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SPORTS FACILITIES and the LAW

How the law affects the sports facilities industry

The 'Baseball Rule:' To Screen or Not to Screen?

By Kendra K. McGuire[1] and Charles F. Gfeller[2].

Baseball is commonly referred to as "America's Past Time," and the thrill of catching a foul ball in the spectator stands is an experience closely related to it. But what happens when a spectator is seriously injured by a rogue foul ball? Who will be held liable for the spectator's injures and damages? In some cases, the Baseball Rule applies.

In general, the Baseball Rule states that commercial sports facility operators ("operators") owe a limited duty to protect spectators from being injured by objects used during the sport. Maisonave v. Newark Bears Professional Baseball Club, Inc., 185 N.J. 70 (2005). The Baseball Rule imposes a requirement of ordinary care to provide seats protected by screening and requires operators to screen any spectator area that is subject to a high risk of injury. See Olds v. St. Louis Nat. Baseball Club, 119 S.W.2d 1000 (Mo. Ct. App. 1938); Quinn v. Recreation Park Ass'n, 3 Cal. 3d 275 (1935); Hummel v. Columbus Baseball Club, 71 Ohio App. 321 (2nd Dist. Franklin County 1943); Williams v. Houston Baseball Ass'n, 154 S.W.2d 872 (Tex. Civ. App. Galveston 1941).

Specifically, the Baseball Rule imposes

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Turf Wars: Texas Court Says the Remedy for a Defective Artificial-Turf Field is Limited to the Manufacturer's Warranty and Leaves ISD with the Replacement Cost

By Mari Bryn Dowdy, Senior Associate, of Segal McCambridge Singer & Mahoney, Ltd.

The Texas Court of Appeals recently held that the plain language of a warranty for a synthetic-turf football field limited the available remedies for breach of the warranty to repair or replacement of the field as opposed to the cost of a replacement incurred by a school district after the manufacturer repeatedly refused to replace the field.[1]

As part of the construction of its new football stadium, Pleasant Grove Independent School District ("Pleasant Grove") hired Altech, Inc. ("Altech") as the general contractor. In turn, Altech hired FieldTurf USA, Inc. ("FieldTurf") to manufacture and provide the field. The field's lifespan was warranted for eight years, but the field began degrading within only five years. Unbeknownst to Pleasant Grove, as early as 2006, key FieldTurf executives were aware that the Duraspine turf was splitting and falling apart faster than expected.[2] So, after multiple inspections, repeated complaints, and several denied requests for replacement, Pleasant Grove "declared the turf struggle" in September 2015 and sued Altech for breach of warranty and Field-

See TURF WARS on Page 10

1 Pleasant Grove Indep. Sch. Dist. v. Fieldturf USA Inc., 2022 Tex. App. LEXIS 4532, 2022 WL 2374396.

2 Baxter, C. and Stanmyre, M. (2016) The 100-Yard Deception. NJ Advance Media. Retrieved from: https://fieldturf.nj.com/

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WMU Athletics Announces Facility Master Plan Partnership

Western Michigan University and Director of Athletics Dan Bartholomae have announced a partnership with Gensler Sports Design to develop a long-term facility master plan for the athletic department.

"Our facility master plan will seek to prioritize efficient and thoughtfully planned upgrades that benefit our student-athletes, staff, donor and fans attribution. We will identify priority projects throughout this process and equip our staff with conceptual design, cost estimates and planning timelines in order to position ourselves to mobilize quickly."

This partnership includes several priorities: inclusivity, maximizing the student-athlete experience, fan experience and revenue generation opportunities, addressing inequities and competitive disadvantages, and the development of immediate priorities.

Inclusivity: Leadership Committees, Focus Groups and Visioning exercises will be broad-based to include important users and constituencies both inside and outside Western Michigan athletics. Head Coaches, University Partners and other constituents will have exclusive time with the planners and the plan will be reflective of the specific needs of WMU's athletic programs and the partnerships inherent on campus and in the community.

Student-Athlete Experience: All projects proposed by the plan will center on maximizing the experience student-athletes have on Western Michigan's campus. This includes maximizing student-athletes' time while utilizing facilities, and the availability of first-class competitive resources.

Fan Experience and Revenue Generation Opportunities: WMU seeks to collaborate with the community to provide energizing events and create a first-class and premium experience for fans. Additionally, WMU recognizes the need for facility development to serve its goal of generating revenue in new and creative ways.

Addressing Inequities and Competitive Disadvantages: WMU seeks to address gaps in facilities as identified in benchmarking across conference and Group of Five peers.

Development of Immediate Priorities: Planning will be administered in a manner that is flexible and provides an opportunity to immediately mobilize on key projects that have immediate department and philanthropic interest.

Gensler Sports Design will engage in a comprehensive conditions and space utilization analysis of athletic facilities prior to utilizing focus group discovery and feedback to propose concept designs and cost estimation for priority projects. It is anticipated this process will continue through the academic year with concept designs completed in Spring of 2023.

SPORTS FACILITIES and the LAW

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Philadelphia Eagles' Fans Lodge Complaint Over Fallen Railing at FedEx Field

By Gina McKlveen

Last year, the Washington Football Team, recently renamed the Washington Commanders, lost its final regular season game 20-16 to the Philadelphia Eagles at FedEx Field in Landover, MD.

But that may not have been the only loss the franchise suffered that day.

As the Eagles were leaving the field, several Eagles fans leaned against the railing, causing it to collapse. They nearly struck Eagles Quarterback Jalen Hurts as he was exiting the field. While Hurts was not injured, the Eagles fans (Plaintiffs) were not so fortunate. They allegedly suffered initial and ongoing injuries after the railing collapsed, which led the plaintiffs to file a negligence claim against the Washington Commanders, WFI Stadium, Inc., and other football stadium staffing companies (Defendants).

The complaint outlines the customary practice following NFL games, both at home and away, in which fans attempt to greet players from the stands as they exit the field through a tunnel toward their respective locker rooms. Here, Plaintiffs allege in their complaint that they sought and gained permission from stadium employees before entering the area adjacent to the tunnel where the Eagles players would walk though as they left the field. Those stadium employees then guided the fans to the fence along the stands that was known to be a regular gathering spot following a football game for fans to attempt to interact with players with a handshake, high-five, or similar contact like obtaining a player's wristband or other articles from the players' uniforms.

Furthermore, Plaintiffs claim that since this was a regular gathering spot for fan-to-player interactions after games, Defendants knew or should have known the likelihood that fans would reach over and lean up against the fencing that separated the fans in the stands from the players below. Yet, no stadium employee or agent ever warned Plaintiffs not to lean on the fence when they directed Plaintiffs to the gathering spot. Relatedly, Plaintiffs also argue that Defendants knew or should have known that weight of the fans leaning on the fence would place extreme pressure on the fence. Nevertheless, the only thing that supported one section of the fence to another were merely zip ties made of thin plastic. As a result of the pressure and this design defect, the fence ultimately collapsed and Plaintiffs fell nearly 10 feet onto a concrete surface, tumbling over one another, some even getting caught in the fence, and just missed landing on the Hurts.

Afterwards, a few of the fallen fans turned the malfunctioned fence mishap into an opportunity to personally greet a similarly stunned Hurts before stadium employees intervened "forcefully lifting some of the plaintiffs and others without first determining what, if any, injuries they had suffered from the fall." Plaintiffs' complaint even accuses Defendants' response after the fall as falling below a reasonable standard of care because they were "physically and forcefully directed and shuttled back up over the wall from where they had fallen" and shouted at using expletives. In fact, Plaintiffs argue that video footage from the fall exhibit Hurts showing a higher regard for their health, safety, and welfare by providing greater care, help and assistance to Plaintiffs than Defendants did in this instance.

Due to these inactions on the part of Defendants, Plaintiffs list their serious injuries from the fall, some still ongoing over seven months later, including cervical strains, muscle strains, bone contusions, cuts, bruises, headaches, and other long-term physical and emotional effects. Consequently, Plaintiffs brought three causes of action against Defendants (1) for negligence and gross negligence against the Washington Commanders and WFI Stadium, Inc., (2) for negligence and gross negligence against Contemporary Services Corporation (CSC), and (3) for negligence and gross negligence against Company Does, the maintenance subcontractors at the stadium property of FedEx Field.

To bring a successful negligence claim against any defendant, the plaintiff must prove four essential elements: duty, breach, causation, and damages. The duty includes the standard of care which is owed to the plaintiff by the defendant. The standard of care which is owed to a plaintiff varies according to the law of torts depending on whether the plaintiff is a trespasser, a licensee, or an invitee. Trespassers are owed the lowest standard of care, while licensees and invitees have higher standards of care. An invitee differs from a licensee in that the invitee has been invited onto the premises for some kind of business purpose like fixing a homeowner's drains, entering into a grocery store or attending a football game, whereas a licensee is more like a social guest such as going over to friend's house to watch a football game. When there is a dangerous condition on the premises that an invitee is not aware of or warned of and the owner knows or should know of that danger through a reasonable inspection, then the owner owes a legal duty to the invitee. If the owner fails meet this duty or falls below the required standard of care, then the next element—breach—has occurred. This breach of a legal duty must also be the cause, both the actual or in-fact cause and proximate cause, of the

plaintiff's injury. In other words, had it not been for the defendant's breach or his or her duty of care, the plaintiff would not have been injured and the resulting injury from the breach was foreseeable to the defendants. Finally, there must also be an injury, harm, or damage suffered by the plaintiff that is not purely economic to recover from a defendant in a negligence suit.

It appears from Plaintiffs' complaint in this case that all the aforementioned elements are met. Specifically, the Washington Commanders and WFI Stadium, Inc. are the owners of the stadium and therefore, owed a duty of ordinary care to maintain a safe stadium for Plaintiffs as business invitees on the January 2, 2022 game day. In addition, the Washington Commanders and WFI Stadium, Inc. are bound by the NFL Rules and Regulations to meet certain minimum standards regarding safety requirements and emergency procedures in the event of an accident to football fans at any NFL stadium. Such safety requirements according to Plaintiffs included securing the fencing that Defendants directed Plaintiffs toward and reasonably knew or should have known Plaintiffs would lean against. However, the Defendants' failure to sufficiently secure the fence or to warn the Plaintiffs not to lean against it, breach the duty owed to them. "In light of these failures, the inadequacy of the railings and the unreasonable design, maintenance, and adequacy of the railings, WFI and the Washington Commanders grossly neglected the duty of care owed to Plaintiffs in a highly dangerous situation which ultimately was the cause of Plaintiffs falling and suffering injuries." Since these occurrences were foreseeable and easily preventable by Defendants, each Plaintiff seeks $75,000 in excess for the resulting and continuous damages they incurred.

Similarly, against CSC, "a highly visible security and crowd control organization," Plaintiffs argue the company knew or should have known upon routinely observing "at professional football games, college football games, and other sporting events" the risk and safety hazard posed to both fans and players when gathered as close as possible at the tunnels exiting the playing field at the end of each game. Despite the "obvious risk of danger at this critical location and this critical time," CSC also breached its duty of care to the Plaintiffs which resulted in their subsequent injuries. Lastly, Plaintiffs' complaint contends Company Does is jointly and severally liable for Plaintiffs injuries because of their failure to "provide inspection, repair, maintenance, design and oversight of all physical facilities" at the stadium, which were responsibilities the company was hired to perform by the WFI Companies, Inc. and the Washington Commanders, prior to the fence collapse.

At press time, Defendants had not responded to the complaint.

Crowd Management Doctor to Help Facilities

A new YouTube channel has been launched as a crowd management training tool. The free videos are designed to help train front line staff. By utilizing 15 minute or less videos, venue management and crowd management companies can help train their staff on a continual basis. Crowd management training is often undertaken once a year, but to really turn crowd management best practices into muscle memory for employees there needs to be constant training and refresher training on a broad array of topics front line staff might face.

That is what motivated Professor Gil Fried, from the University of West Florida, to launch the YouTube channel called the Crowd Management Doctor. The channel can be found at: https://www.youtube.com/channel/UCwHLQMat7qeoMuH-VQefuWA. Prof. Fried stated "[T]he channel's goal is to provide current events and cases studies in a fun and informative manner which can be watched by an employee on their phone and on a break to keep their skills as current as possible."

The channel has been adding new videos, including a regular update of current events. Other videos have included case studies, responding to various hazards, and then interviews with industry professionals such as fan psychologists and venue professionals.

The plan is to release 10-12 videos every year and then at a certain point create a library where front line staff can watch a certain number of videos, take an exam, and receive independent third-party certification of crowd management knowledge from the University of West Florida. This training is not designed to replace any current training undertaken by venues and crowd management companies, but to serve as a supplement where staffers can hear from others and learn in a different environment.

For more information visit the YouTube page or contact Gil at gfried@uwf.edu.

Man Rendered Quadriplegic in Indoor Sky-Diving Accident Sues "Safe" iFLY Facility

By Shalom Samuels

Can an indoor skydiving zone hold itself out to be a family-friendly location, while internally recognizing that its activities are dangerous? This question is the basis of an amended complaint filed on October 11, 2022, in Cook County, Illinois.

On January 21, 2021, David Schilling, 63, visited iFLY, a local Cook County indoor skydiving facility. According to the amended complaint, Schilling, a novice indoor skydiver, entered the "wind tunnel," an indoor tunnel intended to simulate free fall skydiving by causing patrons to float or fly in the air, and, as he was "free-falling," stopped maintaining altitude and began drifting toward the net at the bottom of the tunnel, indications that he was beginning to lose control. As he continued floundering for a period, the instructors on duty failed to intervene or reduce the wind speed. As a result, Schilling lost control and plunged headfirst into the glass wall of the tunnel, resulting in severe injuries, including a catastrophic spinal cord injury that rendered him quadriplegic and requiring constant, round-the-clock care.

On October 11, 2022, Schilling's attorney, Jack Casciato, of Clifford Law Offices, held a press conference in connection with the Office's filing of the amended complaint. At the press conference, Casciato explained that the complaint was amended to add three counts of fraudulent misrepresentation, claiming that iFLY, on its website, fraudulently mischaracterizes indoor skydiving at their facility as "safe," and for "children as young as three," even though in its "iFLY Release of Liability and Indemnity Agreement," which is required to be signed by patrons, it states that "the iFLY Activities are INHERENTLY DANGEROUS ACTIVITIES and among the risks participants will be exposed to are the risks of SERIOUS BODILY INJURY AND DEATH." This claim was bolstered by a written statement by Schilling released contemporaneously at the press conference, calling for the facility to be closed until iFLY makes clear that its activities are not "safe for children" but are instead dangerous.

The amended complaint includes counts against the alleged owners of the iFLY facility, SKYGROUP INVESTMENTS, LLC and IFLY Holdings, LLC, as well as it two employees, for the employees' alleged negligence and willful and wanton conduct in failing to properly supervise Schilling's flight and intervene when it became clear that Schilling was unstable and at risk of serious harm. Further, they failed to recognize that Schilling, a novice indoor skydiver, would require a "spotter" beside him, instead of one by the door, and that they should have reduced the tunnel's wind speed, particularly when

he began showing signs of distressed and out of control movements. Further, the complaint alleges that the two employees were not properly certified flight instructors, and were inattentive during Schillings' flight, talking to other patrons and allowing "their minds to wander."

Further counts are brought against SKYGROUP and IFLY, as well as against SKYVENTURES, LLC, for design defects, alleging that the wind tunnel should have been equipped with netting or mats to protect patrons from slamming into the ungiving glass walls.

Schilling is represented by Clifford Law Offices, and the Defendants are represented by Swanson, Martin & Bell, LLP. This case was originally filed on April 16, 2021, and is before the Honorable Kathy M. Flanagan of the Cook County Circuit Court. According to the press conference, Defendants' motion to dismiss based on Schilling's execution of the "iFLY Release of Liability and Indemnity Agreement" was denied. Trial is set for October 2023.

The amended complaint, statement of David Schillings, and additional resources were provided courtesy of Clifford Law Offices.

Amateur Soccer Player Sues Facility For Failing to Prevent a Post-Game Brawl

By Gary Chester, Senior Writer

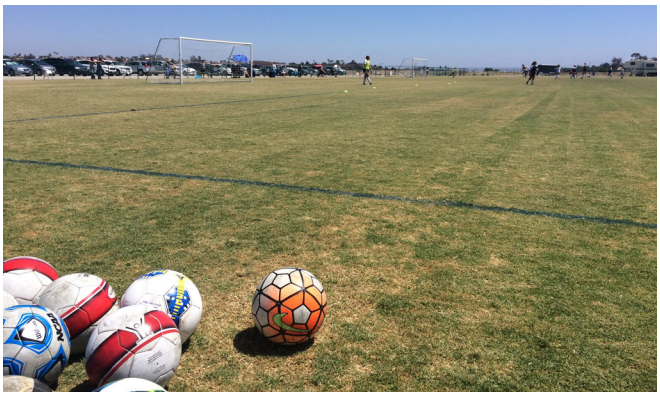
Owners and users of recreational facilities have a common law duty to provide a safe premises. This includes sufficient lighting, safe equipment, and adequate security for the protection of fans, participants, and officials. A Florida case raises an unusual issue: Does a sports venue have a duty to prevent players from one team from attacking their opponents after the game has concluded?

That is the central issue in Juan Sebastian Bonilla Marentes v. Orlando Indoor Soccer, LLC and HMP Investment Inc., a civil lawsuit filed in the Ninth Judicial Circuit Court in Orange County, Florida, on August 25, 2022.

The Facts

The plaintiff is an amateur soccer player who participated in a match against a Chilean team at the Orlando (Fla.) Indoor Soccer (OIS) facility on July

18, 2021. According to the Complaint, Marentes and his Orlando Red teammates were in one of the common areas of OIS when players from the opposing team "began to punch and kick players from 'Orlando Red' on the premises and brutally attacked Plaintiff…[causing] multiple injuries…which required emergency medical care."



The complaint alleges that OIS and HMP Investment are owners of the recreational soccer premises in Orlando that have a non-delegable duty to provide reasonably safe premises to invitees and others. The plaintiff alleges that the defendants should have known of the risk of criminal attacks on persons at OIS "based on the history of criminal activity on the subject premises and in the general vicinity of the subject premises."

The defendants were allegedly negligent in supervising OIS by failing to provide adequate security personnel, failing to monitor the effectiveness of the security plan of its agents and tenants, allowing a named player onto the premises while being aware of his propensity for criminal activities, and otherwise.

Marentes seeks damages for unpaid medical expenses and compensatory damages for pain and suffering.

The plaintiff is represented by Michael Singh and Matthew McNamara of the SSM Law Group in Winter Park, Florida. The defendants have not yet filed their answers to the complaint.

Baseball

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two requirements upon operators: first, the operator must provide a sufficient number of protected seats for those spectators who may be reasonably anticipated to desire protected seats on any ordinary occasion; and second, the operator must provide protection for all spectators located in the most dangerous parts of the facility. Reed-Jennings v. Baseball Club of Seattle, L.P., 351 P.3d 887 (Wash. Ct. App. Div. 1 2015). When both requirements are met, an operator discharges its duty to provide spectators with screened seats. In turn, the operator will not be held liable for a spectator's injuries caused by a projectile.

How Many Screened Seats are Legally "Sufficient"?

Courts have been wary to come up with a specific number of screened seats needed to meet the first requirement of the Baseball Rule. However, there is a consensus among courts that the number of screened seats in a commercial sports facility must be, at least, sufficient for all those spectators who may be reasonably anticipated to desire protected seats on an ordinary occasion.

Specifically, a facility owner is not required to screen every seat, or to provide screened seats for all spectators who may seek one; rather, the facility owner must only provide enough screened seats for as many patrons as may reasonably be expected to call for them on ordinary occasions. Bryson v. Coastal Plain League, LLC, 221 N.C. App. 645 (2012); Turner v. Mandalay Sports Entertainment, LLC, 124 Nev. 213 (2008); Sciarrotta v. Global Spectrum, 194 N.J. 345 (2008); Reed-Jennings v. Baseball Club of Seattle, L.P., 188 Wash. App. 320 (2015).

In practice, it is recommended that facilities provide enough screened seats to accommodate an ordinary demand of spectators. Facility owners should audit the demand for screened seats at previous games and provide enough screened seats at every game to seat the average amount of spectators who wish to sit there.

If an injured spectator brings a claim against a facility operator for injuries sustained from a projectile, the injured spectator must prove that the operator has not satisfied its duty of care by providing sufficient seating. The spectator may be able to meet this burden by showing that

the number of people who attended the game was greater than the number of "safe" seats, or that the "safe" seats were typically reserved in advance by season ticket holders, which left few, if any, "safe" seats for purchase by casual spectators. Zitter, Liability to Spectator at Baseball Game Who Is Hit by Ball or Injured as Result of Other Hazards of Game—Failure to Provide or Maintain Sufficient Screening, 82 A.L.R.6th 417 (2013); Lawson By and Through Lawson v. Salt Lake Trappers, Inc., 901 P.2d 1013 (Utah 1995). Facilities can combat this potential liability issue by taking care to ensure that enough screened seats are provided at every game.

What Areas Qualify as the "Most Dangerous Parts of the Facility?"

The second prong of the Baseball Rule requires operators to screen the most dangerous parts of the facility, which has been interpreted by courts to mean areas that pose an unduly high risk of injury (i.e., directly behind home plate).

Like the first prong of the Baseball Rule, courts have also been careful not to prescribe precisely what, as a matter of law, are the required dimensions of a baseball field screen.

However, New York Courts and many others agree that the proprietor of a ballpark need only provide screening for the area of the field behind home plate, where the danger of being struck by a ball is the greatest. Operators are not legally required to implement screening along the entire baseline, where courts have noted that the risk of being struck by a stray ball is considerably less. Akins v. Glens Falls City School Dist., 53 N.Y.2d 325, 329 (N.Y. 1981); Wade-Keszey v. Town of Niskayuna, 4 A.D.3d 732 (App. Div. 3d Dep't 2004).

The Indiana Court of Appeals held that, while an operator has a limited duty to place protective screening in front of seats behind home plate, it does not owe a duty to install protective screening continuously from first to third base. The court reasoned that, in the absence of evidence suggesting that the number of seats behind protective screening was insufficient or inadequate to accommodate the ordinary demand for such seats, or that the spectator who was struck by a foul ball would not have been able to purchase seats behind the protective screening on the day in question if she had chosen to do so, the operator had fulfilled its limited duty so long as there is protective screening behind home plate. South Shore Baseball, LLC v. DeJesus, 982 N.E.2d 1076 (Ind. Ct. App. 2013).

Operators should also be aware that while there is a duty to provide screened seats, some states have held that there is a duty to provide reasonably safe protection to patrons at and along the ways

provided for their entering and exiting of the screened area. Olds v. St. Louis Nat. Baseball Club, 119 S.W.2d 1000 (Mo. Ct. App. 1938). Operators should note, however, that they are only required to protect spectators from foul balls within the confines of the stadium. Turner v. Mandalay Sports Entertainment, LLC, 124 Nev. 213 (2008).

Generally, it is recommended for operators to install protective screening in the area behind the home plate. Operators would also be wise to determine which areas additional areas of seating are at a high risk for foul balls and install protective screening there as well. In terms of the height of the protective screening, facility operators should install screening high enough to catch the majority, if not all, foul balls.

Injuries Sustained from Foul Balls: An Inherent Risk.

When a spectator buys a ticket to see a baseball game, they are accepting the inherent risks that come with being a spectator. Courts have been clear to emphasize that the risk of being struck by a ball during a baseball game is a risk that spectators are legally deemed to have accepted personal responsibility for, because that risk commonly inheres in the nature of the sport of baseball. Morgan v. State of New York, 90 N.Y.2d at 484, (N.Y. 1997).

For example, in one case involving the Baseball Rule, a court noted that a "spectator at a sporting event, no less than the participant, accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball The timorous may stay at home." Akins v. Glens Falls City School Dist., 53 N.Y.2d 325, 329 (N.Y. 1981).

Dozens of courts have followed suit in their application of the Baseball Rule, which represents a conscious decision to favor the collective interests of all spectators by rejecting as a matter of law individual claims of injured spectators. Coomer v. Kansas City Royals, 437 S.W.3d 184, 196 (M.O. 2014). Despite being decided across the country, these cases reflect the shared principles that it is not possible for players to play baseball without occasionally sending balls into the stands, it is not possible for a facility to protect each and every spectator from associated risks without fundamentally altering the game or the spectators' experience of watching it, and that ordinary negligence principles do not produce reliable acceptable results in these types of cases.

Legally, operators are held to have fulfilled their duty to safeguard spectators from the danger of being struck by thrown or batted balls by providing adequate screened seats for spectators who desire them. Mills for DeBlasio v. Durham Bulls Baseball Club, Inc., 845 S.E.2d 126 (N.C. Ct. App. 2020), review denied, 2021 WL 961683 (N.C. 2021). See Tarantino v. Queens Ballpark Co., LLC, 123 A.D.3d 1105, 2014 WL 7392284 (2d Dep't 2014). In sum, if a facility operates in a jurisdiction in which the Baseball Rule applies, operators can, and should, take steps to avoid being held liable for a spectator's injuries caused by a foul ball, errant puck, etc., by implementing adequate screening.

Turf Wars

Continued from page 1

Turf for breach of warranty and fraud.[3] In May 2016, Pleasant Grove hired another field supplier to replace its football field at a cost of over $300,000.

At trial, Pleasant Grove asked for the turf's replacement cost as damages. Pleasant Grove did not introduce any evidence of the difference in market value between the field it received and the field it was promised. This decision proved fatal to its breach of warranty claim on appeal. In the end, the jury found that FieldTurf breached its warranty and awarded Pleasant Grove $175,000.00 in actual damages. Both parties appealed and the case made its way up to the Supreme Court of Texas before it was remanded for the second time to the Sixth Court of Appeals.

Seven years after the lawsuit was filed, the Sixth Court of Appeals reversed the jury's award of damages and rendered a take-nothing judgment in favor of FieldTurf. According to the Court, the clear language of FieldTurf's warranty provided the exclusive remedy for breach of the warranty, specifically, the repair or replacement by FieldTurf, but not the cost to repair or replace the field. The Court also held that the jury was properly instructed on damages and that Pleasant Grove failed to produce evidence to support the jury's award of damages, (i.e., the difference in market value between the field it received and the field it was promised). Therefore, judgment was reversed. Despite FieldTurf's refusal to replace its defective synthetic-turf field, Pleasant Grove was left with the expense of replacing the field.

Examining the history of this case—including how the turf war between Pleasant Grove and FieldTurf arose—and the recent appellate decision sheds light on what parties engaging in similar transactions and alleging similar claims should consider. From limited warranty language to proving the correct measure of damages at trial, this case illustrates many potential pitfalls to avoid in business, in construction, and in court.

The Turf War Begins

In 2009, Pleasant Grove's governing board selected FieldTurf's Prestige XM-60 field with Duraspine fibers as its new

3 See Pleasant Grove Indep. Sch. Dist. v. FieldTurf USA, 634 S.W.3d 84 (Tex. App.—Texarkana 2020), rev'd in part, FieldTurf USA v. Pleasant Grove Indep. Sch. Dist., 642 S.W.3d 829 (Tex. 2022).

synthetic-turf field for the Pleasant Grove High School football field. FieldTurf provided the turf materials, but a separate subcontractor installed the materials onto the field between August and October 2009. FieldTurf's eight-year limited warranty for the artificial-turf field provided the following:

FieldTurf warrants that if Prestige XM-60 for football, soccer, synthetic turf proves to be defective in material or workmanship, resulting in a loss of pile height greater than 50%, 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 exclusive remedies available under this warranty, and all other remedies or recourses which might otherwise be available are hereby waived by [Pleasant Grove]. 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.

Later, in the summer of 2014, Pleasant Grove notified FieldTurf that the field was degrading, and its fibers were becoming brittle, causing loss of traction and color loss. A FieldTurf representative walked and photographed the field shortly thereafter. During an alleged "off the record" conversation between the FieldTurf representative and Pleasant Grove's athletic director and maintenance director, the FieldTurf representative admitted the field was in poor condition and that multiple FieldTurf fields were failing at a large rate. Pleasant Grove's directors alleged that the representative suggested they "raise a fuss about [FieldTurf's] product" because the "the squeakiest wheel [was] going to get attention." After continued complaints from Pleasant Grove, a FieldTurf designated Duraspine field evaluator inspected the field and found the field showed signs of accelerated wear in the fiber colors and had significant amounts of loose, broken fibers. By the end of 2014, Pleasant Grove demanded that FieldTurf replace the field pursuant to the warranty. However, in January 2015, FieldTurf Customer Service Director responded and stated that FieldTurf's inspection of the field found it to be in "fair/good condition." FieldTurf believed the issues were merely cosmetic and presented no playability or safety hazards, and that the field merely needed a "laymor scrape" to remove some of the rubber infill. Pleasant Grove rejected the laymor scrape as an acceptable solution and demanded that FieldTurf honor its warranty and replace the field. FieldTurf refused to replace the field, claiming the fiber degradation was "predominately a problem of appearance." Consequently, Pleasant Grove decided to file suit.

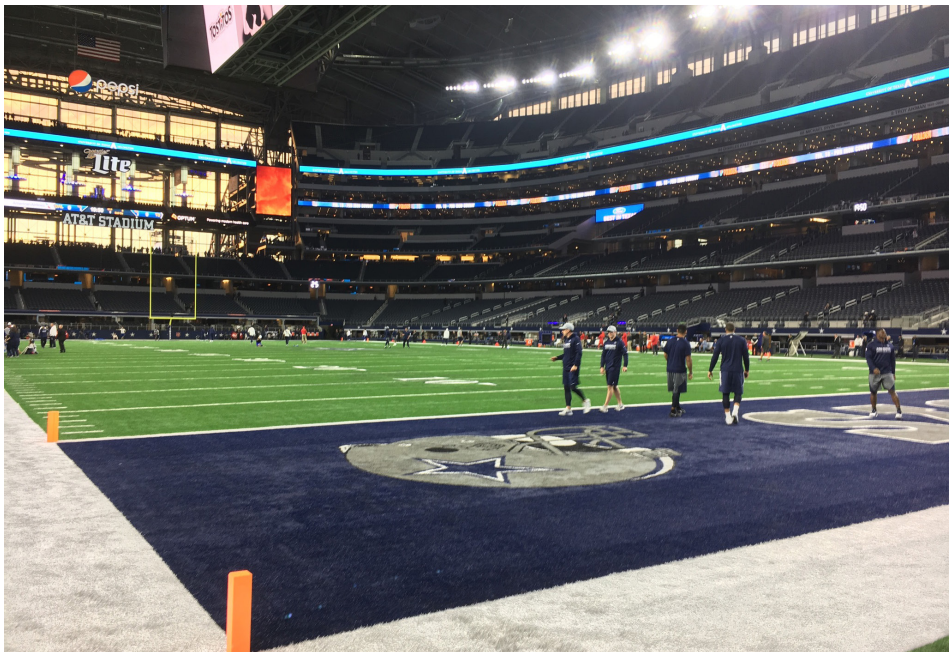
Procedural History

Prior to trial, the district court granted summary judgment in favor of Altech and partial summary judgment in favor of FieldTurf as to Pleasant Grove's fraud claims without specifying the grounds on which it was granting the motions or whether it was granting the motions on traditional grounds or no evidence grounds. Pleasant Grove's remaining claim for breach of warranty against FieldTurf proceeded to trial where the jury found that FieldTurf breached its warranty and awarded Pleasant Grove damages. Both FieldTurf and Pleasant Grove appealed. On appeal, the Court reversed Altech's summary judgment against Pleasant Grove as to the breach of warranty claim, affirmed FieldTurf's partial summary judgment against Pleasant Grove, and remanded the case for a new trial.

The parties appealed again to the Supreme Court of Texas, which affirmed the Sixth Court of Appeal's holding dismissing Pleasant Grove's fraud claims, reversed the judgment in part, reinstated the trial court's award of summary judgment in favor of Altech, reversed the appellate decision to remand the case for a new trial back to the Sixth Court of Appeals so that the previously unaddressed points of error could be considered.

Texas Court of Appeals Round Two

On remand for the second time, the Sixth Court of Appeals considered FieldTurf's challenges to the jury's verdict awarding Pleasant Grove damages for its breach of warranty claim and Pleasant Grove's argument that the jury was erroneously instructed on the measure of damages. As a part of its review, the Court began its analysis with the plain language of FieldTurf's warranty.



Warranty Language: Plain and Simple.

FieldTurf argued that because Pleasant Grove's sole remedy under the warranty and the Texas Uniform Commercial Code (UCC) was repair or replacement of the field, Pleasant Grove was not entitled to recover money damages and FieldTurf's motion for judgment notwithstanding the verdict ("JNOV") should be granted. The Court of Appeals examined the language in the warranty and found that the parties had agreed that repair or replacement were the "exclusive" and "sole" available remedies for a breach of warranty and that Pleasant Grove "waived" all other remedies. The Court noted that other Courts of Appeals and the Supreme Court of Texas have held similar contractual language as establishing an enforceable, exclusive remedy. Pleasant Grove attempted to argue that the warranty language meant the parties agreed to change the "measure of damages recoverable" from Tex. Bus. & Com. Code Ann. § 2.719(a)'s default measure based on the difference in market value to "the cost to repair or replace the field." However, the Court held that under the plain terms of the warranty, Pleasant Grove's remedy for FieldTurf's breach of warranty was limited to repair or replacement of the field, unless it pled, proved, and obtained a jury finding on an exception under Tex. Bus. & Com. Code Ann. § 2.714 that would support damages. Moving forward, the Court then considered Pleasant Grove's contention that the trial court incorrectly instructed the jury regarding the measure of damages.

Jury Instructions: It's Not About the Cost.

Pleasant Grove argued that the trial court erred by refusing its proposed instruction that the measure of damages was the cost of replacing the field. Pleasant Grove requested an instruction that "[r]eplacement cost" is "[t]he cost to repair or replace the field with a field constructed from materials of good quality." The Court rejected this argument because the remedy for a breach of an express warranty under Texas law is first found in the plain language of the warranty and the exclusive remedy for FieldTurf's warranty did not allow for money damages in the event of a breach. The Court went a step further and considered the exception of when an exclusive remedy, like FieldTurf's, fails of its essential purpose under UCC Section 2.719(b). The UCC allows the buyer to recover money damages under that

exception. Specifically, "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted."[4] Accordingly, even if Pleasant Grove had pled, proved, and obtained a jury finding that FieldTurf's express, exclusive warranty had failed of its essential purpose, the only damages Pleasant Grove would be entitled to are those under Section 2.714(b) and, according to the Court of Appeals, the language of Section 2.714(b) closely tracked the instruction provided to the jury.[5] Pleasant Grove further argued that it was entitled to a measure of damages that compensated it for the cost of replacing the field. In support, it relied on general breach-of-contract law to assert its damages should have been "expectancy" damages, which provide the "benefit of the plaintiff's bargain." The Court again rejected Pleasant Grove's argument, finding the breach-of-contract law relied on by Pleasant Grove to be inapplicable to the breach of warranty case at hand, noting that Pleasant Grove failed to provide, and the Court was aware of any breach of warranty case where the proposed instruction was given. Ultimately, because the instruction accurately stated the applicable breach of warranty law, was supported by the pleadings, and assisted the jury in answering the damage question, the Court of Appeals concluded that the trial court was within its discretion to instruct the jury as to the Section 2.714(b) measure of damages.

4 Tex. Bus. & Com. Code Ann. § 2.714(b).

5 The jury was asked "[W]hat sum of money, if any, if paid now in [this] case would fairly and reasonably compensate [the District] for its damages, if any, that resulted from the failure to comply?" This question was accompanied by the instruction: "Consider the following elements of damages, if any, and none other. The difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted."

Damages: Prove It or Lose It.

Lastly, FieldTurf argued that it was entitled to JNOV because Pleasant Grove failed to produce evidence of its damages. The Court agreed, referring to Texas law establishing that even in the face of an exclusive, limited remedy for breach of warranty, a party may still recover money damages under Article 2 of the UCC for breach of warranty "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose." Specifically, a party seeking money damages in contravention of the remedy provided for in the warranty must plead and prove that the warranty failed its essential purpose and must also seek a jury finding on the issue.[6] However, because the Court found that Pleasant Grove did not produce evidence "to support the jury's damages award," the Court did not consider whether Pleasant Grove had pled, proved, and obtained a jury finding that the warranty failed of its essential purpose. Therefore, because Pleasant Grove did not provide any evidence of the difference in the field's market value at the time of delivery, the Court found that Pleasant Grove's claim for breach of warranty failed as a matter of law and rendered a take-nothing judgment in favor of FieldTurf.

When purchasing and installing goods or equipment that are expected to undergo significant wear and tear, carefully review your contract and warranty to confirm if you are limited to dealing with only the seller for repair or replacement rather than making the repairs on your own.

6 See Great Am. Prods. v. Permabond Int'l, 94 S.W.3d 675, 684 (Tex. App.—Austin 2002, pet. denied).

Lessons From the Field

On August 15, 2022, Pleasant Grove filed a petition for review to the Supreme Court of Texas. Today, Pleasant Grove is left with the cost of having to replace its own football field, at least eight years' worth of attorneys' fees incurred in the legal battle against FieldTurf, and likely much regret for the decisions made thirteen years earlier. Those decisions serve as a cautionary tale for both end-users and attorneys in similar types of transactions and lawsuits. When purchasing and installing goods or equipment that are expected to undergo significant wear and tear, carefully review your contract and warranty to confirm if you are limited to dealing with only the seller for repair or replacement rather than making the repairs on your own. If sellers have concerns that the warranty is insufficient to properly protect them, they should consult an attorney and negotiate the terms of the warranty. Attorneys handling warranty cases must carefully review the terms of the warranty and—whether they dispute the way in which the warranty is construed or not—ensure they include damage models that support both interpretations of the warranty.

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