March-April 2022 • Volume 6, Issue 5

# SPORTS FACILITIES and the LAW

How the law affects the sports facilities industry

## Court Rules on Case Involving Errant Punt and Fan at NFL Game

*By Courtney E. Dunn, of Segal McCambridge*

When self-proclaimed "football fanatic" Paulina Callinan attended her very first football game on November 1, 2015, she did not expect to be put on the punt return team.

Callinan was six rows away from the field at M&T Bank Stadium in Baltimore for an up-close view of the game between the Baltimore Ravens and the San Diego Chargers. While distracted by her cell phone, Baltimore Ravens punter, Sam Koch ("Koch") was practicing his punts on the sideline during warmups, causing an "errant punt" to travel into the stands and strike Callinan in the face.

Callinan filed a complaint in the Circuit Court for Baltimore City (the "Trial Court") alleging negligence claims against the Ravens, Koch and the National Football League ("NFL") based upon the punting incident. The Ravens and Koch moved for summary judgment asserting the assumption of risk doctrine and the fact that the exculpatory clause printed on the back of Callinan's ticket barred her claims as a matter of law.[1]

Then, Callinan amended her complaint to add a count of battery against Koch. The Ravens and Koch moved to dismiss the battery count on the grounds

1 The back of Callinan's ticket read "Ticket holder assumes all risks incident to the game or related events, including the risk of lost, stolen or damaged property or personal injury of any kind[.]"

See COURT on Page 8

## INSIDE THIS ISSUE

Discovery Heats Up in Wrongful Death Litigation involving AEDs and High School Athlete 2

Mount Everest Guide Cleared of Charges of Fraud and Breach of Contract 3

Basketball Ticket Holder is Run Over, Sues, and Is Tossed from Court 5

Hackney Publications Recognizes Drew Eckl Farnham, Segal McCambridge, and Ricci Tyrrell Johnson & Grey as Leaders in the Sports Law Field 12

## California Appellate Court Rejects 'The Baseball Rule' in Foul Ball Injury Case

*By John E. Tyrrell and Matthew S. Cioeta, of Ricci Tyrrell Johnson & Grey*

In April of 2018, plaintiff/appellant Monica Mayes was attending her son's collegiate baseball game between visiting Marymount University (for whom her son was pitching) and La Sierra University, when she was struck in the face by a foul ball. *Mayes v. La Sierra University*, No. E076374 (Cal.App.4th. Jan. 7, 2022). Mayes was sitting in a grassy area behind the third base dugout when she was hit. *Id.* at 2. The roof of the dugout was eight feet off the ground, and there was no protective net or fencing above the dugout. *Id.*

Mayes made four allegations in her complaint alleging that La Sierra was negligent in maintaining the premises of the baseball field: (1) La Sierra failed to provide protection of any sort over its dugouts; (2) The university failed to warn spectators of the lack of protection; (3) La Sierra failed to provide a sufficient number of protected seats for spectators; and (4) the school failed to exercise proper crowd control. *Id.*

On appeal, the California Appellate Court considered whether the trial court erroneously granted La Sierra's Motion for Summary Judgment when it held that Mayes's negligence claim was barred by the primary assumption of risk doctrine. *Id.* In support of its Motion, La Sierra offered the following facts: the university did not sell tickets nor charge admission to the game, and they did not dictate where spectators where they could or could not sit at games. *Id.* at 5. Mayes had previously attended over 300 of her sons' baseball games and was familiar with the fact that baseballs frequently flew into spectator areas. *Id.*

See CALIFORNIA on Page 10

COPYRIGHT © 2022 HACKNEY PUBLICATIONS (HACKNEYPUBLICATIONS.COM)

# Discovery Heats Up in Wrongful Death Litigation involving AEDs and High School Athlete

The discovery in a wrongful death lawsuit in Kentucky, where the parents of a high school athlete claimed the school, diocese, and the hospital were negligent, is leading to some interesting details.

First the background: Matthew Mangine was participating in a practice on June 16, 2020 when the incident occurred. His parents alleged in the lawsuit that there were many automatic external defibrillator (AED) devices on-site, none of which were used on Mangine after he collapsed.

Furthermore, the parents noted that the head coach, athletic trainer, and athletic director were not trained properly on how to use an AED. The fault for this, according to the complaint, rested with the defendants – St. Henry High School, the Diocese of Covington, and St. Elizabeth Medical Center, which employed the athletic trainer.

Specifically, the parents alleged that the coaches and trainers there when Mangine collapsed "were not equipped to deal with the situation present by Matthew's cardiac arrest, due in large part to the failures of the defendants to adequately and properly prepare them for such emergencies."

The complaint further states that "for many years, St. Henry and the Diocese have been operating their sports program, in conjunction with St. Elizabeth, in blatant and serious violation of the state law, KHSAA policies and the applicable standard of care."

The "violations" mentioned by the parents centered on the creation of an Emergency Action Plans (EAP) and training on AEDs.

"For well over a decade, the standard of care mandates that schools should have an Emergency Action Plan," according to the complaint. The complaint also noted that the EAP was not specific to the venue of the practice field, as required.

## Discovery Revelations

Since the lawsuit was first reported in these pages, the coaches and athletic trainer at the school revealed that they were in fact trained on how to use an AED and knew what the signs were for sudden cardiac arrest in athletes.

However, they said the AEDs were not secured after Mangine collapsed because the EAP did not list their locations on the school's campus.

Furthermore, media reports suggested that the athletic trainer, Mike Bowling, did not have the necessary keys to access an AED, which was 50 yards from where the athlete collapsed.

KHSAA commissioner Julian Tackett

SPORTS FACILITIES and the LAW

EDITOR IN CHIEF

**Gil Fried, Esq.**
Chair and Professor
Administration & Law Department
University of West Florida
Building 70, Room 109
Pensacola, FL 32514
(850) 474-3426
gfried@uwf.edu

MANAGING EDITOR

**Holt Hackney, Esq.**
Hackney Publications
P.O Box 684611
Austin, Texas 78768
hhackney@hackneypublications.com

Please direct editorial or subscription inquiries to Hackney Publications at:
P.O. Box 684611, Austin, TX 78768,
info@hackneypublications.com

Hackney Publications

ADVISORY BOARD

**Prof. Paul Anderson**
Director, National Sports Law Institute & Sports Law program
Marquette University Law School
paul.anderson@marquette.edu

**Shane Beardsley**
VP of Guest Experiences at Javits in NYC

**Peter Kranske**
COO, Landmark Staffing
Event Services, Inc.
pkranske@aol.com

**Rebecca Bennett**
Claims and Risk Management Manager, The Monument Sports Group
rebecca@monumentsports.com

**James H. Moss, Esq.**
www.recreation-law.com
Recreation.Law@gmail.com

**Matt Nanninga**
Drew Eckl Farnham
NanningaM@deflaw.com

**John M. Sadler**
Sadler & Company
john@sadlerco.com

**Stephen Zito**
General Manager, City of San Antonio
Stephen.Zito@sanantonio.gov

**Todd Seidler, Ph.D.**
Professor and Chair
Health, Exercise and Sports Sciences
University of New Mexico
Email: tseidler@unm.edu

**Russ Simons**
Chief Listening Officer, Managing Partner
Venue Solutions Group
Email: russ.simons@venuesolutionsgroup.com

**John Tyrrell**
Ricci Tyrrell Johnson & Grey
jtyrrell@rtjglaw.com

**Carla Varriale, Esq.**
Segal McCambridge Singer & Mahoney
Carla.Varriale@gmail.com

**Larry Perkins**
Vice President of Guest Relations / Assistant GM of PNC Arena
larryp@pncarena.com

**Frank E. Russo, Jr. CVE**
EVP, Business Development & Client Services
Spectra Venue Management
Frank.russo@spectraxp.com

**Matthew Kastel**
Manger of Stadium Operations, Maryland Stadium Authority
mkastel@mdstad.com

 COPYRIGHT © 2022 HACKNEY PUBLICATIONS (HACKNEYPUBLICATIONS.COM)

has also made a few headlines, confirming that if the school didn't notify his association that it did not have an EAP, that would be a violation of the organization's self-reporting policy.

In a media interview, Tackett noted that it would be "a technical requirement" for the school "to certify that they've got them. I mean, at some point -- there's no way with 286 high schools and that many more middle schools, you're not going to have an army of people going out and checking.

He went on to give an example.

"It's no different (then) an academic rule (we have had) for years. We don't check transcripts. At some point, it is self-policing. It is. They've done it. They know the risk of not doing it. They know the liability of not doing it, and their peers are watching, so there is that accountability."

# Mount Everest Guide Cleared of Charges of Fraud and Breach of Contract

*By Jon Heshka, Associate Professor at Thompson Rivers University*

In a bizarre case pitting a Silicon Valley CEO who's also a Yale and Harvard educated lawyer that clerked for the U.S. Court of Appeals for the Ninth Circuit and was a client on a Mount Everest expedition in 2019 against a mountain guide who cancelled a trip due to concerns over the expedition's safety, a Washington state court recently issued a declaratory judgment against the CEO effectively saying he had agreed that the guide had final say on such matters.

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

Madison disputed Bookman's allegations. Madison's core defense was that the route was threatened by a gigantic serac, a freestanding column of glacial ice, looming about 2600 feet above the climbing route between Base Camp and Camp 1. It's estimated that the serac weighed 54 million pounds and was the size of a 15-story building. In 2014, a serac collapsed on Mount Everest which triggered an avalanche that killed 16 Sherpas in the same area of the Khumbu Icefall.

The San Francisco County Superior Court dismissed Bookman's suit because it lacked jurisdiction as Madison's company is based out of Washington state. Bookman never refiled the suit in Washington.

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

In Madison and Madison Mountaineering LLC v. Bookman, Judge Samuel Cheung stated in the December 21, 2021 declaratory judgment and agreed-to-facts that Bookman signed "a contract that provided, generally, that Mr. Madison and Madison Mountaineering LLC had the exclusive authority to make all decisions regarding the health, safety, and welfare of the expedition."

Bookman attempted to dismiss the extent to which the seracs posed an unreasonable risk and justification for cancelling the expedition. He characterized it as a "red herring" saying in an interview: "There are hanging seracs all over the west wall of Everest. It's like saying we can't walk through the forest until that particular tree falls down."

The sustainability of that argument seriously concerned the adventure industry. The industry would be doomed if guides couldn't make risk management decisions and clients called the shots on what constitutes unreasonable risk.

Judge Cheung not only reaffirmed that Madison's role as mountain guide included the exercise of discretion and judgment in matters related to risk

COPYRIGHT © 2022 HACKNEY PUBLICATIONS (HACKNEYPUBLICATIONS.COM)

management but also that "[t]elephoto and drone images confirmed the serac might collapse at any moment, almost certainly killing everyone in its path."

Bookman also signed an Assumption of Risk and Release of Liability Agreement which stated that he was aware of the inherent risks and dangers involved, including but not limited to weather and forces of nature. These contracts exist to apprise clients of the activity's inherent risks and help protect operators/guides from liability in part due to the nature of the extreme environment in which the activity is undertaken.

Compounding Bookman's position is that the contract he signed had an explicit no-refund policy which stated: "You are required to pay a $69,500.00 USD nonrefundable, nontransferable full payment to reserve your space on the trip." Clauses like this exist due to the enormity of sunk costs involved in organizing such complex trips.

The declaratory judgment stated that Madison's decision to pause and ultimately conclude the expedition "was made solely to protect the health, safety, and welfare" of expedition members including Bookman and that Bookman now agrees that "these were the only reasons for pausing and concluding the expedition." Further, it said that

**Judge Cheung opined that "the fear of lawsuits and the financial repercussions from lawsuits can lead to injuries, illnesses, and fatalities for clients, guides, Sherpas, and other mountain professionals."**

Bookman now agrees that he "assumed weather, safety, and other risks" associated with climbing Mount Everest and that he had no right to a refund.

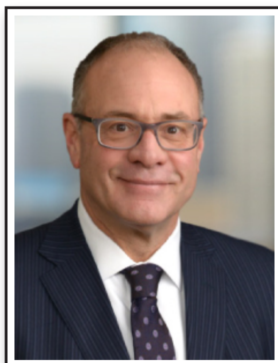
Madison fulfilled his duty of care in his role as mountain guide by properly identifying and assessing the risk, communicating that risk to the clients, and making the reasonable call in the circumstances to not unnecessarily expose the clients to the very real chance of the serac collapsing and thereby killing them.

In an interesting aside, Judge Cheung incidentally opined that "the fear of lawsuits and the financial repercussions from lawsuits can lead to injuries, illnesses, and fatalities for clients, guides, Sherpas, and other mountain professionals."

While Madison withstood this broadside across the bow, the victory to him and the adventure industry will likely only be fleeting. Despite the judgment, it's probable with the proliferation of well-heeled clients in the mountains that there will be more lawsuits questioning and second-guessing guides' decisions, especially if it thwarts clients' notch in their belt summit ambitions.

Over 20 years experience advising clients concerning risks associated with the presentation of spectator events.

Ricci Tyrrell Johnson & Grey
ATTORNEYS AT LAW



JOHN E. TYRRELL
215-320-2090 | jtyrrell@rtjglaw.com

www.rtjglaw.com

 COPYRIGHT © 2022 HACKNEY PUBLICATIONS (HACKNEYPUBLICATIONS.COM)

# Basketball Ticket Holder is Run Over, Sues, and Is Tossed from Court

*By Jeff Birren, Senior Writer*

Helena Shear was a New Orleans Pelicans (nee Hornets) season ticket holder. While attending a game and sitting in her assigned seat, she was hit by a player chasing a loose ball. Shear was injured, and sued the visiting team, the player that collided with her, the State of Louisiana, through its Stadium and Exposition District, and the stadium management company SMG/Facility Management of Louisiana. The State moved for summary judgment. It was denied, as was the writ in the Court of Appeal. The State then went to the State Supreme Court. That Court ordered briefing, and without oral argument, reversed "the judgment of the district court" and granted "summary judgment in favor of the State" (Shear v. Trail Blazers, Inc. et al, Case No. 2021-CC-00873, Supreme Court of Louisiana, at 5 (12-21-21)).

## Facts

Shear became a season ticket holder in 2007. Her tickets were in the third row of the courtside seating. The back of the tickets stated, in relevant part, that "the holder of this ticket voluntarily assumes all risk and danger of personal injury (including death)" (Id. at 3). On February 13, 2013, she went to see the Pelicans and Portland Trailblazers play. During the game, Trail Blazer James Edward Hickson, Jr., "chased a loose ball into the seating area" and "collided with Ms. Shear." Hickson was 6'9" and weighed 242 pounds, and Shear got the worst of it.

Shear sued in 2014, alleging that her seating was "in a dangerous and unsafe area" and that the State was negligent "in failing to erect 'safety measures' to prevent her injuries" (Id. at 3-4). After discovery, various defendants moved for summary judgment. Hickson's motion was granted. The District Court found that Shear's seating was "very close to the action of the game. Further the rules of the game permit the players to chase a loose basketball and injuries to a spectator may result but this does not create an unreasonable risk of harm. The record establishes that Ms. Shear was familiar with the rules of the game, as she was a season ticket holder for the then New Orleans Hornets since the 2007-2008 season. As such, it is reasonable to find that she was aware of the risk of a ball being chased into the spectator area thereby causing the exact injury she suffered" (Id., n. 2 at 3-4).

The State also moved for summary judgment, arguing that as a season ticket holder, Shear "was aware of the risk presented by her courtside seating and its proximity to the game" (Id. at 4). The State submitted an affidavit from a facilities management expert who stated:

SegalMcCambridge
Segal McCambridge Singer & Mahoney

Segal McCambridge welcomes
**Carla Varriale-Barker**
to our New York office.

212.651.7437 | cvarriale@smsm.com
850 Third Avenue, Suite 1100, New York, NY 10022

**www.smsm.com**
Austin | Chicago | Detroit | Ft. Lauderdale | Houston | Jersey City | New York | Philadelphia | St. Louis

COPYRIGHT © 2022 HACKNEY PUBLICATIONS (HACKNEYPUBLICATIONS.COM) 

"the courtside seating was reasonable and commensurate with general industry standards." Shear did not submit "any expert testimony in response to the State's motion" but "relied on her own testimony for the proposition that she was unaware of the particular risk encountered." Initially, at least, that worked.

The District Court determined that that it was "reasonable to infer" that Shear "was aware of the potential for players to come off the court in pursuit of a loose ball." Moreover, "it is fair to deduce that any potential hazard of player collisions while sitting courtside is open and obvious." Nevertheless, the court denied the motion "based on a finding that there were questions of fact concerning 'whether the seating arrangement was safe to begin with.'"

The State sought "supervisory review of this judgment." The Court of Appeal denied the writ and "the State then applied to this court." The Supreme Court "ordered briefing from the parties." The Court also "permitted the parties" "to request oral argument" and "entertained the State's request." However, after "careful consideration, we found oral argument was unnecessary under the facts of this case and therefore elected to exercise our discretion to consider the matter on written briefs only" (Id., n. 3).

## The Court's "Discussion"

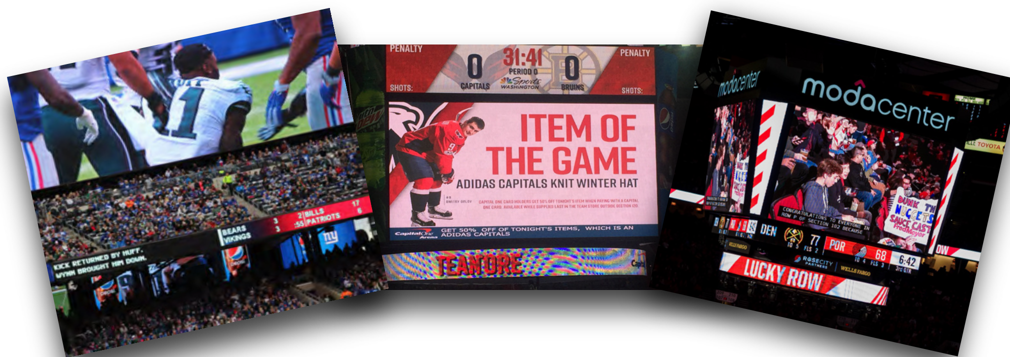
The unanimous "PER CURIAM" discussion began with the summary judgment standard: "whether there is any genuine issue of material fact, and whether the movant is entitled to judgment as a matter of law." The "burden of proof remains with the mover." However, if "the moving party will not bear the burden of proof on the issue at trial and points out an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense, then the non-moving party must produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial." If the "opponent of the motion fails to do so, there is no genuine issue of material fact and summary judgment will be granted" (Id. at 5).

## The Legal Test

A party suing a public entity (in Louisiana) "for damages caused by a thing" must "establish: (1) custody or ownership of the defective thing by the public entity; (2) the defect created an unreasonable risk of harm; (3) the public entity had actual or constructive notice of the defect; (4) the public entity failed to take corrective action within a reasonable time; and (5) causation." Here, the "focus of the arguments is over the second element—namely, whether the seating configuration at the time of Ms. Shear's injury created an unreasonable risk of harm."

The State's expert "opined" in his affidavit that the floor seating on the date of the accident was "reasonable and commensurate with general industry standards." Furthermore, "no basketball courts of any type, at any level, employ physical barriers. He concluded that the lack of physical barriers between the court


# Keep Everybody in the Game




From MetLife Stadium to the Moda Center, LNS Captioning provides real-time captioning services so your fans can catch every play.

LNS Captioning
www.LNSCaptioning.com

p: 503-299-6200
t: 800-366-6201

Caption quality matters to all your fans. We've got you covered.

Fast Accurate Dependable Affordable


 | COPYRIGHT © 2022 HACKNEY PUBLICATIONS (HACKNEYPUBLICATIONS.COM)

and spectators is normal and customary." The Court found "this evidence is sufficient to satisfy the State's burden … to establish an absence of factual support to satisfy" Shear's claim. The burden therefore shifted to Shear "to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to summary judgment as a matter of law."

Shear "presented no evidence which would support her theory that the seating configuration was unreasonably dangerous." She submitted "certain photographs which purportedly showed physical barriers in the seating areas of college basket games" (Id. n. 4), but those photographs "were never authenticated and are inadmissible." In the Supreme Court, Shear stated that the "photographs 'were not exhibits per say' (sic) but submitted to the trial court along with the website link to assist the Court in determining" if the statements submitted by the State and its expert were true or false. However, the photographs were not properly submitted as evidence and therefore the Court "cannot consider the photographs on appeal" (Id.). All that Shear had was her affidavit that stated she was unaware of the "particular risk she encountered" (Id. at 4).

There was thus no competent evidence "which would support her theory that the seating configuration was unreasonably dangerous" and therefore "summary judgment in favor of the State is mandated." Consequently, the Court "must reverse the judgment of the district court and grant summary judgment in favor of the State" (Id. at 5), the Louisiana Stadium Exposition District and SMG. Those "defendants are dismissed with prejudice" (Id. at 6).

## Conclusion

"[T]hose defendants" indicate that other defendants remain in the case. If so, then the Court's opinion would also apply to them, and Shear may well be out of luck and out of court. It must have brought cheer to SMG, a company that operates stadiums and arenas cross the country.

Shear may believe that defendants were guilty of a loose ball foul, but to date the courts have ruled otherwise. The opinion raises the question of whether the result would be different if the plaintiff was a first-time spectator, not a season ticket holder. One of the inherent ironies is that seats closest to the basketball court are the most dangerous but also the most desired seats and command prices vastly higher than seats that are far safer, as Laker fans well know, and that is not going to change despite these types of cases. It is hard to imagine what steps could be taken to improve safety that did not interfere with fans' ability to see the game, or what a plaintiff's expert could say that might have changed the outcome of this motion.

Finally, young lawyers wishing to impress courts should ensure that when using legal terms, they get the spelling right, and submit competent evidence.

## Court Rules on Case Involving Errant Punt and Fan at NFL Game

Continued from page 1

that it failed to state a claim upon which relief could be granted. The Trial Court granted the Ravens' and Koch's motion for summary judgment and motion to dismiss the battery claim, and all claims against the Ravens and Koch were dismissed with prejudice.[2] The Court specifically found that (1) there were no disputes as to any material facts; (2) Callinan assumed the risk as a matter of law; (3) the exculpatory clause was valid, and the clause did not fall into any of the exceptions to enforceability under Maryland law; and (4) the amended complaint failed to plead facts showing that Koch intended to harm Callinan.

Callinan then appealed the Trial Court's decision, raising three questions for review: (1) whether the Trial Court erred in dismissing the battery claim against Koch; (2) whether the Trial Court erred when it ruled that Callinan assumed the risk of being struck by an errantly kicked football at a professional football game; and (3) whether Callinan was entitled to additional discovery before the Trial Court's ruling on the motions.

Did The Trial Court Err in Dismissing the Battery Claim Against Sam Koch?

Callinan argued that, pursuant to the doctrine of transferred intent, the Trial Court erred in dismissing the battery claim. Specifically, her amended complaint presented multiple allegations, such as that Koch was in control over where and when he was to practice punting during pre-game warm-ups; that, as a professional punter with the ability to punt the football nearly 60 miles per hour, Koch intentionally kicked the football which ended up in the grandstands and struck Callinan; that the errant football striking Callinan constitutes an intentional offensive touching, and; that she suffered severe injuries and economic losses as a direct and proximate result of the offensive and intentional touching.

Battery is an intentional tort. It is undisputed that Koch did not intend to strike Callinan when he punted the ball during pre-game warm-ups, and Callinan's attempt at working around that factor failed to sway the Courts. The argument that Koch intentionally kicked the football and the football then struck Callinan was not enough to prove that this was intentional misconduct by way of transferred intent. Though the Court noted that "one can commit a battery through indirect contact, e.g., by 'putting an instrumentality in motion,'" (see Hendrix v. Burns, 205 Md. App. 1, 20, 43 A.3d 415 (2012)), it ultimately

2 The NFL then file a motion for summary judgment on the same grounds as the Ravens and Koch, which was also granted.


Monument SPORTS GROUP

sports insurance specialists

www.monumentsports.com
(866) 674-1234
msg@monumentsports.com

Sport Specific Coverages Include:

- General Liability
- Commercial Property
- Participant Accident
- Umbrella/Excess
- Camps, Clinics, and Tournaments
- Workers Compensation
- Special Events
- Business Auto
- Management Liability (D&O, EPLI, Cyber, Media, etc.)

Call, Email or go online for a FREE quote

 COPYRIGHT © 2022 HACKNEY PUBLICATIONS (HACKNEYPUBLICATIONS.COM)

found that the complaint did not plead facts showing that Koch punted with a "substantial certainty" that the football would cause an offensive contact with any other person.

The Appellate Court rejected this argument, predicating its decision largely on the inconsistencies in Callinan's description of the strike. It could not possibly be accurately described as both an "intentional offensive touching" and "errant[.]" To the Court, "errant" describes "something that has sort of taken its own path, wandered off, done something that it was not intended for." The Appellate Court's definition in this regard stood in stark contrast to the Merriam-Webster definition: "straying outside the proper path or bounds." Regardless of the accepted definition, the Appellate Court found that the allegation does not show that Koch intended to cause a harmful or offensive contact with anyone, or even that Koch intended for the football to stray into the stands, and instead categorized it as an "accidental touching." The Appellate Court ultimately did not consider the doctrine of transferred intent because, according to the doctrine, "a defendant who intends to strike a third person is liable if the blow miscarries and strikes the plaintiff." Id. at 24 (quoting 1 Harper James & Gray on Torts § 3.3 at 318 (3d ed. 2006)). Here, it is not alleged that Koch intended to strike anyone at all and, therefore, the transferred intent doctrine is inapplicable.

Did The Trial Court Err When It Ruled That Callinan Assumed the Risk of Being Struck by An Errantly Kicked Football at A Professional Football Game?

The Appellate Court sided with the Ravens and Koch in its application of the assumption of risk doctrine after considering Callinan's deposition testimony as it related to her knowledge of attending a game. Callinan quite candidly testified that, while watching football on television, she had seen kickers miss the netting and the football unintentionally travel into the stands for multiple different reasons. The Court held that this information established the first element of the doctrine of assumption of risk – knowledge of the risk of danger.

The second element of the doctrine of assumption of risk – appreciation of the risk – was met by Callinan's "experience and familiarity with football shows" coupled with the fact that "she appreciated the dangers associated with the sport." While Koch's stray punt was not part of the game itself, those who are familiar with football are well-aware that the pregame warm-up is customary to the game.

The Court relied on Coomer v. Kansas City Royals Baseball Corp., 437 S.W.3d 184, 203 (Mo. 2014) in support of its position. In that case, the Court held that the risk of injury from the mascot's hotdog toss was not an inherent risk of watching a baseball game. Here, the Appellate Court distinguished a mascot throwing a hotdog into the stands from a player kicking a ball into the stands, as there is "no link between the game and the risk of being hit by [a] hotdog toss." Here, however, Koch was punting in preparation for playing football, and the fans were in the stand to watch football. Therefore, Callinan's position that she could not assume the risk "prior to the game even beginning" was unsuccessful. In other words, the Court may have been more likely to side with Callinan if she had gotten hit in the head with a hotdog instead of a football.

As to the third element of the doctrine of assumption of risk – voluntary exposure to the risk – it is undisputed that Callinan voluntarily attended the Ravens/Dodgers game and sat six rows from the field, fully aware that the football could find its way into the stands, for one reason or another.

Was Callinan Entitled to Additional Discovery Before the Court's Ruling on The Motions to Dismiss and For Summary Judgment?

Prior to the Trial Court's ruling on the subject motions, Callinan had not been provided with the Ravens' and NFL's policies and procedures manuals, which outline when and where players can warm up before a game. Additionally, Callinan had not yet deposed Ravens employees, NFL employees, and Koch and, as a result, requested that the Trial Court stay its decision. The Appellate Court, however, found that, based upon its review of the record and Callinan's deposition testimony, there was no question as to whether she assumed the risk and, therefore, no genuine issue as to any material fact.

While it is clear that Callinan assumed the risk, and that doctrine is an absolute defense, absent from the Court's discussion was the impact, if any, of evidence showing that Koch's conduct was forbidden. For example, the policies and procedures manuals, which would certainly be produced in additional the discovery sought, may have shown that Koch was not allowed to kick the ball in that place at that time. Against that factual backdrop, could the Court fairly hold that Callinan assumed the risk? One thing we can assume is that Callinan will likely be rooting against the Ravens should she risk attending future games.

COPYRIGHT © 2022 HACKNEY PUBLICATIONS (HACKNEYPUBLICATIONS.COM)

## California Appellate Court Rejects 'The Baseball Rule' in Foul Ball Case

Continued from page 1

Since 2009, there had been no reported spectator injuries caused by baseballs hit out of the playing field at La Sierra. *Id.*

Additionally, La Sierra asserted that it offered portable bleachers for seating, which were behind home plate and a protective backstop and accessible for any spectator. *Id.* La Sierra did not ask any of the spectators in the grass along the baselines to take down their tents or umbrellas, nor did it request spectators to sit behind the backstop. *Id.* The university would only assist with crowd control if the game's umpire requested it. *Id.* Furthermore, there was no requirement for a California Pacific Conference member or a National Association of Intercollegiate Athletics (NAIA) institution to put protective netting over the dugouts. *Id.*

In response, Mayes offered, while there were bleachers behind the backstop at home plate, there was only one seat available and "the bleachers were on a hilly, rocky, and dirt-covered area. The dirt was blowing around and making it 'potentially dangerous' to sit in that area." *Id.* at 6. Mayes and her husband proceeded to set up their folding chairs in the grass along the third base line, where hundreds of other spectators had done the same, roughly 60 feet from the playing field. *Id.* at 6-7. There were no posted signs advising the crowd that they had the option to ask La Sierra's athletic director or the umpire to control the crowd. *Id.* at 6.

Mayes had been to hundreds of her sons' baseball games over the previous 15 years, and was not concerned for her safety because she assumed that La Sierra had protective netting over the dugouts like every other field she had been. *Id.* at 7. She had never seen a spectator struck in the face by a ball. *Id.*

Mayes offered expert opinion testimony from a ballpark safety and management expert. The expert opined that, while NCAA standards did not apply to this facility (NAIA standards did), the field would have violated NCAA standards for a college baseball field which require 60 feet of unobstructed space between the foul line and the fence around the field; La Sierra had 32 feet of space. *Id.* at 8. Mayes was able to sit too close to the field which unreasonably increased her chance


### SFL Sponsor Directory

SPORTS FACILITIES and the LAW

**LEGAL**

**Law offices of Alan S. Goldberger**
www.RefLaw.com
Alan Goldberger
973-301-1900

**Segal McCambridge Singer & Mahoney**
www.smsm.com
Carla Varriale
cvarriale@smsm.com

**TECHNOLOGY**

**24/7 Software**
www.247Software.com
Jacob Molz
954-507-3386

**Venue Solutions Group**
Russ Simons
www.venuesolutionsgroup.com
816-352-6494

**CONSULTING/EXPERT WITNESSES**

**Gil Fried**
www.gilfried.com
gfried@uwf.edu

**The Bigelow Companies, Inc.**
Chris Bigelow, FCSI CFSP
www.bigelowcompanies.com
239-234-2502

**Total Playground Consulting Services**
Tom Bowler
860-670-2180

**INSURANCE**

**The Monument Sports Group**
www.monumentsports.com
866-674-1234
msg@monumentsports.com

**Sadler & Company**
John M. Sadler
www.sadlersports.com
(803) 254-6311
john@sadlerco.com

**American Specialty Insurance & Risk Services, Inc.**
Brandon SchalL
www.americanspecialty.com
800-245-2744

**ASSOCIATION**

**National Sports Massage & Athletic Practitioners®, LLC**
Brian Keene
303-345-5967

**EDUCATION**

**Tremont Global Education**
Scott Gray
www.tremontglobal.com
800-843-1634

**Patron Management**
www.patronmanagement.org
gfried@newhaven.edu

**MARKETING**

**Jon Mozes–Public Relations and Broadcast Manager, Trenton Thunder.**
www.TrentonThunder.com.
609-394-3300 x109

**National Speedway Directory / Race Track Business Conference / Frost Motorsports, LLC**
www.speedwaysonline.com / www.racetrackbusinessconference.com / www.frostmotorsports.com / www.businessofspeed.com
Timothy W. Frost
847-853-0294

**Motorsport Services International**
Bob Barnard
www.motorsportservicesinternational.com
912-245-5543


 COPYRIGHT © 2022 HACKNEY PUBLICATIONS (HACKNEYPUBLICATIONS.COM)

of injury. *Id.* That distance, combined with raised dugouts which obstructed spectators' view and a lack of crowd control, created an unreasonable risk of harm for spectators. *Id.* To get La Sierra's field up to the safety standards maintained by the NCAA and Major League Baseball, La Sierra would have had to install protective netting over the dugouts for approximately $8,000-$12,000. *Id.* at 9.

In granting La Sierra's Motion for Summary Judgment, the trial court held that the case was a "textbook assumption of the risk case." *Id.* at 10. The court opined that being struck by a foul ball is an inherent risk to being a spectator at a baseball game and that the primary assumption of the risk serves as a bar to injuries that are common in baseball. *Id.* Further, the trial court did not believe that La Sierra increased the risk of harm to Mayes and that she made a choice to sit in an area without protective netting. *Id.*

In its decision to overturn the trial court's grant of La Sierra's Motion for Summary Judgment, the Appellate Court cited case law to support the proposition that many sports and recreational activities are inherently dangerous, and that some efforts to reduce the risk of harm in those activities may significantly alter participation in them. *Id.* at 13 (*citing Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1154-56). The primary assumption of risk doctrine is in place to avoid imposing a duty to eliminate risks of harm inherent in those activities, which would theoretically create a chilling effect on participation. *Mayes citing Nalwa* at p. 1156.

**This opinion highlights the need for sports and recreational facility owners to frequently evaluate their premises for potential safety hazards for participants and spectators alike.**

However, that does not absolve sport and event operators of owing any duties to participants. Owners and operators of sports venues have a duty not to increase risk of injury over the risk of injury inherent to the sport. *Nalwa*, 55 Cal.App.4th at p. 1154. Additionally, owners and operators of these facilities have a duty to take reasonable steps to protect participants' and spectators' safety, so long as those steps do not alter the nature of the sport or the activity. *See Knight v. Jewett* (1992) 3 Cal. 4th 296, 318. Put succinctly, the Court noted, "[a]s a general rule, where an operator can take a measure that would increase safety and minimize the risks of the activity *without also altering the nature of the activity,* the operator is required to do so." *Mayes* at p.15, *quoting Grotheer v. Escape Adventures, Inc.* (2017) 14 Cal. App.5th at pp.1299-1300 *see also Summer J v. United States Baseball Federation* (2020) 45 Cal.App.5th 261 (emphasis in original).

The Court considered *Summer J* as well as the century-old "Baseball Rule." In *Summer J,* the court acknowledged the two duties that owners and operators of sports facilities owe to participants


# Your Teammates in Litigation Before, During & After the Game

Providing legal counsel and representation to Georgia's largest sports venues and most exciting attractions for over 35 years.

DREW | ECKL FARNHAM

ATTORNEYS AT LAW

MATT NANNINGA
404-885-6221
nanningam@deflaw.com

JACK REALE
404-885-6404
realej@deflaw.com

and spectators. The Baseball Rule, which California first applied in 1935, provides that professional baseball teams and their owners are not liable for injuries to spectators by foul balls so long as the teams and owners took minimal steps to protect the spectators from harm. *Summer J* 45 Cal.App.5th at p.265. In practice, this means "that spectators assume the risk of injury from foul balls if they chose to sit in unscreened seats, even if no screened seats are available." *Mayes* No. E076374 at p. 24. An additional factor to consider, the *Summer J* court noted, is that recent developments to baseball stadiums and baseball games, such as spectators being closer to the field, velocity of pitched and hit balls, and more distractions at games such as free Wi-Fi, all increase the risk of harm to spectators at games. *Id.* at 274 *citing* Grow & Flagel, *The Faulty Law and Economics of the "Baseball Rule"* (2018) 60 Wm. & Mary L. Rev. 59, 85-98.

In in its decision to overturn the trial court, the *Mayes* Court reasoned that the baseball rule "is out of step with California's primary assumption of risk doctrine." *Mayes* No. E076374 at p. 24 *citing Grotheer* 14 Cal.App.5th at pp. 1300-01. The Court held that the trial court, similar to the baseball rule in general, failed to consider the second part of La Sierra's duty: take reasonable steps to increase safety and minimize the risk of harm to spectators if it could be done without materially altering the game for players or spectators. *Mayes* No. E076374 at 23-24. The Court held there were four triable issues of fact to determine whether La Sierra breached its duty of care by: (1) failing to install protective netting over the dugouts; (2) failing to warn spectators of the lack of netting over the dugouts; (3) failing to provide a sufficient number of screened seats; and (4) failing to exercise proper crowd control. *Id.* at 25.

This opinion highlights the need for sports and recreational facility owners to frequently evaluate their premises for potential safety hazards for participants and spectators alike. Likewise, these owners and operators should monitor trends within their industries for advances to safety materials that could be reasonably introduced without altering the nature of the activity.

*John E. Tyrrell is the Managing Member at Ricci Tyrrell Johnson & Grey and has decades of experience in sports and events liability litigation and risk management. Matthew S. Cioeta is an associate at Ricci Tyrrell.*

# Hackney Publications Recognizes Drew Eckl Farnham, Segal McCambridge, and Ricci Tyrrell Johnson & Grey as Leaders in the Sports Law Field

Hackney Publications has announced that its readers have identified Drew Eckl Farnham, Ricci Tyrrell Johnson & Grey and Segal McCambridge Singer & Mahoney as leaders in the sports law field in its annual Roster of "100 Law Firms with Sports Law Practices You Need to Know About."

The Drew Eckl Farnham sports law practice is led by Matthew A. Nanninga, a partner who focuses his practice on general liability tort defense. He has advised clients ranging from large corporations to small business owners on claims handling, loss mitigation, and general defense strategy. He has served as lead counsel for his clients in both state and federal courts throughout Georgia. Nanninga has experience handling cases in numerous industries, including major indoor/outdoor sports arenas and racetracks, amusement facilities, hotel and hospitality entities, restaurants and nightclubs in the food and beverage industry, national restaurant franchises, gas stations and convenience stores, as well as apartment communities facing high exposure negligent security claims. He also represents clients in the trucking and transportation industry. Prior to entering law school, Nanninga played professional baseball in the Cincinnati Reds organization and played one season for a baseball club in Antwerp, Belgium.

The sports group is led Ricci Tyrrell Members John E. Tyrrell and Patrick McStravick. Tyrrell, in particular, has decades of experience in the representation of operators and managers of stadiums, arenas, entertainment and recreational facilities, including professional and collegiate sports teams; golf courses; ice rinks; gymnastics facilities; rowing associations; paintball facilities; and concert and entertainment venues. He is trial counsel to such entities, and also provides risk management and liability prevention consultation to these clients. He has developed a particular expertise in prosecuting and defending contractual indemnity and insurance claims, both at trial and through declaratory judgment proceedings. Tyrrell has lectured at training sessions for the event staff of his clients. He has also authored information guides, ticket and pass disclaimers, prospective releases, patron signage and other communication devices used at facilities.

The Segal McCambridge sports group is led by Carla Varriale-Barker, an accomplished litigator who is at home in a courtroom, board room or classroom. She represents a portfolio of clients in the sports, recreation, amusement, and hospitality industries. Varriale-Barker offers a client-centered practice focusing on tort, discrimination, contract, insurance and premises liability matters, including the defense of claims arising from alcohol service, security lapses, discrimination in places of public accommodation, sexual abuse and molestation. Varriale-Barker counsels clients involved with the U.S. Center for SafeSport, an organization established by Congress to address sexual abuse, bullying and other misconduct, and the U.S. Olympic and Paralympic Movements. She is also an adjunct instructor at Columbia University's School of Professional Studies where she has taught in the Sports Management Program since 2008.

 COPYRIGHT © 2022 HACKNEY PUBLICATIONS (HACKNEYPUBLICATIONS.COM)