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A newsletter brought to you by the Sports Law Group at Proskauer.

Welcome to *Three Point Shot*, a newsletter brought to you by the Sports Law Group at Proskauer. Three Point Shot brings you the latest in sports law-related news and provides you with links to related materials. Your feedback, thoughts and comments on the content of any issue are encouraged and welcome. We hope you enjoy this and future issues.

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NY Court Checks Amateur Hockey Player's Suit against Ice Rink Operator

In a matchup unlikely to garner overzealous shouting from the infamous Hanson brothers, an ice rink operator and a referee recently took on an amateur hockey player who was allegedly injured when said referee intervened in a fight during a championship winter league game. In a final judgment that invoked every law student's favorite tort doctrine of assumption of the risk, and that provided defendants with an early holiday gift, a New York state appellate court ruled that the Plaintiff, an experienced hockey player, effectively knew what he was doing when he skated toward and not away from a scrum that had replaced the hockey game previously being played. (*Falcaro v. American Skating Ctrs., LLC*, 167 AD3d 721 (N.Y. App. Div. 2nd Dept. Dec. 12. 2018)).

In September 2015, Robert Falcaro ("Plaintiff") sued American Skating Centers, LLC, American Skating Entertainment Centers, LLC (together, the "Ice Rink"), and Michael Floru ("Referee") (collectively, the "Defendants") to recover damages for personal injuries he claimed to have sustained during a fight in an amateur hockey game between the Mustangs (Plaintiff's squad) and the Budmen at a rink in Elmsford, New York. In his complaint, Plaintiff alleged that, while playing in a game overseen by the Referee, a fight erupted among several players and, as he was attempting to pull his teammate out of the scuffle, the Referee wrapped his arms around Plaintiff from behind and pulled him backwards, causing both Plaintiff and Referee to fall to the ice, with Plaintiff allegedly sustaining injuries.

The Referee had a different version of events from his side of the ice. He testified that Plaintiff had entered the fight by jumping on an opposing player's back and, in response, he grabbed Plaintiff under his arms and shouted "[i]t's the referee," which the Referee asserted is understood by the players as an unwritten rule to stop fighting. However, according to the Referee, instead of stopping, Plaintiff screamed expletives and threw his elbows backwards, causing both Plaintiff and the Referee to fall to the ice in the ensuing struggle. The Referee also defended himself on the grounds that league rules permit a referee to make physical contact with players to break up a fight.

The Defendants quickly moved for summary judgment to dismiss the complaint, arguing that by skating toward the fight and inserting himself into the scuffle, Plaintiff assumed the risk of injury that might result. However, in June 2017, Plaintiff deked his way to a favorable verdict when the trial court held that the Defendants had failed to make a prima facie case that the Referee's conduct was an inherent part of the game. With the Defendants' motion iced, the matter moved past the blue line and was slated for trial.

On appeal, in December 2018, a New York appellate court disagreed with the lower court and, relying on the doctrine of primary assumption of risk, ruled that summary judgment should have been granted in favor of the Defendants. In its decision, the court emphasized that by engaging in a sport, a participant "consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation."

According to the court, the Defendants had sufficiently established that the risks inherent in ice hockey – specifically that of involving oneself in an ongoing fight – were "fully comprehended" and "perfectly obvious" to Plaintiff, an individual who had played in the amateur hockey league for years. Moreover, the Defendants had established that, under league rules, a referee was permitted to make physical contact with players involved in a fight, and even accepting Plaintiff's version of events, Plaintiff had voluntarily engaged with another player involved in the fight. Consequently, the appellate court found that Plaintiff had assumed the risk of his actions and "slapshotted" away Plaintiff's case,

Interestingly, the Defendants' victory at the appellate level may have amounted to an empty net goal. Although the Defendants had requested a stay during the pendency of their appeal, the appellate court denied the request, thereby refusing to blow the whistle on the parties' preparations for trial. With the prospect of a trial looming, after some additional back and forth, in September 2018 – three months before the appellate court issued its decision – the parties had already unlaced their skates and settled the matter (and we could not find any court document referencing whether the settlement terms were in any way contingent on the appeal's outcome).

Cruise Ship Skates from Verdict over Passenger's Ice Rink Injury

It was hardly smooth sailing, but a two-year legal battle over an ice-skating injury that occurred on a Royal Caribbean cruise ship has finally come to a hockey stop. (*Lebron v. Royal Caribbean Cruises, Ltd.*, No. 16-24687 (S.D. Fla. Dec. 18, 2018)). After being hit with a large share of an almost $700,000 jury verdict in October 2018 for a passenger's injuries, Royal Caribbean Cruises, Ltd. ("Royal Caribbean") performed a nifty pirouette when a Florida federal judge granted Royal Caribbean's motion for a directed verdict, thereby reversing the jury's decision against the cruise line. In doing so, the court ruled that there was "not sufficient evidence by which a reasonable jury could find that [Royal Caribbean]

knew or should have known" about the ice rink conditions that caused the plaintiff's injuries.

The case stemmed from an incident in June 2016, in which Edgardo Lebron ("Plaintiff"), a passenger onboard Royal Caribbean's *Adventure of the Sea* cruise ship, suffered a broken ankle while skating on the ship's ice rink. In the complaint, the plaintiff alleged that Royal Caribbean was negligent in failing to adequately warn passengers of the dangerous condition of the ice rink, failing to adequately train or supervise its staff, and failing to properly inspect and maintain both the ice rink and the ice skates that it provided to the ship's passengers. Specifically, the plaintiff claimed that one of the ice skates he was given had a broken lace and, thus, could not be laced to the top and that the surface of the ice in the rink had gouges in it, one of which caused plaintiff to fall. According to the complaint, the defendant's negligence with regard to the condition of the ice and skating equipment caused the plaintiff's injuries while ice skating.

Despite appearing to be a relatively straightforward tort case, the parties remained anchored to their positions and could not be swayed to a settlement through mediation. As a result, on September 25, 2018, the parties waded into the unpredictable waters of a jury trial. This decision to go to trial initially appeared to backfire for Royal Caribbean, as the jury entered a roughly $667,000 verdict for medical expenses and pain and suffering, among other things, against the company. The jury was not going to let the plaintiff glide away with the entire $667,000 verdict, however, as they found that the plaintiff was 35% responsible, thus lessening the damages payable by Royal Caribbean.

The jury verdict appeared to sink Royal Caribbean's chances of prevailing, but a motion for a directed verdict ultimately turned the tide of the litigation. In its motion, Royal Caribbean argued that there was no evidence by which a reasonable juror could conclude that Royal Caribbean knew or should have known about the gouges in the ice which, together with the broken skate lace, created the dangerous condition. In opposition, the plaintiff argued that the jury was adequately informed on the issue of notice and that the court should respect the jury's decision – however, the court was unconvinced, ultimately spotting several cracks in the plaintiff's arguments.

In granting Royal Caribbean's motion for a directed verdict, the court highlighted the reasons why no jury could find that the company had sufficient notice of a hazardous condition on the ice, including a lack of any prior reported problems with the ice, a lack of evidence showing how long the gouges existed on the ice, and the defendant's compliance with the industry standard of care regarding inspection of the ice (with the court stressing that reasonable care of the ice did not mean "constant" inspection). In its decision, the Florida district court emphasized that the "dangerous condition" at issue in the case was the *combination* of the defective ice skates provided to the plaintiff *and* the gouges in the ice rink. While there was sufficient evidence that Royal Caribbean knew or should have known about the defective skates, there was "not sufficient evidence for a jury to find that the defendant knew or should have known about

the gouges in the ice that, together with the broken skate lace, created the dangerous condition."

Interestingly, a footnote in the decision suggests that the plaintiff's claim may ultimately have been tripped up as much by the plaintiff's own testimony as it was by Royal Caribbean's legal defense. The footnote quotes the plaintiff as testifying that: "If you ask me what caused my fall, I would tell you it's a combination of both things, the problem in the ice and the defect in the skate." This testimony ultimately led the court to hold that the issue at trial was whether the *combination* of the ice and the skate caused the plaintiff's accident. Ultimately, this standard required the plaintiff to perform a double axel to win the day – that is, demonstrate that the defendant had notice of *both* the broken skate laces *and* the gouge on the ice, which the plaintiff was unable to do.

In the end, no matter what ultimately swayed the court to rule in the defendant's favor, Royal Caribbean will be glad to have weathered the storm of a hard-fought jury trial. However, the cruise line is not in the clear yet, as the plaintiff filed a notice of appeal with the 11th Circuit on January 8, 2019 – suggesting that there may still be rough waters ahead.

Divers Surface after $50 Million Settlement in Scuba Equipment Suit

On December 14, 2018, the parties involved in a class action lawsuit over allegedly defective scuba computer equipment finally came up for air when a California state court approved a settlement valued at an estimated $50 million. (*Huntzinger v. Suunto Oy*, No. 37-2018-00027159 (Cal. Super. San Diego Cty., Dec. 14, 2018)). The suit was filed by two scuba divers, Ralph A. Huntzinger and Eric Bush ("Plaintiffs"), against Suunto Oy ("Suunto"), the Finnish company that manufactured and sold the scuba diving computers ("Dive Computers") at issue, and Aqua Lung America, Inc. ("Aqua Lung"), a distributor of and authorized repair facility for the Dive Computers during the relevant period. The divers allege Suunto knowingly sold defective Dive Computers that had depth pressure sensors prone to malfunction due to an alleged hardware or software issue.

With over three million estimated recreational and commercial divers in the U.S., reliable scuba equipment is crucial to a diver's well-being. Dive Computers give scuba divers vital information, such as the depth of the dive, water temperature, safety stops, air tank pressure, air consumption rate and an estimate of remaining air time. They also provide important safety information based upon depth measurements, including how many dives a diver can safely make in a day, and limits the diver should employ to avoid decompression sickness, or the bends, a condition that occurs when the body is not able to properly release nitrogen that is absorbed during a dive as the water pressure outside the body increases. The bends are caused from a diver surfacing at an improper ascent rate; thus, inaccurate data relating to a dive can potentially lead to serious injury, making Dive Computers an important tool.

Suunto manufactures its Dive Computers with the goal of "provid[ing] adventurers and sports enthusiasts with the best tools to explore and conquer new territory from the highest mountains to the deepest oceans – and anywhere in between." But this ticket to dive does not come cheap. The Dive Computers (which are often built into wristwatches) retail for several hundred dollars, with some models costing over $1,000.

In May 2015, the Plaintiffs originally filed a class action complaint alleging that Suunto and Aqua Lung sold and distributed Dive Computers with defective pressure sensors even after allegedly receiving numerous complaints from users of malfunctioning Dive Computers and thereafter failed to issue a recall or inform consumers or regulators about the issue. Moreover, Plaintiffs claimed that divers who returned defective Dive Computers still under warranty were given similarly defective replacements. As the complaint states: "The only reason to purchase a Dive Computer is to have knowledge of the critical information regarding a dive. If the Dive Computer cannot reliably provide that information, it is worthless." The action alleged violations of California consumer statutes, breach of implied warranty and unfair business practices based upon alleged false or misleading advertising of the Dive Computers.

Following an arduous three-year descent into litigation and broad discovery (including depositions of witnesses in Finland), the parties eventually reached a settlement in May 2018. Under the terms of the settlement, class members who purchased one (or more) of over 20 different models of new Suunto Dive Computers in the U.S. that were manufactured between January 1, 2006 and August 10, 2018, are eligible to have their devices inspected, repaired or replaced at no cost per the procedures under the settlement terms (and there is also a $775,000 fund to reimburse divers who threw out their devices or paid for repairs out-of-pocket). The settlement does not act as a release of any injury-related claims and does not represent any admission of liability. The settlement also provides that Suunto: (i) create an educational video to help divers identify pressure sensor failure and its risks, identify best practices when using a Dive Computer, and illustrate how to proceed when there may be a pressure sensor issue under the new warranty program; (ii) notify every class member who has a good faith belief their Dive Computer has experienced a depth pressure failure that they may have it inspected, and if it does, Suunto will either repair it or replace it for free and (iii) create a Settlement Website that includes FAQs as well as a list of service centers authorized to conduct inspections of the Suunto products.

The court approved settlement also requires Suunto to pay $5M in attorney fees, plus litigation expenses and class notice and administration costs. Any funds left over from the $775,000 reimbursement fund will fund training and certification classes offered by the Professional Association of Diving Instructors (PADI).

Under the terms of the settlement, future divers hope to avoid the bends and to gain assurances that trips under the sea will be safer.

Proskauer has more than 50 years of experience counseling the world's premier sports organizations on their most critical and complex matters.

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