September-October 2023 • Volume 8, Issue 2

SPORTS FACILITIES and the LAW

How the law affects the sports facilities industry

Appeals Court Holds for City in Negligence Case Involving Waterpark

By Courtney E. Dunn, of Segal McCambridge

Plaintiff's Underlying Claims

Plaintiff Fabio Fernandes sued the City of Baytown alleging that it negligently operated a waterslide at Pirates Bay Waterpark, which is owned the by the City. In his underlying negligence claim, Fernandes alleged that the lifeguard on duty gave him the go-ahead to ride the slide, but when he got to the bottom of the slide, the catch basin had insufficient water to slow him down, resulting in injuries. More specifically, Fernandes alleged that the City had notice of the unreasonably dangerous condition on the slide and failed to warn him. In acknowledging the City's governmental unit status, Fernandes argued that the Texas Tort Claims Act and Recreational Use Statute waives the City's governmental immunity for personal injury claims arising out of premises liability through gross negligence. Application of this statute, however, required that Fernandes prove gross negligence on behalf of the City.

In its argument to apply the Texas Tort Claims Act and Recreational Use Statute, the City relied on the declara-

See WATERPARK on Page 14

Former NFL Player Has 'Tort' Case Against Team, Stadium Operators and League Partially Dismissed on Preemption Grounds

By Christopher R. Deubert, Senior Writer

In a September 21, 2023 decision, the United States District Court for the Central District of California granted a motion to dismiss by the NFL and Los Angeles Chargers in a case brought by former Denver Broncos' linebacker Aaron Patrick. Patrick v. NFL, 2023 WL 6162672 (C.D. Cal. Sept. 21, 2023). The case presented a difficult and interesting test as to the scope of player claims that must be brought pursuant to the arbitration provisions in the NFL-NFLPA collective bargaining agreement (CBA).

Patrick's Injury

During the October 17, 2022 Monday Night football game between the Broncos and Chargers, Patrick, after trying to make a tackle near the sideline on a punt, tripped over television cables and mats and collided with the NFL's television liaison, the person responsible for coordinating commercial breaks. Unfortunately, Patrick, an undrafted second year player, tore his ACL in the process. Patrick recovered and participated in the Broncos' training camp this year, but he did not make the team.

See TORT on Page 15

INSIDE THIS ISSUE

Appeals Court Holds for City in Negligence Case Involving Waterpark 1

Former NFL Player Has 'Tort' Case Against Team, Stadium Operators and League Partially Dismissed on Preemption Grounds 1

Turf or Grass? Study Warns that Synthetic Sports Fields Increase Concussion Risk 2

Court Grants Hockey League's Motion to Dismiss Player's Injury Claim 3

Snowmobiles Are an Inherent Risk on Ski Slopes in California. 4

Controversy Brews Over Noise at Rock Sports Complex in Milwaukee County 9

Texas A&M Athletics Announces New Partnerships for Domestic and Craft Beer 9

Health Problems and Legal Issues at the Tough Mudder Competition 10

USA Pickleball Announces Quiet Category for Pickleball Products 13

Turf or Grass? Study Warns that Synthetic Sports Fields Increase Concussion Risk

A c academic study has revealed that synthetic sports fields can significantly increase the risk of concussion, when compared to a natural grass surface.

The study, presented at the American Academy of Pediatrics National Conference & Exhibition, highlights the importance of considering the safety of the playing surface itself in athletics.

Ian Chun, a medical student at the University of Hawai'i, conducted the study. He compared the impact deceleration of manikins on natural grass and synthetic turf high school football fields. The findings showed that synthetic turf fields had a greater impact on an athlete's ability to slow down, indicating an increased risk of injuries due to contact with the playing surface.

The study emphasizes the need to consider the spaces where we play and their impact on athlete safety, according to Chun. Synthetic turf fields, although favored for their lower maintenance costs, have been associated with ankle and knee injuries, and now, a potentially higher risk of concussions.

"The emphasis on player safety is especially important for children as injuries sustained in developing adolescence may have longer-term impacts and unforeseen consequences," Chun said.

He continued: "Injuries in sports have always been an accepted consequence of play and competition but in recent years the national discourse around sports safety has changed. Armed with injury prevention strategies and better engineered safety equipment, sports continue to be exciting for players and audiences with the added benefit of better health outcomes for our athletes. The emphasis on player safety is especially important for children as injuries sustained in developing adolescence may have longer-term impacts and unforeseen consequences."

Chun compared the hardness of natural grass or synthetic turf high school football fields by attaching sensors to a manikin that could measure the rate of deceleration as it hit the ground and compared the decelerating force between fields. He found that synthetic turf football fields had a greater impact deceleration compared to natural grass fields, presenting an increased risk of injury due to contact with the playing surface. While more research is needed to assess all the risks of different playing surfaces, this could help guide sports management decisions and create safer playing environments, he said.

"Our findings show that when we consider safety in sports, we need to widen our view to include the spaces where we play," Chun said.

SPORTS FACILITIES and the LAW

EDITOR IN CHIEF

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

MANAGING EDITOR

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

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

Hackney Publications

Court Grants Hockey League's Motion to Dismiss Player's Injury Claim

By Courtney E. Dunn, of Segal McCambridge

Plaintiff Connor Dushay was injured during an ice hockey practice when he was playing for a team in the South Connecticut Hockey League (SCHL). Dushay claimed that he was injured during a hockey practice at third-party defendant Wonderland of Ice's premises. SCHL maintains that it was not affiliated with this particular practice, because it was outside of SCHL's control and supervision and, therefore, SCHL owed no duty of care to Dushay. SCHL further relies on the fact that, even if it did owe Plaintiff a duty, it cannot be held liable for Plaintiff's injuries because they were proximately caused by the intentional act of Plainitff's teammate. Plaintiff, however, posits that SCHL owed him a duty because it was responsible for the hockey practice and because third-party defendant, Wonderland of Ice, was SCHL's agent or apparent agent in scheduling this practice.

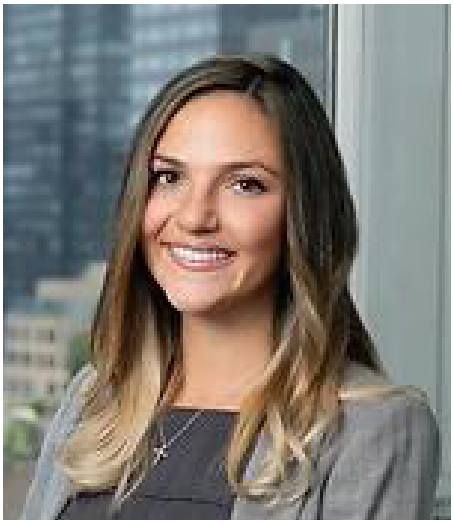
There is no question that the location of the hockey practice was owned and operated solely by Wonderland of Ice – which presents a problem for Plaintiff's theory of liability. Regardless of SCHL's lack of ownership in the premises, Plaintiff argues that SCHL still owed Plaintiff a duty of care because (1) it scheduled the hockey practice or otherwise had an agreement with Wonderland of Ice to act as an agent that allowed SCHL to schedule the hockey practice; (2) made representations to Plaintiff that it was responsible for staffing and overseeing hockey practices; and/or (3) benefited from the practice as a for-profit business and therefore owed a duty of care to Plaintiff.

To bolster his argument against SCHL, Plaintiff submits a SCHL flyer and a Letter of Agreement between SCHL and Wonderland of Ice. However, the flyer does not reference hockey practices and the Letter of Agreement confirms that Wonderland of Ice would provide ice time for games, but again does not mention practices. The Letter of Agreement does, however, include an indemnity provision in which SCHL would indemnify Wonderland of Ice, which Plaintiff relies on to support his argument that SCHL did have a duty to ensure the safety of players during practice. Unfortunately for Plaintiff, given the context of the Letter of Agreement, this indemnification again only extends to games.

Plaintiff cites Peeples v. North End Baseball League of Bridgeport, Inc., Docket No. CV-15-6047702-S (October 5, 2016, Krumeich, J.), where the defendant sports league did have a duty of care based on its right to possess the field during the game at issue in that matter. In Dushay, however, the Court found that there was no evidence to support the argument that SCHL had the right to possess the ice rink at issue and, therefore, Peeples was not analogous. It was further confirmed by Wonderland of Ice that it coordinated practices with teams that were in the Defendant League and did so directly on behalf of Wonderland of Ice by reaching out to team players. The only actual connection between SCHL and Wonderland of Ice was the latter's possession of email addresses for athletes that played in the Defendant League for the purpose of alerting them to the availability of ice time. The Court held that there was no record of an agency relationship between SCHL and Wonderland of Ice. The documentary evidence submitted by Plaintiff, the SCHL flyer and Letter of Agreement, ultimately cut against Plaintiff's position that SCHL owed him a duty of care.

Next, Plaintiff argues that, because SCHL benefited from the hockey practice, it owed a duty of care to those partaking in the hockey practice. The Court disagreed, holding that absent any evidence of a financial benefit on behalf of SCHL from the ice time provided by Wonderland of Ice, it could not find that SCHL owed a duty to Plaintiff and his teammates.

Based upon its holding that SCHL did not schedule the practice, was not an agent of Wonderland of Ice, and did not financially benefit from the practice, the Court did not opine on SCHL's argument that Plaintiff's injuries were proximately caused by the unforeseeable acts of a third-party teammate. The Court held that SCHL did not owe Plaintiff a duty of care during this practice, and SCHL's motion for summary judgment was granted.



Courtney E. Dunn

Snowmobiles Are an Inherent Risk on Ski Slopes in California.

By James H. "Jim" Moss

Appellate court decision finds release stopped claims & plaintiff assumed the risk of hitting a stopped snowmobile on the slope.

Summary

A season pass holder at Mammoth ski area was injured when he hit a snowmobile that was parked on the slopes. The California appellate court held the season pass stopped the plaintiff's claims and also found that a snowmobile on the slopes is an inherent risk of skiing.

Facts

Mammoth is a ski resort in Mammoth Lakes. As is common in the ski industry, it uses snowmobiles in its operations and has taken certain steps to reduce the chance of collisions with guests. It has, for instance, created a snowmobile training program and developed training materials that, among other things, require its snowmobile drivers to limit their speed in congested areas, to ride on the side of the run providing the best visibility, to yield to guests, and to use flags and headlights when driving in public areas. It has additionally posted signs at the top of ski lifts warning that snowmobiles "may be encountered at any time," included the same warning in its trail map, and, in its liability waiver for season-pass holders, required season-pass holders to acknowledge that "Skiing and Snowboarding involve risks posed by . . . collisions with . . . snowmobiles and other over-snow vehicles."

Mammoth has also established preferred routes for its snowmobile drivers with the intent to limit collision risks. One of these routes formerly covered two ski runs called St. Moritz and Stump Alley. Stump Alley is a larger, popular run that ends at the base of the resort; St. Moritz is a smaller run that branches off Stump Alley. To provide a rough visualization of these runs, think of a rotated lowercase y-as in, A-with the longer line representing Stump Alley and the shorter line representing St. Moritz. For the designated route covering these runs, snowmobile drivers were instructed to stay to their left when going up St. Moritz; then, where St. Moritz meets Stump Alley, to make a slight right turn onto Stump Alley to avoid a steep area that is difficult for snowmobiles; and then, after passing this area, to travel across Stump Alley and then stay to their left when going up Stump Alley. A map of Mammoth's preferred snowmobile routes shows the St. Moritz-to-Stump Alley route. As depicted in the map, the route crosses Stump Alley at an upward diagonal from right to left and then goes up the left of Stump Alley. Mammoth began

developing this route at some time before 1989 and used it until late 2016.

In early 2016, one of Mammoth's lift maintenance employees, Joshua Peters, drove his snowmobile up St. Moritz on his way to a lift maintenance station. Peters- who had completed Mammoth's snowmobile safety training-drove up St. Moritz at about 15 miles per hour, slowed to about five miles per hour before exiting St. Moritz, and then continued at this speed on Stump Alley as he looked to cut across the run. Valter, an expert skier, was skiing down the left side of Stump Alley at the same time and began decelerating from about 30 miles per hour to make a left turn onto St. Moritz. Peters said he saw Valter from a distance of about 80 to 120 feet, slowed further, and then stopped. But Valter never saw Peters. Valter made three or four controlled turns a after Peters first saw him, and he then collided with Peters's snowmobile on Stump Alley. Valter suffered significant injuries as a result.

Two other witnesses saw the accident. One was another Mammoth employee who was driving a snowmobile behind Peters. He afterward told an officer that Peters had stopped and that Valter was looking over his left shoulder just before the collision- though Valter told the same officer that he never looked over his shoulder. Another witness saw the accident from above on a ski lift. In a written statement, he said the snowmobile was driving slowly up Stump Alley diagonally from "skier[']s left to right"-as in, from the left side to the right side of the run from the perspective of a skier going downhill. He added that the snowmobile had slowed almost to a stop at the time of impact. But, he wrote, it was "almost as though [the] skier never saw [the] snow mobile"; the skier traveled in a "controlled line but it was directly into [the] snow mobile."

Several photographs taken immediately after the collision show the snowmobile's appearance and position at the time of the accident. The snowmobile is dark blue and flies an orange flag at its back. It is not obstructed by any apparent obstacles. Another photograph taken after the accident, which the parties marked up during Peters's deposition, shows Peters's path from St. Moritz to Stump Alley. Both parties accept that the photograph accurately depicts his path. The photograph (together with other photographs of the scene) shows Peters entered Stump Alley from the far left of St. Moritz near a sign describing different runs and then headed up Stump Alley at a sharp diagonal. According to a diagram that Mammoth personnel made after the accident, the distance between this sign and Peters's snowmobile at the place of the collision was 44 feet.

Before the accident, and as a condition of holding a season pass, Valter signed a liability waiver. In the waiver, Valter agreed he "underst[oo]d Skiing and Snowboarding involve risks posed by . . . collisions with . . . snowmobiles and other over-snow vehicles," "agree[d] that these risks and dangers are necessary to the sports of Skiing and Snowboarding," "AGREE[D] TO EXPRESSLY ASSUME ANY AND ALL RISK OF INJURY OR DEATH which might be associated with [his] participation in the SPORTS," and "AGREE[D] NEVER TO SUE, AND TO RELEASE FROM LIABILITY, Mammoth . . . for any . . . injury . . . which arises in whole or in part out of [his] . . . participation in the SPORTS . . ., including without limitation those claims based on MAMMOTH'S alleged or actual NEGLIGENCE ...."

Analysis: making sense of the law based on these facts.

The defendant was a season pass holder at Mammoth Mountain ski area. In obtaining the season pass, the plaintiff signed a release.

> As a condition of receiving a season pass for Mammoth, Valter expressly agreed to assume the risk of Mammoth's negligence. In the context of sports, including for skiing, courts have consistently found these types of agreements are valid when they excuse liability for ordinary negligence-that is, for "a failure to exercise the degree of care in a given situation that a reasonable person under similar circumstances would employ to protect others from harm."

Releases in California stop all claims for ordinary or simple negligence. In order to defeat a release, the plaintiff must prove that the defendant was grossly negligent.

> … Valter's signing of the liability waiver bars him from suing Mammoth for ordinary negligence-which Valter does not dispute. We further conclude Valter cannot show Mammoth's conduct rose to the level of gross negligence. The undisputed facts show, among other things, that snowmobiles are common at ski resorts, that Mammoth posted signs warning guests that snowmobiles could be encountered at any time, that Valter expressly acknowledged the risk of colliding with a snowmobile and agreed to assume the risk of Mammoth's negligence, that Mammoth trained Peters on snowmobile safety, that Peters drove his snowmobile slowly and stopped or almost stopped before the collision, that his snowmobile flew an orange flag, and that, in the photographs taken immediately after the accident, no obstacles are shown obstructing a downhill skier's ability to see Peters and his snowmobile in the area of the collision.

The plaintiff attempted to argue that several of the actions that Mammoth

did were gross negligence, however, the court did not accept any of those arguments.

> Although Valter argues Mammoth's conduct here could be found grossly negligent for several reasons, we find none of his arguments were persuasive. He first contends Mammoth could be found grossly negligent because the presence of snowmobiles is not an inherent part of skiing. But whether or not the presence of snowmobiles is an inherent part of skiing, we are at least satisfied that no reasonable person could find Mammoth grossly negligent simply because it used snowmobiles. The undisputed facts, again, show that snowmobiles are common at ski resorts. Mammoth's former health and safety manager, for instance, explained that in the ski industry, snowmobiles are used "on a daily basis for lift maintenance, lift operations, and for ski patrol emergency transport." Valter, who said he had skied about a thousand days in his lifetime on various mountains, never alleged differently. He instead acknowledged he commonly saw snowmobiles on ski runs that were open to the public. The undisputed facts, moreover, show that a ski resort's use of snowmobiles can improve safety. Snowmobiles, for example, allow lift maintenance technicians (like Peters) to respond quickly when a chair lift maintenance safety issue arises that requires an immediate response. Again, Valter never alleged differently and, on appeal, states he does not disagree "that snowmobiles are very useful and efficient in the operation of a ski resort." On these undisputed facts, we cannot say that Mammoth's decision to use snowmobiles evidenced "either a '" 'want of even scant care'" or '" 'an extreme departure from the ordinary standard of conduct,'" '" even though, as Valter asserts elsewhere in his brief, snowmobiles (like most, if not all, snow equipment) pose some potential risk to skiers.

What is significant here is another court, based on the plaintiff's facts has held that the plaintiff failed to prove enough issues to prove gross negligence. In the past, the plaintiff simply had to claim gross negligence, and the courts would throw out the release and proceed to trial. Nowadays, the courts are tired of every claim arguing gross negligence and taking it upon themselves to find the facts the plaintiff is arguing cannot rise to the level of gross negligence.

On top of that, the arguments set forth by the court can now be used by other defendants to prove they were not grossly negligent. Those arguments are:

- The presence of snowmobiles is not an inherent part of skiing.
- no reasonable person could find Mammoth grossly negligent simply because it used snowmobiles

• undisputed facts, again, show that snowmobiles are common at ski resorts

• undisputed facts, moreover, show that a ski resort's use of snowmobiles can improve safety

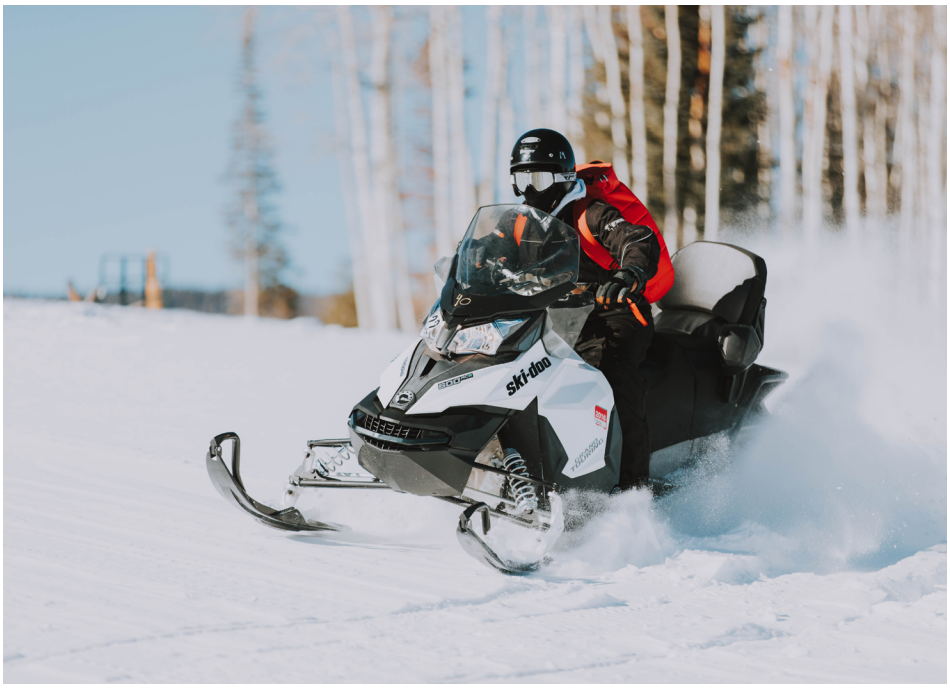
• Snowmobiles, for example, allow lift maintenance technicians (like Peters) to respond quickly when a chair lift maintenance safety issue arises that requires an immediate response

The next section of the decision is where the plaintiff stretched the facts to far. The plaintiff argued that Mammoth never told skiers where the designated snowmobile routes were. However, the court found the routes were not as important as all the warnings that Mammoth put in front of its guests about snowmobiles.

> Second, Valter suggests Mammoth could be found grossly negligent because it never shared its designated snowmobile routes with its guests. But Mammoth repeatedly cautioned guests about snowmobiles and explained they could be encountered at any time. Signs at the top of the lifts at Mammoth, for instance, explain that snowmobiles "may be encountered at any time." The Mammoth trail map says the same: Snowmobiles "may be encountered at any time." And the liability waiver that Valter signed further warned about the presence of snowmobiles and the risk of collisions, stating that Valter "underst[oo]d Skiing and Snowboarding involve risks posed by . . . collisions with . . . snowmobiles and other over-snow vehicles."

And failing to share the routes with the skiers at Mammoth did not rise to the level of gross negligence.

> But we conclude no reasonable person could find Mammoth grossly negligent simply because it failed to share these maps-a practice that no ski resort, as far as Valter has shown, has adopted.



The arguments then descended into arguments about distance. Was the snowmobile, which was stopped at the time, off the route, not known by the plaintiff and if so by inches or yards.

> Third, Valter argues Mammoth could be found grossly negligent because Peters failed to follow Mammoth's preferred snowmobile route for St. Moritz. According to the preferred snowmobile route, again, Peters should have stayed to his left when going up St. Moritz; then, where St. Moritz meets Stump Alley, made a slight right onto Stump Alley to avoid a steep area that is difficult for snowmobiles; and then, after passing this area, traveled across Stump Alley and up the left side of Stump Alley. But according to Valter, Peters instead "drove up near the middle of St. Moritz" (rather than the left), "made a looping right turn near the top of St. Moritz at its intersection with Stump Alley" (rather than a slight right), and "intend[ed] to drive up the right side of Stump Alley" (rather than drive across Stump Alley and up the left side of the run). As a result, Valter asserts, Peters was "several yards from where he was supposed to be before trying to cross Stump Alley" at the time of the accident.

However, the court found this really did not matter because the plaintiff could not show his statements were valid. There was nothing in the evidence that showed the plaintiff's allegations were true. "But much of Valter's alleged facts lack evidentiary support." Then the court held that even if the snowmobile driver was "off route" it did not matter because the plaintiff could not prove that being off route made any difference.

The plaintiff argued Mammoth was grossly negligent for designating the snowmobile route in question as being grossly negligent.

> He reasons that Mammoth should have chosen a different route because it knew Stump Alley was a popular run, knew skiers "coming down Stump Alley 'hug' the tree line on the left in order to turn left onto St. Moritz," acknowledged

that these trees would have grown substantially since the snowmobile routes were initially established around 1989, knew snowmobiles on St. Moritz pose a potential danger to skiers, knew other routes were available, and never conducted any safety, feasibility, or visibility studies for the route. He adds that Mammoth's new snowmobile routes no longer use St. Moritz (though he says the "change was not made in response to Valter's injury") and that Mammoth now uses snowmobile corridors that are marked off with stakes and ropes.

The court rejected that argument on two different grounds. The first was the ski area still inundated its guests with warnings about snowmobiles being on the runs. The second was the plaintiff could not prove that selecting that run for a snowmobile route was done incorrectly, without planning or in any way increased the risk to skiers.

He first contends Mammoth could be found grossly negligent because the presence of snowmobiles is not an inherent part of skiing.

Finally, the plaintiff was shot down because the stretches in the facts went too far for the court. "But Valter's allegations cannot be squared with the undisputed facts."

> First, in his own telling, he was traveling at a speed less than 30 miles per hour, as he was decelerating from 30 miles per hour at the time of the collision. And second, according to Peters's undisputed testimony, Valter managed to make three or four controlled turns after Peters saw him- demonstrating that the issue is more that Valter failed to notice Peters than that he lacked time to avoid Peters. At any rate, because Valter raised this argument for the first time in his reply brief, and without good cause, we find the argument forfeited.

The court said the arguments made by the plaintiff, individually or as a group failed to show any gross negligence on the part of the defendant ski area.

So Now What?

The definition of inherent, is changing either by statute or by law. California has no ski area safety statute. However, the courts have expanded the definition of inherent risk to include snowcats, *Willhide-Michiulis v. Mammoth Mountain Ski Area,*

LLC (2018) 25 Cal.App.5th 344 and now snowmobiles. California now joins Colorado in finding a parked snowmobile is an inherent risk of skiing, see A parked snowmobile is an inherent risk of skiing for which all skiers assume the risk under Colorado Ski Area Safety Act.

Inherent risk used to be those risks that were part and parcel of the activity, without the activity of man. Now, in skiing at least by statute or law, the inherent risks of skiing have expanded. You go skiing or boarding you assume the risk of hitting something on the slopes that is either natural or manmade.

Valter v. Mammoth Mountain Ski Area, LLC (Cal. App. 2023); California Court of Appeals, Third District, Mono, 2023

Jim Moss is an attorney specializing in the legal issues of the outdoor recreation community. He represents guides, guide services, outfitters both as businesses and individuals and the products they use for their business. He has defended Mt. Everest guide services, summer camps, climbing rope manufacturers; avalanche beacon manufactures and many more manufacturers and outdoor industries. Contact Jim at Jim@Rec-Law.us

Controversy Brews Over Noise at Rock Sports Complex in Milwaukee County

Milwaukee Co. Board of Supervisors are reportedly considering a lawsuit against the Rock Sports Complex in Franklin for noise ordinance violations.

If a lawsuit is filed, the catalyst will be a county-funded sound study, which concluded that some activities violated Franklin's noise ordinances. Musical acts appear to be the primary offender.

Supervisor Patti Logsdon told the media that she has been receiving complaints from her constituents since she began as a county supervisor in 2018. She is reportedly drafting a resolution to sue the owners, Roc Ventures, for violating the county's 2017 developer agreement.

Her ammunition will be a $200,000 sound study, which was funded by the county, which allegedly found excessive noise coming out of the facility.

A study found that The Rock Sports Complex in Franklin is sometimes too loud for nearby residential communities.

The aforementioned study reads as follows:

"No person shall operate, permit the operation or allow his or her property to be used for such operation of anything which makes or causes a sound at a level between 70 dBA and 79 dBA as measured at the real property boundary of the noise source or beyond 50 feet from the noise source when operated in a public space without a permit."

Texas A&M Athletics Announces New Partnerships for Domestic and Craft Beer

Texas A&M Athletics announced last month new partnerships with Molson Coors Beverage Company and Boston Beer Company's Twisted Tea Hard Iced Tea. Molson Coors will be the Aggies exclusive marketing partner for domestic beer with Coors Light beginning with the 2023-24 season, while Twisted Tea will serve as Texas A&M's exclusive marketing partner for flavored malt beverage.

This multi-year agreement was secured by Texas A&M Sports Properties and LEARFIELD. Coors Light and Twisted Tea will both be visible parts of the gameday experience at all Texas A&M Athletics facilities, including Kyle Field, Reed Arena and Olsen Field at Blue Bell Park.

As part of the agreement, both companies will benefit from "a fully integrated marketing partnership including access to Texas A&M marks, an engaging Aggie Fan Zone signage presence, and digital offerings throughout the partnership term."

With this new multi-year agreement, Texas A&M Athletics and Molson Coors along with Revolver Brewing Company will also develop a new Texas A&M-branded beer that will debut during the fall of 2023. More information about the product launch and availability will be announced at a later date. All of these products will be distributed by Kristen Distributing Company in Bryan.

"We are always looking for innovative opportunities to engage more Aggies and enhance the fan experience for the 12th Man at all of our venues and we are excited to partner with Coors Light, Twisted Tea and Kristen Distributing Company this fall," Texas A&M Director of Athletics Ross Bjork said. "This multi-year partnership will not only provide already great products to our fans but open new opportunities for the Molson Coors and Boston Beer families. Most importantly, we appreciate all three partners shared commitment to encourage fans to drink responsibly."

Health Problems and Legal Issues at the Tough Mudder Competition

By John T. Wendt, J.D., M.A., Professor Emeritus, Ethics and Business Law, University of St. Thomas

Founded in 2009 by Will Dean and Guy Livingstone,[1] Tough Mudder is a non-timed obstacle course with a choice of 5K (13 obstacles), 10K (20 obstacles), and 15K (30 obstacles) distances. It has been described as "more than just an obstacle course" and is "[b]uilt on a foundation of teamwork and overcoming obstacles, it's the chance to unplug from the daily grind, experience the unexpected, and accomplish something bigger than yourself."[2] The organization itself says that "Tough Mudder creates unconventional life-changing experiences that challenge people to step outside their comfort zone and overcome obstacles through teamwork. Built on a foundation of camaraderie and community our series of obstacle courses and mud runs will push your physical and mental limits, all without the pressure of competition."[3]

Tough Mudder proposes that the number one reason why someone should try a Tough Mudder is that "We Have The Most Fun Obstacles In The World."[4] Three obstacles that they list include: "Arctic Enema: 'What started as a variety of ice-based obstacles slowly morphed into Arctic Enema…At first, you just had to climb in and wade through the ice. However, as the year's progressed those crazies in the obstacle innovation lab started to add more ways to ensure that you had to submerge your whole body as many times as possible. Now it really lives up to its name.'"[5] A second obstacle is entitled "Cage Crawl: 'Pulling yourself along a 48' pit of water with 4" to breathe might not make you panic, but it will definitely make you pee at least a little bit.'" And finally, there is "Electroshock Therapy: 'Perhaps Tough Mudder's most controversial obstacle, this simple structure remains

1 Spartan, Spartan Completes Acquisition of Tough Mudder in the United States, Spartan Race (2020), https://www.spartan.com/blogs/unbreakable-race-stories/spartan-acquires-tough-mudder (last visited Aug 29, 2023). After involuntary bankruptcy Spartan acquired Tough Mudder in 2020. Dean and Livingstone are not longer affiliated with the organization.

2 DoTheBay, Tough Mudder Sonoma at Sonoma Raceway, DoTheBay (2023), https://dothebay.com/events/2023/8/19/tough-mudder-sonoma-tickets (last visited Aug 27, 2023).

3 Tough Mudder, Tough Mudder Press Room for Media Inquiries, Tough Mudder (2023), https://toughmudder.com/press-room/ (last visited Aug 27, 2023).

4 Tough Mudder, 6 Reasons You Should Run a Tough Mudder in 2023, Tough Mudder (2023), https://toughmudder.com/blog/no-excuses/6-reasons-you-should-run-tough-mudder/ (last visited Aug 27, 2023).

5 Tough Mudder, Obstacles in a Tough Mudder Mud Run, (2023), https://toughmudder.com/obstacles/ (last visited Aug 27, 2023).

largely unchanged from its inception and earliest days on course. A field of wires dangling from a rectangular frame, clicking as 10,000 volts crackle through them. Over the years, mud, trenches, rows of hay and even a grandstand have been added to enhance the spectacle. A right (sic) of passage for most participants and favorite amongst spectators who enjoy watching the carnage.'"[6]

Now, enter the 2023 Tough Mudder in Sonoma County held on August 19 and 20, where nearly two dozen people reported a bacterial infection on their skin. Participants posted pictures of rashes, puss-filled pimples or what looked like bug bites on social media as well to sending the pictures to local a television station.[7] More than 100 participants have reported rashes with boils, fevers, diarrhea, cramps, vomiting, and muscle pain. These symptoms could be caused by cercarial dermatitis, staph infections, and aeromonas.[8]

Dr. Karen Smith of the Sonoma County Health Services sent a note to participants saying, "We are reaching out to you through an abundance of caution to alert you that you may have been exposed to bacteria that can cause skin infections… rash, itching, fever, lethargy, and flu like symptoms. These symptoms could be indicative of a minor illness called Swimmers' Itch, but they can also indicate a Staph infection or other more serious bacterial infection such as Aeromonas, which was identified from at least one affected race participant. These bacterial infections can develop when skin is exposed to soils and mud. If untreated, serious illness and sepsis may develop. If you are experiencing an unresolving or worsening rash, flu like symptoms, fever, lethargy (fatigue) or myalgia (nerve pain) please reach out to your medical provider or local emergency department."[9] Tough Mudder also reached out to participants to acknowledge that they are working with the County of Sonoma Department of Health Services and to echo Dr. Smith's letter.[10]

Also, in a response to a KPIX television request, Tough Mudder released the following statement: "We are aware of some reports of individuals experiencing an adverse health reaction following participation in the Tough Mudder Sonoma event this past weekend. We want to let you know, that the health and safety of the Tough Mudder community is always our top priority, and accordingly, we are actively taking all necessary steps to fully investigate the matter. If you are experiencing any medical concerns, please consider seeing your doctor. We thank you for understanding and patience as we continue to look into the matter."[11]

Some participants have questioned Tough Mudder's commitment to health and safety. Participant Nicole Villagran said, "You wake up the next day and you're like, what is all this on my arm? Like what is going on here? And it's on both arms. That's where I was digging and doing army crawls and it's on the inside of my knees where I was pushing off of as well…"[12] A 10K participant Meghan Rowe said, "It was the next morning and I started noticing I had breakouts on my stomach…I had a headache. I had chills and really bad body aches… They (Tough Mudder) knew about it last year, why couldn't they say something…"[13] It was also reported that emails showed that there were health problems reported after the 2022 Sonoma Tough Mudder.[14]

An interesting sidenote is that in order to participate in a Tough Mudder event, a participant must register, pay registration fees, and sign a waiver through the Tough Mudder website and agree to their "Terms of Use." More specifically, Tough Mudder's website states that, "All persons entering the Tough Mudder event must have a waiver signed. All waivers are signed electronically. Sign your waiver before you arrive to save time while checking in on event day."[15] And under the Terms of Use a participant agrees to a choice of law provision that the exclusive jurisdiction shall be in the county and State of New York. A participant also agrees to waive a trial by jury. And by using the website a participant agrees to submit "any and all controversies, disputes or claims" to arbitration conducted by the American Arbitration Association in New York. Finally, a participant agrees to bring a

6 Id.

7 Kelly O'Mara, What Happened at Tough Mudder Sonoma: Hundreds Get Sick With Possible Bacterial Infection, KQED (2023), https://www.kqed.org/news/11959242/what-happened-at-tough-mudder-sonoma-hundreds-get-sick-with-possible-bacterial-infection (last visited Aug 29, 2023).

8 Nicoletta Lanese, "Tough Mudder" Obstacle Course Tied to Serious Bacterial Infections, livescience.com (2023), https://www.livescience.com/health/viruses-infections-disease/tough-mudder-obstacle-course-tied-to-serious-bacterial-infections (last visited Aug 30, 2023).

9 Karen Smith, Health Advisory, (2023), https://spartan-email-cdn-sp.s3.amazonaws.com/Health%20Advisory%20-%20Tough%20Mudder%202023.pdf (last visited Aug 26, 2023).

10 Tough Mudder, Health Advisory, (2023), https://toughmudder.getvozzi.com/'/kqqN-Nm (last visited Aug 26, 2023).

11 CBS San Francisco, Sonoma County Issues Health Advisory for Tough Mudder Participants after Reports of Rashes, Fever, (2023), https://www.cbsnews.com/sanfrancisco/news/sonoma-county-issues-health-advisory-for-tough-mudder-participants-after-reports-of-rashes-fever/ (last visited Aug 26, 2023).

12 Don Sweeney, 'Hundreds' of Tough Mudder Participants Report Rashes, Infections after California Race, The Sacramento Bee, Aug. 28, 2023, https://www.sacbee.com/news/california/article278681369.html (last visited Aug 29, 2023).

13 Christina Rendon, Tough Mudder Athletes Complain of Rash after Sonoma County Race, (2023), https://www.ktvu.com/news/tough-mudder-athletes-complain-of-rash-after-sonoma-county-race (last visited Aug 26, 2023).

14 Madison Smalstig, Emails Show Illnesses Reported after 2022 Sonoma Tough Mudder but Nothing Was Done, Santa Rosa Press Democrat (2023), https://www.pressdemocrat.com/article/news/emails-show-health-problems-reported-after-2022-sonoma-tough-mudder-but-not/ (last visited Aug 30, 2023).

15 Tough Mudder, Do I Need to Bring a Waiver to the Event?, Tough Mudder (2023), https://toughmudder.zendesk.com/hc/en-us/articles/1500006401622-Do-I-need-to-bring-a-waiver-to-the-event- (last visited Aug 29, 2023). At the time of the writing of this article, the author was unable to get a copy of the Tough Mudder waiver.

claim only as an individual and not as a class action.[16]

In 2013, Tough Mudder settled a wrongful death suit filed by the family of 28-year-old Avishek Sengupta who drowned at the Tough Mudder Mid-Atlantic event in West Virginia. The wrongful-death complaint charged Tough Mudder and others with gross negligence for conduct at a "Walk the Plank" water obstacle where participants jumped from a platform 15 feet above a man-made pool of muddy water, roughly 15 feet deep and 40 feet wide. Sengupta didn't come up after his plunge. The complaint had alleged that overcrowding made it impossible for safety personnel to monitor the pool and that Tough Mudder had removed safety features to speed up crowd flow and decrease the wait time. It was reported that at the time Tough Mudder referred to their waiver as a "Death Waiver."[17]

Tough Mudders are popular. They claim that "To face your fears is not easy, it takes a level of determination, bravery and will-power to overcome it. Whether it's a fear of heights, confined spaces or the dark. We want to help you climb that mountain, conquer that challenge and face that fear."[18] Are they fun? Are they dangerous? In the famous case, *Murphy v. Steeplechase Amusement Company* (1929), Benjamin Cardozo said, "The antics of the clown are not the paces of the cloistered cleric… The timorous may stay at home."[19]

At the 2023 Sonoma Tough Mudder, Malia Helms and five other friends completed the 10k course, then woke up the next morning with itchy, painful red bumps across her body and tested positive for Aeromonas infection. Helms said, "I'm still feeling sick from it, and my body is still recovering." She felt frustrated that Tough Mudder didn't warn this year's participants of a potential risk. Her teammate Noa Umbaugh experienced similar bumps on her arms and legs but did not test positive for Aeromonas infection. Umbaugh summed up their experience, "It was just supposed to be a fun thing, and now all six of us are on antibiotics…"[20]

16 Tough Mudder, Terms of Use, Tough Mudder (2023), https://toughmudder.com/terms-of-use/ (last visited Aug 29, 2023).

17 Erin Beresini, Tough Mudder Settles Wrongful-Death Complaint, Outside Online (2016), https://www.outsideonline.com/health/running/tough-mudder-settles-wrongful-death-complaint/ (last visited Aug 30, 2023).

18 Tough Mudder, Psychology Feature: The Benefits Of Facing Your Fears, Tough Mudder (2023), https://toughmudder.com/blog/no-excuses/psychology-feature-the-benefits-of-facing-your-fears/ (last visited Aug 30, 2023).

19 Murphy v. Steeplechase Amusement Company, 250 NY 479 (1929).

20 Maia Pandey, After Tough Mudder near San Francisco, Participants Report Rashes and Fevers from Bacterial Infections, NBC News (2023), https://www.nbcnews.com/health/health-news/tough-mudder-participants-bacterial-infections-rcna101870 (last visited Aug 30, 2023).

USA Pickleball Announces Quiet Category for Pickleball Products

The Acoustic Initiative Unveils Solutions for Players, Manufacturers and Facility Operators.

USA Pickleball, the National Governing Body for the sport of pickleball in the U.S., announced last month the launch of its Quiet Category for pickleball products, a revolutionary initiative that aims to reduce the sport's sound output during recreational play.

As pickleball continues to grow in popularity and new outdoor courts open, controversy has swirled around noisy nature of the sport.

To that end, USA Pickleball has invested in the research and creation of equipment and solutions to enable more communities the opportunity to enjoy the sport. The launch of this Quiet Category "will recognize pickleball products that reduce acoustic output during play without negatively impacting performance," according to USA Pickleball. "In addition to this effort, USA Pickleball is expanding its Facilities Development program to further support noise-reduction solutions for potentially sound-sensitive pickleball venues."

Mike Nealy, USA Pickleball Chief Executive Officer noted that "with the sport's growth, addressing noise concerns is essential to maintain a positive relationship between residential communities and facility operators. We are continuing to develop guidance and resources that offer short- and long-term solutions that continue to enhance the sport. By working together with manufacturers and the entire industry, we can develop quieter options that benefit everyone."

USA Pickleball's Quiet Category for equipment "will promote products that deliver essentially 50 percent or less of the acoustic footprint of equipment commonly sourced and used in community parks.

USA Pickleball claimed that over the last 15 months it "has researched and studied the acoustic output within the sport, making considerable investments to lead the application of resulting data. Collaborating with acoustic experts, USA Pickleball has gained an understanding and ability to address the challenges posed by noise pollution in pickleball facilities in sensitive locations.

The launch of this Quiet Category "will recognize pickleball products that reduce acoustic output during play without negatively impacting performance," according to USA Pickleball.

"The Quiet Category will include specific guidance to manufacturers with thresholds that significantly reduce acoustic propagation during play. USA Pickleball will provide test fixture requirements and procedures to manufacturers during development, specification relief to enable manufacturers to creatively use new materials and configurations while preserving the nature of the game, and ongoing collaboration and guidance to several global brands in sporting goods. With the mission to encourage manufacturers to prioritize innovation in creating quieter products, the Quiet Category will encompass a wide range of products including paddles, balls, paddle covers, and noise mitigation screens for pickleball courts. USA Pickleball is also launching an incentive program for manufacturers to deliver noise-reduced solutions in the Competition-Certified Category."

Applications for Facilities Development Program

"To address noise concerns in local residential communities, and enhance the overall experience for players, USA Pickleball will expand its site design, evaluation, and acoustic mitigation services within its Facilities Development program. These services engage key principles throughout the development process, including greenfield builds, court conversions, and expansions, to assess key variables that affect the acoustic propagation.

"There have been several breakthroughs in new products that not only provide options for facilities designers, but address concerns of weight, cost, and attenuation levels that meet local ordinances and codes. In addition to identifying target thresholds, USA Pickleball is currently engaged in referrals to new sites for existing solutions through collaborations with stakeholders. Future initiatives include facilitating test installations, conducting uniform lab tests for accurate benchmarking, and integrating solutions when running simulations on facilities in planning/development."

Carl Schmits, USA Pickleball Managing Director of Facilities Development and Equipment Standards, noted that due to the "unprecedented levels of growth, … communities are now being faced with pressure to provide places to play. This overwhelming demand has driven municipalities and HOAs with limited resources to seek support in meeting these needs. We have spoken with hundreds of facilities and concerned stakeholders over the last 15 months, and gathered considerable data related to this topic. We're now well-equipped and ready to launch this program."

Waterpark

Continued from page 1

tion of its Aquatics Superintendent, Jenna Stevenson. In her declaration, Stevenson attested to the fact that she was not aware of any prior similar accidents regarding insufficient water in the catch basin of the waterslide and that lifeguard training included ensuring that the water level is at the fill line at the bottom of the waterslide before sending a rider down. The lifeguards are also trained to position themselves so that they are facing a sign that specifies how high the water level should be in the catch basin for a rider to go down the side.

The City further advised the Court that on the date of Plaintiff's accident, the waterpark's lightning detector went off, and the water on the waterslides was depleted as a result. Once the lightning subsided, the lifeguard operating the waterslide thought it was okay to send people down, but when he noticed that they were coming down the side faster than usual and having impacts at the bottom, he signaled for help. The catch basin, which is designed to slow riders down once they reach the bottom of the slide, had a sticker on the side to show how high the water level needs to be. In this instance, the lifeguard made a mistake by failing to ensure that the water was at the fill line, which likely caused Plaintiff's accident.

Fernandes, however, argued that he is not required to prove gross negligence to establish that the legislature waived the City's immunity, and that there is a genuine issue of material fact regardless of whether the Recreational Use Statute applied. Plaintiff pointed to the Pirates Bay incident report which concedes that the lifeguard "dispatched riders before the catch pool was full of water." As a result, multiple riders were caused to "hit the end of the slide." In fact, the lifeguard's witness statement further conceded "It was my fault. If I wouldn't have given the thumbs up this wouldn't have happened." When the trial court denied the City's jurisdictional plea, the City appealed.

The City's Jurisdictional Appeal

The City sticks to its reliance on the Recreational Use Statute and Texas Tort Claims Act, maintaining that because Fernandes asserts personal injury claims sustained at a government-operated waterpark, the legislature has waived governmental immunity solely in instances involving gross negligence and that it met its burden of refuting any claims of gross negligence that would have barred application of the Recreational Use Statute. The Appellate Court took to ascertaining whether genuine issues of material facts exist on the jurisdictional issue. Then, if the evidence creates a fact issue as to jurisdiction, the plea must be denied pending resolution of the issue of fact by the factfinder. If the evidence fails to raise a genuine issue of material fact on jurisdiction, then the jurisdictional plea must be granted as a matter of law. See, e.g., Suarez v. City of Tex. City, 465 S.W.3d 623, 632 (Tex. 2015).

The Appellate Court considered that the City has governmental immunity from liability, but also that the Texas Tort Claims Act waives governmental immunity, depending on the type of claim. Here, the Recreational Use Statute limits the scope of the Texas Tort Claims Act's waiver of immunity for an "owner, lessee, or occupant of real property" who gives a permission to others "to enter the premises for recreation." Tex. Civ. Prac. & Rem. Code § 75.002(c), (f). This is where the question of gross negligence comes into play – to establish a waiver of immunity under the Recreational Use Statute, a plaintiff must establish the governmental unit has been grossly negligent or has acted with malicious intent or in bad faith. Id.

In addition to the consideration of gross negligence, the Appellate Court was faced with determining whether the activities at issue in Fernandes' claims were considered "recreation" pursuant to the definition provided in The Recreational Use Statute (Tex. Civ. Prac. & Rem. Code § 75.001(3)). The "recreation" definition, though nonexclusive, includes swimming and water sports along with "any other activity associated with enjoying nature or the outdoors." Tex. Civ. Prac. & Rem. Code § 75.001(3)(L).

Participating on an outdoor waterslide seems to fit into the catchall definition of recreation provided by the Recreational Use Statute, thus waiving immunity in the event the City acted with gross negligence. To prove gross negligence, Fernandes had to show that the City, as a governmental unit, (1) knew about a condition of the property giving rise to an extreme degree of risk and (2) proceeded with conscious indifference to the rights, safety, or welfare of others. Suarez, 465 S.W.3d at 627.

Of course, the parties disagreed on whether riding a waterslide at an outdoor waterpark constitutes recreation, but the Appellate Court held that it does for purposes of the Recreational Use Statute. In doing so, it concluded that, in cases involving pools, Texas appellate courts have not limited the Recreational Use Statute's application to instances in which the injured party was in the water when injured. See, e.g., City of Dalhart, 476 S.W.3d 103, 107-08 (Tex. App. – Amarillo 2014, pet. denied). Fernandes relies on University of Texas at Arlington v. Williams, 459 S.W.3d 48 (Tex. 2015), which held that the Recreational Use Statute does not apply simply because

an activity takes place outdoors. The Appellate Court notes that the Williams decision was a plurality decision; while a majority agreed on the fact that the Recreational Use Statute did not apply to the spectator's claims because she was not engaged in a recreational activity under the statute, it did not agree as to the rationale. In the end, the Appellate Court found that Williams and this case are just too factually dissimilar to apply the Williams holding here, especially when Williams did not articulate a bright line rule on which it was expected to rely.

Having determined that outdoor waterslide participation did constitute "recreation," the Appellate Court moved on to determine that record evidence demonstrates that the City took measures to mitigate a known risk associated with the waterslide, and had reason to think these measures were adequate to mitigate this risk. Therefore, according to the court, the City was not consciously indifferent to the potential risks to constitute a finding of gross negligence. Given the City's active steps taken in an attempt to avoid incidents leading up to Fernandes' accident, there was no evidence of gross negligence.

Based on the Appellate Court's decision that Fernandes' participation constitutes "recreation" under the Recreational Use Statute and that there was no evidence of gross negligence, it reversed the trial court's order denying the City's jurisdictional plea and rendered judgment dismissing this lawsuit for lack of subject-matter jurisdiction.

Tort

Continued from page 2

The NFL's Preemption Playbook

In November 2022, Patrick sued the NFL, ESPN, the Chargers and the entities that own and operate SoFi Stadium, and others, in California state court for negligence and premises liability. The NFL and Chargers subsequently removed the case to federal court and moved to dismiss, arguing that Patrick's claims were preempted by the CBA, pursuant to the Section 301 of the Labor Management Relations Act, 28 U.S.C. § 185.

The NFL's motion was a familiar one. Whenever the NFL or one of its clubs is sued by a player in court (which is not uncommon), they argue that the claims (usually state common law tort claims) are "preempted" by Section 301. The well-established and controlling Supreme Court precedent on this issue holds that claims whose resolution are "substantially dependent upon analysis of the terms of" a CBA are preempted. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 220 (1985). In other words, claims that are "inextricably intertwined" with the terms and provisions of the CBA cannot proceed. Id. at 213. The intended and frequent result is the dismissal of the claims.

The plaintiff-players cannot reasonably dispute this standard at a high level, nor did Patrick in the instant case. Instead, the parties argue over whether analysis of the claims actually requires interpretation of the CBA.

In this case, the NFL argued that Patrick's claims required analysis of Article 39, Section 11 of the CBA which establishes and discusses the responsibilities of the joint NFL-NFLPA Field Surface Safety & Performance Committee. In short, that Committee is responsible for establishing and enforcing playing field standards, known as the Field Surface Manual. In the NFL's opinion, the court could not evaluate whether the NFL or Chargers was negligent in this case without evaluating whether they complied with the Field Surface Manual. Thus, the NFL says Patrick's claim is really a breach of contract claim, masquerading as a tort claim.

In response, Patrick argued that the case was "a straightforward 'slip-and-fall case," and the court should not get distracted by the fact that it occurred during a Monday Night Football game. According to Patrick, "the claims are garden-variety negligence and premises liability claims that turn simply on whether reasonable live-events broadcast producers would have placed their cords, cables, mats, and personnel which Patrick fell over in similar positions." Such claims, in Patrick's view, did not require analysis of the CBA and thus are not preempted. Moreover, Patrick argued that the Court could not consider the Field Surface Manual, since it is not an explicit part of the CBA.

The Court Rules for the NFL and Chargers

As a threshold issue, the Court determined that it could consider the Field Surface Manual in evaluating whether Patrick's claims were preempted. In the Court's opinion, "it is clear that the document is intended to be incorporated into the CBA as a reference for mandatory safety standards." CBAs are commonly referred to in cases where preemption is argued on a motion to dismiss. Consequently, the Court considered it appropriate to consider the Field Surfaces Manual on the NFL's and Chargers' motion.

From there, the Court evaluated whether Patrick's negligence and premises liability claims were preempted by the CBA. More specifically, the Court considered whether any duty owed by the NFL and Chargers to Patrick arises from state law or, instead, the CBA. The Court noted that "[t]he risk of injury arising from collision with objects on the sidelines is an inherent risk of professional football." In other words, under California common law, the Chargers

and NFL did not owe a duty to Patrick to ensure he did not collide with objects on the sidelines.

Instead, in the Court's determination, "resolution of Patrick's claims, and specifically determination of the scope of each defendant's duty and potential liability, would require interpretation of the CBA," including the Field Surface Manual. The Field Surface Manual imposes obligations on the NFL and the Chargers concerning playing surfaces and to determine whether they were negligent, as Patrick claims, would require evaluating whether they complied with those obligations. Consequently, the Court held, Patrick's claims were completely preempted.

Returning to Section 301, that statute provides federal courts with jurisdiction to hear claims for breach of a CBA. However, "Section 301 preclude[s] an employee bound by a CBA from suing before exhausting bargained-for arbitration procedures." The NFL-NFLPA CBA contains grievance arbitration procedures which Patrick did not pursue. Consequently, his claims against the NFL and Chargers were barred by Section 301 and dismissed in their entirety.

Ready for Kickoff

Patrick's counsel has indicated that they will ask the Court for reconsideration. Barring success there, Patrick is unlikely to now pursue a grievance under the CBA because of the CBA's strict 50-day statute of limitations. Instead, Patrick would be left to pursue his claims against the remaining defendants, including ESPN and SoFi Stadium. The parties' respective faults will of course be difficult to determine, but Patrick still has a couple of deep pockets at which to take aim.

Deubert is Senior Counsel at Constangy, Brooks, Smith & Prophete LLP.

