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SPORTS FACILITIES

How the law affects the sports facilities industry and the LAW

Exculpatory Clauses in New Jersey Recreational Settings: Assumption of Risk May Mean No Reward

By Kelly J. Woy

The enforceability of exculpatory clauses in New Jersey in the context of participation in a recreational activity is addressed in the Supreme Court's decision in Stelluti v. Casapenn Enters., LLC, 203 N.J. 286, 1 A.3d 678 (2010). In Stelluti, the Court held that it is not contrary to the public interest, or to a legal duty owed, to enforce a recreational facility's agreement limiting its liability for injuries sustained as a matter of negligence that result from a patron's voluntary use of equipment and participation in an activity.

In Stelluti, the plaintiff entered into an agreement with the defendant gym for membership at its facility, and in accordance with the gym's requirement, signed and dated a Waiver and Release of liability form ("Waiver"). The Waiver provided that the signing member acknowledges the risks of participation in activities at the gym, is voluntarily participating in those activities, and assumes all such risks, including injuries which may occur as a result of the members use of amenities and equipment, participation in activities, sudden and unforeseen malfunctioning of equipment, and instruction or training. Id. at 682. The Waiver explicitly provided that the signor was releasing the defendant gym for its own negligence. Id. at 683. After signing the Waiver, the plaintiff participated in a spinning class; she set up her bike with the assistance of an instructor, and as she stood up on the pedals during the class as instructed, the handlebars fell off, and she was injured. Id.

The plaintiff sued the gym (among

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New Jersey Court Finds that While a Parent Cannot Sign Away a Minor's Right to Sue, They Can Sign a Stipulation that a Minor Arbitrate Claims

By James Moss

In New Jersey, a release cannot be used to stop a lawsuit by a minor, but it can be used to require a minor to arbitrate a claim.

The decision in *Johnson v. Sky Zone Indoor Trampoline Park in Springfield* (N.J. Super. App. Div. 2021), created an interesting legal analysis. The agreement is not enforceable, but a clause within the agreement is enforceable. The release is not valid by law because a minor cannot contract and a parent cannot sign away a minor's right to sue. However, in the contract that is not enforceable is a clause that is enforceable.

What is even of greater interest is the New Jersey Supreme, with identical legal facts, reached the same conclusion 15 years earlier.

In this instant case, the defendant required the plaintiff and his mother to sign a release before they could enter the trampoline center, so her son could attend a birthday party. The mother signed the electronic release and her son entered the trampoline center. A month later the minor came back and visited the defendant trampoline center and was injured using the center's trampolines. No release appears to be signed the second time the injured minor attended the defendant trampoline park.

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Lawsuit Alleges LAPD Used Excessive Force at Dodgers WS Celebration

A college student sued LAPD for unlawful use of force during an impromptu celebration of the Los Angeles Dodgers' 2020 World Series Championship in Downtown Los Angeles.

Plaintiff Isaac Castellanos, 23, was one of several hundred Dodger fans who gathered near the Crypto.com arena (formerly known as the Staples Center) on the night of October 27, 2020 to celebrate the team's clinching the 2020 World Series Championship title. According to the complaint, an LAPD officer shot Castellanos in the right eye with a "less lethal" munition during the Dodgers World Series celebration. Castellanos, who now suffers from permanent vision loss, was allegedly not warned or asked to disperse before officers fired at him.

The plaintiff's lawyers from the law firm of Baum Hedlund Aristei & Goldman claim their client's participation in the peaceful exercise of freedom of speech and assembly turned into a violent nightmare due to the LAPD's "escalatory and dangerous crowd control tactics," which violated their client's rights under the U.S. and California Constitutions, as well as statutory and common law rights. The lawsuit further accuses LAPD of negligence, assault, and battery.

Chief Legal Officer for the Atlanta Hawks and State Farm Arena to Give Keynote at SRLA Conference this Month

Scott Wilkinson, the Executive Vice President and Chief Legal Officer for the Atlanta Hawks and State Farm Arena, will give the keynote address at the Sports and Recreation Law Association's annual conference in Atlanta on February 24. Wilkinson will make his presentation at the conference hotel, the Renaissance Atlanta Midtown Hotel, starting at noon.

Wilkinson, who assumed responsibility for all Hawks and State Farm Arena legal matters in 2004, is currently responsible for all legal and business affairs of Atlanta Hawks, LP, Arena Operations, LLC, Atlanta Hawks Foundation, Inc. and ATL Investco, LLC (and its various related affiliates). He previously had the additional duty of Hawks Assistant General Manager from 2006 until 2015, serving in that basketball operations role during a stretch of eight consecutive Hawks playoff appearances under three different GMs.

From 1999-2003, Wilkinson served as Assistant General Counsel for Turner Sports, Inc., providing legal support to all Turner Sports properties, including the Hawks, the Atlanta Thrashers, the Atlanta Braves, World Championship Wrestling, TNT Sports and The Goodwill Games.

Wilkinson attended Duke University on a football scholarship and earned his A.B. degree, cum laude, in 1985. He earned his J.D. from Duke in 1988.

He serves on the Peach Bowl Advisory Committee and on the 2016 ACC Men's Lacrosse Championship Advisory Committee.

SPORTS FACILITIES and the LAW

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Sweets Are Bad for You…Don't Jay Walk…Don't Rush the Field - How Incentives to Change Crowd Behavior Have Often Failed.

By Gil Fried, Professor, University of West Florida

Way back in 2004, the Southeastern Conference (SEC) passed rules fining teams when their fans stormed the field. It was hoped that these fines would change fan behavior. It was assumed that schools would try to prevent or minimize the likelihood of fan crowd rushes to avoid having to pay a fine. Crowds rushing the field were a concern not just for fans possibly injuring themselves, but also for players, coaches, officials, and others who could be injured.

As would be expected, the fines did not work as they were hoped. When crowds rushed the field, instead of the schools paying their own money, crowd funding was used to raise money so the universities would not need to pay out of their own pockets.

As is normally seen with crowds, other conferences joined the bandwagon and then various conferences adopted similar rules and penalties. These penalties were increased by the SEC during the 2015 SEC Spring Meetings and are supposed to be imposed for violations in all sports sponsored by the Conference. Institutional penalties range from $50,000 for a first offense to fines of up to $100,000 for a second offense and up to $250,000 for a third and subsequent offenses.

Recently, both the Big 12 Conference and the Southeastern Conference fined member institutions for failing to control crowds at basketball games. The University of Texas was fined by the Big 12 conference this season after fans stormed the court after a victory against the University of Kansas. The conference specifically examined the university's court storming plan and how it did not provide adequate protections to safeguard visiting team personnel.

Similarly, the SEC announced a fine against the University of Arkansas for a violation of the league's "access to competition area" policy when Arkansas fans stormed the court after an early February win against Auburn University. This was not Arkansas' first brush with the conference and violating this rule. The university was fined $250,000 for a third offense as Arkansas was fined earlier this past academic year for a violation following its football game against Texas.

These fines, and how frequently they occur and how frequently fans (primarily students) rush fields and courts, clearly show that these penalties do not work. That led me to explore what might motivate people to change their behavior. This is important because over the last 20 years we have seen an uptick in strategies such as fan codes of conduct, banning fans from venues, increased security presence, increase use of technology, and other strategies to improve crowd behavior. Thus, what works?

An article in the *Journal of Economic Perspectives* entitled, When and Why Incentives (Don't) Work to Modify Behavior (Uri Gneezy, Stephan Meier, and Pedro Rey-Biel) published in 2011 (doi=10.1257/jep.25.4.191) examined whether incentives to pay students to receive better grades or encourage them to read actually worked. Sometimes incentives will do their job and encourage students to improve their performance. Other times the incentive will do the exact opposite and discourage strong performance. As an example, offering incentives for improved academic performance may signal that achieving a specific goal is difficult, that the task is not attractive, or the student is not a strong student, and they need a reward to do well. Furthermore, once the motivation is removed, will there be interest in continuing to do well academically? Sometimes there was short-term success from incentives and at other time, the long-term change was not seen for years. This is where intrinsic and extrinsic motivation both need to be explored to help determine what might motivate someone. The same holds true for punishment and what might motivate someone to stop a certain behavior.

Red light cameras are a good example. These cameras often provide for significant fines if a driver runs through a red light. Instead of slowing down traffic and reducing the number of injuries, these cameras often caused more speeding and more accidents with people trying to get through a light as fast as possible or to slam on breaks to avoid a fine, thus resulting in an accident. This is an example of the law of unintended consequences.

One interesting study highlighted the potential backfiring of penalties. In one experiment an Israeli daycare began charging parents a small fine for arriving late. The result was an increase in the number of late pick-ups even in the short run. The parents did not initially know how important it was to arrive on time. When the parents registered for the daycare, they did not have a penalty for arriving late. The relatively small fine signaled that arriving late was not very important. Thus, parents took to arriving later and paying the fine.

The question is does a fine work to change behavior? There are numerous studies that examined the benefits of exercise, yet many people do not get enough exercise. Similarly, there are numerous studies that people know the harm caused by smoking (or alcohol, or other possible vices), yet people often continue and justify their behavior for various reasons.

So, what does this mean to fines for crowd rushes. The first thing to realize is that there is a tangible benefit for a behaved crowd, and that is a safer environment. Many fans do not think anything will

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Cheesecake Maker's Sues Sacramento Sports Teams in Ticket Dispute

By: Jeff Birren, Senior Writer

Lambert Davis, Jr. is a Sacramento-area cheesecake specialist. Davis provided cheesecake to visiting and home players in exchange for tickets to the River Cats' Sacramento games. He often gave these tickets to family members and friends. Davis "picks up the tickets at the ticket office after showing his driver's license" (Davis v. Sacramento River Cats Baseball Club, LLC, Cal. App., Third Dist., Case No. C092384 ("Davis"), at 2 (9-30-21)).

Davis alleged that in June 2015, the River Cats' ticket manager, John Krivacic, made a photocopy of Davis's driver's license. Krivacic showed the copy to the team's manager and to baseball operations manager Daniel Emmons. He allegedly told both that Davis was a ticket scalper and instructed that the River Cats post a sign in the visiting team's locker room to that effect. That was done with an image of Davis' face from the driver's license. When Davis learned this, he sued the River Cats, its president, Jeffrey Savage, Krivacic, and Emmons. Recently, the California Court of Appeal affirmed the dismissal of all claims (Id. at 6).

Facts

Davis went to high school in Sacramento and eventually opened up To Bay And Back Cheesecakes there. Davis filed his complaint in March 2017. He had causes of action for defamation, invasion of privacy on a common law theory and under California Civil Code section 1798.53 for disclosing personal information obtained from records maintained by a state agency, negligent interference with a present and future business interest and a violation of the California Unruh Civil Rights Act.

The defendants demurred in June 2017. The trial court sustained with leave to amend all causes of action against team president Savage except the Civil Code claim that was sustained without leave to amend "because plaintiff had not alleged sufficient facts to show Savage took part in the posting of the sign." It sustained the defendants' demurrer as to the defamation cause of action with leave to amend. The court also sustained the demurrer without leave to amend as to the Civil Code claim because the defendants were not employees of a state agency. It "overruled the demurrer to all other cause of action as it pertained to all defendants besides Savage" (Davis v. Sacramento River Cats Baseball Club, LLC et al, Cal. App., Third Dist., No. C086440 at 2 (9-19-19)). Davis filed an amended complaint.

This complaint alleged the same operative facts but asserted that Savage "ratified" or "instructed" Krivacic and Emmons to post the sign. It omitted the privacy cause of action. The defendants responded by

filing an anti-SLAAP motion. To succeed, Cal. Civ. Proc. §425.16, requires defendants to show they are being sued because of the "person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." Davis argued that this defense was untimely. The trial court disagreed that it was untimely and found that the sign was protected speech (Id.).

Davis appealed and the Court of Appeal rendered a split decision. It reversed the dismissal under the anti-SLAPP law and remanded the case to allow the trial court to "consider whether to exercise its discretion to hear the defendants' anti-SLAPP motion on the merits" rather than on Davis's assertion that this defense was untimely (Id. at 5). It sustained the trial court's ruling that the Civil Code privacy claim was properly dismissed without leave to amend (Id. at 7).

The case went back to the trial court. That court "exercised its discretion to permit the late filing of the River Cats's special motion to strike and reaffirmed its prior ruling" (Davis at 3), so Davis appealed again.

Back In the Court of Appeal

The first question was what issues Davis had preserved and were thus properly before the court. The defendants argued that Davis was limited to just three issues: timeliness of their motion, success on the merits, and attorney fees, "because those were the grounds addressed on remand or preserved by Davis's first appeal" (Id. at 4), and as a result, Davis could not challenge the trial court's ruling about the nature of the speech because he failed to "challenge that finding on his first appeal."

The Court agreed. Davis failed to challenge the earlier ruling "that his causes of action arose from protected activity" and therefore "Davis is precluded from challenging the trial court's ruling related to the nature of the River Cats's conduct in his second appeal."

The first issue properly before the Court therefore was whether Davis could show that the trial court erred by finding that he had no probability of success on his defamation, invasion of privacy, and Unruh Civil Rights causes of action. The Court noted that Davis did not "challenge the trial court's finding that he could not prevail on his business interference cause of action" (Id.).

Davis had "the burden to establish that the elements of the challenged claim(s) are 'supported by sufficient prima facie showing of facts to sustain a favorable judgment of the evidence submitted by the [party opposing the motion] is credited'" (Id.). The trial court accepts this evidence as true and "evaluates the moving party's evidence only if it has defeated the opposing party's evidence as a matter of law" (Id. at 5). The court "must determine whether a plaintiff can establish a prima facie case of prevailing, or whether a defendant has defeated a plaintiff's evidence as a matter of law." The Court of Appeal reviews this ruling de novo.

Davis argued that the trial court erred "because it discounted his request to consider the evidence submitted by the River Cats as supporting his causes of action." However, that is not what the court did. Rather, it "took issue" with his "failure to demonstrate which evidence supported his prima facie showing for relief on each element of his causes of action." In his opposition Davis only asserted that the River Cats's affirmative defenses failed, but "made no argument and cited no evidence affirmatively demonstrating the elements of his causes of action were supported by facts sufficient to sustain a favorable judgment" (Id.). This is required by California law, and Davis failed to do it.

He "tried to remedy this error by filing a motion of reconsideration, but the court denied that motion and it has gone unchallenged on appeal." Davis also attempted to make that showing on appeal, but the Court of Appeal does "not consider arguments never made to the trial court." Davis "failed to carry his burden in the trial court" and he "cannot make up for that deficit on appeal. Thus, Davis has failed to establish error." The Court added a footnote that described several more arguments that Davis raised for the first time on appeal, but the Court "will not consider arguments raised for the first time on appeal" (Id., FN 4).

The Trial Court's Attorney Fee Award

Davis not only argued that the attorney fee award made against him should be reversed, but the Court of Appeal should make such an award to him. This required Davis to show that the motion below was without merit or was intended to cause unnecessary delay. He claimed that the River Cats' delay prejudiced him by interrupting discovery. Unfortunately for Davis, he failed to challenge the trial court's timeliness determination "which it made on remand following his last appeal. Rulings not challenged are presumed correct" (Id. at 6). Moreover, he failed to show that the River Cats "brought the motion for the purpose of delaying an inevitable judgment against it. Thus, Davis has not established the delay was unnecessary."

Davis also argued that the motion was without merit and "the trial court would have found it so if it had considered the evidence submitted by the River Cats for the purposes of proving Davis's causes of action." However, the trial court "did not disregard the evidence cited by Davis" but rather "found that Davis failed to meet his burden of citing" to evidence "supporting the elements of his causes of action." The record therefore did "not support" his "assertion the trial court ignored evidence favorable to him." Consequently, the "judgment of dismissal and award of attorney fees are affirmed" and Davis "shall pay the River Cats's costs on appeal" (Id.).

The Party's Not Over

While this was going on, Krivacic moved from the River Cats to the Sacramento Kings. Once again, Davis and Krivacic had an interaction at a game, this time in March 2018, and Davis sued Krivacic and the Kings. He filed an amended complaint less than a month later. Krivacic and the Kings filed an anti-SLAPP motion that was granted as to all but one cause of ac-

tion (Davis v. Krivacic et al, Cal. App., Third Dist., No. C089084, at 2 (8-26-20)). While that was pending, Davis filed a second amended complaint. Krivacic and the Kings demurred to the remaining cause of action that the defendants denied him access or otherwise subjected him to unequal treatment due to race. The trial court agreed and dismissed the case (Id.).

Davis appealed only the Unruh Civil Rights Act cause of action. He asserted that he had been treated unequally because of his prior lawsuit against Krivacic and the River Cats. The Court agreed with Davis that he had properly alleged a claim that Krivacic "embarrassed and defamed him" and his "unequal treatment was arbitrary because it was based on his race" (Id. at 3). It reversed the judgment, awarded Davis costs on appeal, and sent the remaining claim back to the trial court (Id. at 4). Davis filed a third amended complaint on 2-22-21 and Krivacic answered on 3-23-21. That case continues: stay tuned. Note: the Court did not publish any of its three opinions.

Conclusion

The month following his second interaction with Davis, Krivacic became the Director of Ticketing for the Professional Bull Riders, in Las Vegas, Nevada. Davis continues to make cheesecake, and he "is a regular" at Sacramento City Council meetings (capradio.org, Sarah Mizes-Tan, "Cheesecake, Persistence, And How A Black Small Business Owner Took To Sacramento City Council Meetings For Help" (3-11-21)). It is now probably a waste of time to suggest that Davis and Krivacic sit down together, break bread (or cheesecake?), and try to amicably resolve their differences, so Davis and Krivacic remain "don't invite 'ems."

Appeals Court Reverses Ruling for FieldTurf in Warranty Dispute; Finds School District Did Not Abide by Warranty Terms

A Texas state appeals court has reversed the ruling of a lower court, siding with the maker of artificial sports fields in a breach of warranty case involving a public high school district.

The appeal dispute involved the New Braunfels Independent School District (NBISD) and FieldTurf USA, Inc. (FieldTurf), concerning the installation of an artificial sports field at one of its stadiums in 2009. FieldTurf's "Duraspine" field was marketed to be more durable and long-lasting than other fields.

The 8-year warranty provided as follows:

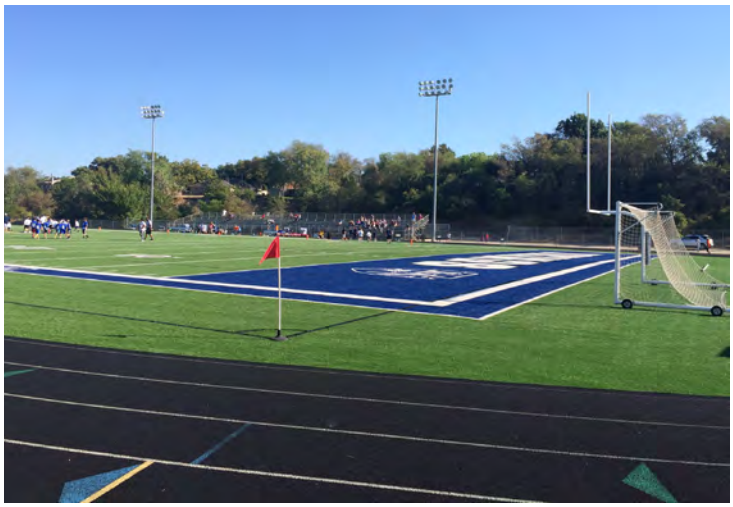
"FieldTurf warrants that if FieldTurf FTOM 1F for football/soccer synthetic turf proves to be defective in materials or workmanship, resulting in premature wear, during normal and ordinary use of the product for the sporting activities set out below or for any other uses for which FieldTurf gives its written authorization, within 8 years from the date of completion of installation, FieldTurf will, at FieldTurf's option, either repair or replace the affected area without charge, to the extent required to meet the warranty period (but no cash refunds will be made) . . . . This warranty is limited to the remedies of repair or replacement, which shall constitute the exclusive remedies available under this warranty, and all other remedies or recourses which might otherwise be available are hereby waived by the Buyer, FieldTurf will have no other obligations or liability for damages arising out of or in connection with the use or performance of the product including but without limitation, damages for personal injury or economic losses."

By 2011, the fibers making up the field began "splitting" and "breaking off," according to the school district. The issues with the field were particularly noticeable when the area received significant rain because the "fibers would pool on the sideline. You could see the volume of them." Moreover, the logo in the center of the field "had started to come undone." The head football coach contacted FieldTurf to report the problems with the field. He also sent an email in September 2011 to Bryan Cox, NBISD's main contact with FieldTurf, and to the regional sales manager. In that email, the coach noted the splitting and broken fibers and said the players were tracking a lot of the broken fibers into the fieldhouse.

The coach's email was sent to another employee of FieldTurf, Chuck Bailey. That email correspondence indicated that other FieldTurf fields were showing signs of similar problems to those at issue in this case. The coach sent additional emails about a month later, informing FieldTurf of more broken fibers. He included pictures in the emails. FieldTurf notified its legal department, and an employee conducted a site review in early November 2011. The report included conclusions that the white fibers were splitting and shedding and that the green fibers were splitting but "stable." The report was not provided to NBISD until after it filed suit. FieldTurf sent NBISD a letter, dated November 30, 2011, stating in part, "While there is some early minor field fiber fibrillation on the Non-Green fibers[,] we do not feel that the fibers are exhibiting any playability or hazardous concerns at this time and will continue to monitor the field going forward. Another site evaluation will be scheduled during the spring of 2012."

According to NBISD, the matting and breaking of fibers continued. The football coach inquired of FieldTurf what options were available to clean up the accumulating broken fibers. Of significance, however, NBISD never requested that FieldTurf "repair or replace" the field. FieldTurf provided options and NBISD chose the option to pay $5,500 for additional maintenance under a service program. That

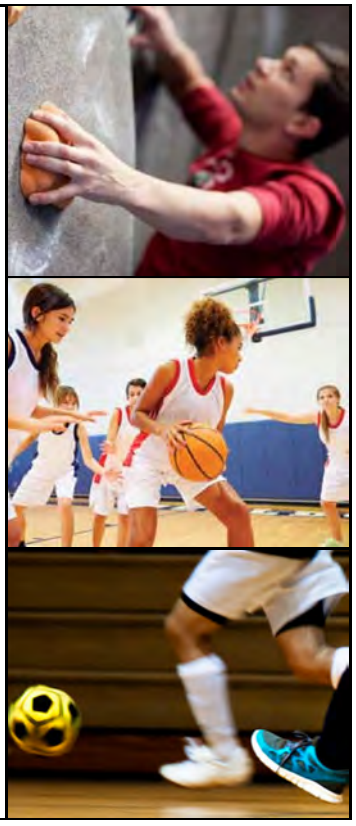
service occurred in October 2012, but the condition of the field did not improve. FieldTurf conducted another site review in February 2013. A report generated after that review concluded that the "[w]hite fibers are degrading rapidly" and the "[g]reen fibers are showing uniform wear for the field." FieldTurf did not provide a copy of that report to NBISD. A second maintenance service was performed in August 2013. The field still did not improve but rather, the broken fibers now appeared in the fieldhouse and on the clothes and shoes of those on the field. In February 2014, while the warranty period was still valid, NBISD filed suit against FieldTurf alleging breach of contract, breach of express and implied warranty, product liability, and negligent misrepresentation/fraud. It requested damages "for the repair and replacement of the property damage from the defective work" and also sought attorney's fees. It also sought exemplary damages for the alleged fraud but did not seek specific performance of the warranty provision.



In the summer of 2016, again while the warranty period was still valid, NBISD replaced the field at its own expense - a cost of $378,507.00.

Meanwhile, after a 2017 trial, a jury found FieldTurf had failed to comply with an express warranty and that its failure was a producing cause of damages to NBISD. The jury also found NBISD had provided FieldTurf reasonable notice and opportunity to cure the breach. NBISD did not request an issue as to whether circumstances caused an exclusive remedy, if any, to fail of its essential purpose. The jury awarded NBISD $251,000 as the cost to repair or replace the field as damages for a breach of warranty.

Both sides appealed. Of note in the article herein, FieldTurf made fine arguments on appeal: (1) NBISD is barred from recovering any damages under the Texas Uniform Commercial Code because the warranty made repair or replacement the exclusive remedies available; (2) NBISD could not recover any monetary damages for breach of warranty because it failed to plead, prove, or obtain a jury finding that the warranty failed of its essential purpose under section 2.719(b); (3)



NBISD's failure to produce any evidence of breach of warranty damages precluded its recovery for breach of warranty; (4) NBISD cannot recover a judgment based on replacement cost because it lacked proof that those damages were reasonable and necessary; and (5) at a minimum, FieldTurf was entitled to a settlement credit and a reduced judgment amount.

By far, the most important issue was the first argument. Of note, the language of the warranty provides that, at "FieldTurf's option, [it will] either repair or replace the affected area without charge, to the extent required to meet the warranty period (but no cash refunds will be made) . . . ." The warranty further provides that "[t]his warranty is limited to the remedies of repair or replacement, which shall constitute the exclusive remedies available under this warranty, and all other remedies or recourses which might otherwise be available are hereby waived by the Buyer" and "FieldTurf will have no other obligations or liability for damages arising out of or in connection with the use or performance of the product including but without limitation, damages for personal injury or economic losses." FieldTurf argues that from the plain language of the warranty and section 2.719, it is clear that NBISD has two remedies: repair or replacement of the field. Accordingly, FieldTurf contends the trial court erred in denying its motion for judgment that NBISD "take nothing" on its claim for monetary damages.

NBISD counterargues that it is not limited to the remedy of "repair or replacement" because such a remedy would fail of the essential purpose of the warranty. Section 2.719 states that through a limited warranty, the parties may "limit or alter the measure of damages recoverable . . . as by limiting the buyer's remedies . . . to repair or replacement of non-conforming goods or parts." § 2.719 (a)(1). According to NBISD, it is clear that seeking "damages" is distinct from seeking "specific performance" of a contractual obligation as set forth in section 2.711 and section 2.716, which treat specific performance as a completely different remedy from damages. §§ 2.711; 2.716. NBISD argues, citing Wal-Mart Stores, Inc. v. Forte, 497 S.W.3d 460, 465 (Tex. 2016), that outside the Texas UCC, "damages" is specifically a reference to monetary remedies. Consequently, the only effect of section 2.719, NBISD contends, is that it allows the parties to elect a different "measure of damages" in lieu of the default measure based on difference in market value. Therefore, it asserts, a claimant can still elect the default measure of damages if it can demonstrate the agreed limited warranty fails of its essential purpose.

The court was unmoved.

It wrote that the warranty "contains the type of language courts have held to establish an exclusive or sole remedy provision." See Equistar Chems., L.P., 579 S.W.3d at 522 (citing PPG Indus., Inc. v. JMB/Houston Ctrs. Ltd. P'ship, 146 S.W.3d 79, 98, 101 (Tex. 2004)

"We thus find NBISD's claim for breach of warranty was limited to repair or replacement of non-conforming goods and that

the trial court erred in denying FieldTurf's motion for judgment that NBISD 'take nothing' on its claim for monetary damages," the appeals court wrote.

Argument two, in which FieldTurf argued that NBISD "could not have recovered any monetary damages for breach of warranty because it failed to plead, prove, or obtain a jury finding that the warranty failed of its essential purpose under section 2.719 of the Texas UCC" was similarly pertinent. "NBISD responds that there was no need to find the warranty failed of its essential purpose because NBISD sought the measure of damages provided under the warranty.

"Based on our analysis of FieldTurf's first issue, we find that for NBISD to recover damages for breach of warranty, it was required to show the exclusive or limited remedy failed of its essential purpose. § 2.719(b). NBISD candidly admits it did not prove that the exclusive or limited remedy failed of its essential purpose because its position was it was not required to do so. As such, it presented no evidence that it had requested repair or replacement of the field or that FieldTurf had refused such requests. It presented only evidence of FieldTurf's offer of and NBISD's acceptance of service under a 'maintenance plan.' Furthermore, NBISD replaced the field through another company at its own expense in 2016—at a time when demand could have been made on FieldTurf to perform according to its warranty. Had NBISD presented evidence proving that the exclusive or limited remedy failed of its essential purpose, the outcome of this matter might have been different. However, based on the facts of this case, we are constrained to sustain FieldTurf's second cross-issue."

New Braunfels Indep. Sch. Dist. v. FieldTurf USA Inc.; Ct. App. Texas, Seventh District, Amarillo; No. 07-20-00308-CV; 11/12/21

Attorneys of Record: (For New Braunfels Independent School District, Appellant) Valerie L. Cantu, Matthew R. Pearson, Brendan K. McBride. (For FieldTurf USA, Inc., Appellee) Thomas C. Riney, E. Leon Carter, Joshua Bennett, David M. Prichard, David R. Montpas.

Exculpatory Clauses in New Jersey Recreational Settings

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other defendants), setting forth negligence claims. The gym defendant filed a motion for summary judgment, which the Law Division granted, and the Appellate Division affirmed. The New Jersey Supreme Court granted the plaintiff's petition for certification. Id. at 687.

Initially, the Supreme Court acknowledged that the Waiver at issue was a contract of adhesion, in that it was a standardized printed form presented to the plaintiff on a "take-it-or-leave-it" basis, without the opportunity for the "adhering" party to negotiate. Id. at 687-88. However, the Court recognized that contracts of adhesion can be enforced where they are not unconscionable. The Court did not consider the plaintiff in this context to be in a classic "position of unequal bargaining power" such that the contract must be voided based on unconscionability, because the plaintiff "could have taken her business to another fitness club, could have found another means of exercise aside from joining a private gym, or could have thought about it and even sought advice before signing up and using the facility's equipment. No time limit was imposed on her ability to review and consider whether to sign the agreement." Id. at 688.

The Court explained that despite the general disfavor for exculpatory clauses and the need for careful scrutiny, such provisions are enforced unless they are adverse to the public interest. Id. at 689. Contracting-away of a statutorily imposed duty and agreements containing a pre-injury release from liability for intentional or reckless conduct are both against public interest. Id. at 688-89. Beyond those categories, there are four factors used to determine whether an exculpatory agreement is against public policy and therefore unenforceable:

- Whether it adversely affects the public interest;
- Whether the exculpated party is under a legal duty to perform;
- Whether it involves a public utility or common carrier; and
- Whether the contract grows out of unequal bargaining power or is otherwise unconscionable.

Id. at 689 (citing Gershon, Adm'x Ad Prosequndum for Estate of Pietroluongo v. Regency Diving Ctr., 368 N.J. Super. 237, 248, 845 A.2d 720 (App. Div. 2004)).

The Court explained that "[a]s a threshold matter, to be enforceable an exculpatory agreement must 'reflect the unequivocal expression of the party giving up his or her legal rights that this decision was made voluntarily, intelligently and with the full knowledge of its legal consequences.'" Id. at 689 (quoting Gershon, 368 N.J. Super. at 247). In this case, the exculpatory agreement explicitly set forth what was covered (including negligence on behalf of the gym), and the terms limiting the gym's liability were prominent. Id. at 690. Further, the plaintiff did not claim that she signed the Waiver as the result of fraud, deceit or misrepresentation. Id. Therefore, the Court found that it could be presumed that the plaintiff understood the agreement.

Regarding the exculpatory clause's implications on public interest, the Court explained that while business owners must maintain safe premises for their business invites, the law recognizes that where certain activities posing inherent risks to participants are conducted by operation of some types of business, the business will not be held liable for injuries sustained as long as it acted in accordance with the "'ordinary duty owed to business invitees, including exercise of care commensurate with the nature of the risk, foreseeability of injury, and fairness in the circumstances.' When it comes to physical activities in the nature of sports--physical exertion associated with physical training, exercise, and the like--injuries are not an unexpected, unforeseeable result of such strenuous activity." Id. at 691 (internal citation omitted).

The Stelluti Court pointed out the New Jersey Legislature's recognition of the need for risk-sharing for certain inherently risky activities through certain activity-specific statutes:

> Assumption of risk associated with physical-exertion-involving discretionary activities is sensible and has been applied in many other settings, including by the Legislature with reference to certain types of recreational activities. Recognizing that some activities involve a risk of injury and thus require risk sharing between participants and operators, the Legislature has enacted statutes that delineate the allocation of risks and responsibilities of the parties who control and those who participate in some of those activities. See N.J.S.A. 5:13-1 to -11 (Ski Act); N.J.S.A. 5:14-1 to -7 (Roller Skating Rink Safety and Fair Liability Act); N.J.S.A. 5:15-1 to -12 (Equine Act). Although no such action has been taken by the Legislature in respect of private fitness centers, that does not place the common sense of a risk-sharing approach beyond the reach of commercial entities involved in the business of providing fitness equipment for patrons' use. The sense behind that approach does not make it unreasonable to employ exculpatory agreements, within limits, in private contractual arrangements between fitness centers and their patrons.
>
> Id. at 692.

The Court found that while there is public interest in holding a health club to its general common law duty to business invitees, "it need not ensure the safety of its patrons who voluntarily assume some risk by engaging in strenuous physical activities that have a potential to result in injuries", as that "could chill the establishment of health clubs". Id. at 693. It recognized that there is "positive social value" in allowing gyms to limit their liability, and "it is not unreasonable to encourage patrons of a fitness center to take proper steps to prepare, such as identifying their own physical

limitations and learning about the activity, before engaging in a foreign activity for the first time." Id. Further, the Court found no evidence of grossly negligent and/or reckless conduct on behalf of the defendant gym. Accordingly, the Court affirmed.

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New Jersey Court Finds that a Parent Can Sign a Stipulation

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The appellate court reviewed each section of the agreement and separated the different sections of the agreement into different discussions. The court found part of the agreement outlined the risks of the trampoline park, but did not look at assumption of the risk as a defense. The court then stated that the appeal did not look at whether the exculpatory clause was enforceable, it was only reviewing the issues of the arbitration clause. Releases are not valid against the claims of a minor since the New Jersey Supreme Court decision in *Hojnowski v. Vans Skate Park*, 187 N.J. 323, 346 (2006).

The Plaintiff's Argument

The plaintiff argued that the agreement was not valid because the mother of the injured plaintiff signed by placing an X on the electronic release. An X was not a signature and it could or could not have been meant as such. However, the defendants countered that argument by showing they had collected the mother's name and other contact information showing affirmatively that the mother knew she was doing more than just placing an X in a box.

The plaintiff next attacked the arbitration clause arguing it was ambiguous and unenforceable as a matter of law. The court rejected the arguments stating that arbitration clauses were "*favored means of dispute resolution*." The issue the court found was whether there was a mutual assent to the terms of the agreement. "*To reflect mutual assent to arbitrate, the terms of an arbitration provision must be "sufficiently clear to place a consumer on notice that he or she is waiving a constitutional or statutory right . . . .*" That analysis was simply, whether the language of the arbitration clause put the plaintiff on notice that she was giving up her right to sue and have her dispute heard by a jury.

The court found the language of the arbitration clause clearly placed the mother of the plaintiff on notice that she was giving up her right to a jury trial. There was no special language, the court just looked at the language in the clause and found it was not as confusing as the plaintiff argued.

The plaintiff also argued the entire agreement was void because of *Hojnowski v. Vans Skate Park, id.* In *Hornowski* the issue was

a nearly identical set of facts. The parent of the minor child who was injured in a skate park sued. The New Jersey Supreme Court held that the release was void; however, the arbitration clause in the release was valid. *Id*. The court in *Hornowski* specifically looked at the conflicting issue of voiding the document, but enforcing a clause within the document and held it was good law.

The plaintiff then attempted other arguments, that requiring a mother to sign a release with an arbitration clause right before a birthday party procedural and substantive unconscionable. The court did not buy that argument.

There was a similar case to *Johnson v. Sky Zone Indoor Trampoline Park in Springfield* (N.J. Super. App. Div. 2021) where the mother signed for her child to enter a trampoline park, *Weed v. Sky NJ, LLC*., 2018 N.J. Super. Unpub. LEXIS 410, 2018 WL 1004206. The difference between the cases was two releases were signed. The first release was signed by the injured minor's mother. Several months later, the plaintiff went back, and that release was signed by an adult who was not the parent or guardian of the injured minor. The first release was thrown out because it did not contain language stating that the release was to be valid in the future, only for incidents that occurred at that visit. The second release was thrown out because it was not signed by the parent or legal guardian of the minor.

The New Jersey courts have carved an interesting safe harbor in contracts to protect the requirement to arbitrate issues.

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Sweets Are Bad for You…Don't Jay Walk…Don't Rush the Field - How Incentives to Change Crowd Behavior Have Often Failed.

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happen to them. Thus, public service announcements (PSAs) from fans who have been seriously injured could be a benefit. Furthermore, PSAs played throughout the game on scoreboards can be effective if the message is from peers, star athletes, and head coaches. Students especially might change their behavior if they realize that they will be prosecuted or subject to prosecution under a school's codes of conduct- which could include being expelled from a university.

The reason why one rarely sees professional sport field/court incursions is that the penalty would be significant and harsh. When schools are fined, the students do not see the harm to themselves. If students were to be personally fined or otherwise punished, they might change their behavior. I am not trying to be a stick in the mud and as the saying goes, it is all fun and games until someone gets hurt. Well people have been hurt and there will be more harm in the future until rules/policies are changed.

