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RECKLESSNESS STANDARD FOR RECREATION PARTICIPANTS REAFFIRMED

In an article entitled “Standard for Sports Participants Debated: Recklessness or Negligence?,” the October 1993 NRPA Law Review in *Parks & Recreation* described the case of *Lestina v. West Bend Mutual Insurance Company*, 501 N.W.2d 28 (Wisc. 1993) as “a most recent addition to the growing body of reported case law which defines the applicable legal standard of care in determining sports participant liability.” In so doing, this article noted as follows that the *Lestina* decision represented a “minority view among state courts” because it departed from the “general rule of requiring proof of reckless misconduct for sports participant liability.”

As a general rule, sports participants are only liable for a reckless disregard of a safety rule which causes injury to another participant. Within this context, recklessness is a graver form of misconduct than mere negligence. While ordinary negligence may result from a careless action or omission which causes an unreasonable risk of injury to other participants, reckless misconduct must demonstrate an utter disregard for the physical well-being of others. Most courts have adopted the lower recklessness standard (and more demanding burden of proof for plaintiffs) as a middle ground between negligence liability and immunity from liability for sports participants. According to the prevailing view, this recklessness standard provides some legal safeguards for sports participants without repressing vigorous competition with the threat of negligence liability lawsuits.

In *Lesina*, the Wisconsin state supreme court decided to impose a higher standard of reasonable care on sports participants and adopted an ordinary negligence standard for sports participant liability. According to the 1993 article, “the difference between recklessness and negligence as the applicable legal standard of care in sports participant injury cases is very significant.”

When reasonable minds can differ on the agreed upon evidence, pretrial dismissal of a case on a motion for summary judgment is inappropriate. Under such circumstances, the case should be allowed to proceed to a full jury trial.

In the majority of sports participant injury cases, there is no evidence of reckless misconduct, i.e., outrageous behavior tantamount to an intent to injure. On the other hand, there is usually some evidence which could be construed as negligence, i.e. creating an unreasonable risk of injury under the circumstances. As a result, application of the negligence standard in *Lestina* would result in more sports participant liability cases getting into court and staying there longer for a full trial before a jury. Under such circumstances, such cases become more difficult and costly to defend. Faced with the prospect of a full jury trial before an unpredictable jury, there is a greater incentive for defendants to settle, rather than litigate, such cases even "when the negligence standard,

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properly understood and applied, is sufficient" for a finding of no liability.

The case described herein, *Ritchie-Gamester v. City of Berkley*, No. 109633 (Mich.1999), represents a reassertion of the majority view among jurisdictions regarding the applicable legal standard which participants in sports and recreational activities owe to each other. Specifically, the state supreme court in this particular case held "coparticipants in recreational activities owe each other a duty not to act recklessly."

ROUTINE ROUGH AND TUMBLE?

In the case of *Ritchie-Gamester v. City of Berkley*, No. 109633 (Mich.1999), the State of Michigan Supreme Court considered "the appropriate standard of care for those involved in recreational activities." In this particular case, plaintiff Jill Ritchie-Gamester alleged she was skating at the Berkley Ice Arena during an "open skating" period when defendant, Halley Mann, then twelve years old, ran into her, knocking her down and causing serious injury to her knee.

Plaintiff alleged in her complaint that defendant Mann was skating backwards in a "careless, reckless, and negligent manner" at the time of the collision. In addition to Mann, plaintiff also sued the city of Berkley (the owner of the rink), and an ice arena employee. (The City of Berkley and the ice arena employee were eventually dismissed from the case.)

Mann moved for summary judgment on the grounds that "no negligent acts were carried out by the minor defendant," and that Mann's "touching of the Plaintiff while skating is foreseeable when skating at an ice arena with a number of other skaters as is to be expected."

The trial court granted summary judgment for defendant Mann, finding that an ice rink "is inherently dangerous," and that "defendant's actions were not contrary to the rules governing skating." Plaintiff appealed, and the state court of appeals reversed, applying an "ordinary care" standard and finding a "genuine issue of material fact regarding whether defendant was negligent."

The state supreme court granted Mann's petition to review this determination regarding "the proper standard of care among coparticipants for unintentional conduct in recreational activities."

[T]he only question before this Court is which standard governs this case: If it is ordinary negligence, we must affirm the Court of Appeals and remand for trial; if it is recklessness, we must reverse the Court of Appeals and reinstate the trial court's grant of summary disposition for defendant.

In "reviewing the current state of Michigan law regarding the appropriate standard of care in the recreational activity context," the state supreme court found "general agreement that participants in

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recreational activities are not liable for every mishap that results in injury, and that certain risks inhere in all such activities.” On the other hand, the court noted “the more recent cases from the [Michigan] Court of Appeals appear to be divided regarding the level of duty, or the standard of care, owed to coparticipants.” The state supreme court, therefore, reviewed the case law from other jurisdictions to determine the prevailing view on this issue. As described by the court, “[o]ther jurisdictions have generally taken one of two approaches to this issue”:

In a few states, ordinary care continues to be the standard. *Lestina v West Bend Mut. Ins. Co.*, 176 Wis 2d 901; 501 NW2d 28 (1993)... In the majority of other jurisdictions, however, the courts have adopted a "reckless or intentional conduct" or a "wilful and wanton or intentional misconduct" standard.

Moreover, the state supreme court noted the following “universally recognized a policy rationale” cited by courts which have required injured participants to prove recklessness or wilful and wanton misconduct:

Courts have recognized that a fear of litigation could alter the nature of recreational activities and sports. Fear of civil liability stemming from negligent acts occurring in an athletic event could curtail the proper fervor with which the game should be played and discourage individual participation.

One might well conclude that something is terribly wrong with a society in which the most commonly-accepted aspects of play—a traditional source of a community's conviviality and cohesion—spurs litigation. The heightened recklessness standard recognizes a common sense distinction between excessively harmful conduct and the more routine rough-and-tumble of sports that should occur freely on the playing fields and should not be second-guessed in courtrooms.

In addition, the Michigan supreme court found courts in other jurisdictions have generally recognized “the potential flood of litigation that might result from the use of an ordinary negligence standard”:

If simple negligence were adopted as the standard of care, every punter with whom contact is made, every midfielder high stucked, every basketball player fouled, every batter struck by a pitch, and every hockey player tripped would have the ingredients for a lawsuit if injury resulted. When the number of athletic events taking place over the course of a year is considered, there exists the potential for a surfeit of lawsuits when it becomes known that simple negligence, based on an inadvertent violation of a contest rule, will suffice as a ground for recovery for an athletic injury. This should not be encouraged. [Citations omitted.]

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REALITY CHECK

In the absence of any action on the part of the state legislature to enact legislation to “modify the common law of torts regarding recreational activities,” the state supreme court acknowledged that “the development of this area of the law, for now, is up to the courts.” Moreover, the state supreme court noted that any determination on the applicable legal standard “must recognize the everyday reality of participation in recreational activities”:

A person who engages in a recreational activity is temporarily adopting a set of rules that define that particular pastime or sport. In many instances, the person is also suspending the rules that normally govern everyday life. For example, it would be a breach of etiquette, and possibly the law, to battle with other shoppers for a particularly juicy orange in the grocery store, while it is quite within the rules of basketball to battle for a rebound. Some might find certain sports, such as boxing or football, too rough for their own tastes. However, our society recognizes that there are benefits to recreational activity, and we permit individuals to agree to rules and conduct that would otherwise be prohibited.

There are myriad ways to describe the legal effect of voluntarily participating in a recreational activity. The act of stepping onto the field of play may be described as "consent to the inherent risks of the activity," or a participant's knowledge of the rules of a game may be described as "notice" sufficient to discharge the other participants' duty of care.

Similarly, participants' mutual agreement to play a game may be described as an "implied contract" between all the participants, or a voluntary participant could be described as "assuming the risks" inherent in the sport. No matter what terms are used, the basic premise is the same: When people engage in a recreational activity, they have voluntarily subjected themselves to certain risks inherent in that activity. When one of those risks results in injury, the participant has no ground for complaint.

Given the “everyday reality of participation in recreational activities,” the Michigan supreme court, therefore, decided to “join the majority of jurisdictions and adopt reckless misconduct as the minimum standard of care for coparticipants in recreational activities.”

We believe that this standard most accurately reflects the actual expectations of participants in recreational activities... [W]e believe that participants in recreational activities do not expect to sue or be sued for mere carelessness. A recklessness

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standard also encourages vigorous participation in recreational activities, while still providing protection from egregious conduct. Finally, this standard lends itself to common-sense application by both judges and juries.

We recognize that we have stated this standard broadly as applying to all "recreational activities." However, the precise scope of this rule is best established by allowing it to emerge on a case-by-case basis, so that we might carefully consider the application of the recklessness standard in various factual contexts.

TIMOROUS MAY STAY AT HOME

In adopting "reckless misconduct as the minimum standard of care for coparticipants in recreational activities," the Michigan high court reiterated the following reasoning of Justice Cardozo in a 1929 New York decision involving a young man injured on a ride at an amusement park:

One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball. The antics of the clown are not the paces of the cloistered cleric. The rough and boisterous joke, the horseplay of the crowd, evokes its own guffaws, but they are not the pleasures of tranquillity. The plaintiff was not seeking a retreat for meditation. Visitors were tumbling about the belt to the merriment of onlookers when he made his choice to join them. He took the chance of a like fate, with whatever damage to his body might ensue from such a fall. The timorous may stay at home.

Nothing happened to the plaintiff except what common experience tells us may happen at any time as the consequence of a sudden fall. Many a skater or a horseman can rehearse a tale of equal woe. . . . One might as well say that a skating rink should be abandoned because skaters sometimes fall. *Murphy v Steeplechase Amusement Co.*, 250 NY 479, 482-483; 166 NE 173 (1929)

In the opinion of the Michigan supreme court, "Justice Cardozo's observations apply just as well to the conduct of coparticipants in a recreational activity as they do to the conduct of a person enjoying an amusement park ride":

Indeed, while most of the cited cases have addressed "contact" sports or team sports, Justice Cardozo's comments help illustrate that the same general analysis applies to non-contact and individual recreational activities. In all these activities, there are foreseeable, built-in risks of harm... Acts that would be negligent if performed on a city

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street or in a backyard are not negligent in the context of a game where a risk of inadvertent harm is built into the sport.

Applying this reasoning to the facts of the case, the state supreme court found the risk of injury to plaintiff was obvious.

One cannot ice skate without ice, and the very nature of ice—that it is both hard and slippery—builds some risk into skating. In addition, an "open skate" invites those of various ages and abilities onto the ice to learn, to practice, to exercise, or simply to enjoy skating. When one combines the nature of ice with the relative proximity of skaters of various abilities, a degree of risk is readily apparent: Some skaters will be unable to control their progress and will either bump into other skaters, or fall. All skaters thus take the chance that they will fall themselves, that they will be bumped by another skater, or that they will trip over a skater who has fallen.

Moreover, the state supreme court found application of “a recklessness standard in this case” led it to conclude summary judgment was “properly granted to defendant.”

Although plaintiff used the word "reckless" in her complaint, a review of the pleadings, depositions, and other documentary evidence reveals that plaintiff merely contends that defendant was skating backward without keeping a proper lookout behind her. These allegations amount to, at most, carelessness or ordinary negligence. Indeed, plaintiff conceded that defendant's actions did not rise to the level of reckless misconduct... [W]e conclude that coparticipants in a recreational activity owe each other a duty not to act recklessly. Because the trial court properly concluded that plaintiff could not show that defendant violated this standard, summary disposition was proper.

Having determined that “the trial court properly granted summary disposition for defendant,” the Michigan Supreme court accordingly reversed the court of appeals decision and reinstated the summary judgment in favor of defendant Mann.