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SPORTS FACILITIES

How the law affects the sports facilities industry and the LAW

School Playground Gear Not Protected by Colorado Governmental Immunity Act

By Jim Moss, Esq. Attorney, Author, and Advisory Board Member jim@rec-law.us

In St. Vrain Valley Sch. Dist. RE-1J v. A.R.L., 2014 CO 33; 325 P.3d 1014; 2014 Colo. LEXIS 362, the plaintiff was playing on a piece of school equipment called a zip line when she fell and fractured her wrist. The court described the playground equipment as an apparatus. The defendants, who included the principle of the school where the playground was located, filed a motion to dismiss based on C.R.C.P. 12(b)(1) stating the court lacked jurisdiction based on the Colorado Governmental Immunities Act, (CGIA).

The zip line was a horizontal pipe with a pole that hung down. The rider stepped up off the ground, grasp the handle on the pole and rode along the ground. The zip line looked more like any other piece of playground equipment rather than riding a cable between towers or across a valley you may recognize as recent thrill rides. Before reaching the end of the ride the plaintiff fell off.

The plaintiff's argued the defendant waived jurisdiction based on the recreation area waiver in the CGIA § 24-10-106(1)(e). The CGIA did not give any court jurisdiction to review cases against entities in the state of Colorado, unless there was an

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As Baseball Fans Fall to Their Death, Concerns Mount

By Jordon Kobritz

Major League Baseball may have a safety issue. But contrary to what you might be thinking, this one isn't due to the action on the field.

Much has been made over the recent spate of fan injuries resulting from foul balls and pieces of shattered bats flying into the stands. The most recent injury to garner headlines occurred on May 24 at Yankee Stadium during a game between the Yankees and Kansas City Royals. The Yankees' Chris Carter broke his bat and the barrel flew into the stands, injuring a young boy sitting a few rows behind the third base dugout.

Two years ago, MLB "urged," but did not require, clubs to expand ballpark netting down each foul line a minimum of 70 feet from home plate. According to the league, all teams have complied with the recommendation and nine teams have extended the netting at least 20 feet further. Among the reasons teams are reluctant to extend netting beyond 70 feet from home plate are difficulties related to ballpark construction and the fear that fans who want to snag a foul ball, and are willing to risk their safety to do so, will be reluctant to pay premium prices for seats that no longer provide that

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THIS ISSUE

Concealed and Open Carry Laws on College and University Campuses

By Dr. Andy Pittman and Prof. Gil Fried

The right to keep and bear arms is protected by the Second Amendment to the United States Constitution passed December 15, 1791. (U.S. Const. amend II). However, this right is not an unlimited right as Justice Antonin Scalia wrote in delivering the majority opinion in District of Columbia v. Heller. (554 U.S. 570(2008) Two years later in McDonald v. City of Chicago, the US Supreme Court extended that right to state and local gun control laws and not just federal laws. (561 U.S. 742 (2010)

Open carry is the practice of openly carrying a firearm in public as distinguished from concealed carry or carrying a concealed weapon which is the practice of carrying a weapon in public in a concealed manner, either on one's person or in close proximity.

Currently 45 state constitutions allow open carry of weapons with few or no restrictions. US citizens, permanent resident aliens, and certain non-immigrant aliens are allowed to carry weapons subject to conditions imposed by the applicable state. The terminology describing open carry varies by state. As defined earlier, open carry is the act of publicly carrying a firearm on one's person in plain sight. Plain sight is broadly defined as not being hidden from common observation, but varies somewhat from state to state. Some states specify that open carry occurs when the weapon is partially visible while other jurisdictions require the weapon to be fully visible to be considered carried openly. Printing refers to a circumstance where the shape or outline of a firearm is visible through a garment while the gun is still fully covered and is generally not desired when carrying a concealed weapon. Brandishing can refer to different actions depending on the jurisdiction. These actions can include printing through a garment, pulling back clothing to expose a gun, or unholstering and exhibiting a gun.

The categories of open carry laws are very similar to concealed carry firearms. Permissive open carry states allow open carry with few restrictions while other states have other regulations as to whom may carry open weapons.

Currently there is no federal statutory law prohibiting the issuance of concealed-carry permits. All 50 states have passed laws allowing qualified individuals to carry certain concealed firearms in public, either without a permit or after obtaining a permit from a designated government authority. Regulations differ widely by state.

There are restricted premises where concealed carry of weapons is not allowed.

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SPORTS FACILITIES and the LAW

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Concealed and Open Carry Laws on College and University Campuses

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These premises may include educational institutions and sporting event venues. In 2004, the United States Congress enacted the Law Enforcement Officers Safety Act (18 U.S.C. sections 926B and 926C), which allows two classes of persons — the "qualified law enforcement officer" and the "qualified retired law enforcement officer" — to carry a concealed firearm in any jurisdiction in the United States regardless of any state or local law to the contrary with certain exceptions.

Recently several states have considered or passed legislation concerning the carrying of firearms on college and university campuses and also to athletic events. In April, the Arkansas House of Representatives passed a bill which outlaws bringing handguns to collegiate sporting events. About one week earlier, Arkansas Governor Asa Hutchinson signed HB 1249 which would have allowed concealed carry in places such as government buildings, bars, and college campuses. The new bill amends HB 1249. In early May, Georgia Governor Nathan Deal signed a campus carry law which places the burden of implementing the regulations on college and university leaders. Starting July 1, Kansas' proposed law will require state universities to allow concealed carry on college and university campuses. The only way university buildings or facilities would be exempt is if there are security measures in place, such as metal detectors at building entrances and security guards. On March 23rd, North Dakota's Governor, Doug Burgum, signed legislation that would allow most adults in that state to carry a hidden firearm without a permit. This means that the state will become as of August 1, one of about a dozen so-called constitutional carry states. In December, Ohio lawmakers approved a bill that would give public colleges and universities the option to be concealed-carry campuses. In Tennessee, a bill passed by the Senate Judiciary Committee in March would prevent any law enforcement officer with a ticket from being denied entry into a sporting event, and the owner or operator of the facility can require notification, which would have to be posted at the facility. In early May, the Texas House approved 3 bills loosening gun regulations, one of which would allow volunteer firefighters and medical services volunteers to bring guns into restricted areas. In Washington, HB 1015, sponsored by Representatives Shea, Taylor and McCaslin, seeks to overturn current policies that allow private operators of public spaces, stadium authorities and public facilities districts to prevent concealed firearms at their venues. Passage of the bill would force these venues to allow concealed guns on their property as long as gun owners have a valid, concealed carry permit. In the opening days of the 2017 Wisconsin Legislature, a proposal was introduced that would allow people with concealed carry permits to carry some weapons onto college campuses. In February 2017, the Wyoming state legislature considered a bill that would allow people to conceal firearms at college sports events. House Bill 136 was approved by the House and is now being considered by the state senate.

Take Away

In light of recent situations and pending legislation, it is incumbent that sport facility owners and operators and event managers keep up to date on the legislation in their jurisdictions and implement the appropriate security measures to ensure the safety of their patrons and participants. Furthermore, appropriate signage and notices need to be posted online and in the parking lot so those who might want to carry (either open or concealed) know the policy before reaching the facility's gates. Also, strategies can help create the safest environment, such as when a facility manager in Texas was hosting a controversial event and scheduled a school practice event on the same day to comply with the law, yet still prohibit guns from the facility.

Pittman teaches sport law at Texas A&M University in College Station.

Fried directs the Sport Management program at the University of New Haven.

Federal Judge Sends Former NFL Player's Premises Liability Claim Back to State Court

A federal judge from the Southern District of Texas has found that federal law does not pre-empt a former NFL player's premises liability claim under Texas law against the Houston Texans, thus remanding the lawsuit back to state court.

Plaintiff Demeco Ryans was a member of the Philadelphia Eagles when the Eagles played the Texans on Nov. 2, 2014. Ryans suffered a torn Achilles tendon that day, which allegedly ended his career. He subsequently sued in state court on Oct. 14, 2016, claiming the allegedly poor field conditions at NRG Stadium caused the injury. He named the Texans, the NFL, the Harris County Convention and Sports Corporation, and StrathAyr Turf System Pty Ltd. as defendants in the litigation.

The Texans removed the case to federal court, claiming that all of the plaintiff's claims and causes of action are preempted by Section 301 of the Labor Management Relations Act (LMRA); asserting that the resolution of the plaintiff's claims would require an interpretation of the Collective Bargaining Agreement. On December 30, 2016, the plaintiff filed the instant motion to remand, claiming that the matter should be handled in state court because his claims are not preempted by LMRA.

Specifically, the plaintiff alleged that his claims are not dependent on an interpretation of the CBA and are not inextricably intertwined with consideration of the CBA. The plaintiff further argued that his claims are not based on any provision of the CBA nor is the CBA the source of any of his claims.

The defendants countered that the CBA "represents the complete understanding of the parties involved. The defendants assert that player safety on the field of play during the game is among the subjects included in the CBA. The defendants further argued that the CBA addresses compensation to be received by a player should he be injured in circumstances similar to the plaintiff. Thus, the defendants asserted that the plaintiff's claims are inextricably intertwined with, necessarily require an interpretation of the CBA and are completely preempted by the LMRA.

In its analysis, the court noted that Section 301 of the LMRA provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. 29 U.S.C. § 185(a).

It went on to write that the narrow issue for review in the instant case "is whether

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Former NFL Player's Premises Liability Claim Sent Back to State Court

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(1) the plaintiff's claims are 'inextricably intertwined' with the CBA, in which case the Court should deny the plaintiff's motion to remand, or (2) whether the plaintiff's claims are based on independent, non-negotiable state law rights, in which case the Court would not have jurisdiction over the plaintiff's claims. McKnight v. Dresser, Inc., 676 F.3d 426, 431 (5th Cir. 2012).

"To determine if adjudicating the claim requires interpreting the terms of a CBA, a court is required first to analyze the elements of the tort at issue." Richter v. Merchants Fast Motor Lines, Inc., 83 F.3d 96, 97 (5th Cir. 1996). Under Texas law, a claim of negligence requires the plaintiff to prove the following elements: (1) a legal duty owed to the plaintiff by the defendant; (2) a breach of that duty; and (3) damages proximately caused by the breach. See Guerra v. Regions Bank, 188 S.W.3d 744, 747 (Tex. App. 2006) (citing IHS Cedars Treatment Ctr. of DeSoto, Texas, Inc. v. Mason, 143 S.W.3d 794, 798 (Tex.2004)). Because the plaintiff's negligence claim is one of premises liability, the plaintiff must also establish: (1) the defendants had knowledge of an unreasonable dangerous condition; (2) which posed an unreasonable risk of harm; and (3) the defendants failed to reduce or eliminate the dangerous condition. See Forester v. El Paso Elec. Co., 329 S.W.3d 832, 836 (Tex. App. 2010). The plaintiff alleged that his claims are exclusive of any rights governed by the CBA, but are instead based on violations of common law duties owed by a premises owner or lessor to invitees."

The court posited that it "must evaluate whether the CBA is the source of the plaintiff's claims, or whether his claims are independent, non-negotiable state law rights. The defendants argued that an analysis of the CBA and its incorporated documents is necessary to determine the scope of the above duty.

" ... (T)he Court finds that the plaintiff's claims against the defendants are not preempted by Section 301 of the LMRA because the resolution of his claims do not require an interpretation of the CBA. While the Court acknowledges that the CBA governs certain aspects of the plaintiff's contractual agreement with the NFL, the court is of the opinion that the terms contained therein would not be implicated in the course of the plaintiff's presentation of his negligence claims. As held by the Supreme Court, the plaintiff's claims do not automatically require an interpretation of the CBA, but should instead focus on the conduct of the involved parties. See Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 252, 114 S. Ct. 2239, 2243, 129 L. Ed. 2d 203 (1994). As mentioned above, a negligence claim requires the court to examine the state common law elements of duty, breach, causation, and damages. It is clear to the court that an analysis of these elements does not require an interpretation of the CBA, which prompts the Court to return this matter to its proper venue."

The Court concluded that the plaintiff's premises liability claim under Texas state law "is not inextricably intertwined with consideration of the CBA because the plaintiff has not invoked the CBA to satisfy any of the elements of his claim. Accordingly, the defendants have neither met their burden of showing that Section 301 of the LMRA preempts the plaintiff's claims, nor have they met the burden of showing the existence of this Court's subject matter jurisdiction."

Demeco Ryans v. Houston NFL Holdings, L.P. d/b/a HOUSTON TEXANS, et al; S.D. Tex.; CIVIL ACTION NO. 4:16-CV-3554, 2017 U.S. Dist. LEXIS 66880; 5/2/17

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Take Away

While field related issues can be a mandatory requirement of collective bargaining through impacting play, maybe the next round of CBAs for various leagues might include more precise language related to facility related safety and management.

Mascots and Fans — When Liability Gets in the Way of Fun

By Joshua Winneker and David Gargone

The fun gives way to potential liability each time a professional team's mascot attempts to entertain the fans with comedic and potentially dangerous antics. More and more proof of this continues to surface in professional sports. Most recently, it was the Minnesota Timberwolves' "Crunch the Wolf" mascot that caused injury to a fan, but this was not an ordinary fan— Crunch actually hurt Karl-Anthony Towns' (the Timberwolves' center) father.

During a game against the Indiana Pacers, Crunch was performing a stunt he had done many times before where he climbs aboard a sled and careens down the arena steps. This time, though, he crashed into Towns' father, injuring Towns' right knee. The assumption is that Towns' connection with the team will prevent him from pursuing a negligence lawsuit against the mascot, and his employer, the Timberwolves. In that respect, the Timberwolves were lucky, but if this incident occurred with a fan with no relation to the team, a potentially successful lawsuit would be on the horizon.

It certainly is not unusual for an injured fan to sue because of a mascot's negligence, but the occurrences are happening more frequently and the law has not been favorable for the teams.

Crunch's antics can be likened to that of "Sluggerrr," the Kansas City Royals' mascot whose behind-the-back hotdog toss into the eye of a fan caused serious injury and a negligence lawsuit. Eventually, the case reached the Missouri Supreme Court who rejected, as a matter of law, the team's "assumption of the risk" defense. Teams typically can defend against spectator-injury lawsuits by maintaining that the fans knew of the inherent risks of the sport prior to attending the game so the fan cannot then claim liability on the team's part if they are later injured during the game.

For the injured Royals fan, the Missouri Supreme Court ruled that getting hit with a wrapped hot dog thrown by a team mascot is not an inherent risk in a baseball game. This decision was in-line with a prior Appellate Court decision in California where the court ruled that an injured fan did not assume the risk of a mascot-related injury because the mascot's antics were not considered an essential or integral part of playing a baseball game. The same would likely be true for Crunch's antics at a basketball game.

Sluggerrr's situation put professional teams on notice of this potential for liability and this trend may continue in Florida as well. The Miami Marlins were recently sued by a fan who injured her neck when the "shark mascot" pretended to bite her but instead twisted her neck. That case is currently scheduled for trial in June 2017.

With prior settlements from injured fans against the Philadelphia Phillies and their mascot, the "Philly Phanatic," and the Miami Heat and their mascot, "Burnie," it's a wonder why professional teams even continue to employ mascots at all. Teams like the Utah Jazz and the Chicago Bulls, whose mascots perform similar stunts as Crunch, must ask the question, "Does the benefit of having a mascot really outweigh the risk of a lawsuit?" Why not ask the mascot-less New York Yankees this question—- they seem to be existing just fine without one.

Joshua D. Winneker, J.D., Assistant Professor of Business at Misericordia University, and David Gargone, Ed.D., Associate Professor of Business at Misericordia University.

Take Away

There have been a number of suits over the years from t-shirt cannons to distracting fans who get hit by foul balls or feel embarrassed by the mascot. Care should be taken to educate those acting as mascot concerning the proper way to engage fans without exposing them or others to harm. It reminds me of the case several years ago where a person broke their leg doing a dizzy bat race, and sued the team. As they say, it is all fun and games until someone gets hurt. GF

Lack of Planning Leads to Deaths

Police in Malawi have confirmed that eight people died after a stampede at the Bingu National Stadium in Lilongwe on July 6, 2017. The crowd rush, which also left dozens injured, took place before an exhibition friendly match between top Malawian teams Nyasa Big Bullets and Silver Strikers.

According to the BBC, gates to the stadium were supposed to open at 6:30 a.m. to allow free entry of fans into the 40,000-capacity venue, but this process was delayed by approximately three hours. The problem was that thousands of supporters had come and the delay, coupled with free entry, got the fans upset and they attempted to force their way into the stadium close to 10:00 a.m. when a gate was finally opened. Police responded by firing tear gas at the crowds in an effort to deter people from pushing forward. This started the crowd rush. It is expected that the death toll number would increase and the majority of deaths were children between age 5-12.

Take Away

Free admission and festival seating are always a major crowd management concern. However, there is no excuse for improper planning. Constant communication is needed leading up to an event and if there would be a major delay, it is possibly wiser to cancel an event than to risk a similar tragedy. GF

http://abcnews.go.com/International/wireStory/killed-stadium-stampede-malawi-48471155

CURRENT ISSUES

Ticketing News

President Obama signed legislation in 2016 outlawing bots that allowed some to circumvent the traditional ticket purchasing process. The new law gave promoters and ticketing companies a tool to fight back in the ever changing technological landscape. In May, 2017 New York Attorney General Eric Schneiderman announced settlements with seven companies who had illegally used ticket bots to purchase tickets and resell them on various web sites such as StubHub. One Connecticut ticket broker was fined $3.5 million and the other brokers were fined an additional $700,000 in fines was levied against other brokers. This is on top of over $7 million in fines in 2016. In 2017, a new law went into effect in New York allowing for criminal penalties on top of civil penalties.

According to the Attorney General's office, Prestige Entertainment employees used two different bots, thousands of credit cards, and numerous Ticketmaster accounts to purchase New York show tickets. To cover their tracks, Prestige used proxy IP addresses to help purchase tickets, including the purchase of 1,012 tickets in less than a minute to a 2014 U2 concert at MSG.

http://ampthemag.com/the-real/major-stub-hub-ticket-supplier-busted-nyag-sweep/?utm_source=The+Real&utm_campaign=d695fa0d9a-EMAIL_CAMPAIGN_2017_05_09&utm_medium=email&utm_term=0_3db035a4e3-d695fa0d9a-190159893

Take Away

While pressure will be put on those who use Bots to purchase tickets, more pressure will also be put on facilities and ticketing companies to prevent these acts. Besides possible claims for fraud and breach of contract, a facility could face an ADA claim for the disabled who cannot access ticketing systems. England has several such cases right now where Bots have disabled online access and disabled fans had to try using the phone systems and were on hold for hours and then could not get tickets. This could result in both legal challenges as well as a public relation nightmare.

Fraud

Joshua B. Newman (of New York) received a three-year prison sentence after the former Yale University graduate pleaded guilty to wire fraud in a case in which he was accused of defrauding 30 people who believed they were investing in his "Crossfit" health clubs. From 2012 through mid-2015, the con man solicited investments for two of his CrossFit-branded businesses. Newman's businesses operated independently and were never directly associated with CrossFit Inc. He is accused of using these funds for personal expenses, such as bankrolling other entrepreneurial endeavors.

http://www.clubindustry.com/news/man-sentenced-3-years-prison-fraud-related-his-crossfit-branded-clubs?NL=FBP-03&Issue=FBP-03_20170705_FBP-03_70&sfvc4enews=42&cl=article_3&utm_rid=CNHNM000000234383&utm_campaign=21959&utm_medium=email

Take Away

There has been an uptick in financial fraud cases involving youth sports over the last couple years. The lost revenue is critical for maintaining youth sport fields/courts and programs. Care should be taken to closely monitor financial accounts, require joint signatures, conduct background checks, bond volunteers, purchase appropriate insurance coverage, and not just develop policies-but enforce them.

Security

The recent bombing (April 2017) of a team bus for Borussia Dortmund in Germany helps highlight how important it is for teams to vary their travel path to and from the stadium/arena from where the team is staying. If the same path is taken, a potential attacker could easily set a trap. Coordination should be made with any local officials and security personnel to make sure everyone is in agreement on the route and how/when it is changed. GF

Workplace Issues Special Feature

The National Occupational Research Agenda (NORA) is a unit of the Center for Disease Control (CDC) and has been in existence for a number of years to help produce and disseminate information to help reduce workplace injuries. I co-chair the arts, entertainment, and recreation subsector of the NORA Council. Based on government research data we have identified a number of key areas for engagement such as building services, education/schools, and recreation/entertainment- of which sport facilities is a part.

Some key sub-areas of our sector include amusement parks and arcades (NAICS 7131) and other amusement and recreation industries (NAICS 7139). In NAICS 7131 there were 7,900 injuries in 2015 with an injury rate of 6.2 injuries for every 100 full-time employees. For NAICS 7139 (since it employees more people) there were 20,200 injuries for a rate of 3.3 per 100 employees. Any employee injury, that is preventable, is a black mark on our industry and employers. It also results in higher workers' compensation rates and possible inspections/penalties. The two most common cause of workers' deaths in our industry are vehicular accidents followed by workplace violence. To help reduce these injuries and deaths steps are being taken across the country. For example:

- Working on overcoming language and cultural difference,
- Developing different strategies and educational material for volunteers,
- Taking significant steps to reach temporary or contingent workers,

Developing strong educational information and videos for areas with larger injury rates such as landscaping workers- such as those developed by OSHA and the National Association of Landscape Professionals.

Providing additional support for employees who might face/anticipate potential violence that can impact the workplace; and

Tracking any employee license suspensions and tickets to identify potential driving related issues that can impact employees and others on the road.

Workplace Clothing Policies

Many people talk about and enjoy casual Fridays. Similarly, there are many sport facilities who have flexible clothing opportunities for employees. However, workplace attire policies and rules can sometimes conflict with the law. If you will use a flexible attire policy, you first should decide how broad your policy will be. Certain policies, such as knees have to be covered, might make it easier to enforce, but also might not allow managers to use discretion. Managers need to straddle the middle ground that sets forth clear expectations, but is not too restrictive. Furthermore, narrow restrictions can result in discrimination claims. There is no federal law governing employee dress codes, but a workplace attire policy cannot discriminate on the basis of gender, race, religion, disability or other protected status. An example could be a policy allowing men to wear shorts, especially during facility changeovers, but not allowing women to wear shorts. This can create an unequal burden between male and female employees, which can result in a discrimination claim. The exception to any such rules is if there is a legitimate justification for the attire policy and it is applied in a non-discriminatory manner.

Any attire policy must accommodate employees' religious beliefs. This might require facility management to make "reasonable accommodations" for clothing requests related to employees' religious beliefs. The best approach is to ask whether a policy infringes on an employee's religious practices. Safety can trump some religious claims, such if a religious garment can expose an employee to harm from moving parts/equipment.

One last concern is the NLRB. The NLRB has ruled that an employer's prohibition on pins, insignias, or other "message clothing" not provided to them by the employer" is overly restrictive and a violation of the NLRA. When unionized employees are allowed to wear any type of personal clothing there can be issues with messages on their clothing and so the attire policy must not conflict with the NLRA (or possible first amendment issues).

Whatever rules are developed, they should be uniformly applied and all violations documented.

Fall Prevention

One of the leading causes of injuries in the workplace are falls- whether at the same height or from different heights. This raises the need to keep educating employees on fall prevention. Besides all the requisite fall prevention requirements (such as using harnesses for working on heights), ladder safety is a major concern. When using a ladder employees should always be warned to:

- Face the ladder
- Remove any slippery material from the ladder steps
- Always use three points of contact with a ladder (such as two feet and one hand)
- Take care when carrying tools and going/up down steps
- Avoid leaning too far to one side or another.
- When using personal fall arrest systems it is important to:
- Connect to an anchor point that can support 5,000 pounds
- Connect to a point where a person cannot free-fall more than four feet
- Tie off at a point above the employee's head
- Use the shortest lanyard possible

Retain experts to help make sure the fall-arrest system and policies are up to date and appropriate.

As Baseball Fans Fall to Their Death, Concerns Mount

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opportunity.

If one Councilman in New York City has his way, local ballparks may not have a choice in the matter. On May 8, Councilman Rafael L. Espinal Jr. of Brooklyn introduced legislation that would require ballparks with more than 5,000 seats to provide netting from home plate all the way down to the foul poles in left and right field. If passed, the bill would apply to the Yankees, Mets and their Class A Minor League affiliates on Staten Island and in Brooklyn, respectively. Currently, the netting at Yankee Stadium ends on the home plate side of each dugout, which wasn't far enough to protect the young fan who was injured last month.

While momentum may be building for additional ballpark netting, there's another safety issue that may be even more controversial. A number of fans, 25 since 1969 according to the website Death at the Ballpark, have fallen to their deaths in MLB stadiums. That's hardly an epidemic considering the billions — literally — of fans who have attended MLB games in the past 48 years. However, that's scant comfort to those who have lost a loved one as a result of injuries suffered in a ballpark fall.

The latest death occurred as a result of a fall on May 16 when 42-year-old Rick Garrity tried to climb a railing on an upper deck ramp as he was exiting Wrigley Field in Chicago. Garrity suffered significant injuries in his fall and died the next day.

Garrity's death and those that proceeded his have fostered a debate on the proper height of railings at MLB stadiums. Code requirements vary from one jurisdiction to another and also depend on the location within the facility and when the stadium was constructed. For example, minimum heights generally vary from 26 inches in seating areas to 42 inches in non-seating areas such as ramps. Furthermore, existing stadiums are mostly "grandfathered," meaning if they met the code minimums at the time they were constructed they are under no obligation to comply with higher standards contained in newer codes. Garrity fell over a 36-inch railing, which, although it met code requirements, is less than the 42-inch height recommended by a number of safety experts.

Could a higher railing have prevented Garrity's death? The Cubs say no, but Garrity's family and proponents of higher railings argue that it may have deterred him from engaging in risky behavior.

Autopsies concluded that many of the victims of ballpark falls were legally intoxicated and at least three fans committed suicide. Most deaths resulted from fans engaging in dangerous — even death defying — activities, such as jumping from ramp to ramp, climbing a wall, and sitting and/or sliding on railings. One fan fell to his death while trying to do a handstand on the upper deck. At least two fans died while attempting to snag baseballs. The latter two deaths may have been prevented if the entire stadium had been enveloped in netting, but doing so would limit the experience of going to the ballpark for some fans.

Should MLB be responsible for protecting fans from themselves, especially when it interferes with sightlines and inconveniences the majority of the league's fans? Where does individual responsibility end and the obligation of institutions like MLB begin?

Safety measures at ballparks can always be improved, but at what cost?

The author is a former attorney, CPA, Minor League Baseball team owner and current investor in MiLB teams. He is a Professor in and Chair of the Sport Management Department at SUNY Cortland and maintains the blog: http://sports-beyondthelines.com. The opinions contained in this column are the author's. Jordan can be reached at jordan.kobritz@cortland.edu.

Playground Gear Not Protected by Governmental Immunity Act

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exception to the CGIA for the suit.

24-10-106. Immunity and partial waiver

(1) A public entity shall be immune from liability in all claims for injury which lie in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by the claimant except as provided otherwise in this section. Sovereign immunity is waived by a public entity in an action for injuries resulting from:

(e) A dangerous condition of any public hospital, jail, public facility located in any park or recreation area maintained by a public entity, or public water, gas, sanitation, electrical, power, or swimming facility. Nothing in this paragraph (e) or in paragraph (d) of this subsection (1) shall be construed to prevent a public entity from asserting sovereign immunity for an injury caused by the natural condition of any unimproved property, whether or not such property is located in a park or recreation area or on a highway, road, or street right-of-way.

The plaintiff's argued the zip line qualified as both a dangerous condition and a public facility. As such, the recreation area waiver highlighted above should apply- allowing the claim to proceed.

The trial court granted the defendant's motion to dismiss finding the recreation area waiver did not apply in this case, and the CGIA prevented the lawsuit. The plaintiff's appealed and the Colorado Appellate Court reversed the trial court's ruling.

The appellate court found that public facility was an ambiguous term that could be defined by two reasonable but contradictory interpretations. Looking at legislative history, the appellate court found the legislature intended playground equipment to qualify as a public facility. Finding the playground equipment met the requirements of public facility and recreation area, the requirements of the recreation area waiver were met, and the plaintiffs could continue their suit.

The Colorado Supreme Court granted certiorari and determined it needed to conduct a review of the recreation area waiver because the issue had not been examined before, and the terms were ambiguous.

The court first found public facility to be an ambiguous term with two different meanings. It could be construed as a either a single piece of playground equipment or not. The court first held that the zip line apparatus at issue did not qualify as a public facility on its own. However, the entire playground, including the zip line apparatus did qualify as a public facility. (At issue would be an identified playground attached to a school with only one piece of equipment.)

The playground promotes the common purpose of play and recreation for school children and the public thus giving the entire grouping of apparatus the status to qualify as a facility. The legislative intent as defined in the waiver was intended for large and permanent structures, which serve a broad purpose. However, the court then concluded that the definition included a collection of affixed man-made items that promote the broader purpose, such as the playground. The term facility can be interpreted to include the collection of items that promote the greater purpose of the structure or building it is attached to.

The Supreme Court found the Appellate Court erred when it determined the individual zip line apparatus was a facility when the entire playground, which included the zip line apparatus was a facility.

The next question was whether the facility, the playground, was public. Again, the court found the term public both modified and constricted the term facility. Here the court found the playground, although attached to a school, was public because the general public was not prevented from accessing the playground during non-school hours. Public was then defined to mean accessible to the public and maintained by a public entity to serve a beneficial public purpose. Thus the playground was a public facility as identified in the recreation area waiver of the CGIA.

The next analysis focused on whether the playground was a recreation area. This required a three-step analysis developed in another CGIA decision, Daniel v. City of Colorado Springs, 2014 CO 34, 327 P.3d 891.

First, we determine what property is relevant to our analysis by determining the boundaries of the "putative recreation area." Id. We do so by including any contiguous areas of public property that plausibly promote recreation and excluding any pieces of property that clearly do not promote recreation. Id. Second, we determine if the public entity's "primary purpose" in constructing or maintaining the recreation area is recreational. Id. Third, assuming the primary purpose is recreational, we determine whether the public facility at issue was located in the boundaries of this recreation area.

Applying this test the court found the playground containing the zip line apparatus was located in a recreation area. The physical requirement was met by the land underlying the playground equipment. The land under the school was excluded by the court because its purpose was educational, not recreational. Impromptu recreation in the school did not change its purpose from educational to recreational. The primary purpose of the activities occurring on the land was recreational and the zip line apparatus was located in that recreation area.

The definition required to meet the recreation waiver area exception of the CGIA was met in this case.

We hold that a collection of playground equipment at a public school qualifies as a "public facility" under the recreation area waiver because it is (1) relatively permanent or otherwise affixed to the land, (2) a man-

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Playground Gear Not Protected by Governmental Immunity Act

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made structure, (3) accessible to the public, and (4) maintained by a public entity to serve a beneficial, common public purpose.

Additionally, pursuant to the three-step analysis employed in Daniel, ¶ 23, we determine that the land underlying the playground equipment was the relevant "putative recreation area," that the "primary purpose" of that area was recreation, and that the playground where A.R.L. was injured was "located in" that area. Therefore, we hold that the public facility here, i.e., the collection of playground equipment, was "located in" the "recreation area" that was the school playground.

Thus the recreation area waiver contained in the CGIA was met and allowed the plaintiff's to continue their lawsuit (The appellate court ruling was affirmed). The piece of playground equipment the plaintiff was injured on, was not protected by the CGIA because it was part of a larger facility and recreation area. It was a public facility located in a recreation area and as such not afforded the protection of the CGIA.

For more about Jim Moss, see his website at https://recreation-law.com/.

Take Away

Recreational user statues need to be carefully reviewed to determine what is actually covered and protected. Is a ballfield or gym a facility? Would these same facilities be considered a recreational area? If they are attached to an educational institution, should they be treated differently than if they were stand alone or part of a park? Can adding/removing one or more elements change the designation and coverage? Similarly, there can be similar concerns with non-profit immunity protection in states that offer such protection. The fact that a non-profit generates revenue from some fundraising activities can possible remove some activities from non-profit activities and thus expose an otherwise protected entity to possible liability. The best defense is to ask the facility's counsel to review all public and non-profit facilities to determine whether immunity provisions might have changed or are applied differently than in the past. GF

Assumption of Risk Bars Claims Based on Alleged Crowd Crush

By Carla Varriale

Plaintiff alleged that she sustained personal injuries on August 30, 2012 while a patron of Splish Splash water park and was caused to slip and fall and sustain a serious injury due to an "on rush of a massive crowd of riotous patrons as plaintiff was attempting to traverse a steeply inclined/declined pedestrian walkway."

Plaintiff's accident was unreported, and the defendants had no knowledge of the alleged accident. There is a countdown leading up to the opening of the park each morning and also a sign that instructs patrons "no running." The court granted summary judgment to the defendants.

The court highlighted that the plaintiff testified that in the five years prior to August 30, 2012, she had been to Splish Splash on numerous occasions; she had a habit to try to get to Splish Splash early before the park got too crowded; she had observed the park's opening procedures numerous times; prior to the opening of the park on the date of loss, the plaintiff and family members made their way to the front of the crowd; when the rope dropped, family members took off running, and plaintiff "took off" barefoot, to catch up to them, over a footbridge.

While the plaintiff was running, there were people all around her, but they did not restrict her ability to run. Plaintiff's fall occurred on the downward side of the footbridge. To her knowledge, no one pushed her or contributed to her fall. Plaintiff testified that as she was attempting to push off from a jog to a sprint, there was a small rock or pebble "on the top of her foot" at the exact moment when she was pushing her weight into it. She felt something give in her leg, and she went flying to the cement. She testified that she did not see the rock or pebble prior to the accident or after it; rather, she testified that she felt it on the bottom of her foot before she fell.

Festival (which operates Splish Splash) submitted the affidavit of a crowd safety and security expert, who opined that Splish Splash management took all reasonable steps to ensure that on August 30, 2012, the opening procedure for the park was sufficiently safe and ensured orderly entry into the attractions area of the park. He further opined that, on the date of the accident, the plaintiff knowingly ran after her children, despite signage clearly warning of the dangers of running in the water park. In addition to this, the plaintiff failed to look where she was going, even though she was admittedly aware of the risk.

In a "crowd control" case, the plaintiff must show that she was "unable to find a place of safety or that her free movement was restricted due to the alleged overcrowding conditions."

In a fact intensive opinion, the court held that Festival established its prima facie entitlement to summary judgment dismissing the complaint and the cross-claim against it. In a "crowd control" case, the plaintiff must show that she was "unable to find a place of safety or that her free movement was restricted due to the alleged overcrowding conditions." Festival established, through the testimony of the plaintiff, and a non-party witness that the plaintiff could freely move around in the crowd, and could have retreated backwards toward a less crowded part of the crowd; that the plaintiff's decision to run in the park was not caused by the crowd, and finally, that her accident was not caused by a member of the crowd, but by the plaintiff's own choices and action. Therefore, the plaintiff's crowd control claim was without merit.

The court further held that Festival established a prima facie case that the plaintiff is barred from recovery under the doctrine of primary assumption of risk in that the plaintiff was aware of the risks inherent in running as the rope dropped to open the park's attractions, having seen people injured on prior visits to the park. "Plaintiff voluntarily chose to run, and then started to sprint, in a park which she testified that she had visited numerous times, and which is replete with signs requesting that patrons not run." Plaintiff's testimony also revealed that her injuries were caused when she stepped on a small pebble or rock while running, as she was attempting to accelerate, causing her to injure herself, which resulted in her fall. "Thus, plaintiff voluntarily assumed the risk of injury, and in fact, her injuries were caused by her own decisions and action, and not due to any negligence on the part of Festival."

In opposition, the plaintiff failed to raise an issue of fact.

Titan also established its prima facie entitlement to summary judgment and the plaintiff failed to establish that defendants failed to control the crowd because the plaintiff could have safely withdrawn to the rear of the crowd and found a "place of safety," but chose not to. Titan also established that it owed no duty to the plaintiff, and it is not liable to the plaintiff as a third-party beneficiary of its contract with Festival.

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Lechtrecker v. Splish Splash, Festival Fun Parks, LLC, and Titan Global, LLC, Supreme Court, Suffolk Country, Index No. 061850/2013

