

SPEEDWAY SPECTATOR INJURED BY FLYING DEBRIS

CORTWRIGHT v. BREWERTON INTERNATIONAL SPEEDWAY, INC.

539 N.Y.S.2d 599 (A.D. 4 Dept. 1989)

New York Supreme Court, Appellate Division, Fourth Department

March 10, 1989

In this case, plaintiff Richard Cortwright was injured at an auto speedway operated by defendant Brewerton International Speedway, Inc. The facts of the case were as follows:

On September 5, 1986 Cortwright, a regular spectator at auto racing events, attended a race at defendant's Brewerton Speedway. Cortwright elected to sit on the top row of the bleachers, which was just above the top of the fence that separated the grandstand from the track. The lower rows, which had empty seats available, were behind the fence. This chain link fence was approximately 8 to 10 feet high and ran along the entire length of the grandstand. The racing surface was approximately four feet below the fence and the race cars passed along a straightaway in front of the bleachers. During one of the races, a jagged stone the size of a baseball was propelled by a passing race car's tire over the chain link fence striking Cortwright in the knee and causing him physical injury.

Cortwright alleged that Brewerton "was negligent in failing to provide adequate protective fencing." Specifically, Cortwright argued that "the speedway owner was negligent in that it failed to erect and provide protective barriers to adequately safeguard and protect spectators from rocks or debris which might be thrown from the track." On this issue of protective fencing or barriers for spectators, the trial court instructed the jury as follows:

The law requires that the owner of a race track has the duty to provide protection for the area of the track where the danger to a spectator of being struck by debris from the track is the greatest. The law also requires that there must be an adequate protection for as many spectators as may reasonably be expected to desire such seating during the course of the race.

With respect to this claim of negligence, if you find that Cortwright was not seated in the area of greatest danger of debris coming from the track when he was injured, you will find that the speedway owner was not negligent. If you find that Cortwright was seated in the area of greatest danger from debris coming from the track, you must consider whether adequate protection was provided for the number of spectators that might reasonably be expected to desire protected seating during a race.

If you find that there was a sufficient number of adequately protected seats, then you will find that the speedway owner was not negligent. If you find that there were not a sufficient number of seats as required, or that the protection for those seats was inadequate, you will find the owner of the speedway negligent.

Based upon this instruction, the jury found that the speedway owner was not negligent and returned a verdict for defendant Brewerton. Cortwright appealed.

As noted by the appeals court, the trial court's instruction to the jury described above was tantamount to directing a verdict for defendant Brewerton because "it was undisputed that Cortwright voluntarily sat in the unprotected last row of seats, though seating was available in the lower protected rows." According to the appeals court, the issue in this case was "**whether the duty owed to a patron by an owner of an auto speedway is the same as that owed by an owner to a patron of a baseball game, viz., to provide a sufficient number of protected seats in the area of greatest danger.**" In the opinion of the appeals court, the rationale in baseball for requiring adequate protective screening for spectators only in the area of greatest danger was not applicable to racetrack spectators.

**In baseball, a fly ball is an integral part of the game itself.** This is not true with respect to flying debris from a racetrack. **While it is not uncommon for debris to be propelled from the track by a passing race car's tire or for parts of cars crashing against one another or against the retaining wall to be propelled into the air, it is not an expected occurrence. This can happen with equal probability anywhere around the track and one location is no safer than another. It is for just this reason that a wall and fence were erected along the entire length of the grandstand.**

Applying this reasoning to the facts of the case, the appeals court found "the fence was of an inadequate height to stop a flying stone from hitting a person seated in the last row of the bleachers." Also, the court found that there were no warning signs indicating the inadequacy of the screening to protect spectators in the last row from flying debris. Further, the court found that there was "**nothing about the seat's location that would allow a spectator to make an informed decision whether to sit in the protected lower rows of seats or the unprotected last rows.**" As noted by the court, this situation at the speedway was "not the case in most baseball parks."

[T]here are clearly defined areas where the maximum danger exists in the game of baseball. The majority of foul balls land in a narrow radius of home plate. **Further, due to the proximity of home plate to the stands, the time to escape these misguided balls is extremely limited. It is for these reasons that protective screening is necessary.** The farther a spectator is seated from home plate, the chances of being struck by a foul ball are diminished and because the ball is traveling a greater distance, it is traveling at a reduced speed. In addition, the farther a patron is seated from home plate the greater the time he has to avoid being struck by the ball. These factors are well known to any baseball fan, thus enabling him to make an informed choice whether to sit in the protected area with a restricted view, or in the unprotected area with an unrestricted view.

According to the appeals court, "the exposure to danger is greater in the present case than in baseball."

The danger of a foul ball traveling to a seat exists only when a batter swings at a pitched ball, a particular moment in time during which a viewer's attention is normally directed at the batter. **The danger of a stone flying from the track is a constant threat during a race when cars are speeding by. A patron watching race cars positioned around the track is not able to remain vigilant against such a danger. Likewise, the proximity of the seating to the track in this case provides little time to react to avoid being struck, even if one was able to see the projectile.**

In the opinion of the appeals court, **"Cortwright was in no different position than a baseball fan seated behind home plate." As a result, the court concluded that "the duty of the owner in this case was to provide adequate protection to all the customers seated in the grandstand, rather than only those seated in areas of greatest danger."**

It requires no proof other than common observation and common sense that there is present in high speed auto racing a constant danger that a racing car, operating at high speed, may hurtle from the course by reason of skidding, collision, mechanical failure, or loss of control, to the great peril of any spectators in its path. The risk being high, the standard of care must likewise be high. One who conducts or sponsors such an event is in our opinion negligent, unless he uses a high degree of care to provide adequate safeguards against reasonably foreseeable dangers to spectators and enforces the observation of such safeguards and precautions, both by participants and by spectators.

The appeals court, therefore, concluded that proper jury instructions regarding the adequacy of protective screening in auto racing should have reflected "general common law negligence principles." Specifically, **the appeals court found that an owner of the speedway had a duty "to provide a reasonably safe condition under all circumstances without strict delineation between areas of lesser and greater danger."** Consequently, the appeals court reversed the judgment of the trial court in favor of defendant Brewerton and ordered a new trial to determine whether the screening was reasonable under the circumstances of this case.