



February 2020 Edition

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.

Edited by **Robert E. Freeman**

Table of Contents

[Back to the Starting Line: Texas Court Revives Driver’s Lawsuit Against Racetrack](#) 1

[Fitness Equipment Maker Pumps out Favorable Verdict in Trademark Dispute](#) 2

[Former Baseball Manager Closes out Victory in Cyclist’s Negligence Suit](#) 4

[Access previous issues of Three Point Shot.](#)

Back to the Starting Line: Texas Court Revives Driver’s Lawsuit Against Racetrack

The two cars inch their way to the starting line, each driver’s hands trembling on the steering wheel with anticipation. In the next few seconds, they will fly down a straightaway for just over a quarter mile at speeds over 140 mph. The column of lights blinks down from the top. Two reds and a yellow before the green light shines. The light they’ve been waiting for all day: 3 ... 2 ...1...

Racing on this “[Two-Lane Blacktop](#),” accidents can happen. Indeed, in January, a Texas appellate court reinstated a race car driver’s negligence lawsuit against a racetrack operator for injuries sustained in a crash, DQing a lower court’s ruling that the racetrack operator was not liable. (*Coleman v. Otese Ltd.*, No. 19-00015 (Tex. App. Jan. 23, 2020)). The appellate court ruled that the racetrack operator failed to prove that the driver had signed an enforceable release or that the track was otherwise clear of liability.

On August 28, 2015, race car driver Tony Coleman (“Coleman”) [lost control of his vehicle at Texas Raceway](#) at speeds over 100 mph, and his truck careened into a retaining wall at a high speed, resulting in a horrific crash and fire. Coleman suffered severe burns and orthopedic injuries. In January 2017, Coleman sued the owner of the racetrack, Otese Ltd. (“Otese”), asserting claims of negligence and gross negligence for Otese’s failure to: adequately clean the track and remove any unsafe track conditions; provide appropriate fire-fighting equipment and trained personnel; provide appropriate medical personnel and equipment; and maintain an adequately designed safety retaining wall (which allegedly had a damaged rail that separated and burst through the truck on impact). In his Complaint, Coleman claimed that the prior race had ended in a crash which, according to Coleman, caused motor oil to spill onto the track. He also alleged that the raceway workers’ attempts to clean up the oily fluids were ineffective, leaving the track slick and unsafe, thereby creating the conditions that were the ultimate cause of his accident. Raising a red light, Otese fired off counterarguments, stating that there was insufficient evidence that it had breached any duty to Coleman, that any breach proximately caused Coleman’s injuries, or that Otese acted in a grossly negligent way. Moreover, Otese claimed Coleman’s claims were barred by the doctrine of waiver, based on Coleman having signed a technical inspection document or “tech card” before the race that referenced a “K & K Insurance waiver” that is contained in a separate

document that purportedly released Otese from any liability for injuries caused by negligence.

In December 2018, a Texas District Court (Tarrant County) [granted](#) Otese's motion for summary judgment and dismissed the action, prompting Coleman's appeal. While the appellate court affirmed the dismissal of gross negligence claims against Otese, it found material issues of fact surrounding Coleman's negligence claims that warranted the dispute take a U-turn back to the trial court. Coleman's first challenge was whether Otese's waiver was effective and whether Coleman had fair notice that the tech card incorporated the Release. While Coleman acknowledged signing the tech card, he claimed he was not aware that he was signing any release. The court rejected Otese's waiver argument, finding that the tech card did not expressly contain a release and the reference to a "K & K Insurance waiver" on the tech card did not sufficiently incorporate by reference any other document. Moreover, the court held that nothing on the face of the Release form introduced by Otese indicated that it was the same document as a "K & K Insurance waiver." Lastly, the court ruled that Otese failed to establish that Coleman or any crew member with authority signed the Release form on the day of the accident.

Coleman's second contention concerned the prior crash that allegedly released fluids on the track. Otese claimed that the prior accident occurred in a different area of the track, the track was adequately cleaned, and that the oil on the track may in fact have come from a missing fuel cap on Coleman's truck (not to mention that Coleman raced without wearing fire-retardant protective apparel). Coleman pointed to his own testimony, stating that he saw a slipshod clean-up of the earlier accident (*e.g.*, personnel allegedly used a sweeper and then poured cat litter on the track). Coleman also pointed to his expert witness's report, which suggested Otese was negligent in its failure to properly train employees in track safety, and have adequate firefighting gear and functioning safety barriers on site. Alarming, when Coleman crashed, the first two fire extinguishers that the raceway workers attempted to use to put out the fire were completely empty while Coleman remained trapped in the wrecked truck. Looking at both sides, the court held that Coleman had raised factual issues as to how the oil got onto the track and whether it was adequately cleaned up, as well as evidence of potential omissions constituting a breach of duty and causation sufficient to allow the case to go forward.

While Otese beat out Coleman by a nose on the gross negligence claim, the court was of the opinion that Coleman's arguments presented enough questions of material fact to overrule the previously entered summary judgment in favor of Otese. With arguments to be renewed at the trial court level, the winner of this race remains to be seen.

Fitness Equipment Maker Pumps out Favorable Verdict in Trademark Dispute

A federal jury in Ohio awarded a fitness equipment manufacturer a \$1.25 million verdict after its former licensee was found liable for trademark infringement.

[Max Rack, Inc.](#) (“Max Rack” or “Plaintiff”), an Ohio-based company that markets and sells weightlifting equipment, brought the case against its former licensing partner, Star Trac Strength, Inc., and its successor, [Core Health & Fitness, LLC](#) (collectively, the “Defendants”), after Max Rack discovered that its old lifting buddy was still using Max Rack’s protected intellectual property after Defendants’ licensing agreement with Max Rack had expired ([Max Rack, Inc. v. Core Health & Fitness, LLC](#), No. 2:16-cv-01015 (S.D. Ohio Jury Verdict Dec. 13, 2019)).

From January 2006 to November 2015, the parties carried on a licensing arrangement whereby the Defendants received an exclusive license to manufacture, sell and distribute the MAX RACK, one of the Plaintiff’s fitness equipment machines. The Plaintiff registered “MAX RACK” as a trademark with the United States Patent and Trademark Office (USPTO) in 1997 ([Reg. No. 2070734](#)). Shortly before the license expired, the Defendants notified the Plaintiff that it planned to continue “selling a product identical to the MAX RACK but under the name ‘FREEDOM RACK’” ([Reg. No. 5503469](#)). Considering the design patents associated with the MAX RACK were set to expire concurrently with the licensing agreement, the Defendants appeared within their rights to pursue the aforementioned business strategy. The relationship soured, however, when the Defendants failed to properly wipe down its equipment and allegedly displayed MAX RACK references on its website and in printed materials, and referenced the MAX RACK in communications with its manufacturers, distributors, and dealers for at least a year and a half after the parties’ license agreement had terminated. The Defendants also allegedly continued to use the product’s “engineering drawings, the MAX RACK artwork, goodwill, and trade dress elements” during that period, and also sold legacy MAX RACK units beyond the permissible run-off period outlined in the license.

Max Rack responded by [filing a complaint](#) and pumping out claims against the Defendants under the Lanham Act (15 U.S.C. §1114(1)) for trademark infringement, unfair competition, false advertising and trademark misuse, and a violation under the Ohio Deceptive Trade Practices Act (O.R.C. §4165). In its complaint, the Plaintiff argued that, by continuing to use the MAX RACK registered trademark without authorization, “the Defendants used the MAX RACK name to bolster the sales of the FREEDOM RACK” and unfairly took advantage of Max Rack’s registered intellectual property. The Defendants countered by seeking summary judgment to avoid the full weight of the Plaintiff’s claims, arguing that Plaintiff failed to put forward sufficient evidence to support its trademark and related claims. The court [granted](#) the Defendants’ summary judgment motions for false advertising and trademark misuse, finding that Max Rack’s evidence lacked the strength needed to clear the bar. ([Max Rack, Inc. v. Core Health & Fitness, LLC](#), No. 2:16-cv-01015 (S.D. Ohio Sept. 17, 2019)). The court noted that the false advertising claim came up short because the Plaintiff did not “establish a connection between Defendants’ misrepresentations and the harm alleged.” Additionally, despite being pressed to do so, the court declined to

create an independent cause of action for Max Rack's trademark misuse claim, emphasizing that such claims were typically used as affirmative defenses.

The infringement claims proved to be trickier to decide as a matter of law. Here, the court had to examine whether the Plaintiff established that the Defendants' trademark use created a likelihood of confusion regarding the origin of the goods offered by the parties. In evaluating this question, the court weighed eight different factors. The salient factors included (1) the strength of the MAX RACK mark, (2) the relatedness of the MAX RACK and FREEDOM RACK equipment machines, (3) the similarity of the marks, (4) the evidence of actual confusion, (5) the marketing channels used, (6) the sophistication of likely consumers, (7) the Defendants' intent in selecting the mark, and (8) the likelihood of expanding the product line. However, at the pre-trial stage, the court refused to rule as a matter of law on the likelihood of confusion issue. For example, while the court noted the MAX RACK mark had been registered for 20 years, the Plaintiff apparently failed to submit sufficient evidence of the strength of its mark in the industry; similarly, the court expressed doubt about the similarity between the MAX RACK and FREEDOM RACK marks, yet could not rule definitively without more evidence about the extent the Defendant referenced MAX RACK on its website to allegedly create consumer confusion. After many reps, the court [denied](#) both parties' motions for summary judgement on the infringement and unfair competition claims, arguing a reasonable juror could come out on either side of the question. Consequently, the jury was tasked with the heavy lifting and put on the clock to determine the fitness of the Plaintiff's remaining claims.

Following a recovery period, the jury finished deliberations and [returned a verdict in favor of the Plaintiff](#), finding the Defendants liable for trademark infringement, unfair competition, and violating the Ohio Deceptive Trade Practices Act. The jury found the Defendants liable for a superset worth of damages, awarding the Plaintiff \$1 million in compensatory damages and \$250,000 of the Defendant's profits. Thanks to the outcome – and with motions for a permanent injunction and attorney's fees pending – Max Rack's bulking season appears off to a great start.

Former Baseball Manager Closes out Victory in Cyclist's Negligence Suit

The Arizona Court of Appeals recently [affirmed](#) the lower court's decision in *Else v. La Russa*, thereby ending an injury suit that arose from an unfortunate cycling accident. On one fateful Friday afternoon, the plaintiff Seth Else ("Else") rode his bicycle through paths in the Arizona woods and hit a fence on the property of Elaine La Russa and Anthony "Tony" La Russa, the former St. Louis Cardinals and Oakland Athletics Hall of Fame manager ("La Russa"). Else alleged he had ridden his bike down a system of trails that he believed he had previously run on. Still believing that he was on a public trail, he proceeded down an unfamiliar path, which he claimed had bike tracks in the dirt, until he unexpectedly collided with a cable fence that the La Russas had erected on their property. Having

sustained serious injuries, Else filed suit in September 2016 against the La Russas alleging, among other things, negligence for the erection of the fence on what Else claimed was a public easement.

Stepping to the plate, in August 2017 La Russa moved for partial summary judgment, asking the lower court to rule that Else was a trespasser when he crashed into the fence. La Russa also moved to dismiss Else's claims for negligence *per se*, gross negligence and punitive damages. La Russa's argument focused on the location of the accident. Put simply, La Russa claimed that Else was riding in foul territory and there was no bike trail or public access that ran through La Russa's land. With the contest still in the early innings, the lower court granted the motion in La Russa's favor as to punitive damages but denied all other motions, finding genuine issues of material fact and setting the case for trial. With the close of Else's presentation of evidence after a four-day jury trial, La Russa renewed his motion for judgment as a matter of law. Before the case went to the jury, the court dismissed the negligence *per se* claim (i.e., negligence based on a statute enacted for public safety) and ruled that Else was a trespasser at the time of the accident, leaving the issue of gross negligence to the jury (i.e., whether La Russa willfully or wantonly caused Else's injuries).

The jury ruled in La Russa's favor on the remaining claim and, in November 2018, Else filed a notice of appeal to the Arizona Court of Appeals. Else's appeal rested on two principal arguments: (1) that the lower court erred in holding that he was a trespasser at the time of the accident because there was a public easement on that portion of the La Russa property where the accident occurred; and that (2) the court erred in dismissing the negligence *per se* claim because the La Russas allegedly violated two state statutes in erecting the fence. In January 2020, the Arizona appellate court refused to overturn the lower court's rulings on the trespass and negligence issues and affirmed the judgment in favor of the La Russas. ([Else v. La Russa](#), No. 18-0764 (Ariz. Ct. App. Jan. 23, 2020) (unpublished), *as amended on denial of reconsideration* (Ariz. Ct. App. Feb. 7, 2020)).

The first issue turned solely on Else's contention that a public easement for water purposes and a bike trail existed on the La Russa property. Else based his argument on an expert witness opinion contending that there was an easement, including evidence that the public had traversed the area around La Russa's property and on the existence of two signs allegedly positioned near La Russa's property that referenced "bicycle path usage." The court concluded that, taken together, the evidence could not support the existence of an easement, not as an express servitude, by dedication, or by prescription. The court held that the alleged easement couldn't have been an express servitude because there was no record or writing, and could not be a public dedication because there was no evidence that La Russa ever offered or otherwise dedicated his land to the general public.

Else also failed to prevail in the argument for an easement by prescription under Arizona law, which, according to the court, requires, among other things, open and adverse use for a period of ten years. Given that testimony at trial merely

pointed to some use of the area around the fence as a trail perhaps around four years before Else's accident, the argument fell well short of the bleachers. The court also rejected the portion of expert opinion that argued that two signs positioned in the general area of the bike accident designated the area as a public bike trail. In doing so, the court stated that the signs were not located on La Russa's property and the signs were not near the path where Else was riding before the accident. The court similarly rejected the argument that the area was a public easement because it was located on a drainage easement owned by the town because such an easement does not provide any right of access to the public. Ultimately, the court stated that "an expert's opinion cannot create an easement where the legal requirements for such an easement have not been proven."

On appeal on the issue of negligence *per se*, Else argued that La Russa's purported negligence flowed from violations of certain local codes and Arizona state statutes when the fence was erected. Specifically, Else claimed that La Russa violated [Scottsdale Revised Code §18-5](#), a public-nuisance ordinance intended to protect the public from harm caused by "a condition" that causes obstruction to water flowing down stream channels. The court rejected the argument, holding that the statute was not applicable to the accident and injury. Else also relied on [A.R.S. § 33-1551](#), which provides for a remedy for recreational or educational users when a property owner is "willful, malicious, or grossly negligent" and directly caused the injury suffered by the recreational or educational user. In ruling that the lower court properly granted judgment as a matter of law on the negligence *per se* claim, the appellate court stated that, even if the statute applied to the incident in question, the superior court had properly instructed the jury on the gross negligence issue and that Else's mention of a different statute with a similar standard was of no consequence.

Following the decision, in February 2020, the appellate court denied Else's subsequent motion for reconsideration, effectively vindicating La Russa's litigation strategy and game plan and closing out this two-game series.

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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