bounds might be inherent in the sport, but no one anticipates that the area outside the field of play will have dangerous traps.

The majority opinion highlights the value in requiring student-athletes to sign pre-event liability waivers before participating in sporting activities. Clarity in pre-event liability waivers is key. Here, the School Board emphasized the clear and conspicuous language in the FHSAA Release warning of potential serious injuries that could result from athletic participation and the language releasing the School Board from liability for any injury or claim resulting from such participation to successfully shield itself from any and all liability for negligence.

On February 1, 2021, Elalouf filed Motion for Rehearing, Rehearing En Banc or, Alternatively, for Certification. ●

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with her mother in the Picnic Area. The accident caused severe injuries, including multiple dislocated and teeth and broken bones requiring multiple endodontic and orthodontic surgeries.

In December 2016, the daughter filed suit against the Durham Bulls Baseball Club ("the Bulls") alleging the team's negligence led to her injuries. After discovery closed, the Bulls moved for summary judgment and argued "the Baseball Rule" – a precedent adopted by North Carolina in the 1930s – barred her suit. The Baseball Rule states owners and operators of baseball facilities cannot be held liable for injuries from batted or wildly throw balls as a matter of law by providing an adequate number of screened seats for those who desire them. The trial court agreed and granted the Bulls' motion, and the Plaintiff appealed.

Under North Carolina law, the Baseball Rule states that baseball field owners and operators "are held to have discharged their full duty to spectators in safeguarding them from the danger of being struck by thrown or batted balls by providing adequately screened seats for patrons who desire them and leaving the patrons to their choice between such screened seats and those unscreened." *Bryson v. Coastal Plain League, LLC*, 221 N.C. App. 654, 657, 729 S.E.2d, 107, 109 (2012). Notably, the Baseball Rule does not impose an obligation to provide protective screening for *all* seats or even for all spectators who might want them; rather the Baseball Rule requires only that a baseball field operator to protect as many patrons as reasonably possible by providing screened seats in the areas of the ballpark behind home plate and where the danger of a sharp foul ball is greatest. *Erikson v. Lexington Baseball Club*, 233 N.C. 627, 628, 65 S.E.2d 140, 141 (1951). On appeal, the Plaintiff argued the Baseball Rule did not apply to her case since (1) she lacked sufficient knowledge of the game to appreciate the potential for injury; (2) she was not afforded a choice of where she sat for the game; (3) she was not a spectator since she was sitting in the Picnic Area; (4) the Picnic Area was negligently designed; and (5) the Baseball Rule is antiquated and should be abandoned.

The North Carolina Appeals Court's decision in *William S. Mills v. The Durham Bulls Baseball Club, Inc.*, addressed and supported the dismissal each of Plaintiff's arguments. Most notably in the decision is the Appeals Court handling of Plaintiff's argument that the Baseball Rule should not apply since she was not afforded a choice of where to sit to attend the game. However, the "choice" set forth in the Baseball Rule is the choice on the part of a spectator to attend a baseball game in an unprotected

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Most Recent Challenge to the "Baseball Rule" Called Out

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seat when the ballpark operator has otherwise offered a reasonable number of protected seats. The Court pointed to the North Carolina Supreme Court decision in *Erickson* where the Baseball Rule's applicability was upheld even after a spectator was struck by a ball after the spectator bought a general admission ticket to a game and arrived after "all off the screened seats were occupied." *Erickson*, 233 N.C. at 628, 65 S.E.2d at 141. The *Erickson* Court refused to abdicate the Baseball Rule because the spectator made the choice to remain and watch the game in an unprotected seat with knowledge that he could be injured by a batted ball. *Id.*

The Appellate therefore held the Baseball Rule similarly precluded liability in this case since Plaintiff and her family made the decision to stay and watch the game from Picnic Area rather than leave and not watch the game at all. The Appellate Court specifically pointed to the *Erickson* holding and the North Carolina Supreme Court ruling the "choice" embodied is not the choice between a screened seat or a non-screened seat but is the choice on the part of the spectator to attend a baseball game in an unprotected seat when the ballpark operator has satisfied its duty to spectators by offering a reasonable number of protected seats. *Id.* In this case, the Appellate Court found that Plaintiff and her family, after arriving at the ballpark and seeing their seats were in the unscreened area, they nonetheless made the choice to stay and sit in the unprotected Picnic Area.

The Baseball Rule is the prevailing standard (versus a common law negligence standard), but it has recently come under scrutiny as there have been some high-profile spectator injury cases and have some safety activists have argued that ballpark owners and operators should do more to protect fans. As evidence of this duty, lawsuits have cited Major League Baseball's recent policy requiring clubs to extend their netting all the way to the end of the dugouts, with some clubs opting to extend netting all the way to the foul poles. While some teams may choose to take additional precautions, the widely accepted Baseball Rule still holds, balancing the desire of some spectators to be "up close" to the action on the field and others to be protected from errant bats and balls. This case illustrates that the Baseball Rule remains one of the best ways that owners and operators can avoid liability for injuries from batted balls even when they do not provide screening for every seat in the ballpark. ●

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Knicks, Rangers Join to Welcome Fans Back to Garden

NEWYORK—(BUSINESSWIRE)—At the start of the first week in which Madison Square Garden can welcome fans in almost a year, members of the New York Rangers and the New York Knicks organizations have joined together to express excitement and gratitude about their return. The teams will play in front of roughly 2,000 fans, beginning with the Knicks on Tuesday, February 23 vs. Golden State, followed by the Rangers on Friday, February 26 vs. Boston.

"We're very excited," said Knicks Head Coach Tom Thibodeau. "We understand how important our fans are and certainly appreciate all the support that they've given us…We're looking forward to the day when The Garden is full, but we're excited to have our fans in the building–they're an important part of our organization."

"Rangers fans are special–and we understand all the support they've given us from afar, so we cannot wait for the day The Garden is full," said Rangers Head Coach David Quinn. "Even if it's just a couple thousand fans to start, we're beyond excited to see them in the stands and hear their energy during the game."

MSG Sports has taken a fan-friendly approach to the reopen, ensuring as many fans as possible have the opportunity to purchase tickets. Tickets to each game are being made available first to Season Ticket Members and suite holders and then to the general public, all at varying price points, starting at $50. The two teams started with their first three games, which for the Knicks includes Golden State on February 23, Sacramento on February 25 and Indiana on February 27. The Rangers first three games are against Boston on February 26 and 28 and Buffalo on March 2.

The Knicks also expect to announce today at 2:00 p.m. a general public on-sale for their March 4 game vs. Detroit.

"New York has been through a lot this year, especially through COVID," said Knicks forward Obi Toppin. "And for us to have the opportunity to play in front of fans is definitely going in the right direction... " ●

Jill Gregory Named to Sonoma Raceway Post

NASCAR executive and sports marketer Jill Gregory has been named the new executive vice president and general manager at Sonoma Raceway.

Named by Adweek one of "The Most Powerful Women in Sports" for the past two years, Gregory assumes leadership of the historic 1,600-acre property where she attended her first NASCAR road course race as a teenager.

"Growing up in nearby Modesto, my cousins brought me to NASCAR races at Sonoma when I was in high school," Gregory said. "I've been a true fan of this place for most of my life, and now I'm blessed with a leadership opportunity to return and inspire others to have the same love for the region that I do."

Gregory follows Steve Page, who announced his retirement last August after nearly three decades at the helm of Sonoma Raceway.

Previously, Gregory was the executive vice president and chief marketing and content officer at NASCAR and the managing executive of the company's Charlotte-based operations. She led the marketing, media, communications, broadcasting and diversity and inclusion functions for NASCAR, and was responsible for the sanctioning body's digital platform, including NASCAR.com, the NASCAR Mobile app and fantasy games. ●

Austin FC Announces Naming Rights Deal with Q2 Holdings

Austin FC's under-construction soccer-specific stadium has its new name, announcing last month that it has entered into a multiyear stadium naming rights partnership with Q2 Holdings, Inc., an Austin-based financial experience company.

Austin FC's stadium will be known as "Q2 Stadium," which will become one of 20 soccer-specific stadiums featured within MLS in 2021. The venue is on schedule to be completed in spring 2021.

"Establishing a long-term stadium naming rights partnership with an Austin-based company that is committed to using this platform to give back to the community was the club's top priority," Austin FC president Andy Loughnane said in Monday's release. "Q2 Stadium holds the distinction of being the first and only major league venue in Austin, and Austin FC is exceptionally proud to begin our MLS journey with Q2 as our partner and Q2 Stadium as our home."

Q2 Stadium has been strategically designed to be a multipurpose venue, including other professional and amateur sporting events outside of soccer, concerts, community activities, cultural events and private functions such as corporate meetings and weddings. ●