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PRODUCT LIABILITY & SPORTS

ALERT

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WIN SOME, LOSE SOME: ASSUMPTION OF RISK DEFENSE FAILS FOR SPORTS COMPLEX OWNERS; CLAIMS AGAINST DOME SELLER DISMISSED

By Matthew J. Kelly Jr. and Harris Neal Feldman

A plaintiff bringing product liability and premises liability claims against multiple defendants in an effort to cover all bases often leads to different legal defenses among classes of co-defendants and a scattered offense by plaintiff's counsel and plaintiff's liability expert. A recent case out of New York's Appellate Division (Third Department), *Dann v. Family Sports Complex, Inc.*,[1] dealt with this multiplicity of claims and defenses. The case serves as a reminder that even though product liability defendants cannot normally utilize an assumption of risk defense, there are still other – and often more potent – viable defenses in the sports context. The Appellate Division affirmed for the product seller on a stand-by defense: plaintiff's expert just didn't come up with a viable theory. The premises defendants were not as lucky, getting their summary judgment win overturned because of issues of fact surrounding their assumption of risk defense.

[1] *Dann v. Family Sports Complex, Inc., et al.* (2014 NY Slip Op 08525 (3d Dep't Dec. 4, 2014))

More than Turf Burn, but Who is to Blame?

The case involved a recreational league soccer match on one of multiple fields inside an inflatable dome. Plaintiff, an experienced recreational soccer player, slid after a ball headed out of bounds behind the goal line. He crashed into the wall of the dome, approximately 4-5 feet from the line and concealed by an inner vinyl liner. Because the inflated fabric walls were not cushioned he slid, knee first, into a concrete footer that anchored the dome walls. His knee cap shattered.

Plaintiff brought suit in New York State Court against multiple parties, including the owner and operator of the dome (the "premises defendants") and the seller of the dome. The claims against the premises defendants included negligence and strict product liability claims; the claims against the seller were primarily in product liability, namely design defect.

Plaintiff's main argument was that the negligent layout of the fields put the out-of-bounds lines too close to the concrete footer, dangerously concealed by the inner vinyl liner. As part of its multiple claims, plaintiff alleged the owner and operator of the dome were negligent in arranging the field in that negligent manner, and/or the seller of the dome was negligent or strictly liable on a design defect theory for designing the dome

and fields in such a manner as to put the boundary lines too close to the dangerous concrete footers.

The lower court granted the premises defendants' motions for summary judgment, but the Appellate Division reversed and remanded, allowing the plaintiff's case to proceed against the owner and operator. The Court found that issues of fact remained as to whether or not plaintiff assumed the risk of injury when he slid after the ball.

In general, voluntary participants in recreational or athletic activities are deemed to consent to "those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation."[2] Participants do not, however, "assume 'concealed or unreasonably increased risks' or 'unique and … dangerous condition[s] over and above the usual dangers that are inherent in the sport.'"[3] While the risk of crashing into a wall while playing soccer is inherent in the activity, and proximity of the dome wall to the field was open and obvious, the Court noted that the vinyl liner hanging to the ground along the wall concealing the concrete footer may have served as a concealed, increased risk.

The premises defendants argued that plaintiff should have noticed the concrete footer where it was exposed at other spots, or noticed how the ball bounced sharply off the liner, indicating its solid state. Plaintiff raised an issue of fact to these points, however. He testified he had never seen the concrete footer and thought the walls were cushioned in some way. Thus, summary judgment for the premises defendants was overturned.

Victory for the Seller, but not on Assumption of Risk

On the other hand, the Court affirmed the dismissal all the product liability claims.[4] The Court affirmed the dismissal of the sports dome seller, Yeadon Fabric Structures, because, quite simply, plaintiff failed to establish a defect case. Plaintiff's primary claim against the seller was basically the same as against the premises defendants – the fields were laid out in a defective manner. However, the Court found no basis to hold the product seller responsible for the design. It appears that the seller did not provide any sort of guidelines as to how to lay out the fields within the dome or whether or not to provide padding at certain parts of the wall, and likewise the expert did not establish that industry standard required the seller to do so. Moreover, plaintiff's expert failed to provide credible support for this allegation. The expert relied on inapplicable standards (standards for outdoor fields for high school and collegiate soccer, not indoor recreational fields). The Court further ruled that the expert's theory that the layout of the fields constituted a "design defect" was conclusory and "unsupported by any analysis, explanation or citation to a relevant industry standard."

Consider if the seller had been more involved with the end layout: would the seller have been able to rely on an assumption of risk defense? No. In New York, assumption of risk is not a viable defense to a product liability claim. As the Appellate Division has held before, "[t]o allow a defendant to escape its nondelegable duty to make a safe product by invoking the implied consent of the product user would undermine the policies underlying the

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[2] *Myers v. Friends of Shenendehowa Crew, Inc.*, 31 A.D.3d 853, 854 (2006).

[3] *Martin v. State of New York*, 64 A.D.3d 62, 64 (2009), *lv denied*, 13 N.Y.3d 706 (2009) (quoting *Morgan v. State of New York*, 90 N.Y.2d 471, 485 (1997)).

[4] The Court affirmed dismissal of product liability claims against the premises defendants because they were outside the manufacture, sale and distribution chain.

doctrine of strict products liability."[5] The focus of strict product liability is on the characteristics of the product, not on the conduct of the parties. The concept weaves well into an assumption of risk mindset. When a player assumes the risk of injury, he or she is assuming appreciable, expected risks, not a hidden defect. The soccer player assumed the risk he would scrape up his leg while sliding across artificial turf, not that a vinyl cover on the nearby wall shrouded an uncushioned concrete wall.

If under alternate, hypothetical facts, plaintiff's expert found (consistent with applicable industry standards) that a reasonable, safer alternative design employed by other sellers or manufacturers existed, then plaintiff's expert could have credibly opined that the dome itself was defective because, for example, the seller should have provided padding to be placed along the concrete footers. These hypothetical circumstances might have allowed plaintiff to defeat an assumption of risk defense raised by a manufacturer or seller.

A good example comes from a 2012 Supreme Court, Queens County case[6] involving a swing set. In that case, a child plaintiff jumping out of a swing lost the tips of two fingers when they became caught in the links of the swing. Plaintiff alleged the chain created a trap-like condition constituting a design defect. When the manufacturer of the swing tried to rely on an assumption of risk defense, the court did not allow it, and denied summary judgment. Plaintiff was helped there by evidence that the manufacturer offered a safer kind of swing chain but did not expressly offer it to the purchaser of the swing set at issue. Because the child could not have known the swing he was on contained a defect (or that safer swings existed), an assumption of risk defense could not apply.

Takeaways

Plaintiffs' attorneys often bring as many types of claims they can against all possible defendants, with the general thoughts of "the more, the better" and "one of the claims is bound to stick." In the personal injury context, this situation often results in product manufacturers, sellers, and landowners as co-defendants sorting through claims sounding in product liability, premises liability and various flavors of negligence. Defendants in those cases must recognize that they may not be able to use the same defenses – particularly assumption of risk – and their defenses may also at times end up at odds with each other.

In any sports or recreation case where defendants include both premises owners and operators and a product manufacturer or seller, all defenses should be considered because, presumably, plaintiff will have brought all imaginable claims. Even though a product seller or manufacturer may not be able to utilize an assumption of risk defense, it still is worth considering how all the arguments in the case will be shaped by assumption of risk factors and issues of fact related to them. When a defendant seller or manufacturer is strategizing in such a kitchen-sink, multi-defendant case, that seller or manufacturer should not lose focus of traditional product liability defenses even when the case sounds in premises liability. A plaintiff who is steered towards those issues of fact that typically apply to premises defendants may well end up losing focus – or enthusiasm – for more difficult and nuanced product liability claims. ◆

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[5] *Lamey v. Foley*, 188 A.D.2d 157, 168 (4th Dep't 1993).

[6] *Faherty v. Birchwood Lodge, Inc.*, 2012 NY Slip Op 52031 (Sup. Ct. Queens Co. Oct. 24, 2012).

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