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SPORTS FACILITIES

How the law affects the sports facilities industry and the LAW

When Actions Speak Louder Than Coaches: Imposing Liability on Contact-Sports Participants

By Kendra K. McGuire[1], Charles F. Gfeller[2], and Olivia C. Tawa[3]

The Incident

Football is a popular collision sport, with almost every play involving players pushing, clashing, and running into each other. It is also a sport where emotions run hot, particularly when rival teams square off.

Despite football's inherent violence, well-established rules of play specifically delineate both permitted and prohibited contact. A breach of these universal rules can impose civil liability, and in some cases, criminal liability, on a player.

The charges filed in November of 2022 by the Washtenaw County Prosecutor's Office in Michigan provide a perfect illustration of a situation in which civil or criminal liability may be imposed on a contact sport participant due to unnecessarily violent behavior directed towards another player.

On October 29, 2022, the University of Michigan Wolverines hosted their in-

See LIABILITY on Page 9

1 Kendra K. McGuire is an Associate Attorney with Gfeller Laurie, LLP. She can be reached at kmcguire@gllawgroup.com.
2 Charles F. Gfeller is a Partner at Gfeller Laurie, LLP. He can be reached at cgfeller@gllawgroup.com.
3 Olivia C. Tawa is an Associate Attorney with Gfeller Laurie, LLP. She can be reached at otawa@gllawgroup.com.

INSIDE THIS ISSUE

Appeals Court Rules for Defendants in Bleacher Fall Case

A Michigan state appeals court has dealt a legal victory to a school district and several individual defendants, who were sued by a mother after her 3-year-old son fell through the space between the bleachers at a high school football game and suffered serious injuries.

Specifically, the court affirmed the lower court's dismissal of the claim against the school district and reversed the lower court's ruling, which had let stand the plaintiff's claim against the individual defendants, finding instead that the men were in fact entitled to governmental immunity.

By way of background, on October 21, 2017, Crystal Cavazos and her three-year-old son, GC, attended a football game at Collins Field, which is near Davison Middle School in Davison, Michigan. They were seated approximately 15 rows up in the bleachers, which correlated to approximately 17 feet above the ground. There were no riser planks between the seats and floorboards, which meant there were 15-inch gaps throughout the bleachers. During the game, GC slipped through an opening between the seat and the floorboard, fell to the ground, and suffered serious injuries.

Davison Community Schools (DCS), a defendant, owns and maintains the bleachers where the accident occurred. DCS's Director of Operations is responsible for, among other things, the maintenance of the grounds of the school district. Davison High School had utilized Collins Field for its football games until a new stadium, Cardinal Stadium, was built and opened in the fall of 2005. Daniel Romzek, the Director of Operations for the school district at the time, was involved with the new stadium project. The bleachers at Cardinal Stadium were built with riser planks. After the new stadium was built, the district decided that there was no need for the wooden, extra seating capacity at Collins Field.

See BLEACHER on Page 11

Another Buffer Zone Concern at Sports Facilities

By Gil Fried, Professor/Chair, University of West Florida

Buffer zone safety has been discussed in these pages over the years. The focus is often whether there is enough room around a basketball court or whether there is enough room around a football or soccer field. The issue has grown in importance over the last several years due to the increased use of technology. Now the issue is not walls and whether there is padding or not. The issue now is that there is so much technology on the sidelines and each element could possibly be a concern.

The most famous sideline collision was in a 1972 preseason game when Bubba Smith went out of bounds and ended up getting tangled in a down marker and chain. Smith's injury was described by one Baltimore Colt's executive as "one of the worst knee injuries our team doctor had ever seen." The incident resulted in the NFL changing their down markers so they no longer involved metal spikes thrust into the ground.

My concern is that the sidelines are getting more and more crowded. There are technology carts, first-aid tents, exercise bikes, heaters, and numerous other objects along the sidelines.

Another incident just happened in October, 2022. Denver Broncos linebacker Aaron Patrick tripped and fell on the mats at SoFi Stadium, tearing his ACL during an October 17th game at the stadium. Patrick claims his foot rolled on one of the mats as he tried to avoid colliding with the NFL's "green hat" TV liaison on the sidelines. The mats were used to cover cables used by the league to operate their replay monitors. Shortly after the injury the mats were removed. It appears that the mat were designed to make the area safer and in fact resulted in the opposite effect. Due to the injury, Patrick sued the NFL, ESPN, the Chargers and the Rams, alleging negligence in the placement of mats.

Patrick's attorney, William M. Berman of Berman & Riedel, was quoted as saying, "The guys holding the cables/wires were still in too close proximity to the field, creating what we believe

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

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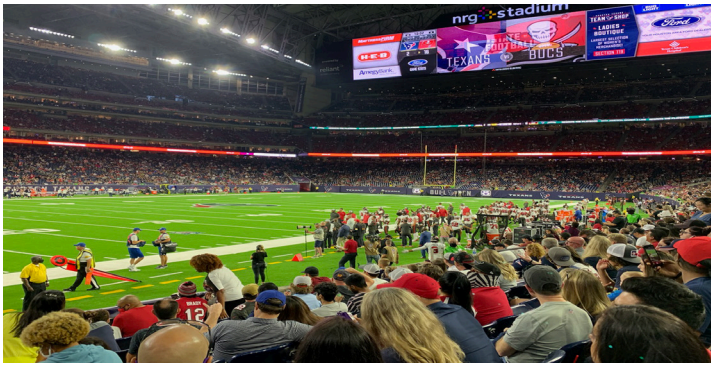
to still be a very dangerous condition," Berman said. "It's about player safety. It's for the betterment of the game."

My concern is that the sidelines are getting more and more crowded. There are technology carts, first-aid tents, exercise bikes, heaters, and numerous other objects along the sidelines. When the initial minimum 9-15 foot sideline buffer zone was developed (five yards per the National Federation State High Schools, 12 foot minimum per the NCAA (one sideline wings with more space behind team benches), and nine foot minimum on sides, 40 foot minimum by team areas for the NFL). The question is whether this is enough room?



This brings to mind the significant injury in 2015 to Reggie Bush. In 2018 a jury in St. Louis ordered the then St. Louis Rams to pay the San Francisco 49'ers former running back Reggie Bush $12.5 million for a season ending severe knee injury. A jury found the Rams 100 percent liable for Bush's injury and ordered the team to pay $4.95 million in compensatory damages and $7.5 million in punitive damages. Bush was pushed out of bounds during a game at what was then the Edward Jones Dome. He slipped on a surface that the lawsuit dubbed the ''concrete ring of death," about 35 feet (11 meters) behind the 49ers' bench.

While the Bush case dealt with a cement surface, there are numerous other hazards on a typical sideline and teams/venues need to closely examine what is on the sidelines and how they are placed. It might be critical to have all that equipment present for a game, not including all the broadcast equipment, thus care needs to be taken to try and provide more protection or warning so players going out of bounds will not be injured. There is no way to guarantee a perfectly safe area, but venue/event managers should examine their space usage and identify possible solutions (such as padding, signage, demarcation devises, etc…) to provide warning and possible protection for those on the sidelines or pushed/tackled into the sidelines.

New Jersey Court: Coaches Should 'Exercise Reasonable Care' When Deciding Where and When to Stage a Practice

By Gary Chester, Senior Writer

Participants in recreational sports generally must clear the high bar of reckless conduct by a defendant to recover for injuries. However, a New Jersey Supreme Court case, *Dennehy v. East Windsor Regional Board of Education*, 2022 N.J. LEXIS 978 (October 26, 2022), reminds us that the lesser standard of simple negligence can apply in some circumstances.

Background

On September 9, 2015, the Hightstown High School athletic director arranged after-school sports practices so that the girls' field hockey team would practice on the school's turf field when the boys' soccer team's use of the field ended at 3:45 p.m. At 3:00, Dezarae Fillmyer, the field hockey coach, instructed her players to warm up in an area adjacent to the turf field. During the informal warm-up, one of Fillmyer's players, Morgan Dennehy, was struck at the base of her skull by an errant soccer ball, allegedly causing substantial injuries.

Dennehy filed a negligence action in the Superior Court of New Jersey against Fillmyer, the board of education, the school, its athletic director, and others. She alleged failures to supervise, to prevent potential foreseeable and dangerous conditions, to provide appropriate safeguards, and to post suitable warnings of potentially dangerous conditions.

The defendants moved for summary judgment, arguing that the plaintiff could not meet the requisite standard of reckless or intentional conduct as established in case law. The plaintiff argued that the defendants owed her a duty of reasonable supervisory care.

The trial judge dismissed the action and the plaintiff appealed, challenging the judge's determination that she must prove her coach acted recklessly. The Appellate Division reversed, finding that the recklessness standard was inapplicable because Fillmyer "was not a co-participant." The defendants appealed to the state's highest court, which granted certification.

The N.J. Supreme Court Clarifies the Standard of Care

The defendants argued that the reckless conduct standard applied pursuant to *Crawn v. Campo*, 136 N.J. 494 (1994), where a catcher sued a baserunner in a recreational softball game for injuries sustained in a collision at home plate. There, the state Supreme Court held that the heightened standard of recklessness applies to causes of action for personal injuries by participants in recreational

sports, rejecting a lower court's reasoning that simple negligence applies. Subsequent decisions established that the recklessness standard applies regardless of whether an activity is commonly perceived as a "contact" or "noncontact" sport. The Court recognized a societal policy of encouraging participation in athletics and avoiding a flood of litigation.

But the Court found an important distinction in this case: Dennehy was alleging tortious conduct by her coach and not by a co-participant in her field hockey warm-up. The Court recognized Fillmyer as a supervisor whose alleged negligence was "her choice of the location of the impromptu workout prior to the scheduled practice and her failure to supervise her players as they waited their turn on the turf field."

The defendants relied on a case in which a karate instructor injured a student during a match, asserting that Fillmyer was a participant in the team's warm up session. The Court distinguished the precedent, recognizing that even if Fillmyer was actively participating in the practice when Dennehy was injured, the injury was not related to field hockey, but from an adjacent activity. Any liability would arise from the coach's supervisory duties and not from participating in the warm-up.

The Court reasoned that applying a simple negligence standard to the case does not undermine the policy of promoting youth participation in recreational sports. The Court added that "parents have the right to expect that teachers and coaches will exercise reasonable care when in charge of their children and that courts will not immunize a teacher's negligence by imposing a higher standard of care."

The Takeaway

A fundamental principle of risk management is to anticipate and prevent potentially dangerous situations. Sports managers must implement policies prohibiting coaches from conducting activities in an area that is dangerously close to another activity or take other precautions such as using a safety net or a partition to minimize risk. Coaches and administrators must recognize potential safety risks in practice as well as in formal competition.

NFL Linebacker Sues, Alleging Dangerous Sideline Conditions Led to His Injury

Aaron Patrick, a linebacker for the Denver Broncos, has sued the NFL, ESPN, Los Angeles Chargers and others, claiming they were negligent for sideline conditions, which led to a season-ending knee injury.

The injury, a tear of his anterior cruciate ligament (ACL), occurred on October 17, 2022 during an overtime loss to the Chargers at SoFi Stadium in Los Angeles.

Patrick, who filed the lawsuit in California Superior Court, suffered the injury when he veered out of bounds, collided with an "improperly situated" NFL TV liaison, and stepped on a mat near the sideline, which was there to cover cables connected to an NFL instant replay monitor.

The lawsuit is similar to litigation brought by former NFL player Reggie Bush, who slipped on concrete after running out of bounds at Edward Jones Dome in St. Louis in 2015 and suffered a knee injury. Bush was awarded $12.5 million by a St. Louis jury in 2018.

In the instant case, Patrick alleged negligence on the part of every named defendant, citing California Civil Code § 1714, which "holds negligent parties financially liable for damages suffered by those injured as a result of the negligence."

In a statement released to the media, Patrick's attorney, William M. Berman, said, "Player safety should be the foremost of importance to the NFL and its owners. The NFL is a multi-billion-dollar sports enterprise and business, and it needs to do everything possible to protect its players from non-contact game injuries. As for Patrick's injuries, Sofi Stadium was built at a $5,000,000,000 expense; the stadium should have the state-of-the-art equipment to protect for player safety, and not use the type of $100 mats that you would expect to see in a restaurant kitchen."

Law Firm Announces Partnership with the Texas Rangers, Including In-Stadium Signage

Bailey & Galyen has announced a two-year business relationship with Major League Baseball's Texas Rangers, designating the legal practice as the Official Law Firm Partner of the Rangers. The deal includes entitlement of the Suite Level at Globe Life Field, presence on the Rangers' digital platforms and in-stadium signage, as well as the Texas Rangers 9th-inning "Get Home Safe" program. This program includes in-stadium signage reminding fans to drive responsibly and a public service announcement on every Texas Rangers Radio Network home game broadcast, progressing the legal practice's mission of advocating for responsible drinking.

"The Texas Rangers are an integral part of one of the greatest sports and entertainment complexes in the world," said President and CEO of Bailey & Galyen, Phillip Galyen. "This partnership allows us to continue to provide high-quality legal services to consumers throughout

the Dallas-Fort Worth Metroplex and the state of Texas while playing our part in putting the best interest of the community at the forefront."

In addition, Bailey & Galyen will be the Official and Exclusive Law Firm Partner of the Texas Live! Entertainment Complex, adjacent to Globe Life Field. As part of the Texas Live! partnership, Bailey & Galyen will receive in-venue signage, digital marketing, and an extension of the "Get Home Safe" program following major events at the venue. The legal practice will also receive an endorsement from legendary Ranger, Ivan "Pudge" Rodriguez as its ambassador during the 2023-2024 season to promote inclusivity among the Hispanic community.

"The Texas Rangers are proud to partner with the leading law firm in the state of Texas," said Jim Cochrane, the Rangers Senior Vice president of Partnerships. "As we set out to find a partner in the category it was important to align with a firm that matched our organization's community-focused approach. It became clear through our many discussions that Bailey & Galyen was a perfect match. We look forward to joining them in advocating responsible drinking via the Get Home Safe program at Globe Life Field, Texas Live!, and throughout all of Rangers country."

Bailey & Galyen bills itself as "one of the Lone Star State's largest premier consumer law firms."

LA Kings Announce Historic New Ice Rink Partnership in California

The Town of Mammoth Lakes, Mammoth Lakes Tourism (MLT), and Mammoth Lakes Recreation have launched an historic new, community-driven partnership with the National Hockey League (NHL) franchise LA Kings. As part of the expansive, multiyear partnership, brokered by AEG Global Partnerships, the partners have teamed up to launch "LA Kings Ice at Mammoth Lakes"– the Town's first indoor Olympic-sized ice rink.

The facility will operate within a newly constructed, multi-use Community Recreation Center (CRC) that is set to open to the public in 2023. Additionally, as part of the agreement, MLT will continue its longstanding relationship as an official partner of the LA Kings.

The CRC, located at Mammoth Creek Park, will be a 40,000 square foot Sprung Performance Arena enclosing the brand new "LA Kings Ice at Mammoth Lakes." The CRC will be open and available to the public year-round, with the new ice rink operating annually each winter season between the months of October and April. During the summer months, the Olympic-sized rink will be transformed into a fully programmable, multi-use RecZone, which will serve as the hub for the expanding Parks and Recreation Department's summer camps and programs. To maximize operational efficiencies and to assist in the development of year-round programming, American Sports Entertainment Company, LLC (ASEC), one of the largest independent owner/operators of ice rink facilities in the United States, have been contracted by the Town to deliver year-round technical and operational consulting services for the facility.

Broad community input from local residents and industry experts alike helped inform and build the programming playbook for "LA Kings Ice at Mammoth Lakes." Based on this feedback, daily drop-in or frequently programmed on-ice activities at the facility will include public skating, youth and adult hockey, figure skating, and learn to skate lessons as well as the expanding curling program. The rink will also serve as the home of Mammoth Lakes Youth Hockey and the Mammoth Stars. Mammoth Lakes Youth Hockey is an all-volunteer and USA Hockey-sanctioned program providing in-house and travel hockey for the youth of the greater Eastern Sierra region. Residents and visitors of Mammoth Lakes will also be able to enjoy a multitude of court sports, community events and recreational activities programmed throughout summer delivering all recreation, all the time!

Under the agreement, the LA Kings brand will be prominently featured at "LA Kings Ice at Mammoth Lakes" including distinctive signage throughout the facility and in center-ice. The LA Kings will also advance its youth hockey development initiatives via LA Kings Youth Hockey camps hosted at the rink as well as unique on-site programming designed to promote hockey and increase accessibility of the sport amongst local youth.

As an official partner of the LA Kings, MLT will have prominent brand exposure during March and April LA Kings home games at Crypto.com Arena, and across the team's digital channels. The partnership also provides a significant opportunity for MLT to introduce visitors from Los Angeles and around the world to the Town, along with some of its best sights and attractions. Mammoth Lakes is known for its year-round natural beauty and this partnership further promotes MLT's new, "The Real Unreal" marketing campaign and reinforces the Town's position as a world-class travel destination.

Risk Management Is Top of Mind for VP of Guest Experiences Shane Beardsley

Whether working in the sports industry, or teaching sports management as a college professor, Shane Beardsley has lived and breathed sports for most of his 25-year career.

So, it was no surprise that when he took over as Vice President of Guest Experiences of Jacob K. Javits Convention Center less than a year ago, Beardsley brought along his approach to risk management that served him exceedingly well in sports.

We wanted to learn more about that approach, so we sought out Beardsley, a member of the Advisory Board for Sports Facilities and the Law, who holds a Bachelor of Science Degree in Sports Management from the State University of New York College at Cortland and a Master of Science Degree from Manhattanville College in Purchase, NY, where he currently serves as an Associate Professor.

As someone enters your venue, there are different access points, where you might have overall concerns about slipping and tripping. It's very important what Dr. Fried said that a great facility manager will walk around the space and take a different path each and every day to try to find out the different problems.

Question: How did you get into the facilities business?

Answer: It's kind of a funny story. I got my first internship from a connection through my mom. She worked with a group of paralegals in upstate New York, and one of the other paralegal's sons was the strength and conditioning coach for the Red Sox. And that's how I got my internship with the Red Sox. I also remember being the backstage manager for school plays, which I really enjoyed.

Q: You have been at the Jacob K. Javits Convention Center for nine months. Tell us about your role there as Vice President, Guest Experiences?

A: Ultimately, it's about the guest experience of anybody who comes into the Javits Center and that includes exhibitors, patrons, event production teams, etc. I manage all of the third-party and outward-facing employees and staffs and crews that are here. It's exhibitor solutions, whether it's 10 or if it's 10,000 exhibitors that come in

for a show.

Q: How does your job intersect with risk management or legal?

A: Almost continuously. Regarding risk management, we have a very good and entrenched security team here. That responsibility cannot be underestimated, given that the facility is six blocks long and more than 3 million square feet. Those responsibilities include making sure we are ADA compliant as well as holding higher-end security conversations while working with outside security companies. So, the risk management or security conversation is always there, for all of us. As for the legal side, it's about reviewing and maintaining contracts that the vendors that we have, be it Starbucks, FedEx, and everyone else. We are also constantly going through the actual contracts with our catering companies, ensuring that the submissions that are made and the billing cycles and everything else are all brought to fruition when the event closes. There's also the legal component for RFPs. Because we're a state entity, all of our contracts have to go through state comptroller's office for approval. So, there's a lot of RFPs and FOIA requests and all that fun stuff.

Q: Is there interaction with outside law firms?

A: Yes, but it is very specific to areas of the law. There might be one law firm for liquor-related issuers and another for tripping and falling hazards.

Q: Is there a philosophy you have adhered to that you can share with us?

A: Actually, there is, and I picked it up from Dr. Gil Fried's book. I'm going paraphrase him. It's about the ability to walk around the space and to be mindful of the journey of all of your patrons. It's looking at it from driveway to driveway. As someone enters your venue, there are different access points, where you might have overall concerns about slipping and tripping. It's very important what Dr. Fried said that a great facility manager will walk around the space and take a different path each and every day to try to find out the different problems. I do that every morning here.

Q: What are you most proud of in the nine months you've been there, which you've been able to get accomplished?

A: My proudest achievement has been the ability to get people to work together, to work closely with our sales and catering teams to reach the levels of event activity that this venue experienced prior to the pandemic. That's a win-win for the Javits Center and a win-win for New Yorkers. I want everyone to realize that ultimately when somebody comes into our space, they're coming to the Javits Center for a one-of-a-kind experience they won't soon forget.

Liability

Continued from page 1

state rivals, the Michigan State Spartans, for an evening game. For the first time in three years, the Wolverines defeated the Spartans, 29-7. Following the game, several Wolverines mockingly waved the Spartans off the field as the Spartans exited into their locker room through a tunnel.

Two Wolverines, graduate defensive back Gemon Green ("Green") and sophomore defensive back Ja'Den McBurrows ("McBurrows"), were walking to their locker room alongside the Spartans in the tunnel when they were suddenly physically assaulted. In a video that surfaced online shortly following the incident, Spartans can be seen pushing, punching, and kicking McBurrows. In another video, a Spartan appears to use his helmet to swing at and strike Green. Both McBurrows and Green sustained injuries as a result of the assault.

One month later, the Washtenaw County Prosecutor's Office in Michigan filed criminal assault charges against a total of seven Michigan State players for their actions in the tunnel on October 29, 2022.

Five players – redshirt sophomore linebacker Itayvion "Tank" Brown, junior safety Angelo Grose, redshirt junior cornerback Justin White, senior defensive end Brandon Wright, and freshman defensive end Zion Yong – were each charged with one misdemeanor count of aggravated assault. In Michigan, a conviction for a misdemeanor assault carries a prison term of up to one year. Additionally, senior linebacker/defensive end Jacoby Windmon was charged with one count of assault and battery, which carries a maximum sentence of 93 days in prison in Michigan.

The most serious charge, felonious assault, was brought against redshirt sophomore cornerback Khary Crump ("Crump"), who faces up to four years in prison if convicted. Crump was the player who appeared to swing his helmet at Green, which would likely account for his more serious charge. Michigan state law defines a felonious assault as an attack "using knife, iron bar, club, brass knuckles, or other dangerous weapon without intending to commit murder or to inflict great bodily harm."[4] To support the more serious of felonious assault, prosecutors likely argued that Crump brandished his helmet as a dangerous weapon during the attack.

All the charged players were suspended indefinitely while Michigan State, the Big Ten College Football Conference, and local police investigations took place. Another player, freshman cornerback Malcom Jones, was suspended from

4 Mich. Comp. Laws § 750.82 (1994).

the team, but he was not included as a charged individual.

Legal Liability for Actions That Go Beyond the Bounds of the Sport

The University of Michigan-Michigan State incident offers valuable insight into the legal liability of the charged players for their actions taken during – or immediately following the conclusion of – a sporting event.

In addition to following the rules of play, participants generally have a duty of care to avoid causing reasonably foreseeable harm to other players.

However, in the context of sports, some jurisdictions apply a "contact sports exception" to the ordinary duty of care. This exception modifies the standard of care and acts as a bar to recovery for injuries caused by negligent conduct sustained in a contact sport, unless "caused by willful and wanton or intentional misconduct."[5] In other words, the "contact sports exception" makes it more difficult to sustain an action against a defendant because the plaintiff must prove that the defendant acted with recklessness or intent to cause bodily injury, not merely a failure to avoid causing reasonable harm.

In football, the rationale behind the "contact sports exception" is that football requires players to constantly come into physical contact with each other, often with great force. For example, linemen aggressively charge the opposing line shoulder to shoulder; a ball carrier risks being violently thrown to the ground, while a tackler risks jumping toward a quickly moving body.[6]

Common Defenses to Legal Liability

The "assumption of the risk defense" is frequently applied to claims arising out of participation in sporting events. Under this defense, a plaintiff's recovery is barred when the plaintiff takes action that assumes the risk of the injury. Note, however, that the "assumption of risk defense" is not recognized in all jurisdictions, and in some states, the doctrine of assumption of risk has been subsumed within the doctrine of comparative negligence.

For example, the Supreme Court of California applied the "assumption of risk defense" when it held that a defendant, who ran into and injured a co-participant when jumping for a ball during a touch-football game, did not breach a legal duty of care owed to the injured co-participant. Even though the defendant's play was rough, it was not so rough or reckless that it totally fell outside of the range of the ordinary activities involved in the sport, because jumping to catch a ball is a reasonably regular and foreseeable aspect of football. In other words, the injured co-participant assumed the risk of being injured as the result of coming into physical contact with a player who was conforming to the regulations of the sport. As a result, the injured co-participant's recovery was barred under the primary assumption of risk doctrine.[7]

Another defense that can be used to combat civil or criminal charges is the "consent defense." Generally, when an individual participates in a sporting event, he or she consents to reasonable contact in accordance with the understood rules and usage of the sport.[8] The "consent defense" fails, however, if the participant engages in such violent contact that the co-participant would not have reasonably consented to it.

In one case involving the "consent defense," the defendant was criminally charged with third-degree assault after he threw a punch while he was tackling the complainant, a ball carrier on the opposing team. The court opined that the complainant could not have legally consented to an "overly violent" activity. The defendant's actions were "overly violent" because the defendant intended to punch the complainant. As a result, the defendant's charge was upheld.[9]

In another case, decided by the Supreme Court of Virginia, a minor middle school football player filed a civil assault and battery charge against his football coach after the coach lifted the player up and slammed him on the ground during a tackling demonstration. The court held that by participating, the minor player consented to physical contact with players of like age and experience. However, the minor player did not expect or consent to his participation in an aggressive tackle by an adult football coach. The court reasoned that, while receiving an injury when tackling or being tackled may be a part of football, the coach's action – given the disparity in size and experience – could lead a reasonable person to conclude that the coach acted imprudently and with utter disregard for the involved player's safety. For these reasons, the minor player sufficiently stated a cause of action for assault and battery against his coach.[10]

In a factually similar case decided by the Western District of the Missouri Court of Appeals, a high school football player filed civil assault and battery charges against his football coaches after sustaining injuries when he was tackled during a practice by one of the coaches, who was wearing full protective padding. The court found that the player voluntarily consented to the risks reasonably inherent in football, which included physical contact and collisions with other players, but the player's physical contact with his coach was not a reasonably foreseeable consequence of playing high school football. As such, the coaches' charges were upheld.[11]

5 *Pfister v. Shusta,* 657 N.E.2d 1013, 1014 (Ill. 1995).
6 *Karas v. Strevell*, 884 N.E.2d 122, 132 (Ill. 2008).
7 *Knight v. Jewett*, 834 P.2d 696, 712 (Cal. 1992).
8 *Avila v. Citrus Community College Dist.*, 131 P.3d 383, 395 (Cal. 2006).
9 *People v. Freer*, 86 Misc. 2d 280, 284 (Dist. Ct. N.Y. 1976).
10 *Koffman v. Garnett,* 574 S.E.2d 258, 261 (Va. 2003).
11 *Elias v. Davis*, 535 S.W.3d 737, 746 (Mo. App. 2017).

Lessons Learned

Although the above-referenced cases involve situations where football players filed civil charges against other participants, the University of Michigan-Michigan State incident offers valuable insight into the potential criminal liability of an athlete's potentially criminal actions taken inside or outside the lines.

Taken together, the Michigan – Michigan State incident and the above-referenced cases suggest that a contact sports participant, or coach, may be held liable for their actions both on and off the field, if those actions go beyond what the other participants bargained for. Controlled violence on the gridiron is one thing – players know what they are getting themselves into; however, conduct that is effectively criminal (i.e., assault and battery) or which goes beyond the bounds of what players signed up for (i.e., coaches tackling players) could lead to criminal and/or civil exposure.

For those reasons, contact sports coaches should educate their players on the civil and criminal repercussions of their on-field and off-field actions, and should also make certain that their players are following the prescribed rules of the game and not engaging in potentially reckless or criminal conduct.

Facility operators should take care to implement security procedures around the facility, including the tunnels and locker rooms. In instances of heated rivalries, where emotions can be anticipated to potentially boil over, keeping the respective teams at arms-length is advisable. Moreover, the bigger and more physically mature the players, the more security a facility operator should have in place to protect against a Michigan – Michigan State tunnel-like scenario.

As an example, at their next home game following the incident, the University of Michigan increased the security presence in and around the tunnel. It also prevented University of Michigan players from entering the tunnel until each player from the opposing team left the field at halftime and after the game to ensure the protection of all participants.

In sum, contact sports – like football – have inherent risks to participants. Sports have rules to govern players' conduct and penalties that are assessed as part of the game when rules are broken. Despite this, players and coaches alike must acknowledge the legal precedent that they are not immune from civil or criminal liability when their actions go beyond what is reasonably foreseeable to reach a level that surpasses what is acceptable.

Bleacher

Continued from page 1

In furtherance of the plan to remove the wooden bleachers, DCS consulted with the architect that designed Cardinal Stadium, THA Architects and Engineering (THA). Jacqueline Hoist, an architect for THA, met at Collins Field to review the project. This meeting took place in December 2005, and Hoist prepared notes in conjunction with that meeting. The project resulted with the wooden bleachers being removed. No riser planks were added to the remaining aluminum bleachers at Collins Field.

In 2008, Romzek, while still the Director of Operations for the school district, contracted with American Athletix, LLC, a co-defendant, to perform an inspection of the various bleachers in the district, including the bleachers at Collins Field. A report was issued on May 22, 2008, which covered inspections for seven different "units" of bleachers. With respect to Collins Field, the report read under "Immediate Safety Issues" that "entry stairs sinking, bent seat, no riser planks, safety rails have large gap." Later in the report, under the "General Inspection" section, concerning all seven units of bleachers, it mentioned: "There no [sic] riser planks at Collins Field."

Romzek did not recall making any inquiries to American Athletix regarding the report or its reference to riser planks. Romzek explained that it was his understanding that riser planks were not required on the Collins Field bleachers because there was no such code requirement at the time they were built. He also stated that he was unaware of any requirement to retrofit preexisting bleachers. There is no dispute that neither Romzek nor anyone from DCS did anything about the lack of riser planks after receiving the 2008 report.

Romzek left DCS in 2012, and Philip Thom took over as Director of Operations. Thom stated that he did not see the 2008 report until this litigation arose. In 2013, Thom asked American Athletix to perform another bleacher inspection for the district. Section 3.1 of the report, titled "Planks and Seats," stated, in pertinent part:

"All aluminum, wood seat, foot and riser planks, and end caps were checked for cracks, breaks, or other damage. Damaged boards and missing end-caps represent a safety hazard and could cause tripping, pinching, and sliver accidents as well as weaken the structural integrity of the installation.

The U.S. Consumer Product Safety Commission suggests in its Guidelines for Retrofitting Bleachers that 'Any opening between the components in the seating, such as between the footboard, seatboard, and riser, should prevent passage of a 4-inch sphere where the footboard is 30 inches or more above the ground and where the opening would permit a fall of 30 inches or more.'

HS Football Stadium - Good condition—No Action Needed.

MS Football Stadium - Good condition—No Action Needed.

Baseball Diamond - Damages, missing end caps - Action Needed.

Soccer Field - Damages, missing end caps - Action Needed.

Tennis Courts - Damages, missing end caps - Action Needed."

Further, Thom testified that he asked American Athletix for a quote to fix "everything." American Athletix later provided a quote to Thom, but it did not include any work for adding riser planks. It is undisputed that no riser planks were added to the Collins Field bleachers after the 2013 inspection, and there is no evidence of any other "professional" inspections having taken place between 2013 and the 2017 accident.

The plaintiff sued on May 13, 2019, alleging three counts: negligence against American Athletix, public-building defect against DCS, and gross negligence against Thom and Romzek.

DCS, Thom, and Romzek moved for summary disposition on the basis of governmental immunity. DCS argued that the public-building exception to governmental immunity did not apply to bleachers, because bleachers are not a "building." Alternatively, DCS argued that the hazard at issue involved a design defect, which falls outside the purview of the duty imposed by MCL 691.1406. For their part, Thom and Romzek argued that their conduct did not rise to the level of gross negligence, and that liability could not attach to them because their conduct was not the proximate cause of GC's injuries.

American Athletix moved for summary disposition under MCR 2.116(C)(10). American Athletix argued that the plaintiff's claim against it sounded in premises liability and that, as a result, it could not be liable because it was not in control of the property. American Athletix alternatively argued that any negligence claim necessarily failed because it did not owe a duty to GC.

The trial court granted summary disposition in favor of American Athletix, ruling that the plaintiff's claim against it sounded in premises liability and because American Athletix was not in control of the premises, it was entitled to summary disposition. The court further determined that to the extent that the claim sounded in ordinary negligence, the claim failed because American Athletix owed no duty to GC. The trial court also granted summary disposition in favor of DCS, finding that for purposes of the motion, it was considering the bleachers to be a public building. However, it held that DCS was nevertheless entitled to summary disposition because the gap at issue in the bleachers was a "design defect," which is not included under the public-building exception to governmental immunity.

The trial court, however, denied the motion for summary disposition as to Romzek and Thom. The court determined that viewing the evidence in a light most favorable to the plaintiff, there was a genuine question of material fact whether their actions represented gross negligence.

The governmental tort liability act (GTLA), MCL 691.1401 et seq., states, in pertinent part:

"Each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all the following are met:

(a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.

(b) The governmental agency is engaged in the exercise or discharge of a governmental function.

(c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. [MCL 691.1407(2).]"

Gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a). In *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004). The court explained its rationale as follows:

"Simply alleging that an actor could have done more is insufficient under Michigan law, because, with the benefit of hindsight, a claim can always be made that extra precautions could have influenced the result. However, saying that a defendant could have taken additional precautions is insufficient to find ordinary negligence, much less recklessness. Even the most exacting standard of conduct, the negligence standard, does not require one to exhaust every conceivable precaution to be considered not negligent."

The instant court noted that the "much less demanding standard of care—gross negligence—suggests, instead, almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks. It is as though, if an objective observer watched the actor, he could conclude, reasonably, that the actor simply did not care about the safety or welfare of those in his charge."

Turning specifically to Romzek, it wrote that "relying on his understanding that the bleachers were compliant with any applicable codes and his knowledge that the bleachers had not caused any injuries, it is hard to envision how a reasonable juror could conclude that Romzek's failure to implement riser planks showed that he 'simply did not care about the safety or welfare of those in his charge." Tarlea, 263 Mich App at 90.' Romzek could have acted to make the bleachers safer. However, 'saying that a defendant could have taken additional precautions is insufficient to find ordinary negligence, much less recklessness. Even the most exacting standard of conduct, the negligence standard, does not require one to exhaust every conceivable precaution to be considered not negligent.' Id.

Therefore, although there may be a question of fact regarding whether Romzek was negligent by failing to address the gaps in the bleachers, reasonable minds could not differ as to whether his conduct was so reckless as to demonstrate a substantial lack of concern for whether an injury resulted. Thus, we conclude that the trial court erred when it denied the motion for summary disposition with respect to Romzek."

The appeals court also sided with Thom, noting that he authorized "the quote from American Athletix to correct 'everything.'" Therefore, he "cannot thereby be deemed to have exhibited a lack of care about the safety of others. Like Romzek, Thom was also unaware of any injuries associated with the bleachers. In short, a reasonable juror could not find that Thom's failure to add risers demonstrated that he 'did not care about the safety or welfare of those in his charge.' Tarlea, 263 Mich App at 90."

As for the appeals court's review after the lower court's grant of summary judgment to American Athletix, the court wrote:

"Looking at the complaint as a whole, [the] plaintiff has alleged both ordinary negligence and premises liability against American Athletix. But because there is no question of fact that American Athletix was not the possessor or otherwise had any control over the premises, summary disposition was proper with respect to the premises-liability aspects of plaintiff's claim."

Turning to the negligence claim against American Athletix, the appeals court focused on the following "threshold question …whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations? If no independent duty exists, no tort action based on a contract will lie. *Fultz v Union-Commerce Assoc*s., 470 Mich. 460, 467; 683 N.W.2d 587 (2004)."

According to the court, "In this case, the trial court did not err when it granted American Athletix's motion because that entity did not owe GC a duty that was separate and distinct from the contractual obligations it owed to DCS."

Furthermore, "it is undisputed that American Athletix did not do anything to the bleachers themselves to make the bleacher gaps larger or otherwise more hazardous."

Turning to DCS and the plaintiff's argument that the public-building exception pierced the governmental immunity protections, with regard to the exception, the court concluded that governmental agencies "are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition."

The instant court went on to summarize that "because the public-building exception excludes claims of design defects, to avoid governmental immunity, a plaintiff must establish that the defective condition was the result of the failure to repair or maintain."

The "essence of the claim is for a design defect, not the failure to repair or maintain," it added, in affirming the lower court.

G. C., by Next Friend Crystal Cavazos v. Davison Community Schools and American Athletix, LLC et al.; Ct. App. Mich.; No. 357805, No. 357966; 10/13/22

