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SPORTS FACILITIES

How the law affects the sports facilities industry and the LAW

Court Hands Defeat to Patron Who Was Injured at Madison Square Garden

By Jeff Birren, Senior Writer

In 2014, Christian Acevedo went to Madison Square Garden with the intent of watching the U.S. national men's basketball team play the Dominican Republic. According to Acevedo, after he entered, he was told to go straight forward. He did so and walked into a panel of glass. Acevedo sued Madison Square Garden, [T]he United States of America Basketball, ("USA Basketball"), and Turner Construction Company ("Turner"). Recently, USA Basketball won a motion for summary judgment (*Acevedo v. Madison Sq. Garden Co,* Supreme Court of New York, N.Y. County, Case No. 157997/16 *("Acevedo")* at 5, (1-7-21)).

Facts

Acevedo intended to see the USA team play a warmup match prior to the FIBA World Championships. Acevedo testified that after he was "wanded" by security, he was told to "go straight forward." He saw "an open area" and continued straight. After two steps, he hit "his forehead" on a high, fixed glass panel (Id. at 2). Two years later, Acevedo sued Madison Square Garden Company, MSG Holdings, LP., Cablevision (collectively "MSG"), USA Basketball, and Turner. Turner had recently done some work on the Garden. The 18-page verified complaint had four causes of action, including one brought by Judith Tejeda, his wife. He claimed that the defendants were "negligent by failing to mark the transparent glass panel" and that they had violated several New York City building codes (Id.).

The defendants filed verified answers and MSG and USA Basketball filed cross-

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Court Agrees Assumption of Risk Bars Negligence Action

By Carla Varriale-Barker, Segal McCambridge Singer Mahoney, Ltd.

New York's Appellate Division, Second Department has affirmed summary judgment on behalf of the Town of Smithtown, with costs, in a case involving a seasoned softball player and coach who fell on a muddy field during a charity tournament. In a Decision and Order dated March 3, 2021, the Court determined that plaintiff could not establish a negligent maintenance claim against the Town of Smithtown based on the record.

Rather, the Appellate Division, Second Department held that the doctrine of primary assumption of risk barred her negligence action. As a voluntary participant, she assumed risks known or apparent in the activity, and the muddy condition of the field was neither concealed nor unreasonably increased. In fact, plaintiff admitted she was aware it had rained the day before the tournament. The Town of Smithtown made the conditions as safe as they appeared to be. Consequently, plaintiff consented to the risk of injury and her negligence action was properly dismissed.

Interestingly, the Appellate Division, Second Department defined "inherent risks" as those risks that are known, apparent, *natural*, or reasonably foreseeable. This underscored that the playing surface, an outdoor field, was exposed to the elements and could become wet and slippery after a rain, which was the case here. However, this language (and the doctrine of primary assumption of risk) could be applied to other natural or

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Study: Artificial Fog Doesn't Boost COVID Transmission Risk

A new study released by Aura Health and Safety, The Phylmar Group, and SafeTraces, Inc, a market leader in DNA-based technology solutions, suggests that artificial fog has no negative impact on suspension of aerosols in sports venues and productions.

The COVID-19 pandemic represents a once-in-a-century crisis that has led to unprecedented health and safety challenges in the built environment, including the entertainment industries. Scientific, medical, and public health experts, including the Center for Disease Control (CDC), have stated that SARS-CoV-2 is a highly infectious virus that is primarily transmitted via respiratory droplets and aerosols. Indoor environments face significant airborne exposure risk, with enclosed areas, prolonged exposure, and poor ventilation high risk factors common in many entertainment venues.

As the sports industry, trade associations, and labor unions prepare to reopen venues and stage new productions, there has been significant concern whether artificial fog increases the airborne transmission risk of diseases such as COVID-19. Artificial fog is widely used in the entertainment industries to enhance lighting, as a visual effect, and to create a specific sense of mood or atmosphere as it disperses across densely occupied venues such as concert halls and theaters, rendering it a suspected risk factor for airborne disease transmission.

For the joint study "COVID-19 Implications of the Physical Interaction of Artificial Fog on Respiratory Aerosols", Aura Health and Safety occupational and public health scientists used the aerosol-based veriDART™ solution by SafeTraces, the most powerful risk assessment tool for airborne pathogens like SARS-CoV-2. It leverages DNA-tagged tracer particles that safely mimic aerosol mobility and exposure in order to identify high-risk infection hotspots and transmission routes, assess ventilation and filtration efficacy, and inform remediations with a rigorous science-based, data-driven methodology.

The scientists released unique DNA-tagged tracer particles with and without glycerin- or glycol-containing artificial fog into a closed environment. They took air samples at regular intervals to determine DNA tracer degradation over time. The study found that none of the artificial fog applications increased the time that respiratory aerosols remained suspended in the air. In fact, artificial fog containing glycol actually decreased suspension time, indicating that this fog application reduces the time respiratory aerosols remain suspended in the air to impact disease transmission.

The highly significant finding that artificial fog does not increase, and may even

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SPORTS FACILITIES and the LAW

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Ruling Against School District in Errant Shot Put Case Affirmed

Dr. Robin Ammon, Chair of Division of Kinesiology and Sport Management, University of South Dakota

Kenji Spearman was a 12-year-old 6th grader attending Geeter Middle School in Memphis Tennessee. On January 12, 2016 tryouts for the middle school track and field team were conducted on a field behind the middle school. A teaching assistant, Marcus Mosby, conducted the tryouts and he was also the track and field coach. Approximately 30-40 students showed up and one of the events held as part of the tryout was the shot put. Mosby participated on his high school track and field team but didn't throw the shot as one of his events. Mosby lined the students up and had them take turns throwing the shot while he stood 25-30 feet away retrieving the implements after they were thrown. After a while Mosby decided to demonstrate the correct mechanics of throwing the shot. He verbally instructed the students to back up and motioned them back with his hands. He turned his back to the group of students and took several additional steps in the opposite direction. The students ended up approximately 30-40 feet away from Mosby and his back was to the students. Kenji had participated in sports since he was five or six years old but was not familiar with a shot put. Kenji was standing sideways to Mosby and testified he did not hear Mosby tell the students to back up nor did he see Mosby motioning the students back. As a result, Kenji hadn't backed up as far as the other students and ended up five feet closer to Mosby. As Mosby spun around to throw the shot, he saw Kenji standing in close proximity and after releasing the metal ball shouted at Kenji to get out of the way. It was too late, and the implement struck Kenji in the side of the head. Mosby rushed to Kenji's side and noticed blood coming out of the youngsters mouth as well as an indentation in the side of his head.

Kenji was rushed to LeBonheur Children's Hospital in Memphis where he stayed for three days. Dr. Paul Klimo, a pediatric neurosurgeon, was the treating physician and on the second day of Kenji's hospitalization he surgically repaired Kenji's depressed skull. During his stay Kenji was in a lot of pain and he was prescribed a number of pain meds to alleviate the pain. During the three days he was worried about not playing sports again. Once Kenji was released, he spent two-to-three weeks at home but didn't attend school, play with any friends, or participate in sports. During this time, he complained of headaches, dizziness and experienced a number of nightmares. One month after the incident Dr Klimo released Kenji for track and field but Kenji didn't participate due to being afraid of a similar experience. Three months after the injury Kenji was still complaining about headaches and dizziness.

The plaintiff, Kenji's mother, filed suit on August 3, 2016 using the Tennessee Government Tort Liability Act (GTLA). She maintained that the defendant (Shelby County Board of Education) was vicariously liable for Mosby's negligence. The plaintiff sought damages for injuries and medical expenses sustained by her and Kenji. The defense filed their answer on September 12, 2016. After several years of continuances and discovery the case went to trial on January 22–23 and February 28, 2019. An interesting twist occurred when Mosby (the coach) was never named as a defendant nor was represented by the counsel for defense.

Outcomes of Trial Court

During the initial trial the plaintiff's expert witness, Dr. Wise, ascertained that Kenji suffered blunt force trauma from being hit by the shot causing a skull fracture that resulted in permanent brain damage. However, while Kenji continued to have pain on the left side of his head and experienced bouts of dizziness, he maintained high grades and played football and basketball. He reported having no problems with his vision, balance, eating, sleeping, hearing, or focusing. Dr. Wise did not believe Kenji's headaches hindered normal functions including participating in sports.

Shortly after the incident an investigation was conducted by the Shelby County Board of Education. The findings indicated that Mosby failed to use the proper procedures when demonstrating how to throw the shot put. As a result, the Superintendent concluded that Mosby neglected his duty as a school employee and as a result Mosby resigned from his position at Geeter Middle School at the end of the 2015-2016 school year. Mosby testified that that he was completely at fault for the events that took place and Kenji shared no responsibility. Mosby admitted that the safest way to throw a shot was to throw away from anyone. He should have placed the students behind him. He stressed that the incident was an accident, and he had no intention of hitting Kenji.

The defendants moved for involuntary dismissal under Tennessee Rule of Civil Procedure 41.02(2). They claimed that Mosby's actions were intentional, reckless, or grossly negligent. As a result, they were immune from liability under the GTLA. The trial court disagreed with the defendants and denied the motion. Surprisingly enough once the trial court denied the motion the defense rested. In October 2019, the trial court rendered a verdict in favor of the plaintiffs. The court found that 1) Mosby acted in the scope of his employment at the time of incident; 2) Mosby acted negligently in injuring Kenji; 3) Mosby's actions were the proximate cause of Kenji's injuries and medical damages; 4) the defendants were vicariously liable for Mosby's negligence and were not immune under GTLA. The court also found that Kenji bore no responsibility for his injuries and that Mosby and the defendants were solely liable. Finally, the court awarded the plaintiff $200,000 in compensatory damages. The defendants appealed.

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Ruling Against School District in Errant Shot Put Case Affirmed

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Appellate Court Decision

Six issues were raised on appeal.

Whether the trial court erred in denying the defendant's motion for involuntary dismissal.

The defendants claimed that Mosby's actions were intentional, reckless, or grossly negligent. The appellate court cited Tennessee Code Annotated §39-11-302(c) that says a person acts with reckless intent "when the person is aware of but consciously disregards a substantial and unjustifiable risk". However, the appellate court mentioned the evidence indicated that Mosby did not consciously disregard the risk. He instructed and motioned for the students to move back. The appellate court also stated that while Mosby made some poor decisions and displayed questionable judgement his actions did not amount to gross negligence.

The appellate court affirmed the trial court's decision to deny the defendant's motion of involuntary dismissal.

Whether the trial court erred in in admitting the deposition testimony of Dr. Paul Klimo.

The defendants argued that portions of the transcript from Dr. Klimo's deposition should not have been admitted. The appellate court stated that Klimo was a licensed neurosurgeon in seven states including Tennessee. The doctor had been deposed but was never subpoenaed to testify at trial. However, under Tennessee Code Annotated §24-9-101(a)(6) he was exempt from a trial subpoena, due to being a practicing physician. Since Klimo was unable to testify at trial the plaintiff was able to use his deposition transcript under Tennessee Rule of Civil Procedure 32.01(3).

Whether the trial court erred in denying the defendant's motion to exclude Dr. Wise's expert testimony.

Before the initial trial, the defendant's filed a motion to have Dr. Wise's expert testimony excluded. The trial court believed that his education, expertise, and training would assist the court, so they denied the motion. The trial court also believed that any data or facts provided by Dr. Wise would be trustworthy. On appeal the defense stated that since Dr. Wise was not an expert in pediatric neurology his testimony should have been excluded. The appellate court established that Dr. Wise was qualified to testify about Kenji's medical bills. While he had never performed the surgery, he was familiar with the procedure as well as the subsequent treatment. Wise testified that he did not know of any alternatives to the surgery and that the surgery performed by Klimo was the accepted practice. Due to Dr. Wise working and consulting with the neurosurgeons in Memphis he was familiar with customary charges for various medical services.

The appellate court observed that by acting as the "gatekeeper" of evidence the trial court did not abuse its discretion in allowing Dr. Wise to testify with no limitations.

Whether the trial court erred in admitting Kenji's medical bills

At the trial court level, the defendants contended that Kenji's medical bills submitted by the plaintiff were improperly admitted. The defendants maintained that the plaintiff had not proven that the services represented by the medical bills were necessary and in addition Dre. Wise did not properly authenticate said bills. As previously mentioned, the appellate court found that Dr. Wise was qualified to testify about the medical bills. On appeal the defendants stated that only the treating physician could authenticate the medical bills. Since Dr. Wise did not perform the surgery, he did not have firsthand knowledge. The appellate court said this was a misstatement of settled law. Citing *Long v Mattingly,* 797 S.W.2d 889, 893 (Tennessee Court of Appeals, 1990), "a physician may testify as to the reasonableness and necessity of medical charges regardless of if he or she rendered the services."

The appellate court determined that the medical bills were proven to be reasonable, and the court affirmed the trial court's decision to admit the bills.

Whether the trial court erred in finding that the defendants did not rebut the presumption that Kenji had no capacity for negligence.

On appeal the defendants claimed that they had refuted the presumption that Kenji had no capacity for negligence, therefore comparative negligence should have been applied. Under Tennessee law modified comparative negligence maintains "so long as a plaintiff's negligence remains less than the defendant's negligence the plaintiff may recover" (*McIntyre v Balentine*, 883 S.W.2d 52, 57 (Tennessee 1992)). However, if the plaintiff was also negligent, the "plaintiff's damages are to be reduced in proportion to the percentage of the total negligence attributable to the plaintiff." (*McIntyre v Balentine*, 883 S.W.2d at 57). However, these rules are amended when the plaintiff is a child in a negligence case. In Tennessee when a minor child is the plaintiff in a negligence case the "Rule of Sevens" is applied. The Rule of Sevens states 1) if the child is under the age of seven, the child has no capacity of negligence; 2) if the child is between the ages of seven and fourteen, there is a rebuttable presumption that the child *does not* have the capacity for negligence; and 3) if the child is ages fourteen to majority, there is a rebuttable presumption that the child *does* have the capacity for negligence *(Cardwell v Bechtol,* 724 S.W.2d 739, 749 (Tennessee 1987)). Whether a minor has a capacity for negligence is a question of fact.

The defendants argued that comparative negligence should be applied. Therefore, the Rule of Sevens applied with the rebuttable presumption that Kenji, being twelve years old, did not have the capacity for negligence. During the trial Mosby testified that Kenji

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was a "good kid". Kenji's grades throughout elementary school were As and Bs. Mosby testified that Kenji did not disregard any of his instructions. Kenji testified that he did not hear or see Mosby warning the students to back up. Finally, while Kenji had previously participated in football and basketball, he was not familiar with a shot put.

After considering the facts the appellate court agreed with the trial court that the defendants had not rebutted the presumption that Kenji did not have the capacity for negligence. The appellate court affirmed the trial court's decision that the defendants were solely to blame for Kenji's injuries.

Whether the trial court erred in only awarding the plaintiff $200,000 in compensatory damages.

Under the GTLA plaintiffs can be awarded a maximum of $300,000.00. The trial court in this case awarded the plaintiff $200,000.00. On appeal the plaintiff claimed the trial court should have awarded her the maximum amount allowed under the GTLA. In Tennessee, a plaintiff who sustains an injury as a result of negligence can be awarded two types of damages. The first type (economic or pecuniary) includes expenditures such as past or future medical expenses, lost wages, and lost earning power. The second type of damages (non-economic) include pain and suffering, permanent impairment/disfigurement ands loss of enjoyment of life (*Meals ex rel. v Ford Motor Company,* 417 S.W.3d 414, 491, 420 (Tennessee 2013)). In Tennessee non-economic damages are in most cases very subjective and the courts don't usually require plaintiffs to provide proof of the monetary value of the non-economic damages.

The trial court awarded the plaintiff $63,859.69 in economic damages and $136,1451.31 in non-economic damages. The plaintiff asserted that Kenji continued to suffer from headaches, but the trial court stated the matter was questionable. The plaintiff also contended that while his nightmares continue to occur, they aren't as frequent. While both Drs. Klimo and Wise testified that Kenji sustained permanent brain damage the damage did not seem to be significant, which is why he was released to participate in sports and other activities. The appellate court concluded that while the plaintiff believed Kenji's injuries to be more severe the assessment of non-economic damages is not an exact science. The court determined that the trial court was accurate in their awarding of the non-economic damages.

Conclusion

The appellate court affirmed the trial court's decision and split the costs of the appeal between the plaintiff and defendant. ●

Elvis Presley Enterprises Wants Tenn. Court to 'Treat Me Nice'

By Robert J. Romano, JD LLM, Assistant Professor of Sport Management, St. John's University

Things got '***All Shook Up***' in the State of Tennessee when its Supreme Court ruled on February 24, 2021, that the plaintiff's, Elvis Presley Enterprises, Inc., lawsuit against the defendants, City of Memphis, Shelby County, and Memphis Basketball, LLC, was not barred by the legal concept of res judicata.

By way of background, in 2014, Elvis Presley Enterprises, Inc., thought ***'It's Now or Never'*** to begin a redevelopment project that involved the celebrated and renowned home of Elvis Presley, and Memphis tourist destination, Graceland. The purposed revitalization plan initially included the construction of a 450-room *non-heartbreak* hotel, convention and concert facilities, a theater, and a series of upgrades to the museum and archive studio.[1]

To make the Graceland project economically feasible, Elvis Presley Enterprises, Inc. approached the Economic Development Growth Engine for the City of Memphis and Shelby County to request a property tax benefit through its Tax Increment Financing Program (TIF). The Economic Development Growth Engine is a Tennessee non-profit corporation that, among other things, considers applications that promote industrial development.[2] Its ***'Don't Be Cruel'*** TIF program, rather than providing for direct funding, allows developers to share in the increased property tax revenues received by the city and county from the surrounding area of the developer's project.[3]

After receiving TIF approval from both the city and the county for its initial revitalization project, Elvis Presley Enterprises, Inc. amended its application to include a 6,200-seat arena.[4] After becoming aware of the changes made by Elvis Presley Enterprises, Inc. to its proposal, Memphis Basketball, LLC, with a ***'Suspicious Mind'***, contacted the City of Memphis to assert its position that the granting of a TIF to Elvis Presley Enterprises, Inc.

1 Elvis Presley Enterp., Inc. v. City of Memphis, WL 714651.

2 Pursuant to Tennessee Code Annotated section 9-23-108, TIF funding is also subject to approval by the State of Tennessee, specifically the Comptroller and the Commissioner of Economic and Community Development.

3 The approved TIF Program allowed Elvis Presley Enterprises, Inc. to receive, from both the City of Memphis and Shelby County, fifty percent of the excess property taxes from the "plan area" (as defined by Elvis Presley Enterprises, Inc. in its proposed economic plan) over the "base tax" (also as defined by Elvis Presley Enterprises, Inc. in its proposed plan).

4 The Supplemental Plan also included a request to have the existing TIF increased from fifty percent to sixty-five percent of excess property taxes over the base tax.

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for its proposed arena would violate the 'Non-Participation Provision' of the 'Arena Agreement' between the City of Memphis and Memphis Basketball, LLC.[5] This 'Arena Agreement', signed by the two parties in 2001, requires Memphis Basketball, LLC to pay a rental fee to the city and county, while also covering any and all costs, expenses, and operational losses incurred in order for the Memphis Grizzlies' basketball team to call the FedEx Forum home. In exchange, the 'Arena Agreement' prohibits the City of Memphis from providing tax incentives for facilities that would compete with the FedEx Forum. Specifically, the 'Non-Participation Provision' of the 'Arena Agreement' states:

> **Non-Participation.** During the Term, neither CITY/COUNTY nor any CITY/COUNTY Affiliate shall, without the prior written consent of [Memphis Basketball], design, develop, construct or otherwise fund, provide economic or tax benefits or incentives to, or materially participate in the design, development, construction or financing of . . . any new Competing Facility; provided, however, the foregoing provisions shall not be interpreted to prohibit transactions and activities normally and/or routinely engaged in by the (x) planning, building, permitting and engineering departments of CITY/COUNTY in the ordinary course of reviewing and/or approving projects submitted by private developers, or (y) CITY/COUNTY Industrial Development Corporations and/or other CITY/COUNTY Affiliates, the general purpose of which is to encourage private development, in the ordinary course of establishing tax freeze programs, tax incentive programs, PILOT programs and other similar economic programs aimed at encouraging private development.[6]

In addition, the 'Arena Agreement' defines 'Competing Facility' as follows:

> **Competing Facility** means any now existing or new indoor or covered sports or entertainment arena, indoor or covered performance facility or other indoor or covered facility that (i) could compete with the [FedEx Forum] for the booking of any event, or (ii) has or will have a seating capacity of more than 5,000 persons and fewer than 50,000 persons; provided, however, the foregoing provisions shall not apply to any hotel ballrooms, movie theaters or convention and hotel facilities that are not designed or constructed to be able to accommodate or be used as venues for concerts, theatrical shows, public assemblies or sporting events.[7]

After reviewing the language of the 2001 'Arena Agreement', the Economic Development Growth Engine for the City of Memphis and Shelby County decided not to grant Elvis Presley Enterprises, Inc. TIF approval for its new, supplemental project that included the 6,200-seat arena.

Feeling like a ***'Hound Dog'***, Elvis Presley Enterprises, Inc, in November 2017,

filed suit against the City of Memphis, Shelby County, and Memphis Basketball, LLC, requesting the court to find on its behalf a declaratory judgment, intentional interference of business relations, together with any and all other injunctive and equitable relief.

The three named defendants, seeking ***'A Little Less Conversation'*** on the issue moved the court to dismiss the plaintiff's claims. The Chancery Court agreed with the defendants, finding that plaintiff, Elvis Presley Enterprises, Inc. lacked standing because it failed to exhaust all administrative remedies before filing its lawsuit. Subsequent to the Chancery Court's ruling, however, both the Economic Development Growth Engine for the City of Memphis and Shelby County and the County Commission approved Elvis Pressley Enterprises, Inc.'s application for the amended TIF, which included the 6,200-seat arena. This approval was contingent, however, on either a court order or an agreement by the parties to the original 'Arena Agreement' (i.e. The City of Memphis and Memphis Basketball, LLC) that the Elvis Presley Enterprises, Inc. revitalization project did not violate their contract.[8]

As a result of the Economic Development Growth Engine for the City of Memphis and Shelby County's contingent approval, Elvis Presley Enterprises, Inc., on June 9, 2018, instigated a second lawsuit against the same three defendants, seeking a declaratory judgment that the TIF does not violate the 'Arena Agreement' between the City of Memphis and Memphis Basketball. The Chancery Court, upon a motion to dismiss filed by the defendants alleging that this was now ***'Too Much'***, again dismissed the plaintiff's lawsuit for a lack of standing. The Court of Appeals affirmed, finding that the second lawsuit filed by Elvis Presley Enterprises, Inc. was barred by the legal concept of res judicata.[9]

5 2001 Arena Agreement. Memphis Basketball, LLC acquired the Grizzlies from HOOPS, L.P. in 2012, at which time Memphis Basketball became the successor-in-interest to HOOPS. Therefore, although HOOPS actually executed the Arena Agreement, Memphis Basketball is still bound by its terms and conditions.

6 Elvis Presley Enterp., Inc. v. City of Memphis, WL 714651.

7 Id.

8 https://www.chattanoogan.com/2021/2/24/423895/Supreme-Court-Concludes-Arena-Lawsuit.aspx

9 Elvis Presley Enterp., Inc. v. City of Memphis, WL 7205894,

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The Tennessee Supreme Court granted an appeal on this issue.

The doctrine of res judicata is a ***'Love Me Tender'*** rule that bars a second suit between the same parties on the same claim with respect to all issues which were, or could have been, litigated in the former suit.[10] (It is a rule of rest, and it promotes finality in litigation, prevents inconsistent or contradictory judgments, conserves judicial resources, and protects litigants from the cost and vexation of multiple lawsuits.) A party asserting a defense of res judicata must demonstrate to the court (1) that the underlying judgment was rendered by a court of competent jurisdiction; (2) that the same parties or their privies were involved in both suits; (3) that the same claim or cause of action was asserted in both suits; and (4) that the underlying judgment was final and on the merits.[11]

The Tennessee Supreme Court determined that the doctrine of res judicata was not applicable to the parties in this matter because the dismissal of the prior lawsuit for failure to exhaust administrative remedies did not constitute an adjudication on the merits. Therefore, since the second suit was not barred by the doctrine of res judicata, the Tennessee Supreme Court in a '***Return to Sender'*** move, remanded the case back to the Court of Appeals for consideration of the standing issue. ●

10 Elvis Presley Enterp., Inc. v. City of Memphis, WL 714651.

11 Id.

Court Agrees Assumption of Risk Bars Negligence Action

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geographic features of the property, such as a tree, or natural features on the playing surface itself, such as a slope, rocky terrain, or exposed tree roots.

This is a helpful decision for property owners, recreational leagues, municipalities, and sponsors of charity tournaments in New York who may be faced with similar claims. It underscores the powerful application of primary assumption of risk to defeat a participant's negligence action under the right circumstances.

This case can be found at 2021 NY Slip Op 01244." ●

Opinion–Could Frictionless Create Big-time Friction for Sports Venues on Fans' Return?

By Chris Hartweg

What is going on?

First, the simple, courteous act of wearing a protective mask in public managed to polarize the country.

Now it appears "vaccine passports"—basically an app to show you have received your COVID-19 vaccine—may be headed for the same fate. (Though apparently we should drop "passport" and call them vaccine "verification" papers per multiple surveys such as this one.)

A simple, secure *and free* method to quickly assure venues, theaters, restaurants, etc. that we've greatly reduced our COVID-19 risk, and that those sitting around us have as well, is…a political issue?

Unfortunately, just as many elected Conservatives and libertarians resisted mask mandates, now we're seeing the same response to vaccine passports. Last Friday, Fla.'s Gov. Ron DeSantis signed an executive order barring businesses from requiring patrons or customers to show vaccine documentation, under penalty of losing state contracts. Since then, Miss. Gov. Tate Reeves and Texas Gov. Greg Abbott have joined in.

Why?

Truthfully, the **World Health Organization (WHO)** has an excellent point per WHO spokesperson Dr Margaret Harris, "At this stage, we would not like to see vaccination passports as a requirement for entry or exit because we are not sure at this stage that the vaccine prevents transmissions."

However, that's not the argument. To many, it comes down to their digital rights or an invasion of privacy.

But **Lawrence Gostin**, a Georgetown University professor of global health law, coauthored a paper in the Journal of the American Medical Association about ethical issues, said vaccine passports would contain very little information. "In many ways vaccine passports protect your privacy. They don't require you to disclose any information, other than if you got a vaccine or not."

Then take for example, in DeSantis' own state, all children in kindergarten through 12th grade must show proof of vaccination against six diseases to attend public school.

Nationally, those looking to immigrate to the U.S. must provide a vaccine record for 14 diseases in all—including two types of influenza, two types of hepatitis, chickenpox and polio. Records are kept in a paper booklet issued by the WHO. Or take the U.S. Armed Forces, which typically requires up to a dozen vaccinations depending on where a person is deployed.

And now the Equal Employment Opportunity Commission has told employers that they can mandate coronavirus vaccination because public health comes first.

What does this mean for sports venues?

"Generally, sports venues provide a license for a spectator to enter–it is permission and it is revocable," explains **Carla Varriale-Barker**, an adjunct professor of Columbia University's Sports Management program and a shareholder at **Segal McCambridge Singer & Mahoney**, where she chairs the law firm's Sports, Recreation & Entertainment Practice Group.

Basically, this is the same concept as "No Shirt, No Shoes, No Service" or refusing entry to (or removing) someone who is visibly intoxicated.

Newly rechristened FTX Arena is not empty for Heat games, in fact, it boasts two sections of seating set aside for those with proof of vaccination.

As a kind of compromise, starting last week, the Miami Heat began setting aside two sections for vaccinated fans with less social-distancing requirements.

Thus far, they are the only team across MLB, MLS, NBA, NFL or NHL with separate seating for fans providing proof of vaccination.

That begs the question—is the solution to split-up venues into the "Have Shots" and "Have Nots" (including the "Will Not Provide Documentations")?

"When we were kids, we all remember being asked 'Would you like Smoking or Non-Smoking Section' when we went out," offers **Dr. Tiffany Richardson**, a sports business professor at **Seattle University**. "Are we headed down the road to all needing to be asked if we prefer 'Vaccinated or Non-Vaccinated'?"

Will we see more of that in sports with entry points, seating sections, concessions lines and bathroom queues divided like the old smoking/non-smoking sections?

"Quite possibly—like an elite tier of seating that already exists, but for a health reason versus a price point reason," says Varriale-Barker. "I think this is more of a public relations concern right now than a legal concern. But I can see a claim being brought to challenge this sort of 'have/have not' seating. Lawyers, like nature, abhor a vacuum."

Is there an extra level of complexity for venues owned by government entities or stadia on public university campuses?

"These venues have 'state action' concerns and concerns about intrusion on constitutional rights that a private venue may not have," explains Varriale-Barker. "Will there be religious liberty concerns, for example, if a venue mandates vaccinations for spectators? The law is just catching up to some of the concerns about 'vaccine requirements' for sports venues now that spectators are returning. I feel as though we just addressed COVID and assumption of the risk and waivers of liability and now we are jumping to this issue! Of course, there are also labor and employment law concerns for the people who work in the venues and event staff to consider."

To all of that, I wonder, 'Do we want sports back with packed stadiums or not?'

With more than 66 million Americans fully vaccinated (20 percent of population), another 46 million with one of two shots

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taken (14 percent) and pacing at more than 3 million new shots per day, the light at the end of the tunnel is actually glowing closer.

"People have suffered for over a year, and they want their lives back," Gostin told BuzzFeed News. "They want to go to restaurants, see movies, travel to see their loved ones, and return to the workplace. Vaccine passports offer a pathway to a more rapid and safer return to normal life."

Yesterday, Clear and the NBA, announced a partnership to make Clear's "Health Pass" technology available to all NBA teams and their arenas for COVID-19 health screenings that presents a tech-driven, common-sense solution to ramping up capacities.

At least 10 NBA teams, including the Heat, as well as the Bulls, Hawks, Knicks, Magic, Spurs, Thunder and Warriors have already implemented Clear's technology for staff, player and/or fan verification.

Health Pass "is a free, mobile experience…that securely connects a user's verified identity to multiple layers of COVID-19-related health information – like test results – to help reduce public health risk and aid in the safe return of fans to NBA venues…Clear's Health Pass allows fans to securely access and verify their health information prior to entering an arena. Additionally, as COVID-19 vaccines continue to be administered across the country, Clear's Health Pass will soon offer the ability to link an individual's vaccination records to their Health Pass account."

You may recall that the NHL partnered with Clear for their restart "bubbles" in Toronto and Edmonton. NHL personnel downloaded Health Pass, uploaded a photo and a form of personal ID to verify their identity through Clear's facial recognition. Then, each day before leaving their hotel room, they answer COVID-related questions. A quick scan at a Clear kiosk, which includes a temperature check, and that's it.

The results are impossible to ignore: zero cases in either bubble. Zero.

Other pro sports users of just Clear for biometrics include MLB's Athletics, Braves, Giants, Mariners, Marlins, Mets, Orioles, Rangers, Rockies, Tigers and Yankees; MLS teams include the Earthquakes, LAFC, NYCFC and Sounders; in addition to their NHL league deal, hockey's Rangers utilize Clear; NFL users include the Seahawks.

When TMR spoke this week with **Ken Lisaius**, Clear's VP, Public Affairs & Communications, he broke it down perfectly, "Clear was not born of the pandemic, but this presents a great opportunity for us to help people get back to what they know and love."

What's next?

As Varriale-Barker, the expert in sports business and sports law doesn't suggest getting all litigious. Rather for teams and venues moving forward she recommends,

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Opinion–Could Frictionless Create Big-time Friction for Sports Venues

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"Just as we saw with other aspects of COVID, tread carefully and with sensitivity."

That, combined with some transparency including an explanation of how the technology is being used, can go a long way.

As Shaun Moore, CEO of facial-recognition supplier Trueface told the Wall Street Journal about where consumer hesitation comes from, "It's the same old story, it's Big Brother. But if you sit and tell them, and they understand [how it works], that takes a lot of the mystery away."

The return of sports, as it was following 9/11, could be the great unifier. Let's not turn a common-sense solution into more division.

You can bet your app I back vaccine passports as the best way to speed the return of sports fans for capacity crowds. ●

Hartweg is the CEO and Publisher of Team Marketing Report (https://teammarketing.com/). This article appeared initially in TMR.

Study: Artificial Fog Doesn't Boost COVID Transmission Risk

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reduce, the risk of airborne transmission of diseases from respiratory aerosols has important implications, as it directly affects the entertainment industries' readiness to re-open and their ability to generate revenue and create jobs.

"Over the past several years the use of atmospheric smoke and fog has been on the rise with many in our membership expressing concern over health concerns around the products used, and any lasting effects of its use. When the COVID-19 pandemic shut down the industry in March of 2020 one of the many concerns brought forward to Local 891–concerns heard throughout the industry North America wide – was, what happens when someone who may have the disease releases aerosols into the fog on a set?" asked Keith Woods, President of the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts (IATSA) Local 891 labor union."Given this, it seemed natural to support a study of this sort to help get some answers to this most pressing of concerns. It gives us some relief to know that artificial fog does not appear to allow the released aerosols to suspend more than normal," stated Woods. ●

Anytime Fitness Steps into NCAA Locker Room Controversy

When controversy emerged about the inadequate training facility in San Antonio for the Division I Women's Basketball Championship Athletes, Anytime Fitness took the initiative to issue a statement:

"We knew that a press release with some generic platitudes might get eyeballs – but we wanted to make a difference for the athletes. Since they can't leave their bubble, offering them access to our clubs in the San Antonio area wouldn't work.

"So, we decided to directly invest in these athletes by offering to build out their San Antonio training facility as quickly as possible and cover all rental costs.

"Nearly 24 hours ago, we directly contacted NCAA basketball leaders–on behalf of the thousands of women and men owners of Anytime Fitness clubs–with an immediate offer to equip the training space at the Alamodome. We had lined up our equipment vendors and were ready to cover the costs to get the full set of equipment in place for the facility. Plus, two women owners of Anytime Fitness clubs in San Antonio were minutes away from the Alamodome with a squat rack, barbell, plates, curl bar, medicine balls, ropes, kettlebells and more to quickly improve the current training facility while we arranged for the larger equipment loans.

"We could have delivered this last night. All we needed was a 'yes' from the NCAA to get rolling.

"We never heard back. But we aren't finished yet.

"This morning, an expanded training space in the Henry B. Gonzalez Convention Center was unveiled for the tournament athletes. It's a start. But it needs so much more to be on par with the men's training facility.

"We want to make this investment–and we are we reaching out again to the NCAA to make this happen.

"We have a track record of backing women: our president is a woman. We have thousands of women club owners and staff worldwide. Our recent Movement Foundation partnership, along with the HeartFirst Foundation, has to-date contributed $500,000 worth of support for women in the areas of fitness, wellness and self-esteem. The executive team of our parent company, Self Esteem Brands, is majority women led.

"So, our offer stands to work with the NCAA and help improve parity for women athletes. We will always seek ways to support women, invest in women, and make a difference as women seek ways to improve their wellness and well-being."

Stacy Anderson – President, Anytime Fitness

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Daytona International Speedway Appoints Frank Kelleher as Track President

Daytona International Speedway has announced Frank Kelleher, an experienced industry veteran, has been appointed President of Daytona International Speedway. Concurrently, NASCAR announced that Chip Wile has been promoted to a new expansive role overseeing 13 NASCAR-owned tracks as Senior Vice President, Chief Track Properties Officer.

In his previous role as NASCAR Senior Vice President and Chief Sales Officer, Kelleher oversaw a team responsible for business strategy and revenue generation. His team played a critical role in driving both media and partnership sales for NASCAR and its tracks. Kelleher helped secure the founding sponsorships to Daytona International Speedway's highly visible injectors. As only the ninth track president in DIS history, Kelleher is well-suited to step into this important position.

"For nearly two decades, Frank has demonstrated the ability to foster meaningful relationships and lead critical areas of our business," said Lesa France Kennedy, Executive Vice Chairperson, NASCAR. "He is a dedicated member of the greater Daytona Beach community, a true team-builder, and most importantly, he has a deep-rooted passion for motorsports and promoting the fan experience. We are incredibly excited to have Frank leading Daytona International Speedway."

"I am incredibly honored to take on this historic role and represent the most iconic motorsports venue in the world," said Kelleher. "Our race fans are what makes working in motorsports so special and I'm excited to work with the tremendous team at Daytona International Speedway to continue to deliver a best-in-class racing experience for our fans locally, nationally and around the globe."

As President of DIS, Wile successfully oversaw promotion and operation of the most famous and iconic venue in motorsports. From his first major event, the Country 500 over Memorial Day weekend in 2016, to leading the industry through a revised Speedweeks in 2021, Wile has pushed innovation and fan engagement at every turn. Prior to Daytona, Wile was the President of Darlington Raceway, spearheading a five-year strategy to reinvent the track experience, including the successful introduction of the now widely celebrated Throwback race weekend. ●

Court Hands Defeat to Patron Who Was Injured at Madison Square Garden

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claims against each other. In 2017 Turner filed a motion for summary judgment and USA Basketball filed a motion to dismiss the complaint, or "alternatively, for summary judgment dismissing the complaint and any crossclaims" (*Acevedo,* "Mot. Seq. No. 001 and 002, (12-6-17)). Turner "established that while it performed work on the premises, it did not design or install the glass or hire the security guards who directed" Acevedo "into the glass panel" (Id.). Acevedo did not oppose the motion and Turner was granted summary judgment (Id. at 3).

USA Basketball's motion to dismiss was "denied outright" because it "failed to demonstrate" that plaintiffs' "should be dismissed for failure to state a claim" (Id. at 2). The Court also denied the summary judgment motion, because it was "premature" (Id.). USA Basketball claimed that it had not hired the security guards, but the Court ruled that the parties were "entitled to discovery to ascertain, what role, if any, USA Basketball had in marking the panel, setting up the subject area where the panel was located, and security/check-in procedures, among other issues." Moreover, it had "not demonstrated" that the "accident was caused solely by the MSG defendant's negligence" (Id.). Discovery ensued. During that process, Acevedo submitted a "Bill of Particulars" wherein he claimed "a loss of earnings in the sum of $14,000 for the approximate two (2) week (sic) he was unable to attend to his employment and usual activities" and for hospital expenses of "approximately $5,000" as a result of the accident (*Acevedo,* Doc. No. 77, at 2, (10-22-18)).

In July 2020, USA Basketball again moved for summary judgment on the "complaint and all crossclaims with costs and disbursements against plaintiff" (*Acevedo* at 1). Acevedo opposed the motion. MSG "partially" opposed the "motion to the extent that" it sought summary judgment on their crossclaims. MSG also moved for summary judgment on Acevedo's claims, USA Basketball's crossclaims, and sought a declaration "that USA Basketball is required to defend and indemnify MSG and that USA Basketball breached its contract to procure insurance" (Id. at 1/2). MSG claimed that the accident "was not caused by a dangerous or defective condition in the glass panel which plaintiff struck" (Id. at 2). Acevedo opposed the motion, and USA Basketball "partially" opposed "the request for relief against it" (Id.).

USA Basketball asserted that it was MSG's responsibility to admit and check patrons for security purposes. USA Basketball did not employ the relevant personnel,

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nor were any USA Basketball employees near the area of the accident. Finally, "the alleged dangerous and defective condition … could not have been reasonably foreseeable to warrant USA Basketball to be liable to the plaintiff or MSG" (Id. at 3).

In December 2020 the, Court "adjourned" the motions until January 2021 so the parties could "submit a copy of the video of the underlying accident that was annexed to the parties' papers via Dropbox or another cloud sharing service. A link to the video should be emailed" to the Court's "Principal Attorney" (Interim Order (12-24-20)).

The Court's "Discussion"

The Court began by stating the relevant standard. The party seeking summary judgment "has the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor without the need for a trial" (*Acevedo* at 3). The party opposing the motion must then produce "admissible" evidence "to raise a triable issue of fact." If the party moving for summary judgment fails to make out its prima facie case, the motion will be denied "regardless of the sufficiency of the opposing papers." Summary judgment is "a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue" (Id.).

MSG's Motion as to Acevedo

The Court noted that a "property owner has a duty to keep the premises in a reasonably safe condition so as to prevent anybody lawfully on the premises from becoming injured." The plaintiff must "demonstrate" that the premises were not reasonably safe; that the defendant either created the dangerous condition or had actual or constructive notice of it; and that this negligence "in allowing the unsafe conditions to exist was a substantial

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factor in causing" the injury (Id. at 3/4).

The "expert" affidavit submitted by USA Basketball and relied on by MSG, "only creates a triable issue of fact as to whether the applicable building codes required" marking the glass panel that Acevedo struck. Furthermore, even if the codes allowed it, a "reasonable fact finder" could conclude that the having such a panel "where open doors were located without any further markings or warnings constituted a dangerous condition." The motion was denied (Id. at 4).

USA Basketball's Motion as to Acevedo

USA Basketball was a "licensee" and "there is no case law defining" a licensee's duty of care that would support Acevedo's claims. If a "tenant did not have a duty to mark the glass" then "a mere licensee certainly cannot be said to have such a duty." Moreover, the injury did not occur within the areas that "USA Basketball accepted the privilege to use on an 'exclusive' basis." Using areas such as the "back-house" did "not transform USA Basketball into a possessor of the premises. Therefore, USA Basketball cannot be held liable to plaintiffs under ordinary premises liability principles" (Id.).

Whether a defendant "owes a duty to care to a plaintiff is a question of law to be determined by the court" and "contractual obligations do not give rise to a duty of care in favor of third-parties." USA Basketball "did not hire any security guards and otherwise had nothing to do with the area where plaintiff's accident occurred." USA Basketball was thus "entitled to summary judgment dismissing plaintiffs' claims against it" (Id.).

USA Basketball and MSG's Dueling Motions

USA Basketball and MSG filed competing motions for contractual indemnification. MSG also filed a motion for USA Basketball's alleged failure to procure insurance as required by their contract. Contractual indemnification is permitted but New York law "prohibits and renders unenforceable" any agreement that would "hold harmless and indemnify" a "landowner against its own negligence" (Id.).

The contract between USA Basketball and MSG provided that USA Basketball would be entitled to contractual indemnification from "all liabilities, losses, damages, judgments settlement expenses, claims costs and expenses whatsoever" related to a "areas utilized by guests attending the Events including … all areas and facilities utilized for ingress and egress of guests" except for claims based on willful misconduct (Id. at 4/5). There "is no dispute that plaintiff was injured at an area of ingress to the premises." There were "issues of fact as to MSG's security procedures and whether the glass panel met statutory requirements and/or was dangerous" so that "MSG has not demonstrated freedom from negligence and is therefore not entitled to contractual indemnification" (Id. at 5). MSG asserted that it had not supplied an affidavit "from the security guard present at the time of plaintiff's accident because" one was never demanded. This assertion "fails to recognize that as the proponent of a motion for summary judgment, it is MSG's burden to establish prima facie entitlement to such relief." The Court denied both summary judgment motions on the contractual indemnification claims (Id.).

The final issue was MSG's claim that USA Basketball "breached its duty to procure insurance." However, USA Basketball "has provided a certificate of liability insurance" that contained "a $1 million personal injury policy" with an excess liability of $5 million that "was in effect" at the time. "Since there is no dispute that USA Basketball obtained the insurance it was required to under the License Agreement" the Court granted summary judgment to USA Basketball on this claim and denied MSG's competing motion (Id.).

The Court's "Conclusion"

The Court "ordered" that Acevedo's claims against USA Basketball and MSG's cross-claim against it for breach of contract "are severed and dismissed," but "the balance of USA Basketball's motion as well as MSG's motions are denied." The Court stated that any "requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court" (Id.).

Conclusion

Acevedo claimed special damages of less than $20,000 so it seems strange that the case has continued for over six years without being settled. At some point it became clear that Turner was not responsible for the glass panel. Some of Turner's summary judgment expenses could have gone to Acevedo to settle their part of the case. MSG and USA Basketball's insurance companies have spent untold thousands of dollars fighting Acevedo, and each other, when that money could also have been used for settlement. Acevedo's demands may have precluded that, but it is exactly for such cases that court-sponsored mandatory settlement conferences were created. This case should be resolved, and, if there truly is a glass panel that can hit patrons in the head as they enter, it should be long gone by now. ●