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# PROTECT YOUR BLIND SIDE: POTENTIAL LIABILITY FOR SPORTS INJURIES

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**PROTECT YOUR BLIND SIDE:  
POTENTIAL LIABILITY FOR SPORTS INJURIES**

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## **PROTECT YOUR BLIND SIDE: POTENTIAL LIABILITY FOR SPORTS INJURIES**

The claims professional needs to have a working knowledge of potential liability issues involving sports injuries for at least two reasons: first, he or she may be required to adjust a claim brought by a participant or spectator against an insured, and second, he or she could possibly be personally involved in a sports injury claim, either defending against a claim resulting from personal participation in coaching or supervising youth sports leagues, or even bringing a claim resulting from an injury suffered while participating in or watching a sporting event. The purpose of these materials is to address some common liability scenarios involving sports injuries and highlight some of the associated legal issues. It should be noted that the potential liability of school districts and municipalities, and their employees, whether for allegedly failing to supervise or to provide appropriate safety equipment to protect students from serious injury during school-related athletic activities, is beyond the scope of this article.

### **I. INJURIES TO PARTICIPANTS**

Regardless of the sport, injuries are a part of nearly every game. In light of these risks, there are two legal principles to be aware of when faced with a personal injury claim by a participant in a sporting event: the Contact Sports Exception and Assumption of Risk.

#### **A. Contact Sports Exception**

Illinois law recognizes an exception to ordinary negligence liability for injuries sustained by participants of contact sports. Simply stated, the "Contact Sports Exception" is a judicially-created exception to ordinary negligence claims which provides that voluntary participants in a contact sport may potentially be held liable for injuries to other participants for injuries caused by willful and wanton or intentional conduct, but not for injuries caused by ordinary negligence. The exception is based upon public policy considerations, taking into account the voluntary nature of participation in games where physical contact is anticipated and where the risk of injury caused by the contact is inherent. The rationale for the exception was explained in this fashion by our Illinois Supreme Court in a decision rendered 15 years ago in *Pfister v. Shusta*, 167 Ill. 2d 417, 657 N.E.2d 1013, 212 Ill. Dec. 618 (1995), a case in which a college student was injured during an informal game of "kick-the-can" and was barred from recovering under ordinary negligence claims:

The 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 willful and wanton or intentional misconduct by participants. 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 coparticipants.

*Pfister*, 167 Ill. 2d at 426.

Two years ago the Illinois Supreme Court extended the Contact Sports Exception to protect certain sports organizations in the case of *Karas v. Strevell*, 227 Ill. 2d 440, 884 N.E.2d 122, 318 Ill. Dec. 567 (2008).

In *Karas*, a hockey player was injured during a hockey game when he was checked from behind, forcing him into the boards and injuring his head and neck. At the time of the accident, there was a rule in place that prohibited body checks from behind and the word "STOP" was even sewn onto the backs of the players' jerseys. Following the accident, the plaintiff sued the offending players, the opposing players' hockey team, the hockey officials organization, and the hockey league for negligent and willful and wanton conduct.

The Illinois Supreme Court threw out the negligence claims against all of the defendants. Once again, the court was very concerned with public policy, noting that a rule limiting the liability of participants in contact sports was necessary to avoid a chilling effect on the way these sports are played as well as the need for a rule limiting liability in the sports context in order to avoid a flood of litigation. The case held that whether the contact sports exception is applicable to a non-participant defendant (i.e. an organizational defendant) is a policy determination that rests on (1) the circumstances of the sport and its inherent risks; (2) the relationship of the parties to the sport and to each other; and (3) whether imposing broader liability on the defendant "would harm the sport or cause it to be changed or abandoned." In reaching this conclusion, the court noted:

As the appellate court below noted, plaintiff's essential allegation against all three organizational defendants is that they failed to adequately enforce the rule against bodychecking from behind. Yet, as noted earlier, rules violations are inevitable in contact sports and are generally considered an inherent risk of playing the game. Further, in an organized contact sport, such as the one at issue here, the enforcement of the rules directly affects the way in which the sport is played. Imposing too strict a standard of liability on the enforcement of those rules would have a chilling effect on vigorous participation in the sport. Finally, as the organizational defendants point out, coaching and officiating decisions involve subjective decisionmaking that often occurs in the middle of a fast moving game. It is difficult to observe all the contact that takes place during an ice hockey game, and it is difficult to imagine activities more prone to second-guessing than coaching and officiating. Applying an ordinary negligence standard to these decisions would open the door to a surfeit of litigation and would impose an unfair burden on organizational defendants such as those in the case at bar. Accordingly, we conclude that, under the facts alleged here, the contact sports exception applies to the organizational defendants. To successfully

plead a cause of action for failing to adequately enforce the rules in an organized full-contact sport, plaintiff must allege that the defendant acted with intent to cause the injury or that the defendant engaged in conduct "totally outside the range of the ordinary activity" involved with coaching or officiating the sport. (Internal citations omitted.)

*Karas*, 227 Ill. 2d at 464-465.

Several recent Appellate Court decisions have declined to expand the Contact Sports Exception to those not actively participating in a contact sport. In *Weisberg v. Chicago Steel*, 397 Ill. App. 3d 310, 922 N.E.2d 489, 337 Ill. Dec. 366 (2d Dist. 2009), an athletic trainer assigned by an outside company to provide athletic training services to a hockey team was struck in the face by a hockey puck while in the bench area to refill water bottles during hockey practice. The Contact Sports Exception was held not to apply because the trainer was not participating in conduct inherent in the sport of hockey, nor was the fact that players were shooting pucks at water bottles located in the bench area an inherent part of the sport, therefore the negligence claims were not barred. Similarly, there is a new case out of the Fourth District, *Pickel v. Springfield Stallions, Inc.*, No. 4-09-0490, 2010 WL 1205959 (4th Dist. March 23, 2010), where a spectator watching an indoor football game was injured when a player ran out of bounds and fell over a wall separating the spectators from the playing field and collided with her. It was held that the arena owners and operators were not insulated from liability for negligence by virtue of the Contact Sports Exception since the spectator was not participating in the game and thus the Contact Sports Exception does not apply.

## **B. Assumption of Risk**

Under certain circumstances, a plaintiff's claim in Illinois can be barred by the doctrine of assumption of risk. Broadly stated, assumption of risk arises whenever a plaintiff knowingly and voluntarily assumes the risks inherent in a particular activity or situation. In other words, from a legal point of view, when the plaintiff incurs the known dangers inherent in an activity, he agrees to relieve the defendant of any duty to protect him against those risks. If those circumstances are present, assumption of risk may act as a complete defense to a plaintiff's claim.

There are two types of assumption of risk found in Illinois law: (1) express assumption of risk (such as an exculpatory clause or other explicit agreement), and (2) implied assumption of risk (where a plaintiff's willingness to assume a known risk is determined from the conduct of the parties rather than from an explicit agreement). See *Duffy v. Midlothian Country Club*, 135 Ill. App. 3d 429, 481 N.E.2d 1037, 90 Ill. Dec. 237 (1st Dist. 1985). Let's discuss those separately, beginning with express assumption of risk.

### **1. Exculpatory Clauses / Agreements**

Black's Law Dictionary defines an exculpatory clause as a contractual provision relieving a party from liability resulting from a negligent or wrongful act. Furthermore:

An exculpatory agreement constitutes an express assumption of risk insofar as the plaintiff has expressly consented to relieve the defendant of an obligation of conduct toward him. The doctrine of assumption of risk presupposes that the danger which caused the injury was one which ordinarily accompanies the activities of the plaintiff and that the plaintiff knew, or should have known that both the danger and the possibility of injury existed before the occurrence. (Internal citations omitted.)

*Falkner v. Hinckley Parachute Center, Inc.*, 178 Ill. App. 3d 597, 602, 533 N.E.2d 941, 127 Ill. Dec. 859 (2d Dist. 1989).

Exculpatory agreements have been considered in a variety of sports and/or recreational activities, often pertaining to more dangerous activities such as parachuting, skydiving, or racing.

For example, in *Evans v. Lima Lima Flight Team, Inc.*, 373 Ill. App. 3d 407, 869 N.E.2d 195, 311 Ill. Dec. 521 (1st Dist. 2007), an executor of a deceased pilot's estate brought a wrongful death and survival action against a formation flight team and its individual members. The Appellate Court held that an exculpatory agreement precluded claims against the individual flight team members:

Although exculpatory agreements are not favored and are strictly construed against the party they benefit, parties may allocate the risk of negligence as they see fit, and exculpatory agreements do not violate public policy as a matter of law. An exculpatory agreement will be enforced if: "(1) it clearly spells out the intention of the parties; (2) there is nothing in the social relationship between the parties militating against enforcement; and (3) it is not against public policy." . . . [A]n exculpatory agreement need not specifically name the individuals to which it applies. Rather, the exculpatory agreement may designate a class of beneficiaries covered under the agreement. (Internal citations omitted.)

*Evans*, 373 Ill. App. 3d at 412.

In *Masciola v. Chicago Metropolitan Ski Council*, 257 Ill. App. 3d 313, 628 N.E.2d 1067, 195 Ill. Dec. 603 (1st Dist. 1993), a ski race participant brought a personal injury action against a race sponsor. The Appellate Court affirmed a summary judgment on the negligence count, and then went on to discuss various factual scenarios in which exculpatory agreements were found to be valid and others which were held to be invalid:

The present case is analogous to *Schlessman v. Henson* (1980), 83 Ill.2d 82, 86, 46 Ill. Dec. 139, 141, 413 N.E.2d 1252, 1254, wherein this court held that a problem with an automobile race track surface was the type of risk which the exculpatory agreement was intended to cover. Although the parties may not have

contemplated that a section of the race track would collapse during the race, they did contemplate a "broad range of accidents which occur in auto racing." See also *Garrison v. Combined Fitness Centre* (1990), 201 Ill.App.3d 581, 585, 147 Ill.Dec. 187, 190, 559 N.E.2d 187, 190 (exculpatory clause contained in health club membership agreement relieved club from liability for injury caused by allegedly defective equipment, where clause stated that each member bore the "sole risk" of injury that might result from use of weights, equipment or other apparatus provided); *Neumann v. Gloria Marshall Figure Salon* (1986), 149 Ill.App.3d 824, 827, 102 Ill.Dec. 910, 913, 500 N.E.2d 1011, 1014 (exculpatory clause which expressly covered all risks of injury "while using any equipment" at the salon was enforceable because an injury to plaintiff resulting from the use of the machines was encompassed in the release).

Cases in which this court has found an exculpatory clause to be insufficient to release a defendant from liability for personal injuries to plaintiff are distinguishable from the present case. One line of cases wherein an exculpatory clause has been found ineffective have involved injuries or fatalities which clearly do not ordinarily accompany the activity which is the subject of the release. See *Simpson v. Byron Dragway, Inc.* (1991), 210 Ill.App.3d 639, 649-50, 155 Ill.Dec. 398, 404-05, 569 N.E.2d 579, 585-86 (a question of fact existed as to whether or not striking a deer while operating a race car on a drag strip was the type of risk which ordinarily accompanies the sport of racing); *Larsen v. Vic Tanny, International* (1984), 130 Ill.App.3d 574, 578, 85 Ill.Dec. 769, 772, 474 N.E.2d 729, 732 (exposure to noxious fumes which injured plaintiff's respiratory system was not a foreseeable risk related to the use of a health club). In the present case, however, the injuries to plaintiff resulting from a fall from a compression area in the ski course is a risk inherent in ski racing and as such falls within the scope of the exculpatory clause.

Another line of cases wherein this court has found that an exculpatory clause did not shield a defendant from liability that the language of the exculpatory clause was ambiguous with respect to which activities were covered. See *Macek v. Schooner's, Inc.* (1991), 224 Ill.App.3d 103, 106, 166 Ill.Dec. 484, 486-87, 586 N.E.2d 442, 444-45 (genuine issue of material fact precluded summary judgment for sponsors of arm wrestling contest in personal injury action brought against it by a participant who was injured in the contest, existed as to whether the intent of the clause was to release the promoter of liability when injury resulted from the participant's physical condition, or when injury resulted from the promoter's negligence); *Calarco v. YMCA of Greater Metropolitan Chicago* (1986), 149 Ill.App.3d 1037, 1043, 103 Ill.Dec. 247, 251, 501 N.E.2d 268, 272 (statement that "participation in any of the activities of the YMCA" was ambiguous in that it could be read to mean that the exculpatory clause only pertained to participating in activities at the YMCA but not to liability from the use of equipment at the YMCA). The language of the exculpatory clause at issue in the present case is

explicit and unambiguous and is thus sufficient as a matter of law to relieve defendant from liability.

*Masciola*, 257 Ill. App. 3d at 318-319.

Exculpatory clauses were addressed in the recent decision of *Oelze v. Score Sports Venture, LLC*, No. 1-09-1476, 2010 WL 1235404 (1st Dist. March 30, 2010). In *Oelze*, a member of a tennis club filed an action against the club owner for negligence and willful and wanton misconduct based on injuries she suffered while playing tennis at the club. The trial court dismissed the negligence count and granted summary judgment for the owner on the willful and wanton count. The Appellate Court held that Plaintiff voluntarily waived the right to sue the owner for negligence by signing a one-page players club membership agreement which contained a release and that the injuries (her foot was caught in a rope ladder) fell within the release. In so doing, the court noted that “[a]lthough the precise occurrence which caused an injury need not have been contemplated by the parties when the release was signed, the injury must fall ‘within the scope of possible dangers’ accompanying the activity and, thus, have been reasonably contemplated by the plaintiff and covered by the release.” That being said, the Appellate Court further held that there was a genuine issue of material fact as to whether the owner exhibited conscious disregard for safety in failing to discover or pick up the rope ladder, thus precluding summary judgment on the willful and wanton claim. The court noted that “[o]ne can, therefore, infer that defendant’s efforts to safeguard the hallway failed . . . [b]ut there is a question of fact regarding whether defendants’ efforts to prevent the danger caused by the errant ladder failed due to inadvertence or due to a reckless disregard for the safety of others.”

## **2. Implied Assumption of Risk**

Years ago, there were two types of applied assumption of risk in Illinois. They were called primary implied assumption of risk and secondary implied assumption of risk. Since comparative negligence came to Illinois in the early 1980’s, however, there is no more secondary implied assumption of risk (which used to apply where a plaintiff assumed a risk created by defendant’s negligence) since that conduct is now subsumed within the comparative negligence analysis of plaintiff’s negligence *vis-à-vis* that of the defendant.

However, primary implied assumption of risk – which applies whenever a plaintiff knowingly and voluntarily assumes the risk inherent in a particular activity or situation – is still alive and well and may serve as a complete bar to a plaintiff’s cause of action.

Primary implied assumption of risk requires the defendant to prove: (1) that the plaintiff voluntarily and knowingly encountered an inherent and ordinary danger of an activity; (2) the defendant did not create the inherent danger; (3) the danger was the cause of plaintiff’s injury; and (4) the defendant and plaintiff had a contract or other agreement under which the plaintiff was to participate in the activity which exposed him to the danger. *See generally*, Ill. Pattern Jury Instr.-Civ. 13.00 Intro. 1 (2009 ed.). For example, it has been held to apply in *Clark v. Rogers*, 137 Ill. App. 3d 591, 484 N.E.2d 867, 92 Ill. Dec. 136 (4th Dist. 1985) (where a horse trainer was held

to have assumed the risk of any fall from a stallion where she had accepted her employment knowing such horses were likely to buck or jump and knew the stallion could become excited and uncontrollable around mares, but attempted to mount the stallion anyway) and *Coleman v. Ramada Hotel Operating Co.*, 933 F.2d 470 (7th Cir. 1991) (where an employee who participated in an obstacle course game during an employer-sponsored picnic was said to have assumed the risk of injury by volunteering to encounter a known and obvious risk in choosing to climb up a slide backwards); *But see Evans, supra*, (declining to affirm summary judgment based upon the doctrine of assumption of risk where the court was unable to say, as a matter of law, that plaintiff was aware of and accepted the risk that emergency procedures were possibly inadequate).

## **II. INJURIES TO SPECTATORS**

Generally speaking, the owner of a business premises has a duty to an invitee to exercise ordinary care in the use and maintenance of his property and, more specifically, the owner has a duty to discover dangerous conditions existing on the premises and to give sufficient warning to the invitee to enable him to avoid harm. *Duffy v. Midlothian Country Club*, 92 Ill. App. 3d 193, 197, 415 N.E.2d 1099, 47 Ill. Dec. 786 (1st Dist. 1980). Along these lines, the court in *Pickel* noted that the defendants, as possessors of the football facility, had a special relationship with the plaintiff (their invitee) that obliged them to take reasonable action to protect against an unreasonable risk of injury either from the conduct of their agents or the conduct of third persons. *Pickel v. Springfield Stallions*, 2010 WL 1205959 at \*11.

It must also be noted, however, that there are some special statutory exceptions which apply depending upon the type of sporting event at which a spectator is injured, e.g. owners and operators of hockey and baseball facilities are afforded special statutory protections which may apply when spectators are injured while attending a hockey or baseball game:

### **A. Hockey Facility Liability Act (745 ILCS 52/1 et seq.)**

The owner or operator of a hockey facility shall not be liable for any injury to the person or property of any person as a result of that person being hit by a hockey stick or puck unless: (1) the person is situated behind a screen, protective glass, or similar device at a hockey facility and the screen, protective glass, or similar device is defective (in a manner other than in width or height) because of the negligence of the owner or operator of the hockey facility; or (2) the injury is caused by willful and wanton conduct, in connection with the game of hockey, of the owner or operator or any hockey player or coach employed by the owner or operator.

## **B. Baseball Facility Liability Act (745 ILCS 38/1 et seq.)**

The owner or operator of a baseball facility shall not be liable for any injury to the person or property of any person as a result of that person being hit by a ball or bat unless: (1) the person is situated behind a screen, backstop, or similar device at a baseball facility and the screen, backstop, or similar device is defective (in a manner other than in width or height) because of the negligence of the owner or operator of the baseball facility; or (2) the injury is caused by willful and wanton conduct, in connection with the game of baseball, of the owner or operator or any baseball player, coach or manager employed by the owner or operator.

The constitutionality of the latter statute was addressed in *Jasper v. Chicago Nat. League Ball Club, Inc.*, 309 Ill. App. 3d 124, 722 N.E.2d 731, 242 Ill. Dec. 947 (1st Dist. 1999), a case in which a spectator at a professional baseball game sued the owner of the ballpark after he was struck by a foul ball. Included in his complaint was a count seeking a declaration that the immunity provided by the Baseball Facility Liability Act was unconstitutional. The Appellate Court held that provisions of the Act do not violate the equal protection clauses of federal and state Constitutions or the Illinois Constitution's proscription against special legislation. In so doing, the court noted that Baseball Facility Liability Act encourages baseball team owners to build and maintain parks for the sport of baseball by shifting the expense of injury caused by foul balls to spectators unless the injury is caused by the owner's willful and wanton conduct.

In other words, if you are going to sustain an injury while attending a sporting event, you are better off if it occurs while you are watching a lacrosse or soccer contest than if it happens at a hockey or baseball game!

## **III. PROTECTION FOR VOLUNTEERS**

As discussed above, the Illinois Supreme Court extended the Contact Sports Exception to protect certain sports organizations in *Karas*, but subsequent Appellate Court decisions have declined to expand the Contact Sports Exception to those not actively participating in a contact sport. In light of this debate, it is important to remember that in 1987, the Illinois legislature passed what is known as the Sports Volunteer Immunity Act. This statute affords special protections for volunteers including managers, coaches, umpires, and referees under certain circumstances as described below:

### **A. Sports Volunteer Immunity Act (745 ILCS 80/1)**

1. Manager, coach, umpire or referee negligence standard. (a) General rule. Except as provided otherwise in this Section, no person who, without compensation and as a volunteer, renders services as a manager, coach, instructor, umpire or referee or who, without compensation and as a volunteer, assists a manager, coach, instructor, umpire or referee in a sports program of a

nonprofit association, shall be liable to any person for any civil damages as a result of any acts or omissions in rendering such services or in conducting or sponsoring such sports program, unless the conduct of such person falls substantially below the standards generally practiced and accepted in like circumstances by similar persons rendering such services or conducting or sponsoring such sports programs, and unless it is shown that such person did an act or omitted the doing of an act which such person was under a recognized duty to another to do, knowing or having reason to know that such act or omission created a substantial risk of actual harm to the person or property of another. It shall be insufficient to impose liability to establish only that the conduct of such person fell below ordinary standards of care.

(b) Exceptions.

(1) Nothing in this Section shall be construed as affecting or modifying the liability of such person or a nonprofit association for any of the following:

(i) acts or omissions relating to the transportation of participants in a sports program or others to or from a game, event or practice.

(ii) acts or omissions relating to the care and maintenance of real estate unrelated to the practice or playing areas which such persons or nonprofit associations own, possess or control.

(2) Nothing in this Section shall be construed as affecting or modifying any existing legal basis for determining the liability, or any defense thereto, of any person not covered by the standard of negligence established by this Section.

(c) Assumption of risk or comparative fault. Nothing in this Section shall be construed as affecting or modifying the doctrine of assumption of risk or comparative fault on the part of the participant.

(d) Definitions. As used in this Act the following words and phrases shall have the meanings given to them in this subsection:

"Compensation" means any payment for services performed but does not include reimbursement for reasonable expenses actually incurred or to be incurred or, solely in the case of umpires or referees, a modest honorarium.

"Nonprofit association" means an entity which is organized as a not-for-profit corporation under the laws of this State or the United States or a nonprofit unincorporated association or any entity which is authorized to do business in this State as a not-for-profit corporation under the laws of this State, including, but not limited to, youth or athletic associations, volunteer fire, ambulance,

religious, charitable, fraternal, veterans, civic, county fair or agricultural associations, or any separately chartered auxiliary of the foregoing, if organized and operated on a nonprofit basis.

"Sports program" means baseball (including softball), football, basketball, soccer or any other competitive sport formally recognized as a sport by the United States Olympic Committee as specified by and under the jurisdiction of the Amateur Sports Act of 1978 (36 U.S.C. 371 et seq.), the Amateur Athletic Union or the National Collegiate Athletic Association. The term shall be limited to a program or that portion of a program that is organized for recreational purposes and whose activities are substantially for such purposes and which is primarily for participants who are 18 years of age or younger or whose 19th birthday occurs during the year of participation or the competitive season, whichever is longer. There shall, however, be no age limitation for programs operated for the physically handicapped or mentally retarded.

(e) Nothing in this Section is intended to bar any cause of action against a nonprofit association or change the liability of such an association which arises out of an act or omission of any person exempt from liability under this Act.

The statutory language of the Sports Volunteer Immunity Act is fairly straight-forward, and that may be the reason why there are no published opinions from the Illinois reviewing courts interpreting the Act. In any event, the Sports Volunteer Immunity Act should be kept in mind when defending a claim brought against a volunteer coach or official, since the protections afforded by the Act could serve as a key tipping point in favor of the defense.

#### **IV. GOLF-RELATED APPLICATIONS**

The very nature of golf lends itself to some interesting applications of some of the principles discussed throughout this paper.

No presumption of negligence arises from the mere fact that a player on a golf course is hit by a ball driven by another player. *Hampson v. Simon*, 345 Ill. App. 582, 104 N.E.2d 112 (1st Dist. 1952). For example, in the case of *Dann v. Gumbiner*, 29 Ill. App. 2d 374, 173 N.E.2d 525 (1st Dist. 1961), where the plaintiff sustained injuries when she was hit by a golf ball driven by the defendant who was playing immediately behind her, the court noted that the risk of being hit by a golf ball on a golf course has been termed to be a risk assumed by playing. In Illinois, "[a]lthough the object of the game of golf is to drive the ball as cleanly and directly as possible toward its ultimate intended goal . . . the possibility that the ball will fly off in another direction is a risk inherent in the game." *Heiden v. Cummings*, 337 Ill. App. 3d 584, 587, 786 N.E.2d 240, 243, 271 Ill. Dec. 982 (2d Dist. 2003) (quoting *Rinaldo v. McGovern*, 78 N.Y.2d 729, 733, 587 N.E.2d 264, 579 N.Y.S.2d 626 (1991)).

In *Duffy v. Midlothian Country Club*, 135 Ill. App. 3d 429, 481 N.E.2d 1037, 90 Ill. Dec. 237 (1st Dist. 1985) a spectator who was struck in the eye by a golf ball during a golf tournament brought a negligence action against the country club and golf association. The Appellate Court opinion held that the doctrine of secondary implied assumption of risk was abolished by the rule of comparative negligence and the trial court properly precluded defense counsel from using the terms "assumption of risk" and "assumed risk," and properly refused to instruct the jury concerning assumption of risk.

In the course of reaching this decision, the Appellate Court also discussed primary implied assumption of risk (discussed above on pages C-8 and 9). In that respect, the court noted that under the implied form of assumption of risk, plaintiff's willingness to assume a known risk is determined from the conduct of the parties rather than from an explicit agreement. The primary type of implied assumption of risk, which has been applied to situations where a plaintiff has assumed known risks inherent in a particular activity or situation, have not been those created by defendant's negligence but rather by the nature of the activity itself. Accordingly, primary implied assumption of risk is arguably not a true negligence defense, since no cause of action for negligence is ever alleged. Thus, under the circumstances of this case, where the plaintiff was a spectator at a professional golf tournament who was injured outside a concession tent and there were questions of fact whether it was negligence to place the tent at that location, primary implied assumption of risk was not applicable. *Duffy*, 135 Ill. App. 3d at 432-434.

In *Zurla v. Hydel*, 289 Ill. App. 3d 215, 681 N.E.2d 148, 224 Ill. Dec. 166 (1st Dist. 1997), a plaintiff sued a golfer for personal injuries, alleging that the golfer negligently hit a golf ball which struck him in the head as they played a round of golf. The Appellate Court held that game of golf was not a "contact sport" and thus plaintiff did not need to plead and prove wilful and wanton misconduct. The court noted:

The issue of the proper duty of care as between golfers is one of first impression in Illinois. Defendant argues that Illinois law should require that a golfer hit by a stray ball plead and prove wilful and wanton misconduct against the defendant. He argues that an allegation of simple negligence should be insufficient to support a cause of action in cases involving golf ball injuries because the public policy of Illinois is to promote athletic endeavors such as golf. Plaintiff responds that the proper standard of care should be the same here as in any ordinary negligence case, i.e., to exercise reasonable and ordinary care for the safety of other golfers.

*Zurla*, 289 Ill. App. 3d at 217-18. The *Zurla* opinion went on to state:

In our view, golf is simply not the type of game in which participants are inherently, inevitably or customarily struck by the ball. . . . We specifically reject the notion found in some of the recent opinions from other jurisdictions that physical contact with another player's ball is simply "part of the sport" of golf. Adopting such a view undermines the reasonable incentive golfers have to guard

against injuries to one another, ultimately becoming a self-fulfilling prophesy. Instead, we adopt the traditional "zone of danger" analysis which has historically governed golf course injury cases. (Internal citations omitted.)

*Zurla*, 289 Ill. App. 3d at 221-22.

In other words, golf is not characterized as a "contact sport" for purposes of the Contact Sports Exception, so a golfer injured by a golf ball may allege negligence and is not required to plead and prove wilful and wanton conduct.

In *Sullivan-Coughlin v. Palos Country Club, Inc.*, 349 Ill. App. 3d 553, 812 N.E.2d 496, 285 Ill. Dec. 676 (1st Dist. 2004), a golfer brought an action against a golf course owner after she was struck in the head by a golf ball while riding in golf cart near the pro shop. The Appellate Court held that the evidence was sufficient to support a finding that the golf course owner should have known that the area of the golf course outside the ninth green near the pro shop, barbecue pit and cart return was unreasonably dangerous, namely there was evidence that golf balls occasionally landed in that area and that the course owner had constructed a fence to provide limited protection, employees and others testified as to golf balls striking the pro shop, and it was reasonable to conclude that golfers would stop to socialize, not realizing the danger of being struck by a golf ball.

The court also addressed the primary assumption of risk doctrine and found it to be inapplicable referencing *Zurla*:

[G]olf is simply not the type of game in which participants are inherently, inevitably or customarily struck by the ball . . . "A golf course is not usually considered a dangerous place, nor the playing of golf a hazardous undertaking. It is a matter of common knowledge that players are expected not to drive their balls without giving warning when within hitting distance of persons in the field of play, and that countless persons traverse golf courses the world over in reliance on that very general expectation." (Citations omitted.)

*Sullivan-Coughlin*, 349 Ill. App. 3d at 560.

## **V. CONCLUSION**

Given the level of sports participation in this country, there are inevitably going to be a significant number of sports injuries. Fortunately, most of those injuries will not be what might be termed as "serious" injuries and, of those injuries, only a small percentage are likely to result in claims. As a claim professional, however, you need to have a working knowledge of sports injuries and applicable Illinois law so that you will be prepared to adjust such a claim. Of course, if you regularly attend sporting events as a spectator, coach or officiate youth sporting events, or are yourself an active "weekend warrior," you run the risk of being injured and could

conceivably be a claimant yourself. Regardless of how a sports injury claim arises, you need to remember that every sports injury claim requires a fact-intensive analysis as well as a working knowledge of pertinent Illinois case law and statutory immunities. Please do not hesitate to let us know should you need assistance with such a claim.





## Matthew S. Hefflefinger

- Partner

Born in Pennsylvania, Matt began his legal career with Heyl Royster while he was still in law school by clerking with the firm during the summer. Following graduation, he joined the firm in the Peoria office in 1989 and became a partner in 1997. He is the co-chair of the firm's Truck/Motor Carrier Litigation Practice Group.

Matt is an aggressive advocate who has tried many cases to verdict and enjoys the challenges of complex litigation. He handles the defense of personal injury cases primarily focusing upon the trucking and construction industries. Matt is frequently contacted immediately after a catastrophic loss to visit an accident scene and help develop the facts and case strategy with an eye toward a successful result once litigation is filed. Beyond his expertise in trucking and construction matters, he has also handles cases touching upon a wide variety of areas including construction delay claims, covenants not to compete, breach of contract, aviation accidents, premises liability, auto accidents and product liability.

Matt has taught a Masters level course in the graduate business program at Bradley University and is a frequent speaker at continuing legal education seminars held across the state addressing a variety of different legal topics.

Matt is a Martindale-Hubbell AV rated lawyer who has remained extensively involved in the community serving on a number of boards of community organizations. He has also been instrumental in founding two local charitable organizations dedicated to, among other things, awarding college scholarships to local high school seniors. Matt has also been recognized as one of Peoria's "40 Leaders Under 40."

### Significant Cases

- *Riddle v. McLean County Unit District 5, Parkside Junior High School, and Richard Peterson*, 341 Ill. App. 3d 1129 (4th Dist. 2003) - Obtained summary judgment for a school district arising out of a near amputation of an 8th grader's hand while in shop class, which was affirmed on appeal, based upon a failure to supervise theory under the Illinois Tort Immunity Act.
- *United States of America for the use of Bowman Metal Deck, a division of ARMCO, Inc., and Bowman Met*, 94 CV 1214 - A complex Miller Act case involving millions of dollars in

construction delay claims arising from the construction of identical federal prisons in Pekin and Greenville, Illinois. The case was successfully resolved at mediation for our clients, the steel subcontractors at each site.

- *Jalel Hanafi v. Tri-Hi Transportation, Inc.*, McLean County, 03 L 200 - Jury trial of a trucking accident with chronic pain claims involving testimony from 14 physicians. Verdict for plaintiff was in line with case evaluation and less than the offer of settlement prior to trial.
- *Neziroski v. Von Maur*, 99 L 121 - Jury trial involving false arrest, false imprisonment and malicious prosecution claims arising out of an unusual transaction at the Bloomington Von Maur Store. Plaintiff asked for more than \$250,000. Verdict for plaintiff in the amount of \$50,000.

### Professional Recognition

- Martindale-Hubbell AV rated
- Selected as a *Leading Lawyer* in Illinois. Only five percent of lawyers in the state are named as *Leading Lawyers*
- 40 Leaders Under 40 - Peoria, 2000
- Abraham Lincoln American Inn of Court (President 2005-2006)

### Professional Associations

- Abraham Lincoln American Inn of Court (Past President)
- American Bar Association
- Defense Research Institute
- Illinois State Bar Association
- Illinois Association of Defense Trial Counsel
- Peoria County Bar Association

### Court Admissions

- State Courts of Illinois
- United States District Court, Central District of Illinois

### Education

- Juris Doctor, Southern Illinois University School of Law, 1989
- Master of Business Administration, Southern Illinois University, 1989
- Bachelor of Science (Magna Cum Laude), Bradley University, 1984

