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SPORTS FACILITIES

How the law affects the sports facilities industry and the LAW

Gym Owner Not Liable For Injuries Suffered in Personal Training Session

By John E. Tyrrell, with Nicholas Rollo, of Ricci Tyrrell Johnson & Grey

As folks head back to the gym as the COVID-19 pandemic subsides, we are reminded that injuries can occur, even under the supervision of a personal trainer. Through a strenuous legal "workout," the Southern District of New York ("Court") recently ruled in favor of a gym owner as not owing a duty based on the assumption of risk doctrine. *Pryce v. Town Sports Int'l, LLC*, 2021 U.S. Dist. LEXIS 62977, at *2 (S.D.N.Y. Mar. 31, 2021).

On the morning of July 2, 2015, 51-year-old Simone Pryce ("Mrs. Pryce") arrived at New York Sports Club ("NYSC") for a training session with her personal trainer, Jonathan Reyes ("Reyes"). *Id.* at *10. About halfway through the session, Reyes demonstrated a new exercise called the "core diagonal crossover," which required Mrs. Pryce to lift a medicine ball from her chest to above her shoulder while bending her knee. *Id.* at *11. When Mrs. Pryce began the exercise, Reyes stood within three feet of her in order to observe and, if necessary, correct her form. *Id.* at *12-13. At some point during the exercise, Reyes walked approximately twelve feet away from Mrs. Pryce to talk to a patron at the gym. *Id.* at *13. After completing two or three repetitions of the final set, Mrs. Pryce felt a pull in her shoulder. *Id.*

After her session, Mrs. Pryce began to feel sore in her shoulder. *Id.* at 13-14. At first, Mrs. Pryce believed her pain to be the usual soreness she experienced after training sessions. *Id.* at *14. However, Mrs. Pryce sought medical attention when the pain continued for twelve days. *Id.*

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Fan Hit by Foul Ball Cries 'Foul!' on Cubs' Arbitration Clause

By Gary J. Chester, Senior Writer

Q. When is a contract not a contract?
A. When it violates public policy.

First-year law students learn that courts will void an otherwise enforceable contract if the terms of the contract violate public policy. A basic example of a substantively unconscionable contract is a fitness center agreement in which the patron waives the right to sue the gym for personal injuries, regardless of whether the facility's conduct was negligent or intentional.

Cases of procedural, as opposed to substantive, unconscionability are harder to find. But our nation's pastime has provided us with one such case, *Zuniga v. Major League Baseball*, 2021 Ill. App. LEXIS 111 (App. Ct. of Illinois, No. 1-20-1264, March 16, 2021).

The Facts

Laiah Zuniga's father gave her a ticket to the Mets-Cubs game at Wrigley Field on August 27, 2018. Zuniga was struck by a foul ball while eating a sandwich she bought at the game and suffered serious head injuries requiring hospitalization and subsequent rest at home. She missed two weeks of work and did not read or engage in any eye-straining activity pursuant to her doctor's orders.

Zuniga filed a complaint in state court against Major League Baseball (MLB) and the Cubs for negligence. The defendants moved for an order compelling binding arbitration per the terms and conditions of the ticket. The trial court denied the

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Court Dismisses Defamation Claim Against Jazz & Westbrook

A federal judge has dismissed a lawsuit filed by two Utah Jazz fans in state court in Utah against the Utah Jazz and NBA star Russell Westbrook, which alleged that the Jazz and Westbrook defamed the plaintiffs when they publicly branded them racists, after the plaintiffs directed insensitive remarks against Westbrook during a game.

In so ruling the court found that plaintiffs Shane Keisel and Jennifer Huff were never identified by name and that the term "racist" is not an actionable word.

The incident in question occurred on March 11, 2019 in a game in Salt Lake City at Vivint Arena in a game between the Jazz and the Oklahoma City Thunder, the team Westbrook played for. In the aftermath, the Jazz organization banned Keisel and Huff from attending future events at the arena, issuing the following statement:

"The Utah Jazz and Larry H. Miller Group announced today a permanent ban of the fan who engaged in the inappropriate interaction with the Oklahoma City Thunder's Russell Westbrook last night at Vivint Smart Home Arena. The ban is effective immediately and includes all arena events.

"The organization conducted an investigation through video review and eyewitness accounts. The ban is based on excessive and derogatory verbal abuse directed at a player during the game that violated the NBA Code of Conduct."

In comments to reporters after the incident, Westbrook described the plaintiffs' speech as racially motivated. Then-Utah Jazz owner Gail Miller said "This should never happen. We are not a racist community. We have a code of conduct in this arena. It will be strictly enforced."

The plaintiffs then filed the lawsuit in the 4th District Court in Utah County, alleging that Westbrook's postgame comments as well as a subsequent Utah Jazz press release and comments by Miller were defamatory and caused intentional and negligent infliction of emotional distress to the plaintiffs.

In response to the lawsuit, Jazz Senior Vice President of Communications Frank Zang responded to the lawsuit with the following statement: "We believe there is no legal or factual basis for these claims against the Utah Jazz. The organization investigated the underlying incident and acted in an appropriate and responsible manner. We intend to vigorously defend the lawsuit."

The defendants moved for summary judgement on the claim. The court heard oral arguments in the case on April 5.

In granting a summary judgment to

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SPORTS FACILITIES and the LAW

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Assessing Sports Risk and Security Management Practices in New Mexico High School Athletics

By John Miller, Ph.D. and Todd L. Seidler, Ph.D.

The 2020 high school football season has kicked-off in various areas of the country with a very different look and security concerns. However, aggressive (sometimes violent) behaviors have continued to occur among fans attending high school sports contests even with the spread of COVID-19. Examples of misbehaviors at high school games in the last two years include a person in Kansas, dying after being shot while attending a youth football game (Miller, 2020); an exchange of gunfire that occurred after a domestic dispute at a high school football game (Robinson, 2020); and two people were wounded after being shot while attending a high school football game in Ohio (Associated Press, 2020)

The examples mentioned above represent the tip of the iceberg of issues that compromise spectators' safety while attending high school sports contests. When a fan attends a game on the high school's property, a special relationship between the fan and the school is formed by either expressed or implied invitation (Dobbs, 2000). This relationship stipulates that the premises owner has a duty to the invitee to provide a reasonably safe environment (Grady, 2013). A reasonably safe facility or sporting event is foreseeably safe for participants, spectators, staff, and visitors (Seidler, 2005). In particular, according to the court in *Betrand v. Alan Ford* (1995), a landowner should "exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land" (p. 606). Further, premises liability mandates that the landowner has a duty to properly supervise athletic events (*Hills v. Bridgeview Little League Association,* 2000*; McPherson v. Tennessee Football Incorporated*, 2007). The court in *Quinlivan v. The Great Atlantic & Pacific Tea Co, Inc.* (1975) stated that the premises owner could not be considered "the absolute insurers of the safety of their invitees" (p. 261). Thus, when an incident of spectator rage occurs at a youth sporting event, the plaintiff must be able to prove that the landowner owed a duty of care to protect against attacks by third parties (van der Smissen, 2003).

Due to today's litigious environment, lawsuits developing from injuries incurred at sports events are probable (Bezdicek, 2009). Youth sports organizations such as Pop Warner, Little League Association, and the National Alliance for Youth Sports have developed policies hoping to decrease violent behavior at youth sports events. However, the effects may have been less than stellar in curbing violence at these events. In many cases, the issues continue because the policies and sanctions meant to reduce the violence are not rigorous enough to discourage such actions. To reduce the chances that individuals may be exposed to harm at youth sports contests, the organization should develop and implement a comprehensive risk management policy. Despite some states passing legislation to deal with sports rage at high school athletic contests, there is a shortage of information regarding interscholastic athletic directors' risk management practices (Miller & Curto, 2020). This study aimed to analyze the risk and security management procedures being employed in high school athletics in the state of New Mexico.

A 27-item questionnaire was created to elicit responses from New Mexico high school athletics directors. Of the 156 high schools in New Mexico, 66 (42%) athletic directors responded to the questionnaire. The results revealed that 68% of the responding New Mexico high school athletic departments possessed at least a basic written risk management plan. While 79% had a law or policy that prohibit spectators from bringing concealed weapons (e.g., guns or knives) into home football games, 64% revealed that game personnel such as ticket takers or ushers were not trained for security issues such as dealing with an active shooter situation. Additionally, 72% reported that game personnel were not trained to help break up altercations that may occur in the stadium during a game.

Only 21% agreed that local law enforcement or security personnel check vehicles entering the school parking lot before home football games. Additionally, 10% agreed the football stadium was searched by qualified security before each football game. Finally, 9% of the respondents indicated that spectators were searched before entering the football stadium. Thus, the results indicate that most high schools are employing little in the way of risk and security management proactive strategies such as searching spectators before they enter the facility nor searching the stadium before a game and that the schools do little to prepare game personnel for any violent misconduct by spectators.

Discussion

Due to the coronavirus pandemic, many high school athletic seasons have been canceled or modified by allowing only a small percentage of spectators at each contest. Despite such decreases or alterations in conducting a sports contest, enough incidents have occurred to believe that violent misbehavior among high school sports spectators is not going away soon. For example, since 2013, there have been at least 108 incidents of gunfire around school sporting events in 36 states (Smith & Lu, 2020). While this study's results emanate from one state, it identifies security and risk management gaps that may compromise some spectators' safety at high school athletic competitions.

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Risk Management Recommendations

One of the founding fathers of sport risk management, Dr. Herb Appenzeller, published his landmark text, Risk Management in Sport in 1998. When discussing the importance of risk management, he said "The law does expect, however, that sport administrators develop risk management and loss control programs to ensure a safe environment for all who participate in sport. Risk management has become a crucial part of the overall sport program. It is as important as budgeting, scheduling, insurance coverage, eligibility, equipment and facility management, contracts, and other duties". (p. 9) One part of an overall high school athletics risk management program is to properly plan for foreseeable emergencies that may occur during events such as football and basketball games. The following are some suggested steps that athletic administrators should take to prepare for the possibility of violence or an active shooter at an event:

1. Every school and athletic department should develop a basic risk management plan.
2. School administrators should be aware of any state laws or school district policies regarding the carrying of weapons onto school property. If such laws or policies exist, they should be communicated to event managers and staff so that they can be enforced. If no such law or policy exists, consideration should be given to their development. Proper signage can be used to communicate it to the public.
3. An evacuation plan for each facility should be developed and communicated to anyone with supervisory responsibility. Practicing the plan so that everyone knows how to react is prudent.
4. Paid and volunteer staff should be trained on how to appropriately respond if violence, including an active shooting, should break out during an event. ●

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As More Venues Go Cashless, ASU experts See Downside

As businesses and destinations begin to reopen from the pandemic shutdown, consumers will likely see more places going cashless.

Chase Field in downtown Phoenix, home of the Arizona Diamondbacks, reopened to its full capacity a couple months ago. When the stadium initially opened to a limited number of fans in April, the team announced a new policy of not accepting cash. Fans use a smartphone app to reserve parking and to order and pay for concessions. Cash is not accepted at the concession windows, parking garages or team shop.

The east entrance of the Grand Canyon, closed for over a year, reopened last month with a policy of accepting only park passes and credit cards — no cash.

Going cashless will not be a major inconvenience for people who already use their debit or credit cards almost everywhere, but it does raise some issues regarding privacy and equity, according to two Arizona State University experts.

"It's more hygienic because there's less contact and you're not sharing bills and change," said Geoffrey Smith, clinical associate professor of finance in the W. P. Carey School of Business at ASU.

"Things have been heading toward cashless, but this is a good time for businesses to roll it out, when consumers are more accepting of it under the guise of safety."

Also, businesses don't have to deal with hiring armored cars to transport large amounts of cash.

Some businesses accept digital payment services, like Apple Pay, Smith said.

"I think that's the future, where you use your phone and get rid of the cards," he said. "People like the speed and convenience and the accurate record keeping.

"You can go out to dinner and split the bill right at the table on everyone's phones."

In addition, Smith sees even brick-and-mortar retail sites adopting cashless policies.

"Some places are trying to get rid of cash registers in stores by moving toward a kind of shopping where you put your item in the cart and it'll just charge you right then," he said.

The Amazon Go and Amazon Go Grocery stores use this method, where there are no checkout lines.

"It saves space and frees up labor," Smith said. "Retail needs to compete with the online experience, so these types of instantaneous payments allow retail to be more competitive."

But he sees some people preferring to use cash for privacy reasons.

"There is a loss of privacy. All of your transactions are now electronically tracked, and people can tell where you were, how much you spent and what you bought," he said.

As consumers' purchases add up, the data can be mined for more personal information.

"For example, if you go to the same place every day for coffee, a company can infer that you work in that area because you're there 200 days a year at 8 a.m.," he said.

But the move toward cashless transactions raises issues of equity, because low-income people are less likely to have accounts with traditional banks, according to Debra Radway, a lecturer in the W. P. Carey school and a certified financial planner.

"A lot of the banks have requirements for minimum balances, they have overdraft fees and they have a lot of fees in place that make it cost prohibitive for a low-income person to have an account at a traditional bank," she said.

"With larger institutions, they usually have a minimum amount you have to keep in your account or you have to have one direct deposit going in to waive the fees."

A traditional bank's fee for an overdraft could be $40 or $50, she said, although credit unions typically charge less.

Banks are for-profit companies and make money from fees and from the large balances carried by customers, which they can lend out, charging interest.

"They do have a requirement they have to be in underserved communities, but as a general rule, banks are focused on making a profit so they're looking for the most profitable customers," Radway said.

A 2019 survey by the Federal Deposit Insurance Corporation found:

- 5.4% of households, about 7.1 million, in the U.S. were "unbanked," with no checking or savings accounts.
- The percentage is much higher for Black households, 14%, and Hispanic households, 12%.
- Unbanked households said the main reason is because they don't have enough money to keep in an account.
- About 7% of unbanked households had a credit card.
- Two-thirds of unbanked households reported that they pay bills in cash, according to another FDIC survey conducted in 2017.

Being unbanked doesn't mean avoiding fees, though.

"If you're low-income and you don't have a checking account and you get paid with a check, you have to pay an extra charge to cash that check," Radway said.

"If you want to look at who's serving the poor, it's the check-cashing companies and the payday loan companies. When poor people live paycheck to paycheck, they run short and have to take out short-term loans and wait until their next paycheck comes in to cover it.

"Those tend to have high annualized fees, but if you don't have an account, you don't have a choice."

Not everyone is embracing the cashless trend. Last year, New York City joined Philadelphia and San Francisco in banning stores from going cashless because of the equity issues, specifically the difficulty that

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homeless and undocumented people would face in acquiring bank accounts.

Some venues are acknowledging that many consumers still use cash. At the Staples Center in Los Angeles, where the Lakers play, the concessions are cashless but fans can use "cash-to-card" kiosks in the arena to convert dollar bills to prepaid cards with no fee.

Radway said that other countries, such as China, use digital wallets that are not attached to bank accounts.

"It will be interesting to see how we evolve toward payments on our phones without cash," she said.

"These fin-tech companies are offering banking-related services and allow you to move money around without a bank." ●

Federal Legislation Introduced to Ban Greyhound Racing, Simulcasting, Live-Lure Training

Several members of the U.S. House of Representative introduced legislation this week to phase out commercial greyhound racing and simulcasting of dog racing. The Greyhound Protection Act also bans the use of live animals for training of greyhounds.

Leading the charge are Reps. Tony Cárdenas, D-Calif., Mike Waltz, R-Fla., Steve Cohen, D-Tenn., Elvira Salazar, R-Fla, Stephanie Murphy, D-Fla., and Brian Fitzpatrick, R-Penn.

"Greyhound racing has become exceedingly unpopular with Americans and is in a death spiral," said Wayne Pacelle, president of Animal Wellness Action and the Center for a Humane Economy. This bill allows for a managed phase-out of the activity to enable planning to provide homes for the dogs and certainty for the small group of remaining owners, workers, and breeders in the industry.

"Dog racing is cruel from start to finish," added Christine A. Dorchak, president and general counsel of GREY2K USA. "This is an antiquated industry with a compulsion for cruelty."

Cardenas' bill comes in the wake of a 2020 investigation by GREY2K USA that exposed live lure training in Oklahoma, Kansas, and Texas, with "farms" training dogs by allowing them to tear apart rabbits. During the course of an investigation that spanned nearly a year, GREY2K USA documented illegal greyhound training at breeding farms in three states, including at a property that is only two miles from the National Greyhound Association headquarters in Abilene, Kansas. The details of this investigation and relevant footage have been provided to law enforcement officials and regulators in Arkansas, Florida, Iowa, Kansas, Oklahoma, Texas, and West Virginia.

The bill also comes after a series of track closure announcements in the United States. In June of 2020, Texas's last track became the most recent one to announce an end to live racing. Alabama's lone track announced an end to live racing effective in April 2020. And just months before, Arkansas's Southland track announced will phase out operations over the next two years.

Those announcements came not long after Florida voters approved Amendment 13, which banned all live racing in the state by the end of 2020. Floridians approved the measure with well more than a two-to-one margin in the industry's hub. Just prior to the launch of the ballot measure campaign, Florida had 12 of the 18 operating tracks in the United States.

"Greyhound racing is cruel and must end," said Rep. Tony Cárdenas, D-Calif. "These docile animals are kept in stacked cages for 20 hours or more a day and are subjected to brutal training practices and races, facing the risk of injury and death at every turn. My bipartisan bill allows for a sensible wind-down of an already-declining industry that will ultimately outlaw greyhound racing. As a longtime animal welfare advocate, I am always committed to always speaking up for the voiceless."

Today, outside of Florida, only four tracks operate, and the only two without a definite timeline to end live racing are in West Virginia. The tracks, based in Charleston and Wheeling, are owned by Delaware North, a privately held company based in Buffalo and built around gambling and food service. A generation ago, there were 60 tracks in the United States, so the decline of racing has been precipitous.

The federal government has authority on this subject because dogs are bred and transported across state lines for racing and races are broadcast to numerous states for simulcast gambling. The bill amends the Wire Act to achieve its purposes of ending greyhound racing and live-lure training.

The Greyhound Protection Act has been endorsed by more than a hundred animal protection groups and community leaders, including 70 local animal shelters from 31 states. Lead endorsers are Animal Wellness Action, GREY2K USA and the Center for a Humane Economy, and other notable endorsers include Stop Predatory Gambling, the Federation of Humane Organizations of West Virginia, Eastwood Ranch Rescue, the National Greyhound Adoption Program, the National Humane Education Society, Dumb Friends League, Alaqua Animal Refuge and Best Friends Animal Society. ●

Court Dismisses Defamation Claim Against Utah Jazz and Russell Westbrook

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Westbrook and the Jazz, the court ruled that being called a "racist" is a matter of opinion and cannot be factually proven true or false. Thus, statements made by Westbrook and the Jazz were constitutionally protected by the opinion privilege.

"The Court's conclusion today — that calling a person racist or attributing racist statements to him is not actionable in defamation — serves important policies underlying the First Amendment," it wrote. "It is only in the free expression of these ideas the nation can hope to heal the historic wounds of slavery and racial injustice that fester still today. That healing cannot occur if public dialogue about racism is silenced under threat of defamation liability."

Another factor in the decision was the fact that Westbrook never identified Keisel or Huff, so "the statement is not actionable in defamation." ●

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motion and the defendants filed an interlocutory appeal.

The appeals court noted that the back of the ticket consisted of an ad and six lines of fine print, reading in part: "By using this ticket, ticket holder *('Holder')* agrees to the terms and conditions available at www.cubs.com/ticketback *(the 'Agreement')*, also available at the Chicago Cubs administrative office." The fine print also warned spectators to be alert for baseballs being hit into the stands and that any disputes that may arise "shall be resolved by binding arbitration…"

It was undisputed that the plaintiff did not read the fine print or go to the website and that the website contained a comprehensive eight-paragraph mandatory arbitration agreement. Buried in the sixth paragraph was a sentence permitting the holder to opt-out of the Agreement within seven days after the event.

Zuniga argued at the trial level that the Agreement was unconscionable because the terms were set forth on the ticket in tiny type that did nothing to highlight the arbitration provision or the need to visit a separate website to ascertain the full terms and conditions being agreed to. The trial court ruled that the arbitration provision was procedurally unconscionable on this basis and denied the defendants' motion to compel arbitration.

Procedural vs. Substantive Unconscionability

The appellate court considered substantive unconscionability as well as procedural unconscionability. The court stated that the former is found where contract terms are "inordinately one-sided" and the latter is where contract terms are difficult to find, read, or understand. The court added that procedural unconscionability "consists of some impropriety during the process of forming the contract depriving a party of a meaningful choice."

The court observed that the Illinois Supreme Court applied procedural unconscionability to invalidate a term in a car warranty where the warranty was printed in the car owner's manual inside the glovebox and unavailable to the owner until after she purchased the car. But the doctrine did not apply in another case where a cellular phone service customer acknowledged in writing that she had read a written service agreement containing an arbitration clause in fine print on the back of the document.

The Appellate Decision

The Cubs and MLB argued that the terms of the arbitration clause set forth on the ticket were simple and conspicuous. The

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appellate court rejected the argument and affirmed the trial judge's decision. The principal reasoning was that the paper ticket only contained a summary of the terms and conditions of the Agreement and not the full provisions.

The court also reasoned that:

- A ticket holder is unlikely to access the full agreement on the internet or review it at the team's offices while attending a game;
- Nothing on the ticket tells the holder that he/she is giving up important legal rights; and,
- The summary pertaining to arbitration is not emphasized in any way and it uses dense legal language.

The court distinguished the circumstances under which the Agreement was created – holding a ticket to be scanned at the gate – from an internet transaction in which the consumer can read all the terms and must click on an electronic button to assent. Here, the court stated, there was "more of an effort to impose the onerous terms of one's carefully drawn printed document on an unsuspecting contractual partner."

The Court Goes Extra Mile

The court could have ended its opinion with this finding, but it proceeded to find that the Agreement was also substantially unconscionable. It found that the opt-out period of seven days was not reasonable given that the plaintiff was unable to read or engage in eye-straining activity for at least seven days. In addition, the Cubs required the plaintiff to provide an account number in the opt-out request and Zuniga had no account number with the club.

"These additional factors support our holding that the arbitration provision at issue is unenforceable," the court concluded. "[A] contract term can be invalidated on the basis of procedural unconscionability, substantive unconscionability, or a combination of both."

You might say the Cubs, as is often the case, hit into a double play. ●

Gym Owner Not Liable For Injuries Suffered in Personal Training Session

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The medical examination showed that she needed surgery followed by physical therapy. *Id.* at *15. Even after the surgery, Mrs. Pryce still had issues with her shoulder, specifically experiencing twinges and having difficulty completing ordinary tasks. *Id.* at *17-18. Not only did she suffer physically, she also suffered financially by means of lost income and out-of-pocket medical expenses. *Id.*

On June 28, 2018, Mrs. Pryce brought a negligence claim against NYSC[1] to recover damages for the shoulder injury she suffered during her personal training session. *Id.* at *1. Specifically, Mrs. Pryce alleged that Reyes briefly left her unsupervised while she was performing the "core diagonal crossover" and thereby breached a duty to ensure a safe exercise environment, which breach proximately caused her injury. *Id.* at *1-2. The case proceeded to a bench trial held over four days before the Honorable Katherine Polk Failla.

The first issue presented to the Court was whether NYSC was entitled to judgment as a matter of law on its assumption of risk defense under Federal Rule of Civil Procedure 52(c)[2]. *Id.* at *36. The Court emphasized "that '[t]he application of the doctrine of assumption of risk is generally a question of fact to be resolved by a jury.'" *Pryce*, 2021 U.S. Dist. LEXIS 62977, at *39 (quoting *Layden v. Plante*, 957 N.Y.S.2d 458, 461 (3d Dep't 2012)). Specifically, a dispute existed as to whether Reyes unreasonably heightened the risks to which Mrs. Pryce was exposed beyond those usually inherent in weight-lifting. *Pryce*, 2021 U.S. Dist. LEXIS 62977, at *39. Although the record suggested that Mrs. Pryce exercised with weights voluntarily and was aware that such movements carry an inherent risk of injury,

the Court could not ignore the fact that Mrs. Pryce was new to lifting weights and was paying for special instruction from Reyes. *Id.* at *39-40. Thus, the Court did not grant NYSC judgment as a matter of law. *Id.* at *40.

Judge Polk Failla then decided the merits of the claim as a factfinder. New York law provides that the assumption of risk doctrine is "not an absolute defense, but rather a measure of the defendant's duty of care." *Id.* at *33 (citing *Morgan v. State*, 90 N.Y.2d 471, 484 (1997)); *see also Turcotte v. Fell*, 68 N.Y.2d 432, 438 (1986) ("[W]hen a plaintiff assumes the risk of participating in a sporting event, the defendant is relieved of a legal duty to the plaintiff; and being under no duty, he cannot be charged with negligence[.]"). Generally, a plaintiff assumes a risk if he or she is aware of the dangerous condition and the resultant risk. *Pryce*, 2021 U.S. Dist. LEXIS 62977, at *35. It is not necessary, however, for a plaintiff to prove that he or she foresaw the exact manner in which injury occurred. *Id.* Citing four reasons, the Court found that Mrs. Pryce failed to establish facts indicating that NYSC breached a duty of care, and thus she assumed the risk of injury and was not entitled to recovery. *Id.* at *41-42.

The first basis relied upon by the Court was the NYSC membership agreement which Mrs. Pryce signed. *Id.* at *42-43. By signing the membership agreement, Mrs. Pryce admitted that she understood that "[a]ny strenuous athletic or physical activity involves certain risks," and "that there are certain risks associated with the use of a health club and the use of fitness equipment[.]" *Id.* at *42 (quoting the NYSC membership agreement). Further, Mrs. Pryce acknowledged her agreement that exercise carries a risk of injury even when conducted under the supervision of a trainer. *Id.* Understanding this risk, Mrs. Pryce voluntarily joined NYSC, signed up for personal training, and performed the exercises Reyes prescribed for her. *Id.* Importantly, Mrs. Pryce failed to present evidence that, "Reyes, by either action or inaction, concealed, misrepresented, or unreasonably increased the commonly-understood risks to Mrs. Pryce of her use of NYSC's facility and equipment." *Id.*

Second, the Court found nothing in the record suggesting that the "core diagonal crossover" was an inherently dangerous exercise, that it was contraindicated specifically for Mrs. Pryce given her known prior injuries, or that Mrs. Pryce expressed concerns about performing it. *Id.* at *43. Instead, the record indicated that Mrs. Pryce was not lifting a large

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1 Gym owned by Defendant Town Sports International, LLC, d/b/a/ "NYSC".

2 FED. R. CIV. P. 52(c).

Gym Owner Not Liable For Injuries Suffered in Personal Training Session

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amount of weight, not making any sort of jerking motion, and not performing an exercise that would likely exacerbate an underlying condition of which Reyes was aware; the "core diagonal crossover" was a steady exercise and appeared appropriately tailored for a client of the same fitness level as Mrs. Pryce. *Id.* at *44.

Third, the Court noted that Mrs. Pryce was unable to identify the mechanism by which she was injured and lacked evidence that Reyes did anything improper. *Id.* She offered no evidence that he demonstrated how to perform the exercise improperly, that the weight was too heavy, or that she utilized improper form. *Id.* at *44-45. Instead, Mrs. Pryce testified that Reyes demonstrated the exercise to her and observed her performing the exercise with the proper form, that she did the exercise as instructed, and that she was able to complete two sets of it. *Id.* at *45. Furthermore, the fact that Mrs. Pryce struggled with the exercise towards the end of each set was unconvincing to the Court as having any relevance to the cause of the injury. *Id.*

Fourth, since there was no evidence that Mrs. Pryce had improper form or too heavy of a weight, the Court noted that it was unclear what Reyes could have done to prevent her injury even had he been standing right next to her. *Id.* at *46. Notwithstanding Reyes's testimony asserting that it would be unprofessional and potentially unsafe for a trainer to lose sight of a client mid-session, the Court found this was not enough for Mrs. Pryce to prove that he allowed her to perform the exercise in an unsafe manner. *Id.* Based upon the facts presented at trial, the Court could not conclude that, "Reyes's conduct, even if a deviation from best practices, unreasonably increased Mrs. Pryce's risk of injury." *Id.* at *47.

The Court left open the possibility for liability of a gym owner in a scenario where a plaintiff can present evidence that he or she was using bad form or too much weight during an exercise and the personal trainer could have prevented it if in close proximity. Mrs. Pryce could not prove that any of these scenarios occurred. Otherwise, the result could have been different. ●

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SPORTS FACILITIES DIGEST

Texas Entity Files Lawsuit Over MLB's Decision to Move All-Star Game, Then Withdraws It

Job Creators Network (JCN), a small business advocacy organization, filed a lawsuit May 31 in federal court in New York against Major League Baseball, MLB Commissioner Rob Manfred and Major League Baseball Players Association, and Executive Director Tony Clark over their decision to move the All-Star Game out of Georgia of recent voting laws that were passed there.

Then, less a month later, the JCN withdrew it, likely because a district judge denied the request for an injunction to force Major League Baseball to move the All-Star Game back to Georgia.

The initial suit demanded the return of the game or that the defendants "pay $100 million in damages to local and state small businesses – many of which are minority-owned and still recovering from Covid-19 losses.

"MLB robbed the small businesses of Atlanta – many of them minority-owned – of $100 million, we want the game back where it belongs," said Alfredo Ortiz, president and CEO of the JCN. "This was a knee-jerk, hypocritical and illegal reaction to misinformation about Georgia's new voting law which includes Voter-ID. Major League Baseball itself requests ID at will-call ticket windows at Yankee Stadium in New York, Busch Stadium in St. Louis and at ballparks all across the country."

The "harm done to the communities of Atlanta, Cobb County and the state of Georgia would be devastating at the worst possible time, as they're still recovering from Covid-19:

- More than 8000 hotel reservations were canceled.
- Revenues from ticket sales, concessions, and events at Truist Park – including the Futures Game and Home Run Derby Contest – by the more than 41,000 fans expected, were lost.
- According to Cobb County Chief Financial Officer William Volckmann, the county would receive a "robust return" on its roughly $2 million investment to host the events. Previous MLB All-Star events have generated between $37 million and $190 million for their host communities.
- Atlanta is 51 percent African American; Denver is 9 percent African American. U.S. Census data indicates there are roughly 7.5 times more African American-owned businesses in Georgia than Colorado.

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"Small businesses in this community had valid contracts relating to the All-Star Game and other events, the result of two years of planning and all that was ripped away by fear and misinformation spewed by political activists. Many states, including Colorado where the game has been moved to, have similar or more restrictive election laws. This move essentially tells fans of teams in many other cities that they can never again host the All-Star Game; it's hypocritical, illegal and we won't stand for it."

Ortiz was defiant in a statement he issued in the wake of the withdrawal:

"I'm here today to promise Atlanta-area small businesses that we will continue to find ways to remedy the injustice inflicted upon them. While we are withdrawing our case from federal court here in New York, we will continue to evaluate our legal options and other out of court opportunities. We will have more information to announce in the coming days."

Appeals Court Affirms Ruling that Insurance Companies Are Not Liable to Defend Joint Venture that Built Levi's Stadium

The 9th U.S. Circuit Court of Appeals has affirmed a lower court's ruling that Hartford Financial Services Group Inc., Chubb Ltd., and Markel Corp. are not obligated to defend the joint venture that constructed the San Francisco 49ers football team's stadium in a disability discrimination lawsuit.

The underlying putative class-action lawsuit was brought in 2016 by Abdul Nevarez, who named the 49ers, the City of Santa Clara (home of Levi's Stadium), and related corporate entities as defendants. Specifically, she alleged that the stadium did not have sufficient public accommodations – such as accessible seating, restrooms, and signage – in violation of the federal Americans with Disabilities Act and state law.

The 49ers then sued Turner/Devcon (the joint venture of New York-based Turner Constructor Co. and Devcon Construction Inc.), which had constructed the stadium, claiming any liability was caused by Turner/Devcon's negligence. Further, it alleged the joint venture had a contractual obligation to indemnify the 49ers for any litigation relating to "penalties or fines levied or assessed for violations of any Legal Requirement."

Turner/Devcon turned to the aforementioned insurance companies, spawning litigation. The lower court agreed with the insurance companies, leading to the appeal.

"In California, the design and construction of a structure that allegedly violates accessibility laws generally does not fall within the plain meaning of 'accident' when used in insurance contracts," wrote the panel in its ruling.

"Put another way, an event is not an 'accident' where the insured intended the acts that caused the victim's injury…and an insured's intentional act does not become an accident simply because it had the unintended effect of violating federal and state accessibility laws.

"With these principles in mind, we agree with the district court that the Nevarez complaint does not allege an 'occurrence' within the meaning of the policies.

"The Nevarez complaint alleges that the 49ers violated the Americans with Disabilities Act by designing and constructing their stadium in a manner that did not comply with federal disability access design standards.

"Because the design and construction of the stadium was not an 'accident,' it was not an 'occurrence,' and is not covered by the policies in issue."

Bryan Engle Named Associate AD for Facilities & Operations at Lipscomb

Lipscomb University has named Bryan Engle as its Associate Athletic Director of Operations and Facilities, effective June 1.

Engle spent the last eight years at California Baptist University in Riverside, California where he served as an Assistant Director of Athletics after being hired in 2013. Engle was then promoted to Associate AD for Facilities/Game Management in January of 2018.

Engle will oversee the day-to-day operations, scheduling, maintenance and more with all of Lipscomb's facilities and athletic fields. He will be a primary point of contact for Athletics with various other areas on campus, including scheduling of facilities for all games, practices, and events, working service operations, housekeeping, food service, security and working with external groups as well.

Paul Westbury Promoted to Executive Vice President of Development and Construction

Madison Square Garden Entertainment Corp. has announced that Paul Westbury – an accomplished executive with more than 25 years of diverse global construction industry experience – has been promoted to Executive Vice President of Development and Construction. Westbury previously served as Senior Vice President of Development and Construction where he has played a critical role in advancing the Company's MSG Sphere initiative – "state-of-the-art venues that will pioneer the next generation of immersive experiences."

As Executive Vice President, Westbury will oversee strategic planning and delivery for all of MSG Entertainment's venue development projects, led by MSG Sphere. The first MSG Sphere venue – MSG Sphere at The Venetian – is currently under construction in Las Vegas and is expected to open in calendar year 2023. The Company has also announced plans to build a second MSG Sphere

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in London, pending necessary approvals. Westbury will manage a global team of construction professionals in both the U.S. and London who are responsible for driving the completion of the Las Vegas venue and retaining the knowledge gained for future MSG Sphere projects. Westbury will report to James Dolan, Executive Chairman and Chief Executive Officer of MSG Entertainment.

"He has already been a driving force behind helping us realize our vision for MSG Sphere, as we continue to make significant construction progress in Las Vegas and move forward with the planning application process in London," said Dolan. "Paul's decades of experience and expertise working on complex and high-profile construction projects across the globe will be essential as we advance our plans for MSG Sphere and the future of live entertainment."

Westbury joined MSG Entertainment in 2019 as Senior Vice President of Development and Construction, bringing his expertise to MSG Sphere. Prior to MSG Entertainment, he was Group Technical Director at Laing O'Rourke, a multinational construction company, where he also served as the Director of the Laing O'Rourke Center for Construction Engineering at the University of Cambridge. Before joining Laing O'Rourke, Westbury spent 20 years with Buro Happold, an international engineering consulting firm, in roles of increasing responsibility, including as Group CEO. During his tenure at Buro Happold, Westbury was involved in the development of some of the world's most prestigious venue projects, including the masterplan and main stadium design and delivery for London's successful 2012 Olympic Games. His other high-profile projects have included the Millennium Dome and O2 Arena in London; Arsenal Football Club's Emirates Stadium in London; and Aviva Stadium in Dublin, Ireland.

Family of Man Who Died After Fall at Stadium Sues University of New Mexico

The family of a man, who tripped and fell at University Stadium at the University of New Mexico (UNM), leading to a fatal head injury, has sued UNM.

The family of John Haaland allege university officials created dangerous conditions at the facility and were thus negligent.

Specially, the lawsuit alleged that Haaland, 74, was about to enter the stadium to attend a UNM-Hawaii football game on Oct. 27, 2019, when he tripped over a buildup of asphalt near the parking lot and fatally struck his head.

The family is asking a 2nd Judicial District Court judge to award the family compensatory damages in an amount to be determined at trial.

