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### CONTACT SPORT EXCEPTION ALLOWS FOR PARTICIPANT NEGLIGENCE

In the case of *Pfister v. Shusta* (Ill. 1995), the Illinois state supreme court reaffirmed the majority rule among jurisdictions regarding sport participant liability. Under the “contact sports exception,” participants in contact sports may be held liable for injuries to co-participants caused by wilful and wanton or intentional misconduct, but are not liable for injuries caused by ordinary negligence. As a general rule of law, the state supreme court acknowledged that “a person owes a duty of ordinary care to guard against injuries to others that may result as a reasonably probable and foreseeable consequence of negligent conduct.” However, the court cited *Nabozny v. Barnhill* (1975), 31 Ill. App. 3d 212, as controlling precedent for a “judicially created exception to the standard of ordinary care” for participants in contact sports.

In *Nabozny*, a member of a high school soccer team kicked the opposing team's goalie in the head in violation of a soccer rule intended to protect participants of the game. In this case, the court had held that “voluntary participants in contact sports are not liable for injuries caused by simple negligent conduct.” Under *Nabozny*, such participants do, however, “owe each other a duty to refrain from wilful and wanton or intentional misconduct and are liable for injuries caused by wilful and wanton misconduct.”

Within this context, the court defined “wilful and wanton conduct” as “a course of action which shows actual or deliberate intent to harm or which, if the course of action is not intentional, shows an utter indifference to or conscious disregard for a person's own safety or the safety or property of others.”

Wilful and wanton conduct is "a hybrid between acts considered negligent and behavior found to be intentionally tortious. Under the facts of one case, wilful and wanton misconduct may be only degrees more than ordinary negligence, while under the facts of another case, willful and wanton acts may be only degrees less than intentional wrongdoing.

In this particular case, the issue was whether the contact sports exception to negligence liability applied to injuries sustained in an informal game wherein “two college students spontaneously began to kick a crushed soda can in the lobby of a college dormitory.” Specifically, the issue was whether the contact sports exception applied to Shusta’s alleged pushing of Pfister toward a wall in an attempt to gain control of the can. After being pushed by Shusta, Pfister attempted to break his fall. In so doing, Pfister put his left hand and forearm through the glass door of a fire extinguisher case on the wall of the dormitory.

In determining the applicability of the contact sports exception, the state supreme court found “the

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relevant inquiry is whether the participants were involved in a contact sport, not whether the sport was formally organized or coached.” In so doing, the court provided the following “practical reason for applying the wilful and wanton standard to organized and informal contact sports”:

Even in those cases where rules govern the permissible degree of physical contact among the participants of a game, it is difficult to determine what may be an acceptable amount of physical contact allowed by the rules. In games where physical contact is inherent, rule infractions, deliberate or unintentional are virtually inevitable and justify a different standard of care... The players in informal sandlot or neighborhood games do not, in most instances, have the benefit of written rules, coaches, referees or instant replay to supervise or re-evaluate a player's actions...

Participants in team sports, where physical contact among participants is inherent and virtually inevitable, assume greater risks of injury than nonparticipants or participants in non-contact sports. Recovery will be granted for injuries sustained by participants in contact sports only if the injuries are caused by wilful and wanton or intentional misconduct of co-participants.

As a matter of social policy, the state supreme court found “[t]he contact sports exception strikes the appropriate balance between society's interest in limiting liability for injuries resulting from physical contact inherent in a contact sport and society's interest in allowing recovery for injuries resulting from wilful and wanton or intentional misconduct by participants.”

The exposure of one participant to liability to another participant for merely negligent bodily contact, even under the disorganized situation here, will cause more harm than good. In common understanding, football, wrestling, and boxing, among others, are clearly recognized as contact sports. Basketball, hockey, and soccer all permit some bodily contact and, in actual practice, more contact is permitted than a reading of the rules would indicate. In all of the above sports, players regularly commit contact beyond that which is permitted by the rules even as applied. In basketball, such an illegal contact is described as a foul for which a sanction is imposed. Sometimes the player fouled is injured. This is to be expected. If every time a negligent foul resulted in injury, and liability was imposed, the game of basketball [and any other contact sport] as we know it would not be played...

The contact sports exception allows recovery for injuries resulting from wilful and wanton and intentional misconduct while taking into account the voluntary nature of participation in games where physical contact is anticipated and where the risk of injury

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caused by this contact is inherent.

Applying this reasoning to the facts of the case, the state supreme court found the contact sports exception precluded liability for injuries caused by the mere simple negligence alleged in Pfister's complaint.

Due to the spontaneous and disorganized nature of the can kicking game, it does not appear that rules were formulated governing the permissible physical contact among participants in this case. The can kicking game was a spontaneous, informal equivalent to soccer or floor hockey. The parties divided themselves into teams, set goals and engaged in the physical contact typically found in soccer or floor hockey. Both soccer and floor hockey are team sports where physical contact among participants is inherent in the game...

Those who participate in soccer, football, softball, basketball, or even a spontaneous game of can kicking, choose to play games in which physical contact among participants is inherent in the conduct of the game. Participants in such games assume a greater risk of injury resulting from the negligent conduct of co-participants...

In this case, Pfister agreed to participate in a can kicking game similar to soccer and floor hockey. A degree of physical contact among the participants in this game was inherent in the conduct of the game. In fact, Pfister allegedly pushed Shusta immediately before Pfister was allegedly pushed... Pfister did not allege, and the facts do not establish, either wilful and wanton or intentional misconduct by Shusta.

In *Pfister*, Illinois supreme court also noted that "[s]ome jurisdictions have explicitly adopted the logic of *Nabozny* and its progeny and applied the 'wilful and wanton' standard, or the comparable local standard, to injuries sustained by participants in a variety of formal and informal sports activities where physical contact among the participants is inherent." As indicated by the following description of more recent decisions from Connecticut and Texas, state courts in other jurisdictions continue to apply the logic of *Nabozny* and adopt the contact sports exception as the generally applicable legal standard of care for participants.

### RECKLESSNESS STANDARD FOR PARTICIPANTS

In the case of *Jaworski v. Kiernan* (Conn. 1997), plaintiff was injured during the course of an adult coed soccer game when she made contact with defendant, a participant on the opposing team. In her complaint, plaintiff alleged defendant "failed to exercise due care and that his conduct was negligent and

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careless in that he 'hit' and 'tripped' her from behind" in violation of league rules. In response, defendant argued that "a participant in an athletic contest is, as a matter of law, not liable to a co-participant for injuries sustained as a result of simple negligence during the playing of the game." The trial court, however, held that negligence was "the proper standard of care to apply to team athletic competition." The jury subsequently returned a verdict for plaintiff on her negligence claim. Defendant appealed the jury verdict claiming an "action for personal injuries sustained in an athletic competition must be predicated on recklessness and not mere negligence."

According to the state supreme court, the existence of a legal duty and the extent of a defendant's legal duty in a particular instance will depend upon the foreseeability of the plaintiff's injury. In determining "the extent of the legal duty to be imposed" the state supreme court considered the following factors:

(1) the normal expectations of participants in the sport in which Jaworski and Kiernan were engaged; (2) the public policy of encouraging continued vigorous participation in recreational sporting activities while weighing the safety of the participants; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions.

In so doing, the state supreme court held that "the normal expectations of participants in contact team sports counsel the adoption of a reckless or intentional conduct duty of care standard for those participants." Because the jury determined that defendant's conduct, which caused plaintiff's injuries, was negligent only, and not reckless or intentional, the state supreme court reversed the judgment of the trial court in favor of plaintiff.

### EVIDENCE OF INTENTIONAL MISCONDUCT

In the case of *Greer v. Davis* (Tex.App. 1996), plaintiff alleged that defendant recklessly and intentionally collided with him plaintiff while running the bases in a municipal softball game. At the time of the injury, plaintiff was attempting to tag defendant at home plate. In denying any liability, defendant contended that he did not act intentionally or recklessly, as required in a cause of action arising from injuries sustained in a competitive contact sport. The trial court agreed and granted defendant's motion for summary judgment.

On appeal, however, plaintiff Greer provided the following testimony that contradicted Davis' assertions that he did not act intentionally and recklessly:

I received the throw in time for any base-runner to see that I had it (if he were looking at home) and either slide or avoid me. I was about two feet in front of the plate, according to umpire Sahadi, and was in a crouched position to make the tag on Davis'

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expected slide.

Instead and unexpectedly, Davis lowered his shoulder and ran over me. Davis did have time to run to the right of me or could have attempted a slide. In his previous at-bat, Davis hit the ball directly back at me, narrowly missing my head. After he scored and went back to the dugout, I heard him tell teammates, "I was aiming right at the son of a bitch." Months earlier, Davis and I were competitors in a church league basketball game. I fouled him as he was on a breakaway lay-up causing him to fall to the floor. He threw the ball at me when he got up.

Based upon this evidence, the appeals court found further trial proceedings were necessary to determine whether the collision was purely accidental or the result of defendant's intentional or reckless conduct. In so doing, the appeals court rejected defendant's contention that he should not be liable for any injuries arising from his participation in an organized contact sport. On the contrary, the appeals court held that plaintiff must prove "intentional or reckless" conduct, rather than mere negligence.

According to the court, requiring sport participants to prove intentional or reckless misconduct, rather than mere negligence, "protects sports participants from liability for genuinely accidental injuries." Having determined that sufficient evidence existed in this case to support plaintiff's allegation of "intentional and reckless" conduct, the appeals court reversed the summary judgment of the trial court in favor of defendant and remanded (i.e., sent back) this case for a jury trial.