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Sports Law in the State of Wisconsin

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SPORTS LAW IN THE STATE OF WISCONSIN

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I. INTRODUCTION

The state of Wisconsin has a rich history involving the intersection of sports and law. Although not a center of the sports industry, Wisconsin is home to the Wisconsin Interscholastic Athletic Association (WIAA), the first and oldest statewide interscholastic athletic association, the National Association of Sports Officials, the Commissioner of Major League Baseball, and one of the most storied franchises in sports, the Green Bay Packers.

Wisconsin is the home of the National Sports Law Institute of Marquette University Law School. Founded in 1989, the Institute's mission is to be the leading national educational and research institute for the study of legal, ethical, and business issues affecting amateur and professional sports. One of the ways that the Institute fulfills this mission is by publishing the *Marquette Sports Law Review* (formerly the *Marquette Sports Law Journal*). This survey is another outgrowth of that mission.

The purpose of this survey is to provide an overview of the development of sports law in the state of Wisconsin until the end of the year 2004. With the support of the Sports and Entertainment Law Section of the State Bar of Wisconsin, the Institute began to compile the cases and statutes that make up this report in 2002. The focus of the report is on the rich history of cases in Wisconsin focusing on legal issues in sports. Many of the cases discuss several distinct legal claims; therefore, these cases are included in several different areas within the report according to the specific claim discussed. Cases are presented in chronological order to demonstrate the progression within the particular area to the most recent decision by the Wisconsin courts.

Statutory law will also be provided where appropriate; however, due to the difficulty in tracking the historical progression of and changes in various state statutes, the focus will be on those statutes specifically mentioned in the cases presented and those current statutes that specifically involve sports.

This survey is a starting point for practitioners undertaking the practice of sports law in the state of Wisconsin. It is also intended to provide an in depth look at how the law has impacted the sports industry in the state of Wisconsin.

II. TORT LAW

On the national level, the most highly litigated area in sports is claims arising from torts or alleged torts committed by participants, organizers, spectators and others. In Wisconsin, this also is true as the area of torts in sports has been the most litigated. What follows are cases involving various

aspects of tort law, from negligence and various immunities, to specific legally created duties within the sports context.[1]

A. Negligence

Many sports tort cases in Wisconsin involve injured plaintiffs' claims that the negligence of the defendant caused their injuries. For a court, this analysis may include a focus on whether the plaintiff assumed the risk of his or her injuries, whether the danger was open or obvious, whether the defendant may have had a duty to supervise the plaintiff, whether the injury sustained was foreseeable, and whether there are any public policy concerns that may affect the negligence analysis.

Wisconsin is a contributory negligence state. Under the contributory negligence doctrine, when the negligence of another is the proximate cause of the individual's injury, the individual will not be allowed to recover for his or her injuries if his or her negligence is also a proximate cause of the injury. Many of the cases that follow discuss contributory negligence in Wisconsin as codified in section 895.045 of the Wisconsin statutes.[2] According to the statute, Wisconsin's contributory negligence standard is that of comparative negligence; even where there is contributory negligence, an individual will not be barred from recovering damages for injuries if his or her negligence is not greater than the negligence of the other individual.[3] When determining whether a plaintiff can recover damages, courts must compare the negligence of the parties involved.[4]

The following cases focus on negligence claims in the sports setting. The cases are organized so that cases with similar fact patterns are discussed in the same section.

1. Spectator Injuries

The first cases deal with situations where an injured spectator sues to recover for those injuries.[5]

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1. For further analysis of sports torts in Wisconsin see, Jay Urban, *Sports Torts in Wisconsin*, 8 MARQ. SPORTS L.J. 365 (1998).

2. WIS. STAT. § 895.045 (2003-04).

3. *Id.*

4. *Id.*

5. For further information on spectator injuries see, Joshua Kastenburg, *A Three Dimensional Model of Stadium Owner Liability in Spectator Injury Cases*, 7 MARQ. SPORTS L.J. 187 (1996).

Wills v. Wisconsin-Minnesota Light & Power Co.[6]

Rose Alice Wills was attending an amusement park run by the Wisconsin-Minnesota Light & Power Co. with her mother and other relatives. The amusement park had a movie theatre, dancing pavilion and baseball field on its premises. Wills and her mother were stopped on a path ninety feet from home plate when she was struck in the face by a line drive. She brought an action for negligence, and a jury entered judgment in her favor. The Light & Power Co. appealed.

The Wisconsin Supreme Court affirmed the jury verdict in favor of Wills.[7] Light & Power Co. alleged that it was not negligent and that Wills was contributorily negligent. The supreme court disagreed. The court concluded that Light & Power Co. could have reasonably protected visitors to its park from the foreseeable danger of getting struck by a baseball. Additionally, Wills was not contributorily negligent because she was not aware of the possibility of being struck by a baseball. She was not watching the baseball game, did not know a baseball game was going on, and had never seen a baseball game before. Therefore, Light & Power Co. was negligent, and Wills was awarded damages.

Lee v. National League Baseball Club of Milwaukee[8]

During a scramble for a foul ball, the plaintiff, May Lee, a sixty-nine year old woman, was knocked out of her seat and injured. After the ball was hit into her section, ten or twelve people converged upon her, knocking her out of her seat, severely bruising her and breaking at least one of her ribs. Lee sued the Milwaukee Braves Baseball Club, alleging that as host of the game, it had failed in its duty to protect her from injury.

The trial court held the Braves responsible for Lee's injuries and awarded her $3,500 in damages. The court found that the Braves had failed to protect Lee (there was no usher in Lee's section at the time of her injury), that their failure to do so was the proximate cause of her injuries, and that Lee did not assume any risk of being injured by sitting in the stands. The Braves appealed.

On appeal, the Wisconsin Supreme Court upheld the trial court's decision. The court recognized the Braves' duty to protect Lee and concluded that the

6. 205 N.W.2d 392 (Wis. 1953).

7. This case and many other cases in this report were decided before the Court of Appeals was created in 1978. Therefore, for all of these cases there is no Court of Appeals decision to refer to; instead the appeal is directly to the Wisconsin Supreme Court.

8. 89 N.W.2d 811 (Wis. 1958).

Braves should have reasonably anticipated that a spectator could have been injured during a scramble for a foul ball. The court agreed that there was sufficient testimony for the trier of fact to reasonably conclude that the Braves' breach of this duty proximately caused Lee's injuries.

In addition, the court agreed that Lee had assumed the risk of being hit by a batted ball; however, she had no knowledge that there was the possibility of being injured by scrambling patrons, and thus, she assumed no risk of being injured in this manner. The supreme court upheld the trial court's decision finding the Milwaukee Braves liable for Lee's injuries.

Powless v. Milwaukee County[9]

During a Milwaukee Braves baseball game, the plaintiff, Ramona Powless, was injured after being struck by a foul ball. She alleged that by not protecting the area of the field she was sitting in, Milwaukee County – the owner of Milwaukee County Stadium – had violated the Wisconsin safe place statute.[10] Powless was not watching the game when the ball was hit; instead she was recording the score in her program. Powless admitted that she heard fans say that the ball was coming toward her and that some fans began running away from the area. However, she made no efforts to protect herself and did not see the ball until just before it struck her.

The Wisconsin Supreme Court affirmed the trial court's decision, finding that the county was not liable for Powless' injuries. The court held that by not paying attention to the game, Powless was at least as negligent as the county, and therefore, was barred from recovering any damages under Wisconsin's contributory negligence statute.

Pelock v. Prairie du Chien Joint School District[11]

Lawrence Pelock was struck in the head by a baseball bat while watching a softball game. Pelock was standing approximately thirty feet from the batter behind a four-foot high fence that paralleled the first base line. According to witnesses, Pelock was not looking at the batter when he was hit. Following the injury, Pelock sued the school district, alleging that its negligence in not creating a safer viewing point for him, in violation of Wisconsin's safe place statute, caused his injuries.[12]

The school district argued that it had not been negligent because the

9. 94 N.W.2d 187 (Wis. 1959).

10. The safe place statute claim in this case is discussed *infra* at page 466.

11. No. 84-1276, 1986 Wisc. App. LEXIS 3184 (Feb. 12, 1986).

12. The safe place statute claim in this case is discussed *infra* at page 469-470.

danger of loose bats was obvious to Pelock, and he was obligated to tend to his own safety by maintaining a vigilant lookout. Based upon this argument, the school district moved for summary judgment. The trial court granted the school district's motion, finding that Pelock had been more negligent than the school district. Pelock appealed.

The Wisconsin Court of Appeals reversed; holding that the school district's defense of contributory negligence could not properly be decided by summary judgment. In reaching this conclusion, the court noted that many issues of fact remained in dispute, including the field manager's negligence in erecting the fence, the batter's negligence, and the spectator's contribution to the accident.

Moulas v. PBC Productions[13]

On October 21, 1994, Andrea Moulas was hit in the face by a puck during a Milwaukee Admirals hockey game. Moulas sued the Admirals and the Bradley Center, alleging that both had been negligent and that the Bradley Center had violated Wisconsin's safe place statute. The defendants moved for summary judgment, arguing that Moulas had assumed the risk and exposed herself to an open and obvious danger and that in any event, she was more negligent than the defendants. The Milwaukee County Circuit Court granted the defendants' motion for summary judgment, finding no existing issues of material fact. Moulas appealed.

The Wisconsin Court of Appeals affirmed, holding that Moulas did not show that the Admirals or the Bradley Center owed any duty of care to her. Before each game fans are told to keep their eyes on the puck at all times in order to prevent injury. The court also pointed out that by attending the game Moulas had assumed the risk of being struck by a puck, and the back of her admission ticket released the Admirals and the Bradley Center from liability. Additionally, Moulas had attended at least ten other Admirals games prior to her injury. Thus, the court concluded that she knew that the puck could leave the ice during games. The court found that Moulas's negligence exceeded any negligence on the part of the Bradley Center and dismissed the complaint.

Moulas appealed to the Wisconsin Supreme Court and in a *per curium* decision the court affirmed.

Spectator Injuries in General

Sports facilities and event organizers have a duty to protect spectators in

13. 570 N.W.2d 739 (Wis. Ct. App. 1997), *aff'd*, 576 N.W.2d 929 (Wis. 1998).

high risk areas within their facility; however, in general in spectator injury cases the injured spectator will not be able to recover for his or her injuries caused by risks inherent in the particular sport (i.e. foul balls or pucks being hit into the stands). Of particular importance will be the spectator's knowledge of the sport and prior attendance at similar events. Still, injuries that occur after some conduct that might be considered an inherent risk (i.e. a scramble for a foul ball) may be afforded some form of recovery.

2. Duty of Supervision

Coaches and teachers typically have a duty to provide proper supervision for their participants and students, especially when those individuals are minors. The following cases discuss this duty of supervision.

Cirillo v. City of Milwaukee[14]

The plaintiff, Donald Cirillo, and three of his classmates engaged in a game of keep away. The game became more and more rough, eventually resulting in Cirillo's injury. The teacher, Paul Sherry, left the class unattended for a period of approximately twenty-five minutes, including the time when Cirillo was injured. Cirillo sued Sherry and the City of Milwaukee, alleging that Sherry had acted negligently in leaving the class unattended for such a long period of time. Sherry countered, arguing he had not been negligent, and even if he had been, Cirillo was contributorily negligent for participating in a rough game. The trial court granted Sherry's motion for summary judgment, finding that Cirillo's actions, not Sherry's absence, were the cause of his own injuries. Cirillo appealed.

The Wisconsin Supreme Court reversed and held that the question of negligence was one for the jury. The court stated that it was possible that the jury could have found that Sherry acted unreasonably by leaving the class unattended for such a long period of time. The court also stated that it was entirely possible that Cirillo's actions were the cause of the injury, not Sherry's absence. Therefore, the court held that a jury should hear the case.

Lueck v. City of Janesville[15]

While attempting a gymnastics stunt in gym class, the plaintiff, Terry

14. 150 N.W.2d 460 (Wis. 1967). The discussion of the duty that Sherry owed to Cirillo can be found *infra* at pg. 460-461.

15. 204 N.W.2d 6 (Wis. 1973). Further discussion of the duty the school owed to the student in this case can be found *infra* at pg. 461-462.

Lueck, fell and suffered serious injuries. Although Lueck did not request a spotter before attempting the stunt, he contended that the class instructor, Mr. Sorenson, failed in his duty to prevent such an injury from taking place. Lueck sued Sorenson and the City of Janesville, alleging that their negligent supervision of the gym class had resulted in his injury. The trial court found both Lueck and Sorenson negligent but held that this negligence did not cause the injuries. Sorenson made a motion to change the conclusion on the question of negligence from yes to no. The motion was denied, and the jury awarded damages to Lueck, prompting the City of Janesville to appeal.

On appeal to the Wisconsin Supreme Court, the plaintiff alleged that Sorenson was negligent by not providing a spotter for Lueck. The court found this to be an unreasonably high standard of care and determined that Sorenson's supervision was adequate. Sorenson met the standard of ordinary care when he furnished adequate equipment, and provided proper instruction, supervision, and assistance, before and during the time of the plaintiff's injury. Therefore, Sorenson was not negligent, and the motion to change the verdict answer concerning negligence from yes to no should have been granted. Even if Sorenson's negligence had been established, the supreme court agreed with the trial court's determination that his negligence was not the cause of the accident.

Pierce v. Mount Horeb Area School District[16]

After suffering a serious knee injury during gym class, the plaintiff, Nathaniel Pierce, sued both the Mount Horeb Area School District and his instructor, Jack Louko. He contended that the move he was performing during wrestling class (known as a "stand up" move) is known for the risk it poses for knee injuries. After a trial, the jury returned a verdict that found no negligence on the part of the school district or Louko. Pierce appealed the verdict, claiming that the jury had erred in failing to find negligence.

On appeal, the Wisconsin Court of Appeals found evidence produced at trial showed that Pierce had learned the move and performed it successfully prior to his injury. The court found that Louko had properly demonstrated the move and required warm-up exercises prior to the students' participation in class. Thus, the court held that there was sufficient evidence to support the jury's verdict and affirmed the trial court's ruling.

16. No. 86-1795, 1987 Wisc. App. LEXIS 4425 (Dec. 23, 1987).

Duty of Supervision in General

Even in situations where there is a claim that the defendant breached a duty to supervise the plaintiff in the sport or school setting, courts will typically evaluate the plaintiff's own negligence as required in Wisconsin's contributory negligence scheme. The focus will then be on whether the defendant's breach of duty was more responsible for the plaintiff's harm than the plaintiff's own negligence.

3. Duty of Care for Athletic Participants

Perhaps the most litigated tort law area within sports involves claims of participants against other participants who harm them during competition. The Wisconsin courts have faced these issues many times and even the legislature has been involved. Still, the exact nature of what type of conduct a participant will be liable for is subject to debate. The following cases discuss different aspects of the duty of care participants owe co-participants in sports activities.

Rasmussen v. Richards[17]

James Rasmussen and a friend were walking to hole number four at the Tri-City Golf Course when a ball driven by Joe Richards hit Rasmussen. Richards was teeing off from hole number three when his ball sliced to the right. As the ball approached Rasmussen a member of Richards' foursome shouted "fore." Rasmussen did not hear the warning and the ball hit him on the top of the head causing a brain contusion. The circuit dismissed the case after a jury found that Richards was not negligent and that Rasmussen had assumed the risk of injury. Rasmussen appealed.

The Wisconsin Supreme Court affirmed. On appeal, Rasmussen argued that Richards was negligent because he violated a golf course rule stating that golfers should not tee off until players ahead are out of the way. Richards normally hit a tee shot 170 to 190 yards, and testimony at trial showed that Rasmussen was clearly within that distance. The court found that the course rule applied to players on the same hole, but did not apply in this situation where Rasmussen was on different hole.

Rasmussen also alleged that Richards was negligent because he did not yell "fore" prior to teeing off, instead waiting to yell after the ball began to slice towards Rasmussen. The court upheld the jury's determination that Richards was not negligent, finding that he did not have reasonable grounds to

17. 95 N.W.2d 791 (Wis. 1959).

believe that his ball might hit Rasmussen prior to teeing off because Rasmussen was not in the area next to the hole or within the intended flight of the ball. Because the court determined that Richards was not negligent it did not consider the assumption of the risk issue on appeal.

Ceplina v. South Milwaukee School Board[18]

The plaintiff, Rosemarie Ceplina, brought a negligence claim against the South Milwaukee School Board and James Pauwels after Pauwels struck her with a bat during a sixth-grade softball game. Ceplina alleged that Pauwels did not exercise the proper amount of care and improperly controlled the bat that struck her. Pauwels filed a motion for summary judgment, claiming that he did not owe a duty to Ceplina because the danger of being struck with the bat was or should have been open and obvious to her. The circuit court denied the motion and Pauwels appealed.

The Wisconsin Supreme Court affirmed the circuit court's decision denying Pauwels's motion for summary judgment. The court held that Pauwels did owe a duty of care to Ceplina. Pauwels had a duty to refrain from any act that would cause foreseeable harm to other participants. The court stated that swinging a bat gives rise to the probability of foreseeable harm to others. The summary judgment motion was properly denied because it was up to a jury to determine whether Pauwels breached this duty.

Strong v. Buran[19]

During a doubles tennis match, the plaintiff, Terence Strong, was struck in the eye by a tennis ball hit by Richard Buran. The impact caused Strong to lose sight in the eye. Strong sued Buran, claiming that Buran's negligence was the cause of the injury. Buran filed a motion for summary judgment, arguing that he owed no duty of care to Strong; the circuit court agreed, granting the motion.

The Wisconsin Court of Appeals affirmed. The court noted that recognition of the duty to refrain from negligent conduct, advocated by Strong, would place an unreasonable burden on free and vigorous participation in sporting activities. The court decided recklessness was the appropriate standard of care for athletic activities and concluded that Buran had no duty to refrain from playing vigorous, competitive tennis. Thus, the court concluded that Strong had failed to state a cause of action for negligence because Buran

18. 243 N.W.2d 183 (Wis. 1976).

19. No. 78-680, 1979 Wisc. App. LEXIS 3432 (June 27, 1979).

did not owe Strong a duty of care.

Lestina v. West Bend Mutual Insurance Co.[20]

During an adult recreational soccer league game, the plaintiff, Robert Lestina, sustained serious injuries to his leg and knee after allegedly being slide tackled by the defendant, Leopold Jerger. The league's rules clearly stated that slide tackling was illegal during league play. Lestina sued claiming that Jerger's conduct had been both negligent and reckless. Jerger field a motion for summary judgment, claiming that Lestina's allegations of negligence were insufficient to state a cause of action. The circuit court denied the motion, and the jury returned a unanimous verdict finding Jerger 100% causally negligent.

Jerger appealed, contending that recklessness, not negligence, was the proper legal standard to use to decide the case. Jerger contended that if the negligence standard were applied, the vigorous competition inherent to athletics would be diminished.

On appeal, the Wisconsin Supreme Court examined a number of similar cases that had occurred in Wisconsin and concluded that:

> Depending as it does on all the surrounding circumstances, the negligence standard can subsume all the factors and considerations presented by recreational team contact sports and is sufficiently flexible to permit the "vigorous competition" that the defendant urges. We see no need for the court to adopt a recklessness standard for recreational team contact sports when the negligence standard, properly understood and applied, is sufficient.[21]

Based upon this finding, the supreme court determined that negligence was indeed the proper legal standard to apply to recreational sports players and affirmed the judgment of the circuit court.

Duty of Care for Athletic Participants in General

In *Strong*, the court of appeals determined that recklessness was the appropriate standard of care for athletic activities and that participants have no duty to refrain from playing vigorous, competitive sports.[22] Several years later, in *Lestina*, the Wisconsin Supreme Court joined the debate over the appropriate standard, holding that "the negligence standard can subsume all

20. 501 N.W.2d 28 (Wis. 1993).

21. *Id.* at 33.

22. *Strong*, 1979 Wisc. App. LEXIS 3432.

the factors and considerations presented by recreational team contact sports and is sufficiently flexible to permit . . . 'vigorous competition.'"[23]

In response to and in direct conflict with this decision, in 1995, the legislature added section 895.525, subsection (4m) allowing recovery in contact sports only for reckless or willful conduct.[24] This section provides that

> (a) A participant in a recreational activity that includes physical contact between persons in a sport involving amateur teams, including teams in recreational, municipal, high school and college leagues, may be liable for an injury inflicted on another participant during and as part of that sport in a tort action only if the participant who caused the injury acted recklessly or with intent to cause injury.[25]

The impact of this legislation is still unclear. Some sporting events may not qualify under the statute because they fall outside the two basic requirements of team activity and physical contact.[26] Until the Wisconsin courts clarify the matter, the negligence standard seems to apply as provided in *Lestina* for cases where no team or physical contact is present because the recreational activity statute would seemingly not govern that situation.

4. Assumption of Risk

As some of the cases above have discussed, in assessing the negligence of the parties involved in sports, the nature of the risk and the plaintiff's or defendant's assumption of that risk will often be important considerations. The following cases focus on this analysis.

Polsky v. Levine[27]

Michael Polsky was attending a camp when he was injured attempting a waterskiing trick. He sued the camp, the camp water skiing instructor and Dan Levine, who was acting as a spotter in the boat, alleging that their negligence resulted in the loss of two of his toes. At trial, the jury returned verdicts in favor of the defendants. The jury was also instructed on assumption of the risk, and found that Polsky assumed the risk inherent in performing the waterskiing trick. Polsky appealed, alleging it was error to instruct the jury

23. *Lestina*, 501 N.W.2d at 33.

24. WIS. STAT. § 895.525(4m) (2003-04).

25. *Id.*

26. For a further discussion on the statute, the *Lestina* case and sports torts in Wisconsin see, Urban, *supra* note 1.

27. 243 N.W.2d 503 (Wis. 1976).

and to submit a question concerning assumption of the risk.

The Wisconsin Supreme Court affirmed. However, the court concluded that it was error to submit a question to the jury on whether Polsky assumed the risk of doing the waterskiing trick because assumption of the risk as a bar to a negligence action no longer exists in Wisconsin. Instead, the instruction should have been given in terms of contributory negligence. In the end, the court determined that the jury would have answered yes to a question about whether Polsky was contributorily negligent; therefore the erroneous instruction and question submission had no impact on the verdict.

Little v. Bay View Area Red Cats[28]

The plaintiff, Ricky Little, suffered a neck injury while participating in a football game for the Bay View Area Red Cats. Little had suffered a fractured thumb three weeks earlier, and this was the first game he had played in since that injury. Little's family alleged that Ronald Bird, the team's head coach, had acted negligently in allowing Little to play in the game, based on the previous injury and providing him with a helmet that did not fit properly. Little's family sued Bird and the team, seeking damages for Ricky's injuries.

The circuit court found the coach fifty percent negligent, Little's father thirty percent negligent and Little twenty percent negligent. The result was a damage award to Little of over $250,000. The Red Cats appealed arguing that there was no evidence showing that Bird's negligence caused Ricky's injuries. Additionally, they argued that Little had assumed the risk of injury by participating in a dangerous contact sport.

The Wisconsin Court of Appeals disagreed, holding that Bird's decision to allow Little to play, combined with the improperly fit helmet, was the likely cause of the injury (expert testimony indicated that "the loose helmet caused the neck injuries by its failure to give adequate support to the neck"[29]). The court noted that Little had not participated in any scrimmage or practice for three weeks preceding the game and he had received no instruction on playing with a cast.

The court explained that the analysis of whether someone assumed the risk of injury is determined when the trier of fact decides the issue of contributory negligence. Because Little had a duty to exercise ordinary care to protect himself from injury, the trial court instructed the jury that tackling with your head down, as Little did, was negligent. Next, the court instructed the jury to determine the proportion of Little's negligence by considering the degree of

28. No. 80-1801, 1981 Wisc. App. LEXIS 4185 (June 15, 1981).

29. *Id.* at *5.

care "ordinarily exercised by a child of the same age, capacity, discretion, knowledge and experience under the same or similar circumstances."[30] The defendants asserted that Little had the same duty as an adult because football is a dangerous sport, and anyone participating in it should be held to an adult standard of care. The court of appeals disagreed, stating that children lack the maturity and experience to make responsible decisions, and the jury should consider this when determining a child's proportion of negligence.

The court concluded the trial court's finding that Little had been twenty percent negligent more than adequately accounted for his assumption of the risk in playing a contact sport. Thus, the trial court's decision was affirmed, and the defendant's appeal was dismissed.

Summary of Assumption of Risk

As the court explained in *Little*, assumption of risk may be a factor in analyzing the negligence of the parties involved. However, in a contact sport, an injured participant's assumption of risk often will not increase his or her negligence to the point where it outweighs the negligence of the defendant. Although assumption of risk can be a valid defense to a negligence claim, Wisconsin courts typically will consider this defense in the context of the contributory negligence scheme. It will be a factor in the analysis but may only be a factor in assessing the party's overall negligence instead of providing a full defense to a negligence claim.

5. General Negligence Claims

The following cases involve various other types of negligence claims based on injuries suffered during athletic participation.

Kaiser v. Cook[31]

Marie Kaiser was injured at Cedar Lake Speedway when a tire flew off a racecar and struck her. Kaiser was watching the race from an area in which spectators' cars were allowed onto various tiers, allowing their occupants to watch the race either from inside or outside of their car. Kaiser was outside of her car at the time she was injured. A ten-foot fence that extended above the race wall protected the tiered area. The defendant, Elmer Cook, owner of the racetrack, indicated that spectators in the tiered area were to stay in their vehicles at all times while watching the race. However, there were no signs

30. *Id.* at *9.

31. 227 N.W.2d 50 (Wis. 1975).

indicating this. Kaiser sued Cook, alleging that Cook had failed to keep the track safe in accordance with Wisconsin's safe place statute[32] and that by failing to keep the track in proper condition, he negligently caused her injuries. The jury found Cook liable for Kaiser's injuries. However, the court found that regardless of whether Cook's negligence violated the safe place statute, Kaiser's negligence exceeded Cook's negligence. The court granted Cook's motion for a directed verdict releasing him from liability. Kaiser appealed.

The Wisconsin Supreme Court concluded that Kaiser's negligence did not exceed Cook's negligence. Although Kaiser voluntarily attended the race and chose where to view the race from, she was unaware that it was more dangerous to watch from the curve than to sit in the grandstand. Additionally, Kaiser was paying close attention to the race prior to the accident. Therefore, it was reasonable for Kaiser to believe she was safe watching the race from the turn, and her own behavior did not contribute to the accident. The circuit court's judgment was reversed, and the case was remanded with instructions to reinstate the jury verdict in favor of Kaiser.

Treps v. City of Racine[33]

While playing catch in a parking lot at Douglas Park in Racine, John Treps was injured when he stepped back to catch a ball and his left foot slipped into a hole in the concrete pavement. Treps was in the parking lot warming up for a game in the municipal softball league. A drinking fountain had been removed, creating the hole. The circuit court for Racine County found the City of Racine negligent as a matter of law, and the jury found that Treps was not contributorily negligent. The city appealed.

The Wisconsin Supreme Court found that Treps should be considered a public invitee; thus, the city owed him a duty of ordinary care. The city breached this duty by permitting the hole to exist for several months. The hole was hazardous to those visiting the park, and it was not an open, unconcealed, or obvious hazard. Therefore, the city was under a duty to foresee the hazard and protect against it. The court affirmed the circuit court's decision.

Wendt v. Brookfield Square Merchants Ass'n[34]

The plaintiff, Timothy Wendt, organized and participated in a marathon volleyball tournament to raise money for the Cystic Fibrosis Foundation. The tournament took place in the parking lot of the Brookfield Square Shopping

32. The safe place statute claim in this case is discussed *infra* at pg. 467-468.

33. 243 N.W.2d 520 (Wis. 1976).

34. No. 85-2285, 1986 Wisc. App. LEXIS 3511 (May 14, 1986).

Center with the consent of the Brookfield Square Merchants' Association. Wendt signed an indemnity agreement under which the Merchants' Association was to be held harmless against all liability arising out of the event. Additionally, the Merchants' Association was never asked to provide security for the event. During one of the tournament's games, Wendt asked three men who were harassing several of the tournament's female participants to leave. Shortly after this request, one of the men hit Wendt in the face causing him serious injuries. Wendt sued the Merchants' Association on the grounds that the association had negligently failed to provide adequate protection for Wendt and the other tournament participants. The association moved for summary judgment, arguing that it had never been asked to provide additional security officers and had no affirmative duty to do so. The trial court granted summary judgment.

The Wisconsin Court of Appeals affirmed and dismissed the case. In order for the contributory negligence standard to apply, a reasonable person must find that the harm is reasonably foreseeable. In this case, there was no evidence of past assaults in the Brookfield Square parking lot, and when the indemnity agreement was signed the tournament organizers raised no concern for security issues. Because the injuries to Wendt were not reasonably foreseeable, the association had no duty to hire extra security.

Kloes v. Eau Claire Cavalier Baseball Ass'n[35]

While pitching for the Eau Claire Cavalier Baseball Association, Jeffrey Kloes was struck in the face with a batted ball. Kloes sued the Association and the city, claiming that both had negligently caused his injuries by failing to provide adequate lighting in the stadium. Kloes claimed that inadequate lighting prevented him from seeing the ball and reacting in time to avoid injury. The Association argued that Kloes voluntarily confronted an open and obvious danger because he participated in an evening baseball game at Carson Park knowing that the lights were inadequate and that there was a danger of being hit by a batted ball. In addition, the city argued that it was immune from liability under Wisconsin's recreational immunity statute.[36] The circuit court found that the city was immune under the statute. Additionally, the court found that in Wisconsin, where a plaintiff voluntarily confronts an open and obvious danger, his or her negligence, as a matter of law, is greater than the defendant's. The court dismissed Kloes's complaint. Kloes appealed.

After affirming the circuit court's decision concerning the city's

35. 487 N.W.2d 77 (Wis. Ct. App. 1992).

36. The recreational immunity statute claim in this case is discussed *infra* at pg. 451-452.

recreational immunity, the Wisconsin Court of Appeals moved to the issue of negligence. In determining whether Kloes's behavior constituted negligence, the court noted that the open and obvious danger rule is not an absolute defense, instead it bars plaintiffs' recovery under the contributory negligence standard. In order for a circumstance to be considered an open and obvious danger, there must be a "high degree of probability that the condition or danger confronted will result in harm."[37] Recognizing the dangers of participating in baseball, the court still did not find that Kloes's participation put him in front of such open and obvious dangers that his negligence would automatically outweigh that of the defendants.

Therefore, the appellate court reversed the circuit court's decision in part, finding that Kloes's negligence was not automatically greater than that of the Association and remanded in part for further proceedings.

Anderson v. Regents of the University of California[38]

Plaintiffs contracted with tour companies and ticket agencies for packages to the 1994 Rose Bowl featuring the University of California at Los Angeles (UCLA) and the University of Wisconsin. Upon arrival in Pasadena, California, plaintiffs learned that they did not have tickets to the game and either did not attend the game or paid above face value for tickets. UCLA was allotted 40,000 tickets for the game of which it "sold" 4,000 to an anonymous donor and 1,223 to non-season ticket holders. Plaintiffs alleged that these actions caused tickets to reach the hands of scalpers, which in turn caused them harm for which they sought damages for breach of contract, conspiracy and negligence.[39] UCLA filed a motion for failure to state a claim, which the trial court granted. The plaintiffs appealed.

Concerning the negligence claim, the trial court held that the plaintiffs failed to allege that UCLA had a duty to make tickets available to their travel agents. The Wisconsin Court of Appeals concluded that the plaintiffs could not recover from UCLA under the negligence theory because of public policy concerns. Under Wisconsin law, negligence claims can be denied for public policy reasons when the injury is too remote, the injury and culpability of the tortfeasor are out of proportion, the probability of harm was highly extraordinary, the tortfeasor would be unreasonably burdened, fraudulent

37. *Kloes*, 487 N.W.2d at 81.

38. 554 N.W.2d 509 (Wis. Ct. App. 1996).

39. The contract claims in this case are not discussed because the court noted that under Wisconsin law the parties to a contract may agree, "that the law of a particular jurisdiction controls their contractual relations." *Id.* at 514. Therefore, the court applied California law to the contract claims in this case.

claims would arise, or there would be no stop to the litigation that would follow.

The court found that allowing the claim against UCLA would place an unreasonable burden on the university because it would be subject to claims from other buyers who paid above face value for their tickets. Because demand for the tickets exceeded the supply of tickets to the event, UCLA had no reasonable way to prevent harm to some potential buyers.

Bader v. Westfield Insurance Co.[40]

The plaintiff, Bruce Bader, sued his brother, Jeff, his nephew, Travis Thompson, and Westfield Insurance Company. Bruce alleged that Jeff and Travis's negligence following a family volleyball game resulted in his suffering a serious knee injury. Travis was attempting to push Bruce backward onto Jeff, who was on his hands and knees behind Bruce, so that Bruce would fall over Jeff into a mud puddle. Bruce slipped while trying to avoid being pushed into the mud by Travis (nobody actually saw Travis push Bruce), resulting in the injury to his knee. The jury returned a verdict finding none of the parties negligent. However, following several post-trial motions, the court determined that Jeff was indeed negligent and awarded $134,444.29 in damages to Bruce. Jeff appealed, arguing that the trial court had erroneously found him negligent.

The Wisconsin Court of Appeals reversed, holding that the court had erroneously taken the case away from the jury. The court noted that in negligence cases "[w]hen more than one inference may be drawn from the evidence [the court must] accept the inference drawn by the jury."[41] The appellate court found that there was credible evidence to support the jury's verdict, and thus, the trial court had abused its discretion by overruling the jury. Accordingly, the court of appeals reversed and remanded the case with directions to reinstate the original jury verdict.

Ansani v. Cascade Mountain[42]

The plaintiff, Mark Ansani, was skiing on Cascade Mountain's racecourse when he lost control and crashed into a timing box at the finish line, suffering numerous injuries, including a ruptured small intestine. He sued, alleging that Cascade acted negligently by not protecting the box with hay bales, padding or any other material. Cascade countered by arguing that Ansani was negligent

40. No. 96-2643, 1997 Wisc. App. LEXIS 524 (May 13, 1997).

41. *Id.* at *2 (citations omitted).

42. 588 N.W.2d 321 (Wis. Ct. App. 1998).

because he assumed the risks inherent in skiing by choosing to ski on the course. Cascade contended that colliding with an object on the slopes should be included as an inherent risk of skiing. The circuit court ruled in favor of Ansani, holding Cascade 100% negligent. Cascade appealed, arguing that Ansani's negligence, not its own, had caused his injuries.

The Wisconsin Court of Appeals affirmed the decision of the trial court. In doing so, the court found that Ansani was not negligent per se for simply choosing to ski. The court concluded that Cascade was negligent for its failure to protect the timing box.

6. Negligence Claims in Wisconsin

As this last group of cases makes clear, there have been a variety of negligence claims brought against participants in, and sponsors and coaches of sports activities. The main focus is an assessment of the negligence of the parties involved in order to make the contributory negligence comparison. When the negligence of another is the proximate cause of the individual's injury, the individual will not be allowed to recover for his or her injuries if his or her negligence is a greater proximate cause of the injury than the negligence of the other individual. When making this comparison, courts must literally compare the negligence of both parties involved, assessing whether one party was more negligent than the other.

As the cases above explained, where a plaintiff voluntarily confronts an open and obvious danger, his or her negligence is greater than the defendant's as a matter of law. However, this open and obvious danger rule is not an absolute defense; it merely bars plaintiffs' recovery under the contributory negligence standard.

In addition, as the *Anderson* case explained, negligence claims can be denied for public policy reasons when the injury is too remote, the injury and culpability of the tortfeasor are out of proportion, the probability of harm was highly extraordinary, the tortfeasor would be unreasonably burdened, fraudulent claims would arise, or there would be no stop to the litigation that would follow.[43]

The analysis in the sports cases follows this scheme. The only unique factors will be the facts involved in the particular sport, the possible inherent risks of participation in the sport, the possible assumption of these risks by the injured participant and any duties owed to participants, spectators and others involved in the sports enterprise.

43. *Anderson*, 554 N.W.2d 509.

B. *Immunities*

The Wisconsin Legislature has enacted several immunity statutes that can provide immunity to those involved in sports activities. The following section discusses these various immunities.

1. Recreational Immunity

States have developed recreational immunity statutes in order to encourage landowners to allow others to use their property for recreational purposes. The statutes provide immunity to the landowner if the user sustains harm while on the property.[44] Typically, a landowner has a duty to warn the user of ultrahazardous situations and known hidden dangers, but has no duty to warn of open and obvious risks.

Wisconsin's recreational immunity statute is section 895.52.[45] The statute provides immunity to a property owner from any claims by a person who enters the property for recreational purposes. Cases dealing with the statute typically focus on several areas.

Some cases focus on the definition of what type of entity is covered under the statute. These cases will often focus on the statute's definition of an owner as a "person . . . that owns, leases or occupies property," or a "governmental body or nonprofit organization that has a recreational agreement with another owner."[46]

Other cases focus on whether the activity itself is a recreational activity. The statute defines such activities as

> any outdoor activity undertaken for the purpose of exercise, relaxation or pleasure, including practice or instruction in any such activity. "Recreational activity" includes hunting, fishing, trapping, camping, picnicking, exploring caves, nature study, bicycling, horseback riding, bird-watching, motorcycling, operating an all-terrain vehicle, ballooning, hang gliding, hiking, tobogganing, sledding, sleigh riding, snowmobiling, skiing, skating, water sports, sight-seeing, rock-

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44. In addition to these recreational immunity statutes, section 66.0123 provides for the creation of departments of public recreation in the state of Wisconsin. WIS. STAT. § 66.0123 (2003-2004). Such recreational authorities are vital in protecting recreational land as they "may conduct public recreation activities on property purchased or leased by a governmental unit for recreational purposes." § 66.0123(4)(a).

Additionally section 59.52 provides the authority for a county board to take land for public uses including "parks, recreation. . .parkways and playgrounds." WIS. STAT. § 59.52 (2003-2004).

45. WIS. STAT. § 895.52 (2003-04).

46. § 895.52(1)(d).

climbing, cutting or removing wood, climbing observation towers, animal training, harvesting the products of nature, sport shooting and any other outdoor sport, game or educational activity.[47]

In addition, the statute provides exceptions that preclude immunity for what might otherwise be covered entities. The exact ramifications of these exceptions are subject to considerable discussion by the courts. The following language within the statute provides two possible exceptions: " 'Recreational activity' does not include any organized team sport activity sponsored by the owner of the property on which the activity takes place."[48] This language has lead to the "sponsorship" exception, which can apply where an organization pays for or plans a team sport activity in some way. In addition, the "organized team sport exception" allows a participant in team sport activities to seek redress because the activities are not considered to be recreational activities.

The statute provides other specific exceptions such as the malicious failure of the owner to warn against an unsafe condition, and the "social guest" exception, which applies to those invited onto the property where a recreational activity takes place.[49] Only those exceptions analyzed within the following cases will be discussed in this report.[50]

The following cases are grouped into three different areas: (1) cases that focus on an evaluation of whether the organization involved is immune under the statute, (2) cases that focus on the area where an injury takes place and the type of activity involved, and (3) cases that focus on exceptions from the immunity provided in the statute.

a. Type of Organization Covered

The following cases focus on whether the defendant organization is an entity provided with immunity under the recreational immunity statute.

Johnson v. City of Darlington[51]

Jeremy Johnson drowned while swimming in a City of Darlington outdoor

47. § 895.52(1)(g).

48. *Id.*

49. § 895.52(6)(b) & § 895.52(6)(d).

50. Another statute connected to recreational use of land is WIS. STAT. § 23.305 (2003-2004), which allows the Department of Natural Resources to lease "state park land or state forest land to towns, villages or counties for outdoor recreational purposes associated with spectator sports" including baseball games, water ski shows, motorboat races, and other sports.

51. 466 N.W.2d 233 (Wis. Ct. App. 1991).

swimming pool. His father sued the city, claiming that its negligence had caused his son's death. He contended that because the lifeguards were not properly performing their jobs, the state's recreational immunity statute could not apply because the city had violated the Department of Health and Social Services regulations governing safety at public pools. Mr. Johnson alleged that by violating these regulations, the city had breached a duty of care owed to him and his son. At the time of Jeremy's death, three lifeguards were on duty, but none were at their assigned posts. The city argued that the state recreational immunity statute barred Johnson's claim. The circuit court granted the city's motion for summary judgment, finding that the plain language of the department's regulations did not contemplate liability for the type of incident that had occurred.

The Wisconsin Court of Appeals affirmed. According to the court,

> even where the law imposes a duty to protect a particular class of persons from a particular hazard, Wisconsin requires that there is some expression of legislative intent that the enactment was meant to serve as a basis for determining a standard of care that will support a negligence suit.[52]

The court did not find such a showing of legislative intent in the Department of Health and Social Services' regulations. The court reasoned that because the Department of Health and Social Services' regulations did not create liability for damages, the recreational immunity statute applied, and the city was immune from liability.

Peterson v. Midwest Security Insurance Co.[53]

The plaintiff, Danny Peterson, was injured when a tree stand he was hunting in collapsed and fell to the ground. Peterson was hunting on land owned by Vernon and Culleen Peterson but was using a tree stand built and owned by their nephew, Harold Shaw. Peterson sued Shaw's insurer, Midwest Security, claiming that the stand had been negligently built and maintained. Midwest moved for summary judgment, claiming that Shaw was immune from liability under the recreational immunity statute. The circuit court held that the recreational immunity statute applied and dismissed the case.

Peterson appealed, alleging that the circuit court had misinterpreted the statute. Peterson maintained that the statute gives immunity to owners of real property for injuries that occur on the real property or on any buildings, structures or improvements thereon. Therefore, because Shaw did not own the

52. *Id.* at 235.

53. 2001 WI 131.

real property the structure was on, he was not immune under the statute. The court of appeals affirmed the circuit court. Peterson again appealed.

The Wisconsin Supreme Court also affirmed, concluding that Peterson's interpretation of the statute was incorrect. The court held that a person who owns a building, structure, or improvement on real property owns property as defined in the statute, regardless of whether he or she also owns the underlying real estate. Because the statute gives immunity to owners of property and because Shaw owned the property that Peterson was injured on, Shaw was immune from liability.

b. Type of Activity Covered

The second major consideration for a court will be whether the activity engaged in by the injured plaintiff is the type of activity that falls under the statutory definition of a recreational activity. The following cases involve courts' analysis of this issue.

Taylor v. City of Appleton[54]

While playing catch with a football, the plaintiff, Marvin Taylor, was injured in an Appleton city park. Taylor sued the city for negligence, claiming that it was not immune from liability under Wisconsin's recreational immunity statute. The trial court granted the City of Appleton's motion for summary judgment. Taylor appealed.

The Wisconsin Court of Appeals affirmed. The court held that playing catch with a football was covered under the definition of a recreational activity, and thus, the city was immune from any liability claims.

Weina v. Atlantic Mutual Insurance Co.[55]

Dawn Weina sued Mount Pleasant Lutheran Church after suffering injuries while playing in a recreational softball game during a church function. While standing on second base, Weina was struck by a ball hit by a teammate. Weina alleged that the sponsor of the activity, the church, was not immune from liability under Wisconsin's recreational immunity statute. The church moved for summary judgment, arguing that since it did not provide any equipment, conduct registration, or require a fee, it could not be considered a sponsor of the game for liability purposes. The circuit court granted the church's motion for summary judgment, holding that the recreational

54. 433 N.W.2d 293 (Wis. Ct. App. 1988).

55. 508 N.W.2d 67 (Wis. Ct. App. 1993).

immunity statute was applicable.

The Wisconsin Court of Appeals affirmed. The court held that because the game was a classic "pick-up" game with the church providing no organization, equipment or umpires, the church could not be held to have sponsored it. In essence, the only thing the church did was paying a fee to reserve a park area that happened to include a baseball diamond. Therefore, the court ruled that the church was immune from liability for Weina's injuries under Wisconsin's recreational immunity statute.

Leete v. General Casualty Co. of Wisconsin[56]

The plaintiff, Katherine Leete, suffered injuries on Lakeshore Municipal Golf Course in Oshkosh, Wisconsin; when the golf cart she was a passenger in hit a hole on the course, throwing her from the cart. Leete suffered a broken leg. Leete sued the golf course and its insurance provider, claiming that the golf course had been negligently maintained.

The Circuit Court for Outagamie County granted summary judgment in favor of the golf course, holding that the golf course was a non-profit entity and thus, enjoyed recreational immunity under Wisconsin's recreational immunity statute. Leete appealed.

The court of appeals affirmed, finding that although it was not included in the list of activities, golf was clearly a recreational activity subject to recreational immunity. The court noted that the phrase, "activity undertaken for the purpose of exercise, relaxation or pleasure,"[57] is very broad, and the word "includes" does not limit the scope of the statute but rather gives examples of such activities. Thus, the golf course and its insurance company could not be held liable for the plaintiff's injuries because she was injured while playing golf, which the court found to be a recreational activity under the statute.

Auman v. School District of Stanley-Boyd[58]

The parents of Trista Auman sued the School District of Stanley-Boyd and its insurers to recover damages for injuries that occurred to Trista while at school. Trista was playing outside on a snow pile during recess when she fell down and broke her leg. Three days earlier, the playground supervisors had determined that the snow pile posed a safety hazard, and the children were not

56. 2000 WI App 161.

57. *Id.* ¶ 5.

58. 2001 WI 125.

to play on it. On the day of the accident, the playground supervisor did not attempt to stop Trista from playing on the snow pile. The plaintiffs alleged that the school district negligently inspected and maintained its premises and failed to provide adequate supervision during recess.

The defendants moved for summary judgment claiming that they were immune from liability under both the recreational immunity and governmental immunity statutes. The plaintiffs contended that the school could not be immune under the recreational immunity statute because attending school and recess were both mandatory activities and would not qualify as recreational activities under the statute. The circuit court denied the defendant's motion on governmental immunity but granted the motion under recreational immunity. The plaintiffs appealed, and the court of appeals was granted permission to appeal the case directly to the Wisconsin Supreme Court.

The Wisconsin Supreme Court reversed the decision of the circuit court. Whether the school district was immune from liability depended on "the nature of the property, the nature of the owner's activity, and the reason the injured person [was] on the property."[59] Additionally, the "court consider[ed] the totality of the circumstances surrounding the activity, including the intrinsic nature, purpose, and consequences of the activity . . . [and] appl[ied] a reasonable person standard to determine whether the person entered the property to engage in a recreational activity."[60]

The court held that the school was not immune from liability under the recreational immunity statute because Trista did not enter the property for the purpose of engaging in a recreational activity; instead, she entered the property to fulfill an educational purpose. The state's compulsory education law mandated Trista's attendance in school; likewise, her attendance at recess was mandatory. Looking at the totality of the circumstances, the court concluded that the activity was not recreational under the statute; thus, the school district could not be immunized from liability.

c. Exceptions from the Statute

As explained earlier, the two most widely referenced exceptions to immunity provided within Wisconsin's recreational immunity statute involved sponsors of organized team sport activities. The statute provides that the definition of recreational activities covered under the statute does not include "any organized team sport activity sponsored by the owner of the property on

59. *Id.* ¶ 12.

60. *Id.*

which the activity takes place."[61] This language has lead to the "sponsorship exception," which can apply when an organization pays for or plans a team sport activity and the "organized team sport exception" that allows participants in team sport activities to seek redress because their activities are not considered to be recreational activities.

The other exception often discussed is the "social guest exception." This exception precludes immunity when the injured person was invited by the private property owner to take part in the otherwise recreational activity during which an injury occurs.[62]

The following cases involve these exceptions.

Hupf v. City of Appleton[63]

Lawrence Hupf was walking to his car after a softball game when he was struck in the eye by a softball thrown by a man warming up for another game. Hupf sued the City of Appleton, claiming that the city's negligence caused his injuries. Hupf contended that he was at the park to play in a recreational softball league that he had paid to participate in. The city argued that it was immune from liability under Wisconsin's recreational immunity statute and that Hupf signed an exculpatory contract releasing the city from liability. The circuit court held that the city was immune from liability under the statute and granted its motion for summary judgment. The court also agreed that Hupf had signed an exculpatory contract releasing the city from liability.[64] Hupf appealed.

The Wisconsin Court of Appeals looked to the statute and its provision that any "organized team sport activity sponsored by the owner"[65] is not provided with immunity under the statute. The court held that the city was a sponsor of the organized team sport in this case. The main issue was whether Hupf was walking directly from a non-immune activity. If he were, the city would not be immune from liability under the recreational immunity statute. As the court explained, "the legislature did not intend to create a corridor of immunity from the ball field to the parking lot when the walk is inextricably connected to a non-immune activity."[66] The court then the reversed and remanded the case because there were issues of material fact concerning

61. WIS. STAT. § 895.52(1)(g) (2003-04).

62. § 895.52(6)(d).

63. 477 N.W.2d 69 (Wis. Ct. App. 1991).

64. The court's analysis of the exculpatory contract claim in this case is discussed *infra* at pg. 477-478.

65. *Id.* at 71.

66. *Id.* at 72.

whether Hupf was engaged in a recreational activity as defined in the statute.

Kloes v. Eau Claire Cavalier Baseball Ass'n[67]

As described earlier, while pitching for the Eau Claire Cavalier Baseball Association, Jeffrey Kloes was struck in the face with a batted ball. Kloes sued the association and the city, claiming that both had negligently caused his injuries by failing to provide adequate lighting in the stadium. The city argued that it was immune from liability under Wisconsin's recreational immunity statute. In addition to the negligence claims discussed earlier in this report,[68] the circuit court found that the city was immune under the statute and dismissed Kloes's complaint. Kloes appealed.

The Wisconsin Court of Appeals began by reviewing the recreational immunity statute focusing on the "sponsorship" exception. Kloes argued that because the city sponsored the Association, the city should not be granted the immunity protection provided by the statute. As the court explained, "[a] sponsor is a person or organization that pays for or plans and carries out an activity."[69] If a city takes team registrations, maintains the grounds, and provides umpires, scorekeepers, bases and balls, it would be sufficiently involved to be considered a sponsor of the league. In this case, although the city charged the Association a per game fee and employed a maintenance worker to prepare the park for games, the Association made its own season schedule and decided what tournaments to participate in. The Association also selected its players, hired umpires for its games, and furnished its own equipment. The court found that the city was insufficiently involved with the Association's activities to fall within the definition of a sponsor and was immune under the statute.

In regard to the association, the court found that it sponsored the baseball team, charged an admission fee, and was an owner of the park in that it occupied the property as required under the statute. Therefore, the Association fell under the sponsorship exception and was not granted immunity under the statute.

Meyer v. School District of Colby[70]

On September 9, 1996, the plaintiff, Diane Meyer, attended her son's junior varsity football game at Colby High School. After the game, as she was

67. 487 N.W.2d 77 (Wis. Ct. App. 1992).

68. *See infra* p. 440-441.

69. *Kloes*, 487 N.W.2d at 84.

70. 595 N.W.2d 339 (Wis. 1999).

exiting the premises, she was injured when one of the wooden bleachers she was standing on broke. Meyer sued the school district, alleging that its negligence in maintaining the safety of the bleachers violated Wisconsin's safe place statute. The school district argued that it was immune from liability under the state's recreational immunity statute. The school district moved for summary judgment, and the circuit court granted the motion. Meyer appealed.

Meyer argued that the recreational immunity statute's organized team sports exception applied to the participants taking part in the activity as well as the spectators on the premises. The Wisconsin Court of Appeals held that the organized team sport exception does not extend to spectators who are not participants in the activity and whose injuries do not arise out of the team sport activity or the actions of participants in that activity. Meyer appealed.

The Wisconsin Supreme Court held that because nothing in the legislative history of the statute indicated a deliberate intent to limit the organized team sport exception to participants, spectators attending such an event should not be treated differently than participants. The statute's purpose was to encourage owners to open their property to persons engaging in recreational activities. The court pointed out that there was no shortage of facilities for organized team sport activities that an owner sponsors, so there was no reason to immunize them. The court held that the legislature did not intend to grant immunity to facility owners who sponsor team sports events from liability arising out of injuries suffered by spectators. The supreme court reversed and remanded the case.

Waters v. Pertzborn[71]

Christopher Waters was injured when a car hit him after he traveled into the street while sledding down a hill in the defendants' front yard. Prior to the accident, the defendants' daughter, Kathleen Pertzborn, was out playing with Waters and suggested that the two go back to her house. When Mrs. Pertzborn discovered that the two were sledding down the front yard, she told them to stop unless someone was continuously looking out for cars and suggested that they go sledding at the local school. The children made plans to go to the school after the daughter was done eating, but Waters decided to sled down the hill alone and was injured. The plaintiffs sued the Pertzborns and their insurer.

The defendants moved for summary judgment, claiming that they were immune from liability under the recreational immunity statute. The plaintiffs contended that Waters had been a "social guest" at the time of the accident;

71. 2001 WI 62.

therefore, the defendants were not immune from liability. The circuit court agreed and denied the motion. The defendants appealed, and the case was certified directly to the Wisconsin Supreme Court.

The supreme court affirmed, holding that issues of material fact existed as to whether the "social guest exception" applied to these particular facts. The "social guest exception" precludes immunity when the injured person was "expressly and individually invited. . .by the private property 'owner' for the specific occasion during which the . . . injury occurs."[72] The issue concerned whether the defendants' daughter was authorized to invite Waters to their home. The court remanded the case for further proceedings.

Miller v. Wausau Underwriters Insurance Co.[73]

Mark Miller was injured during soccer practice at a park owned by the City of Oconomowoc when a soccer goal struck him on the head when it tipped over while his teammates were putting it back into place. Miller's parents sued the city and its insurer for negligence in maintaining the soccer field and anchoring the goal to the ground.

Until 1980, the city sponsored youth soccer programs at its city parks. Shortly thereafter, the city stopped sponsoring the programs but allowed private organizations to use the fields for a seasonal fee. The association that the team Miller belonged to was not one of the organizations that had permission to use the fields. Additionally, the city was not aware of, and did not receive a fee for the team's use of the fields. The Millers argued that the city sponsored soccer at the particular field because it collected registration forms, collected fees from associations and team participants, incurred expenses in maintaining the field, and took field reservations for games and practices. The defendants moved for summary judgment based on the recreational immunity statute. The lower court granted the motion, and the Millers appealed.

The Wisconsin Court of Appeals affirmed. The court held that the city was not a sponsor of Miller's team, its practices or games, because the activities the city performed were only part of its relationship with the paid organizations. The organization that Miller's team belonged to was not a paid organization. The only actions that the city carried out at the time of the accident were collecting fees, taking reservations, and maintaining the fields. In order to be exempt from immunity under the statute, the city had to be considered a sponsor of an organized team sport. There was no sponsorship

72. *Id.* ¶ 40 (citing WIS. STAT. § 895.52(6)(d) (1995-96)).

73. 2003 WI App 58.

relationship between the organization and the city; thus, the city was immune from liability for Miller's injury under the recreational immunity statute.

d. Summary of Recreational Immunity

Wisconsin's recreational immunity statute provides protection for landowners, particularly public landowners, who open up their property to others for recreational activities. When faced with defenses by landowners claiming they are immune under the statute, courts initially must determine the nature of the property owner and the nature of the activity in order to determine if it is the type of recreational activity covered by the statute. If the activity is found to be covered by the statute, before granting immunity to the landowner, the courts will often look to any potential exceptions in the statute that remove the activity from the immunity protection provided. In general, if a landowner in some way sponsors an organized sports activity, even if it is within what is known as a recreational league, he or she will not be immune under the statute.

2. Governmental Immunity

Sports activities often take place on public property or at public schools. When injuries happen, plaintiffs may sue the city, school district, or other public entity involved. The threshold issue is whether such a suit can proceed against a public official or whether the official is immune from liability. The following cases focus on two types of governmental immunity in Wisconsin.

Section 893.80 of the Wisconsin statutes provides immunity to governmental entities in several different ways.[74] In general, governmental officers, agents, or employees will not be liable for "acts done in their official capacity or in the course of their agency or employment"[75] or for "acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions."[76]

The focus of the cases dealing with governmental immunity under the statute is often on whether the individual involved was performing a discretionary or ministerial act. Discretionary acts are those that call for the judgment and discretion of the actor. Ministerial acts are those that are certain in performance of a specific task imposed by law and require no judgment on the part of the actor. Generally, courts have found that the statute provides immunity to officials for their discretionary acts; however, no immunity is

74. WIS. STAT. § 893.80 (2003-04).

75. § 893.80(1).

76. § 893.80(4).

provided for their ministerial acts.

The other type of immunity discussed in this section is the public officer immunity doctrine. This common law doctrine provides immunity to public officials from liability for injuries caused by actions performed within the scope of their official duties.

a. Discretionary or Ministerial Acts

The following cases focus on whether the injury is the result of a public official acting in a discretionary manner, thus granting the official immunity under the statute, or a ministerial manner, thus not providing the official with immunity under the statute.

Stann v. Waukesha County[77]

Claire Stann and her three-year-old daughter were wading together at Menomonee Park in Waukesha County. After leaving the area momentarily, Stann returned to find her daughter missing. She searched the beach and beach house twice, and then asked that the water be cleared and that a search be conducted for her daughter. A human chain searched the water and Claire's daughter was found alive. She died a day later. The Stanns sued Waukesha County for wrongful death.

The plaintiffs alleged that the county was negligent because it failed to establish appropriate policies for locating missing children in the swimming area, the lifeguards failed to take appropriate actions to find Stann's daughter, and the county had improperly barred the use of life jackets in the children's swimming area. The county argued that it was immune from liability under both the Wisconsin recreational immunity statute and the governmental immunity statute. The circuit court held for the county and dismissed the case.

The Wisconsin Court of Appeals affirmed. The court found the county immune from liability under the governmental immunity statute, which grants immunity from tort liability to governmental bodies for the discretionary acts of their employees, because the decision to implement beach policies was a discretionary act under the statute.

Wellner v. Beechwood Fire Department[78]

Timothy Wellner, a ten-month old boy, was struck in the head by an errant throw during a recreational league softball game and suffered permanent brain

77. 468 N.W.2d 775 (Wis. Ct. App. 1991).

78. No. 91-2011, 1992 Wisc. App. LEXIS 1208 (Sept. 23, 1992).

injury. His parents sued the fire department, which owned and designed the field where the game was played. The plaintiffs alleged that the fire department's negligence in designing the field, in violation of Wisconsin's safe place statute, had caused the injury.[79] The plans for the field called for fences to be built at forty-five-degree angles from the backstop. Instead, these fences were actually constructed at sixty-three-degree angles. At trial, testimony indicated that had the fences been built at forty-five-degree angles, the injury would not have occurred. The fire department contended that the field was not a public building under the safe place statute and that it was immune from liability under Wisconsin's recreational immunity and governmental immunity statutes.

The trial court held that the fire department was not immune from liability under either of the immunity statutes. First, the incident occurred prior to the recreational immunity statute taking effect. Second, the negligence was in owning the property, not fighting fires; therefore, the fire department was not immune because this action was outside the scope of its official capacity. The court determined that the fire department was ten percent negligent, but limited Wellner's recovery from the department to $25,000, as required by the governmental immunity statute. The fire department appealed.

The Wisconsin Court of Appeals affirmed. According to the court, the statute provides immunity to governmental bodies for their discretionary acts, not ministerial acts. The only aspect of the ballpark's design and construction that would be covered under the statute was the decision to build the facility, because that decision would have qualified as a discretionary, quasi-governmental act. Once the decision to build the ballpark was made, the actual construction and maintenance would be considered ministerial, and thus, not protected under the statute. The court affirmed the trial court's decision.

Bauder v. Delavan-Darien School District[80]

During a gym class, the plaintiff, Christopher Bauder, was struck in the eye by a deflated soccer ball. The class was held in the school's gym because of poor weather conditions. Bauder sued the school district, claiming that it acted negligently by allowing the soccer game to take place indoors. In addition, because physical education classes were required under state law, the actions of the teacher were ministerial, not discretionary, and therefore, not subject to governmental immunity under the statute. Bauder argued that the

79. The safe place statute claim in this case is discussed *infra* at pg. 471.

80. 558 N.W.2d 881 (Wis. Ct. App. 1996).

teacher created an unsafe situation by placing too many people in a small area to play soccer with a deflated ball without eye protection, thereby violating this ministerial duty. The circuit court granted summary judgment for the school district

The Wisconsin Court of Appeals affirmed. The court held that the decision to move the class inside was discretionary. According to the court, "[a] duty is ministerial 'only when it is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion'."[81] In this case, the manner in which gym classes were conducted was not mandated by statute or the school district; therefore, it was a discretionary act.

Next, the court of appeals addressed Bauder's claim that the circumstances presented a known present danger, thus exempting the school district from immunity. Immunity does not attach in those situations where an obviously dangerous condition exists and nothing is done to remedy the situation. The court found that deflating the ball was not an obvious danger; therefore, the known present danger exemption did not apply. Finally, the court of appeals dismissed Bauder's contention that the teacher's decision to deflate the ball was not a governmental activity, stating that this exemption from immunity only applies in the medical context. The court also dismissed Bauder's allegation that using the gym for a soccer game constituted a nuisance.

Scott v. Savers Property & Casualty Insurance Co.[82]

Ryan Scott, a high school senior and promising hockey prospect at Stevens Point Area Senior High School, received an offer for an athletic scholarship to a Division I institution. Scott and his parents met with a guidance counselor to ask whether a "Broadcast Communication" class would fulfill the NCAA's academic core English requirement. The counselor incorrectly advised Scott that the class would satisfy the requirement. Scott took the class and graduated on schedule. After graduating, he played junior hockey and was offered a hockey scholarship contingent on NCAA certification that he had satisfied the required core courses. However, the NCAA determined that the "Broadcast Communication" class failed to satisfy its core English requirement, and Scott was not eligible to participate in NCAA athletics.

The Scotts sued the school district seeking damages for the value of the

81. *Id.* at 882.

82. 2003 WI 60, *reconsid. denied*, 2003 WI 140.

scholarship that was rescinded by the university. In response, the school district filed a motion to dismiss for failure to state a claim upon which relief could be granted. The circuit court granted the motion, the Scotts appealed, and the Wisconsin Court of Appeals affirmed. The Scotts again appealed.

The Scotts argued that the school district was not immune from liability because the guidance counselor had a ministerial duty to provide advice regarding college eligibility and because he was exercising professional discretion, not engaging in a governmental activity. The Wisconsin Supreme Court did not consider advice given by a high school guidance counselor a "ministerial" duty because it was not required by a specific legal obligation. Additionally, the "professional discretion" exception did not apply because it is limited to the medical setting.

The Scotts also argued that their son had a contract with the school district that was breached when the counselor provided incorrect advice. The court held that there was no consideration for the alleged contract because the district had a pre-existing legal duty to provide college-related advice.

Finally, the Scotts argued that relief could be granted under the doctrine of promissory estoppel because Ryan Scott had a special relationship with the counselor, and the school district should have anticipated that he would justifiably rely on the counselor's advice to his detriment. The court rejected this claim on public policy grounds because it was based on the same allegations as the prior claims and would contravene the governmental immunity policy of the state.

The supreme court affirmed, holding that Wisconsin's governmental immunity statute barred the plaintiff's claim against the guidance counselor.

b. Public Officer Immunity

The following cases deal with the common law public officer immunity doctrine. The doctrine provides immunity to public officials from liability for injuries that result from actions they perform within the scope of their official duties.

Kimps v. Hill[83]

Renee Kimps, an elementary education major at the University of Wisconsin-Stevens Point (UW-SP), was setting up volleyball nets in preparation for an education class instructing elementary-aged students how to play volleyball. She was injured when the base of a standard detached from its

83. 546 N.W.2d 151 (Wis. 1996).

pole and fell on her foot. Kimps sued her instructor, Dr. Leonard Hill, a former UW-SP safety officer, Allen Kursevski, and several others for negligence. Hill and Kursevski contended that they were protected from liability by the public officer immunity doctrine. This common law doctrine states, "state officers and employees are immune from personal liability for injuries resulting from acts performed within the scope of their official duties."[84] Kimps alleged that Hill and Kursevski were exempted from immunity because their negligent conduct was ministerial in nature, and ministerial duties are not included under the public officer immunity doctrine. The trial court held that Hill was not immune, but that Kursevski was immune. Kimps appealed. The Wisconsin Court of Appeals held that both men were immune. Kimps again appealed.

The Wisconsin Supreme Court affirmed. The court held that a ministerial duty is one that is absolute and certain. The plaintiff's and the defendant's actions in connection with Kimps's injury were not absolute or certain, but involved choice and judgment; therefore, they were discretionary and both defendants were immune from liability.

Eneman v. Richter[85]

Erika Eneman and several other plaintiffs sued a number of employees of the University of Wisconsin after suffering injuries following a Badger football game. At the conclusion of the game, fans seated in the student section attempted to rush onto the field. Anticipating such a reaction, security personnel began securing gates designed to prevent fans from entering the field. As a result of the surge of students, Eneman and several other students were pinned against the security gates, resulting in numerous injuries. Eneman sued the university and several of its security personnel, claiming that her injuries were caused by the school's failure to maintain the premises in a safe and orderly fashion.[86] The university filed a motion for summary judgment on the grounds that its employees were governmental employees, and thus they were entitled to immunity for their actions. The Circuit Court for Dane County granted the university's motion for summary judgment and dismissed Eneman's complaint.

Eneman appealed, arguing that even though the university's employees were public officers, they had a duty to perform the ministerial (as opposed to discretionary) task of opening the gates to allow the students onto the field, in

84. *Id.* at 156.

85. 577 N.W.2d 386, 1998 Wisc. App. LEXIS 135 (1998), *aff'd*, 589 N.W.2d 414 (Wis. 1999).

86. The safe place statute claim in this case is discussed *infra* at pg. 472.

order to prevent injury. Eneman argued that by failing to perform this task, the officers had acted negligently and should therefore be held liable.

The Wisconsin Court of Appeals affirmed, holding that the defendants were immune from liability under the public officer immunity doctrine, which "precludes personal liability for discretionary acts performed within the scope of a state officer's official duties."[87] The court held that the decision to open the gates was discretionary in nature, because it was one in which a moment-to-moment evaluation of the crowd was necessary. The university's plan for crowd control did not assign security personnel with any specific tasks. Instead, university officers were instructed to be responsive to the crowd. The court found this plan to be discretionary, and concluded that the officers could not be held liable for their failure to open the gates.

3. Duty of School to Student

Related to governmental immunity is the duty a public school official has toward students participating in athletic activities during school or at any other time under the supervision of school employees. This common law duty includes a duty to instruct and to warn students of known dangers, or dangers that the official should know by exercising ordinary care, the duty to be present in the classroom to supervise, and the duty to instruct students in methods that will protect them from those dangers, whether the danger arises from equipment, devices, machines or chemicals. A failure to warn the students of a danger, or to instruct them how to avoid this danger, can become actionable negligence.

What constitutes ordinary care in instruction and warning depends on the surrounding circumstances of the accident. Courts will also consider the feasibility of implementing safeguards. The following cases discuss the parameters of this duty.

Cirillo v. City of Milwaukee[88]

The plaintiff, Donald Cirillo, and three other classmates engaged in a game of "keep away." The game became more and more rough, eventually resulting in Cirillo's injury. The teacher, Paul Sherry, left the class unattended for approximately twenty-five minutes, including the time when Cirillo was injured. Cirillo sued Sherry and the City of Milwaukee, alleging that Sherry had acted negligently in leaving the class unattended for such a long period of

87. *Eneman*, 1998 Wisc. App. LEXIS 135, at *3.

88. 150 N.W.2d 460.

time. Sherry argued that he had not been negligent, and even if the court found him to have been negligent, Cirillo was contributorily negligent for participating in a rough game. The trial court granted Sherry's motion for summary judgment, finding that Cirillo's actions, not Sherry's absence, were the cause of his own injuries.[89]

In determining whether the City of Milwaukee was liable for Cirillo's injuries, the Wisconsin Supreme Court stated "a teacher in the public schools is liable for injury to the pupils in his charge caused by his negligence or failure to use reasonable care."[90] Because a jury could conclude that the teacher's behavior was unreasonable, summary judgment was not appropriate in the case. Therefore, the case was remanded to determine whether the circumstances surrounding the incident constituted reasonable care by the teacher. In determining reasonable care, the court stated that it is appropriate to consider "the activity in which the students are engaged, the instrumentalities with which they are working, the age and composition of the class, the teacher's past experience with the class and its propensities, and the reason for and duration of the teacher's absence."[91]

Lueck v. City of Janesville[92]

While attempting a gymnastics stunt in gym class, the plaintiff, Terry Lueck, fell and suffered serious injuries. Although Lueck did not request a spotter before attempting the stunt, he contended that the class instructor, Mr. Sorenson, failed in his duty to prevent such an injury from taking place. Lueck sued Sorenson and the City of Janesville, alleging that negligent supervision of the gym class had resulted in his injury. The trial court found both Lueck and Sorenson negligent, but held that the negligence did not cause the injuries. Sorenson made a motion to change the conclusion on the question of negligence from yes to no. The motion was denied and the jury awarded damages to Lueck, prompting the City of Janesville to appeal.[93]

In its review of the case, the Wisconsin Supreme Court carefully looked into exactly what duty Sorenson, the teacher, owed to Lueck, the student. It reviewed the trial court's jury instruction that analogized the duty owed by teachers to their students to the duty parents owe to their children. This duty includes instructing and warning students of known dangers and instructing

89. The negligence issue in this case is discussed in more detail *supra* at p. 431.

90. *Cirillo,* 150 N.W.2d at 463.

91. *Id.* at 465.

92. 204 N.W.2d 5.

93. The negligence portion of this case is discussed in more detail *supra* at p. 431-432.

the students in methods that will protect them from known dangers.

The court determined that it would be impractical to require Sorenson to watch the actions of all students during a gym class that involved multiple pieces of gymnastics equipment. As a result, the court held that Sorenson did not fail to use ordinary care in his duties as a gym instructor; therefore, he did not breach the duty owed to his students and was not negligent.

Vaash v. Racine Unified School District No. 1[94]

While participating in a high jump exercise during gym class, the plaintiff, Calvin Vaash, fractured his elbow after falling on a bar used for the activity. Vaash sued the school district and the school's physical education instructors, alleging that both parties had been negligent in supervising the exercise by failing to provide spotters to catch students in the event that an accident took place.

During the trial, the jury was instructed that the teacher had a duty to warn the students of known dangers and methods to protect against known dangers. A failure to do so would be considered a breach of the duty teachers owe to their students, and thus negligence. The jury found neither the school district nor the instructors to be negligent, but it awarded special damages to Vaash totaling $14,256.33. Vaash appealed, claiming that the instructors had been negligent as a matter of law.

The Wisconsin Court of Appeals stated that the jury instruction was an accurate statement of the law. The court noted that the coach had given instructions to the students on how to perform the exercise for approximately fifteen minutes, and that someone routinely demonstrated how to jump safely over the bar. After determining that these precautionary measures were adequate, the court held that a jury could have reasonably concluded that the instructors had not been negligent, and affirmed the decision of the trial court.

4. Good Samaritan Law

In general, Good Samaritan laws protect those who provide emergency health care from being sued when they are providing health care to someone in a reasonable way. Wisconsin's Good Samaritan law is section 895.48, which provides, "(1) Any person who renders emergency care at the scene of any emergency or accident in good faith shall be immune from civil liability for his or her acts or omissions in rendering such emergency care."[95] Specific to

94. No. 81-708, 1982 Wisc. App. LEXIS 3894 (Aug. 5, 1982).

95. WIS. STAT. § 895.48(1) (2003-04).

sports, a licensed athletic trainer or physician who renders voluntary care to a participant in an athletic event is immune from liability provided that the care is rendered at the site, on the way to a health care facility, or in the locker room, and the provider does not receive compensation besides reimbursement for expenses.[96] Because the provision of emergency care is often necessary during sports participation, especially at events that are not sponsored by a school or association, this immunity statute is important in allowing individuals to provide necessary health care without worrying about potential liability. To date no reported sports cases in Wisconsin have dealt with this statute.

Several subsections of the statute provide other immunities. Section 895.481 of the Wisconsin statutes provides immunity for equine activity participants as it states that anyone "including an equine activity sponsor or an equine professional, is immune from civil liability for acts or omissions related to his or her participation in equine activities if a person participating in the equine activity is injured or killed as the result of an inherent risk of equine activities."[97] This statute has the potential to impact sport activities as the equine activities covered include "shows, fairs, and competitions."[98]

Another statute provides immunity to a ski patrol member for "acts or omissions while he or she is acting in his or her capacity as a ski patrol member, including the rendering of emergency care."[99]

The purpose of these three statutory provisions in Wisconsin is to keep people from being reluctant to help an injured individual due to fear of legal repercussions if they make a mistake in treatment. These statutes will typically only provide immunity for reasonable conduct in providing the emergency care; however, perhaps because of this protection, there have been no reported sports cases in Wisconsin under any of these provisions.

C. Safe Place Statute

Wisconsin's safe place statute is codified as section 101.11 and requires that

> [e]very employer shall furnish employment which shall be safe for the employees therein and shall furnish a place of employment which shall be safe for employees therein and for frequenters thereof and shall furnish and use safety devices and safeguards, and shall adopt

96. § 895.48(1m)(a) & § 895.48(1)(b).

97. WIS. STAT. § 895.481 (2003-04).

98. § 895.481(1)(b)(1).

99. WIS. STAT. § 895.482 (2003-04).

> and use methods and processes reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees and frequenters.[100]

In cases that deal with sports activities and facilities, the statute can apply and often will not focus on whether the owner of the facility is an employer. Instead, these cases deal with another portion of the statute provides that "every owner of a place of employment or a public building now or hereafter constructed shall so construct, repair or maintain such place of employment or public building as to render the same safe."[101] The statute imposes a duty on owners of public facilities to maintain and repair their facilities in a way that renders them safe to those who come into the facility. This duty is the focus of most of the cases discussed below.

Wisconsin's safe place statute creates protection for persons who frequent buildings and structures. These structures can be ballparks, stadiums or other places likely to be used for sporting events by spectators. The safe place statute does not require facility owners to make their facilities as safe as possible; instead, it requires them to make their facilities as safe as reasonably possible. Typically, a court will undertake a fact specific analysis to determine whether a violation of the statute has occurred. When an owner fails to construct or maintain safety features such as fences, a court may find the owner to be in violation of the safe place statute. Additionally, an owner may be liable if he or she knowingly allows employees or visitors to the property to enter potentially dangerous areas.

As demonstrated below, if a court already finds a plaintiff to be more negligent than the facility owner, which is the contributory negligence analysis in Wisconsin, it often will not reach the issue of whether there is a violation of the safe place statute. Because the statute does not impose a higher duty of care than ordinary negligence, the plaintiff's own contributory negligence may bar recovery under the statute. However, a facility owner will not be able to waive his or her duty under the statute through an exculpatory clause, because such clauses are not a defense to the statute.[102]

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100. WIS. STAT. § 101.11(1) (2003-04).

101. *Id.*

102. In addition to the safe place statute, section 167.32 of the Wisconsin statutes provides many general safety rules, from prohibitions on bringing alcohol in to sports facilities to prohibitions against body passing that apply at sports facilities in Wisconsin. WIS. STAT. § 167.32 (2003-2004). Similarly, section 59.54(11) provides that a county board may enact and enforce ordinances to prohibit conduct prohibited by section 167.32. WIS. STAT. § 59.54.

Bent v. Jonet[103]

The plaintiff, William Bent, was injured when he fell off the back of the bleachers while attending a professional football game. Bent purchased a bleacher seat at the top of the bleachers. During the game, the spectators in front of him stood up, and he had to stand up to see the game. When he went to sit back down, the wooden plank he was sitting on slipped out of place, and because the bleachers lacked a back guardrail, Bent fell was injured. Bent sued the Green Bay Football Corporation for violations of Wisconsin's safe place statute, then codified as section 101.06. The defendant contended that the temporarily fastened bleachers did not take on the characteristics of a "building," within the meaning of the statute, and that as a charitable institution it was exempt from the statute. The trial court disagreed and held the defendant ninety percent negligent for Bent's injuries.

On appeal, the Wisconsin Supreme Court affirmed. As the court discussed, according to the statute a "public building . . . shall mean and include any structure used in whole or in part as a place of resort, assemblage, lodging, trade, traffic, occupancy, or use by the public, or by three or more tenants."[104] The court concluded that the bleachers were a public building under the statute and that the safe place statute applied to charitable institutions like the football corporation because "the safe place statute applies as fully to religious and charitable institutions as it does to any other."[105]

Hoepner v. City of Eau Claire[106]

Wesley Hoepner was playing in a municipal softball league game on a newly constructed field when he caught his shoe on a protruding wire while running to first base. He was injured and sued the City of Eau Claire to recover damages. Hoepner alleged that the field was unsafe in violation of the safe place statute and that the city was negligent. The circuit court granted the city's motion for a directed verdict. Hoepner appealed.

The Wisconsin Supreme Court affirmed. Hoepner argued that the field was a place of employment and a public building under the safe place statute. The court found that the field was not a place of employment because the city did not generate any revenue from the operation of the field, and the city was not engaged in a business through the operation of the field. The field was not a public building because a field has no similarity to a building, and therefore,

103. 252 N.W. 290 (Wis. 1934).

104. *Id.* at 291 (quoting WIS. STAT. § 101.01(12) (1933-34)).

105. *Id.* at 292.

106. 60 N.W.2d 392 (Wis. 1953).

it was not covered under the safe place statute. In addition, the city was immune from liability for negligence because the court found the maintenance of a ball field to be a governmental function.

Powless v. Milwaukee County[107]

During a Milwaukee Braves baseball game, the plaintiff, Ramona Powless, was injured after being struck by a foul ball. She alleged that by not protecting the area of the field she was sitting in, Milwaukee County—the owner of Milwaukee County Stadium—had violated the Wisconsin safe place statute. Powless was not watching the game when the ball was hit; instead, she was marking down the score in her program instead. Powless admitted that she heard fans say that the ball was coming toward her and that some fans began running away from the area. However, she made no efforts to protect herself and did not see the ball until just before it struck her.

The trial court held that Milwaukee County complied with the safe place statute. The plaintiff appealed. The Wisconsin Supreme Court affirmed, finding that the county was not liable for Powless's injuries. The court held that by not paying attention to the game, Powless was at least as negligent as the county, and therefore, was barred from recovering any damages.

Looking to the safe place statute, the court noted that one must consider the nature of the facility and the particular facts of the case in order to determine whether the facility is covered. In this case, the facility was a stadium. The defendant had provided a backstop screen to protect those seated behind home plate, which was the standard and custom of other major league baseball parks. Additionally, attendance at the stadium was voluntary, and spectators had a choice of where to sit. The plaintiff chose not to sit behind the protected backstop even though there were seats available. Although it would be possible for the defendant to continue the protective netting throughout the entire stadium, the court found that this requirement would be unreasonable. Based on these facts, the court stated that the stadium appeared to be in compliance with the statute, but found no reason to make this finding because the negligence of the plaintiff prohibited her from recovering damages.

Novak v. City of Delavan[108]

The plaintiffs, Catherine and Anton Novak, attended a high school football

107. 94 N.W.2d 187. The negligence claim in this case is discussed *supra* at pg. 429.

108. 143 N.W.2d 6 (Wis. 1966).

game at an athletic field in Delevan, Wisconsin. While watching the game, they stood on the footboard of a wooden bleacher. At some point the footboard broke, throwing Catherine to the ground causing serious injuries. She and her husband sued the school district that hosted the game and the City of Delavan. The plaintiffs alleged that the defendants' negligence in not maintaining the facility in violation of Wisconsin's safe place statute was the proximate cause of Catherine's injuries.

At the trial court level, the jury concluded that the school district was not negligent in failing to provide safe bleachers. However, the court held, as a matter of law, that the school district had a duty to provide for the stadium's maintenance and upkeep. The court concluded that the district breached this duty and was liable for damages.

The Wisconsin Supreme Court reversed. The court held that the school district was not an owner of the athletic facility because it did not have "control or custody" of the bleachers.[109] The school district paid a fee to rent the facility from the city to host seven football games. The court stated that such use did not constitute control of the premises; therefore, the school district was not required to maintain the facility to meet safety standards. However, the court found that the City of Delavan had sufficient control over the athletic field to justify holding it liable for the plaintiff's injuries. Thus, the court dismissed the action against the school district while allowing the action against the city to proceed.

Kaiser v. Cook[110]

Marie Kaiser was injured at Cedar Lake Speedway when a tire flew off a racecar and struck her. Kaiser was watching the race from an area in which spectators' cars were allowed onto various tiers allowing their occupants to watch the race either from inside or outside of their car. Kaiser was outside of her car at the time she was injured. A ten-foot fence was extended above the race wall protecting the tiered area. The defendant, Elmer Cook, owner of the racetrack, indicated that spectators in the tiered area were to stay in their vehicles at all times while watching the race. However, there were no signs indicating this. Kaiser sued Cook, alleging that Cook had failed to keep the track safe in accordance with Wisconsin's safe place statute and that by failing to keep the track in proper condition, he negligently caused her injuries.[111]

The jury found Cook liable for Kaiser's injuries. However, the court

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109. *Id.* at 10.

110. 227 N.W.2d 50 (Wis. 1975).

111. The negligence claim in this case is discussed *supra* at pg. 438-439.

found that regardless of whether Cook's negligence violated the safe place statute, Kaiser's negligence exceeded Cook's negligence. The court granted Cook's motion for a directed verdict releasing him from liability. Kaiser appealed.

The Wisconsin Supreme Court reversed the trial court's directed verdict in favor of Cook. Cook was aware that flat tires occasionally flew over the wall and onto the tiered area; therefore, the area was unsafe for spectators. By allowing spectators to view races from the tiered area, Cook violated the safe place statute that required him to maintain the racetrack in a reasonably safe condition. Thus, the court reversed the trial court's decision and awarded damages to Kaiser totaling $11,000.

Ruppa v. American States Insurance Co.[112]

The plaintiff, Dr. Rex Ruppa, suffered severe injuries that eventually led to his death after falling off of a horse during a "cutting" exhibition (the separating of one animal from a herd of cattle) at the Madison Imperial Horse Show. Ruppa's estate sued the show's insurance carrier, the show's officers, Dane County and members of the Madison Saddle Club, alleging that their negligence and failure to provide and maintain a safe place for the horse show breached their duties under the safe place statute. The defendants moved for summary judgment arguing that they were not liable for Ruppa's death because he had signed a waiver releasing them from liability. The circuit court granted the motion, finding that the form did release them from liability. Ruppa's estate appealed.[113]

After finding that the form released only the Madison Saddle Club from liability, the Wisconsin Supreme Court concluded that the Dane County Arena, where the horse show was held, was a public place under the statute. Following the statute, the court noted, "[a]n owner of a public building is liable only for injury resulting from structural defects and unsafe conditions associated with the structure."[114] The summary judgment motion was reversed, and the case was remanded for a factual determination as to who should be classified as an owner under the statute and whether Ruppa's death was caused by structural defects or unsafe conditions in the facility.

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112. 284 N.W.2d 318 (Wis. 1979).

113. The court's analysis of the exculpatory contract in this case is discussed *infra* at pg. 473-474.

114. *Ruppa*, 284 N.W.2d at 323.

Hackel v. Whitecap Recreations[115]

The plaintiff, William Hackel, was injured while skiing at Whitecap Mountain after his ski became caught in a depression on a hill, apparently caused by water drainage. He sued Whitecap, alleging that its negligence in maintaining the physical condition of the ski hill was a violation of the safe place statute and caused his injuries. Whitecap countered that Hackel had waived any potential claims by agreeing to an exculpatory clause when he purchased his lift ticket. Hackel claimed that the lift ticket was not an exculpatory clause and that he had not read the clause because he believed it was for admission purposes only. In granting Whitecap's motion for summary judgment the circuit court held that the ticket did include an exculpatory clause and that by purchasing the ticket, Hackel agreed to its terms.[116]

The Wisconsin Court of Appeals reversed, finding disputed issues of material fact concerning the safe place statute's applicability and the enforcement of the exculpatory clause. As to the issue of Wisconsin's safe place statute, the court held that because its applicability depended upon facts produced at trial, it was inappropriate for the circuit court to have granted Whitecap's motion for summary judgment. If a trier of fact determined that the safe place statute applied to the circumstances surrounding Hackel's injury, then the exculpatory clause would have no effect because the clause functions as an assumption of the risk, which is not a defense under the statute. The case was remanded to the circuit court for further deliberations.

Pelock v. Prairie du Chien Joint School District[117]

Lawrence Pelock was struck in the head by a baseball bat while watching a softball game. At the time he was hit, Pelock was standing approximately thirty feet from the batter behind a four-foot high fence that paralleled the first base line. According to witnesses, Pelock was not looking at the batter at the time of the incident. Following the injury, Pelock sued the school district, alleging that its negligence had caused his injuries in violation of Wisconsin's safe place statute.[118]

The school district argued that it had not been negligent because the danger of loose bats was obvious to Pelock, and he was obligated to tend to his own safety by maintaining a vigilant lookout. Based upon this argument, the

115. No. 83-2203, 1984 Wisc. App. LEXIS 4190 (Sept. 4, 1984).

116. The court's analysis of the exculpatory contract in this case is discussed *supra* at pg. 477-478.

117. No. 84-1276, 1986 Wisc. App. LEXIS 3184 (Feb. 12, 1986).

118. The negligence claim in this case is discussed *supra* at pg. 429-430.

school district moved for summary judgment. The trial court granted the school district's motion, finding that Pelock had been more negligent than the school district. The trial court also dismissed the safe place statute claim, finding that the softball field did not constitute a building within the meaning of the statute. Pelock appealed.

The Wisconsin Court of Appeals reversed; holding that the school district's defense of contributory negligence could not properly be decided by summary judgment. The court also reversed the trial court's dismissal of the safe place statute claim. As the court explained, the safe place statute applies to public buildings and places of employment. A "ball park is an integrated structure of fences and bleachers, with controlled access from the street."[119] Additionally, when Pelock was injured, the ballpark "was used and designed for public resort, assemblage or use."[120] Therefore, the case was remanded for a determination of whether the defendants' actions constituted negligence under the safe place statute.

Miles v. Dunn County[121]

Aaron Miles was a member of the Eau Claire Memorial High School varsity hockey team. During a match against Menomonee High School, Miles suffered injuries to his jaw and teeth after being checked into the barrier separating the ice from the spectators. The barrier was made of chain-link fence supported by thick metal rods. Miles sued Dunn County, alleging that the use of chain-link fence in its hockey arena, as opposed to Plexiglas, was a violation of the safe place statute. The circuit court dismissed Miles's complaint. He appealed, arguing that the evidence presented at trial demonstrated a violation of the statute.

The Wisconsin Court of Appeals affirmed. The court held that the safe place statute did not require facility owners to install the safest equipment available. Instead, the statute required owners to make their facilities as safe as reasonably possible. Although Dunn County utilized chain-link fence, the court held that doing so met the minimal safety requirements set out by the Wisconsin Interscholastic Athletic Association, and Miles did not demonstrate that the chain-link fence was unreasonably dangerous. For these reasons, the court affirmed the circuit court's decision and dismissed Miles's complaint.

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119. *Id.* at *4.

120. *Id.*

121. No. 90-2458, 1991 Wisc. App. LEXIS 1059 (July 30, 1991).

Wellner v. Beechwood Fire Department[122]

Timothy Wellner was struck in the head by an errant throw during a recreational league softball game and suffered permanent brain injuries. His parents sued the fire department, which owned and designed the field that the game was played on, alleging that its negligence in designing the field was in violation of the safe place statute and caused the injury. At trial, testimony indicated that had the fences been built at forty-five-degree angles the injury would not have occurred. The fire department contended that the field was not a public building under the safe place statute and that the department was immune from liability under Wisconsin's recreational immunity statute and the governmental immunity statute.

The trial court held that the fire department was not immune from liability under either of the statutes.[123] The fire department appealed.

The Wisconsin Court of Appeals noted that because the field did not cause the injuries, the question under the statute was whether the bleachers and backstop constituted a public building. The court initially noted that the bleachers constitute a public building within the meaning of the statute. As a result, while the faulty construction of the fence may have been the leading cause of the injury, and a fence alone would not constitute a public building, the appellate court found that the safe place statute covered the totality of the surrounding area and circumstances, including the bleachers and backstop.

Additionally, the court determined that there was ample evidence to show that the fire department exercised control over the premises, as required by the statute. Even though the department testified that it gave control to the athletic club, it still retained the right to control the premises because it could have instructed the club differently or could have required the club to stop using the facility.

Finally, after finding that the structural defects were a factor in causing the plaintiff's injury and that allowing recovery by the plaintiff was not against public policy, the court of appeals affirmed the circuit court's award of damages for the plaintiff.

Eneman v. Richter[124]

Erika Eneman and several other plaintiffs sued a number of employees of the University of Wisconsin after suffering injuries following a Badger

122. No. 91-2011, 1992 Wisc. App. LEXIS 1208 (Sept. 23, 1992).

123. The governmental immunity claim in this case is discussed *supra* at pg. 455-456.

124. No. 96-2893, 1998 Wisc. App. LEXIS 135.

football game at Camp Randall Stadium. At the conclusion of the game, fans seated in the student section attempted to rush onto the field. Anticipating such a reaction, security personnel began securing gates designed to prevent fans from entering the field. As a result of the surge of students, Eneman and several other students were pinned against the security gates, resulting in numerous injuries. The plaintiffs sued claiming that their injuries were caused by the school's failure to maintain the premises in a safe and orderly fashion. The university responded by filing a motion for summary judgment on the grounds that its employees were governmental employees; thus, they were entitled to immunity for their actions. The Circuit Court for Dane County granted the university's motion for summary judgment dismissing the complaint. The plaintiffs appealed, arguing that the officers had acted negligently and should therefore be held liable. The plaintiffs also alleged that the defendants were liable under the safe place statute, regardless of whether they were immune under the public officer immunity doctrine.[125] The plaintiffs alleged that the defendants violated the statute by breaching a duty owed to them by violating various building codes.

The appellate court noted that the safe place statute applies to places of employment and public buildings, and an organization must be for-profit to constitute a place of employment under the statute. Therefore, the university could not be held to be a place of employment because it is a non-profit organization. In the end, although Camp Randall Stadium is a public building, defendants, as "agents or employees who operate[d] as supervisory personnel for the principal owner of a building, [were] not subject to liability."[126] The court held that the defendants were not liable for plaintiffs' injuries under the safe place statute.

Heenan v. Fireman's Fund Insurance Co.[127]

Heenan was struck in the face by an errant hockey puck hit into the stands during pre-game warm-ups at a Milwaukee Admirals hockey game at the Bradley Center in Milwaukee. The puck caused significant injury to her eye and nose. She sued the Admirals and the Bradley Center, contending that both parties violated their duty to maintain safe premises under the safe place statute. The defendants contended that she was contributorily negligent and assumed the risk inherent to attending a live hockey game. The trial court dismissed the complaint. Heenan appealed.

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125. The public officer immunity claim in this case is discussed *supra* at pg. 459-460.

126. *Eneman*, 1998 Wisc. App. LEXIS 135, at *19.

127. No. 99-1185, 2000 Wisc. App. LEXIS 486 (May, 25, 2000).

The Wisconsin Court of Appeals held that the plaintiff had failed to produce evidence sufficient to create a prima facie case of any violation of the safe place statute. The court found that the risk of pucks leaving the ice is inherent in the game of hockey. The court also found that the plaintiff did not present sufficient evidence to establish that raising safety nets during warm-ups would be a reasonable safety measure, she could have chosen to sit farther away from the action reducing the risk of being struck by a puck, she failed to read warnings present on both her ticket stub and the arena's jumbotron that flying pucks could cause injury, and a reasonable person attending a hockey game should be familiar with the risks inherent to a hockey game, including being struck by a hockey puck. Additionally, the ice rink design conformed to National Hockey League (NHL) and International Hockey League (IHL) rules. Therefore, the court of appeals affirmed the trial court's dismissal of the plaintiff's complaint and declined to rule on the contributory negligence issue.

Summary of Safe Place

As these cases show, Wisconsin's safe place statute provides injured plaintiffs with some protection against owners of public facilities when these owners do not make their property as safe as reasonably possible. Often the analysis will focus on the nature of the facility owner and the determination of what is a reasonably safe condition for the facility. In addition, even though a court may not get to the safe place issue if the plaintiff is found to be more negligent in causing the injury than the defendant, a facility owner cannot waive this statutorily imposed duty by using a waiver or release.

III. WAIVERS, RELEASES OR EXCULPATORY CONTRACTS

In order to participate in many sporting activities, individuals are required to sign some form of waiver, release, or exculpatory contract releasing the event organizer from liability for injuries the participant might sustain under certain circumstances. The following cases involve these types of agreements.

Ruppa v. American States Insurance Co.[128]

The plaintiff, Dr. Rex Ruppa, suffered severe injuries that eventually led to his death after falling off of a horse during a "cutting" exhibition (the separating of one animal from a herd of cattle) at the Madison Imperial Horse Show. Ruppa's estate sued the show's insurance carrier, its officers, Dane County, and members of the Madison Saddle Club, alleging that the

128. 284 N.W.2d 318 (Wis. 1979).

defendants' negligence and failure to provide and maintain a safe place for the horse show breached their duties under the safe place statute.[129] The defendants moved for summary judgment arguing that they were not liable for Ruppa's death because he had signed a waiver releasing them from liability. The circuit court granted the motion finding that the form did release the defendants from liability. Ruppa's estate appealed.

The Wisconsin Supreme Court affirmed in part agreeing that the exculpatory contract released the Madison Saddle Club and its officers from liability because, according to the form, the sponsor of the horse show was released from all liability. According to the court, of all the named defendants, only the Madison Saddle Club and its officers came within the conventional definition of "sponsor." Although the judgment was reversed as to the other defendants, the supreme court affirmed the circuit court's decision releasing the Madison Saddle Club from liability for Ruppa's injuries.

Merten v. Nathan[130]

After her first riding lesson, Bonnie Merten signed an exculpatory contract releasing Kerry and Peter Nathan, owners of Burgundy Ridge Farms, from liability for injuries sustained during the lessons. The contract stated that the defendants had no insurance covering equestrian activities and that Merten would not be permitted to engage in equestrian activities without signing the release. Merten was injured after falling off a horse during a horseback-riding lesson and sued, claiming that the defendants' negligence caused her injuries. Contrary to the representations in the exculpatory contract, Merten learned that Burgundy Ridge Farms did have a liability insurance policy covering the injuries Merten sustained. Based on the contract, the circuit court granted the defendants' motion for summary judgment, which the court of appeals affirmed. Merten appealed.

Merten argued that the exculpatory contract was void because it misrepresented the fact that the Nathans did have insurance. The Nathans contended that the contract was still valid because it was not against public policy. The Wisconsin Supreme Court reversed and remanded the case, holding that the misrepresentation in the contract made it void as against public policy. The court found it important that the defendants included a false statement about a fact relevant to Merten's decision whether to sign the release. The court then found it contrary to public policy to enforce the contract when the bargaining process itself involved a false statement that was

129. The safe place statute claim in this case is discussed *infra* at pg 468-469.

130. 321 N.W.2d 173 (Wis. 1982).

relevant to a reasonable person's decision to execute the release.

Arnold v. Shawano County Agricultural Society[131]

During a stock car race sponsored and operated by the Shawano County Fair Board, Leroy Arnold's vehicle crashed through the track's guardrail and burst into flames after colliding with a utility pole. While in the car, Arnold was subjected to toxic materials that were used in extinguishing the flames, and he was rendered a quadriplegic. He sued the Shawano County Agricultural Society for negligence in its rescue efforts. Arnold's wife also brought suit, claiming loss of consortium. Shawano countered arguing that prior to the incident, Leroy had signed an exculpatory contract releasing Shawano from liability in the event of an accident, and by doing so both of the Arnolds' suits were barred. The trial court agreed with Shawano and granted its motion for summary judgment. The Arnolds appealed.

The Wisconsin Court of Appeals reversed the trial court's grant of summary judgment. The court concluded that too many issues of material fact were still in dispute, so it was not appropriate to grant summary judgment. The court explained that because the contract was a form release that was broad and general in its terms, it was up to a trier of fact to determine the intent of the parties concerning the types of accidents to be precluded from liability. Additionally, the court held that Karen Arnold's action was not barred by the exculpatory contract because she had never signed a release, and her action for loss of consortium was a separate cause of action from her husband's negligence claim. Thus, the case was reversed and remanded.

Hackel v. Whitecap Recreations[132]

The plaintiff, William Hackel, was injured while skiing at Whitecap Mountain after his ski became caught in a depression on a hill, apparently caused by water drainage. He sued Whitecap, alleging that its negligence in maintaining the physical condition of the ski hill was a violation of the safe place statute and caused his injuries.[133] Whitecap countered that Hackel had waived any potential claims by agreeing to an exculpatory clause when he purchased his lift ticket. Hackel claimed that the lift ticket was not an exculpatory clause and that he had not read the clause because he believed it was for admission purposes only. In granting Whitecap's motion for summary judgment, the circuit court held that the ticket did include an exculpatory

131. 330 N.W.2d 773 (Wis. 1983).

132. No. 83-2203, 1984 Wisc. App. LEXIS 4190 (Sept. 4, 1984).

133. The safe place statute claim in this case is discussed *infra* at pg. 469.

clause and that by purchasing the ticket Hackel agreed to its terms.

Hackel appealed, claiming that the issue of whether the ticket was an exculpatory clause was a question of fact for the jury. The Wisconsin Court of Appeals agreed and reversed the circuit court's decision, noting, "[a] 'meeting of the minds' is necessary to establish that the ticket constituted part of the contract."[134] Whether a "meeting of the minds" had occurred was a question for the trier of fact to determine. In addition, summary judgment was inappropriate because the language of the clause was ambiguous regarding whether Whitecap was relieved from liability and what types of injuries were covered under the clause. The court remanded the case for a determination of the disputed factual issues.

Trainor v. Aztalan Cycle Club, Inc.[135]

Kip Trainor, a motorcycle racer, was injured during a practice run at Aztalan racetrack. He alleged that Aztalan and the American Motorcycle Association (AMA), the two sponsors of the event, had negligently maintained the track and that their negligence was the cause of his injury. Prior to the race, Trainor complained about the safety of one of the course's double jumps, but track officials did not make any of his requested changes. The defendants responded to Trainor's complaint by pointing to a liability waiver that Trainor signed prior to the race releasing Aztalan and AMA from any potential liability. The circuit court held that the contract released Aztalan and AMA from liability and granted their motion for summary judgment. Trainor appealed.

The Wisconsin Court of Appeals affirmed, holding that the injuries suffered by Trainor were covered by the release. Trainor had expressed his concerns prior to signing the exculpatory contract, and he was told that no changes would be made. He still decided to participate in the race. Thus, he was fully aware of the risk, and his injury was the type the release was intended to cover. Trainor alleged that the defendants' failure to alter the track after he complained was gross negligence, which could not be covered in an exculpatory contract because to do so would be against public policy. The court found that the conduct did not constitute gross negligence, and even if it did, there was no precedent in Wisconsin invalidating exculpatory contracts because of gross negligence. Therefore, the court affirmed the dismissal of Trainor's complaint.

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134. *Hackel*, 1984 Wisc. App. LEXIS 4190, at *3.

135. 432 N.W.2d 626 (Wis. Ct. App. 1988).

DeGuzman v. Marquette University[136]

Joseph DeGuzman was injured while performing a stunt for the Marquette University cheerleading squad at a men's basketball game. He injured his spine and was temporarily paralyzed. DeGuzman had signed a release form prior to joining the cheerleading squad. Based on the release form, the trial court granted Marquette University's motion for summary judgment. DeGuzman appealed.

The Wisconsin Court of Appeals reversed, finding that there were disputed issues of material fact. The waiver did not mention negligence and it was unclear whether DeGuzman was aware he was relieving Marquette from liability for its negligent acts when he signed the form. Additionally, there was conflicting evidence concerning whether DeGuzman understood the importance of the release when he was signing it. Therefore, the case was remanded for a trial to determine whether the exculpatory contract was enforceable. Marquette and DeGuzman eventually settled for $1.5 million.

Hupf v. City of Appleton[137]

Lawrence Hupf was walking to his car after a softball game when he was struck in the eye by a softball thrown by a man warming up for another game. Hupf sued the City of Appleton, claiming that the city's negligence caused his injuries. Hupf contended that he was at the park in order to play in a recreational softball league that he had paid to participate in. The city argued that it was immune from liability under Wisconsin's recreational immunity statute and that Hupf signed an exculpatory contract releasing the city from liability. The circuit court held that the city was immune from liability under the statute and granted its motion for summary judgment.[138] Additionally, the court agreed that Hupf had signed an exculpatory contract releasing the city from liability. Hupf appealed.

The Wisconsin Court of Appeals held that the effect of the exculpatory clause was still in dispute. Neither party disputed the injuries that occurred while playing the game itself fell within the scope of the clause. However, the court concluded that there was still a disputed material fact as to whether the parties contemplated that the clause would apply to injuries suffered while Hupf walked between the game and his car. The court of appeals reversed the circuit court's decision and remanded the case.

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136. No. 88-0308, 1988 Wisc. App. LEXIS 1050 (Wis. Ct. App. Nov. 29, 1988).

137. 477 N.W.2d 69.

138. The recreational immunity statute claim in this case was discussed *supra* at pg. 450-451.

Kellar v. Lloyd[139]

Peggy Kellar volunteered to work at Elkhart Lake's Road America racetrack starting in July 1986. The racetrack required her to sign an exculpatory contract before every race releasing the track, the Sports Car Club of America (SCCA), car owners, drivers, and others from liability if she was injured while working in a restricted area. Kellar was injured while working as a member of the flagging and communications crew when a driver lost control of his vehicle during a practice lap. The vehicle struck her while she was working in a restricted area. She sued the track, SCCA, and other defendants, alleging that their negligence had resulted in her injuries.

Kellar claimed that the exculpatory contract was against public policy because she was an employee of the racetrack and that the defendants were liable because they were in violation of the safe place statute. The defendants moved for summary judgment, arguing that because the exculpatory contract contemplated the type of danger and injuries she sustained it precluded her suit. The trial court granted the defendants' motion and dismissed the complaint. Kellar appealed, arguing that she had not contemplated the actual danger and risk of injury presented by inadequate worker protection and that the exculpatory agreement was void as against public policy.

The Wisconsin Court of Appeals affirmed, holding that the track, the SCCA, and all other defendants were immune from liability. The court noted that because Kellar had worked at the track for an extended period, she was aware of the specific dangers presented. In regard to her public policy argument, the court noted that exculpatory contracts that exempt "an employer from liability to an employee for injury in the course of his [or her] employment"[140] are unenforceable, but Kellar could not be categorized as an employee, so she could not be protected by public policy considerations. Keller volunteered at the track and did not receive any wages or benefits; therefore, she was not an employee. The exculpatory contract was enforceable, and the defendants were exempt from liability.

Eder v. Lake Geneva Raceway[141]

Kristine Eder, her friend Catherine Fields, and their husbands, met at Lake Geneva Raceway to watch motorbike races. Eder paid the admission fee and was asked to sign a release form. Because she was still in her car with others

139. 509 N.W.2d 87 (Wis. Ct. App. 1993).

140. *Id.* at 93.

141. 523 N.W.2d 429 (Wis. Ct. App. 1994).

waiting behind her, Eder signed the form without reading it. As she entered the raceway, she was asked again to sign the same waiver. She asked what the form was for, but her question went unanswered and because people were waiting behind her, she again signed the liability waiver without reading its terms.

During the race, one of the bikers lost control of his motorcycle and left the racetrack, striking both Kristine and Catherine. Both sued the raceway claiming that its negligence and violations of the safe place statute had caused their injuries and that the exculpatory contracts they signed were void as against public policy. The raceway owners moved for summary judgment arguing that by signing the exculpatory contracts, the plaintiffs waived their rights regardless of whether they read the contracts. The circuit court agreed and granted the defendants' motion for summary judgment. The plaintiffs appealed.

The Wisconsin Court of Appeals reversed the circuit court's decision. The court determined that the contract was not consistent with freedom of contract principles because it was not the result of free bargaining. According to the court, even though actual negotiation of the terms of the contract might have been logistically unrealistic, the plaintiffs should still have had an opportunity to read and ask questions about the terms of the contract. Additionally, the plaintiffs' injuries were not within their contemplation when they signed the exculpatory contracts. Finally, the court found the exculpatory contract to be ambiguous regarding the area and people covered under the release. It was unclear what the term "restricted area" meant and whether the agreement applied to spectators or to participants. Thus, the court found that the exculpatory agreement was void as against public policy.

Yauger v. Skiing Enterprises, Hidden Valley Ski Area[142]

Michael Yauger purchased a family ski pass from Hidden Valley Ski Area for the 1992-93 ski season, naming himself, his two daughters, and his wife as the users of the pass. In 1993, his ten-year-old daughter was killed after colliding with the concrete base of a chair lift tower. Yauger filed a wrongful death suit against Hidden Valley, contending that it had negligently failed to place padding on the chair lift tower. Hidden Valley responded by filing a motion for summary judgment based upon an exculpatory clause contained in the application for the season family ski pass.

The circuit court granted Hidden Valley's motion, holding that the exculpatory clause was valid and binding on both Michael and his wife. The

142. 557 N.W.2d 60 (Wis. 1996).

court of appeals affirmed this decision, finding that the exculpatory contract barred the Yaugers from suing for negligence and that the terms "inherent risks in skiing" described the risk of colliding with a fixed object while skiing. The Yaugers appealed.

In its review of the contract, the Wisconsin Supreme Court stated that the ambiguity concerning "inherent risks of skiing" did not inform Yauger that he was waiving all claims against Hidden Valley. The court also held that since the waiver portion of the application for a season pass was not set off by itself, Yauger was not put on notice of the rights he was waiving. Therefore, the court found the exculpatory contract to be void as against public policy because it was not clear and unambiguous, and it did not alert Yauger of the nature and significance of the document.

Park-Childs v. Mrotek's, Inc.[143]

Mona Park-Childs was injured while she was on a guided horseback ride at Mrotek's, Inc., a company owned and operated by Helen Mrotek. She sued Mrotek for negligence in causing her injuries. Prior to starting the horseback ride, Park-Childs signed an exculpatory contract that read in part, "In consideration of Helen Mrotek, doing business under the name and style of Mrotek's, Incorporated, . . . the undersigned does hereby release and hold Helen Mrotek HARMLESS from any LIABILITY FOR INJURIES. . . ."[144] Pointing to the contract, Mrotek moved for summary judgment. The trial court granted the motion, and Park-Childs appealed.

The Wisconsin Court of Appeals noted, "exculpatory contracts are not favored by the law and are to be strictly construed against the party seeking to rely on them."[145] As such, the contract only barred an action against Helen Mrotek and not Mrotek's, Inc., which was mentioned in the contract but was not specifically released or held harmless by the language of the contract. Therefore, Park-Childs's negligence suit against Mrotek's, Inc. could proceed. The court reversed and remanded the case.

Werdehoff v. General Star Indemnity Co.[146]

Douglas Werdehoff and David Smith were both injured during a motorcycle race when the motorcycles they were driving slid on an oil slick on the track. They sued Elkhart Lake's Road America, Inc. and CCS-RMS and its

143. No. 97-2456, 1998 Wisc. App. LEXIS 253 (Mar. 3, 1998).

144. *Id.* at *2.

145. *Id.*

146. 600 N.W.2d 214 (Wis. Ct. App. 1999).

insurers, alleging negligence, recklessness, malice, and violations of the safe place statute. Their spouses also asserted claims for loss of consortium. The defendants moved for summary judgment because Werdehoff and Smith signed exculpatory contracts releasing them from liability. The plaintiffs argued that the contracts were vague and overly broad and therefore, unenforceable. The circuit court ruled that the contracts clearly and unambiguously informed the plaintiffs of what was being waived and alerted them as to the nature and significance of the release. The court dismissed the plaintiffs' complaint, and the plaintiffs appealed.

The Wisconsin Court of Appeals court held that the exculpatory contracts were valid and did release the defendants from liability for ordinary negligence, but found that there was a disputed issue as to whether the defendants' conduct was reckless. An exculpatory contract does not bar recovery for reckless conduct because to do so would be against public policy. Therefore, if it is found at trial that the defendants acted recklessly, such conduct would be outside the scope of the agreement and the exculpatory contract would not bar recovery. Finally, the wives' claims for lack of consortium were not covered in the exculpatory contracts and were not barred. The court reversed and remanded the case.

Niese v. Skip Barber Racing School[147]

The plaintiff, Jill K. Niese, acting as executor of her deceased husband's estate, filed a wrongful death suit against a motor racing school and a race track for negligence in conducting a racing event where her husband was killed. The plaintiff alleged that the two defendants were negligent and showed a reckless disregard for the safety of her husband in the manner in which they carried out their duties and responsibilities of preparing and maintaining safe conditions for the race.

The trial court granted the defendants' motion for summary judgment based largely upon a release signed by the decedent prior to his taking part in the event. The plaintiff appealed.

The Wisconsin Court of Appeals found that while the liability release signed by the husband was indeed valid as to the negligence claim, the wife's wrongful death claim was not barred under a theory of recklessness because a liability release exempting a party from tort liability for harms caused intentionally or recklessly was void on public policy grounds. Because there were material questions of fact concerning whether the defendants were reckless in conducting the event, the court reversed and remanded the case.

147. 2002 WI App 85.

Osborn v. Cascade Mountain, Inc.[148]

Amanda Osborn was injured while skiing at Cascade Mountain. Her parents sued Cascade Mountain and its insurer, alleging that a defective ski boot binding system caused the injury. Prior to Amanda's trip, Joan Osborn signed a release that highlighted the fact that skiing is hazardous, that the binding systems will not release at all times, and that ski-boot bindings do not reduce the risk of injury to knees or any other body part. Additionally, the release specifically stated that the signee released Cascade Mountain from "any and all responsibility or liability for injuries or damages to the user of the equipment listed on this form, or to any other person."[149] It also absolved Cascade Mountain from all claims made for damages or injuries resulting from the use of the equipment or the negligence of Cascade's employees in servicing such equipment.

After the lower court granted summary judgment in favor of Cascade Mountain, the Osbornes appealed. The Wisconsin Court of Appeals held that the liability release was enforceable, noting that the release was neither confusing nor unduly broad. The court affirmed the lower court's decision.

Atkins v. Swimwest Family Fitness Center[150]

Benjamin Atkins, through his guardian ad litem, brought a wrongful death action against Swimwest after his mother drowned while swimming laps at Swimwest. His mother, Dr. Wilson, signed a guest registration card on the date of her death, which included a waiver release statement. The Circuit Court for Dane County granted Swimwest's motion for summary judgment, finding that the exculpatory clause absolved Swimwest from any liability for Wilson's death. Atkins appealed. The court of appeals certified the appeal to the supreme court.

The Wisconsin Supreme Court reversed. When determining whether an exculpatory contract is enforceable the court will look to contract law and public policy. Looking at the contract the court determined that the release signed by Wilson was broad enough to cover drowning.

The court then looked at public policy and found that the release was not enforceable. First, the release was overly broad and all-inclusive. Next, the form served two purposes; to register guests and to release Swimwest from liability, thus making it impossible to determine whether Wilson had notice of

148. 2003 WI App 1.

149. *Id.* at *2.

150. 2005 WI 4.

the significance of what she was signing. Finally, Wilson was not given an opportunity to bargain because failure to sign the form would have also been a sacrifice of her opportunity to swim. The supreme court determined that these factors were contrary to public policy and reinstated Atkins's wrongful death action.

Summary of Exculpatory Contracts

Exculpatory contracts are not favored because they tend to allow conduct below the acceptable standard of care. However, courts are faced with competing considerations. On the one hand is the duty to promote freedom of contract principles premised on a bargain freely and voluntarily made. On the other hand, tort law principles impose liability on persons whose conduct creates an unreasonable risk of harm. In addition, public policy considerations require courts to balance these interests on a fact-by-fact basis according to the following basic guidelines.

Cases interpreting exculpatory contracts usually involve issues of fact making summary judgment a poor device for deciding these cases. Of particular concern are questions such as what risks the parties contemplated the release to cover, what the inherent risks of a particular activity are, and whether a document or clause constitutes an exculpatory contract. To be enforceable, an exculpatory contract must give notice to the signer. That is, it must clearly, unambiguously, and unmistakably inform the signer of what is being waived. In addition, viewed in its entirety, the form must be set off from any other document or other material in a document and must alert the signer to the nature and significance of what is being waived. At a minimum, those bound by the contract must have had an opportunity to read and ask questions about the terms releasing liability. Exculpatory contracts do not release a party from his or her own reckless conduct and may be unenforceable if the contract involves a mistake, deceit or misrepresentation.

When dealing with particular sports, for instance, baseball and hockey, courts are more likely to relax the exculpatory contract standards for release of liability for injuries that occur due to risks inherent in the activity. For instance, having the exculpatory clause on the back of an admission ticket may suffice for baseball and hockey, but not other sports. The requirement of giving notice, or ensuring that a spectator has notice of a risk, such as being struck by a baseball or hockey puck, may be more relaxed in these types of activities.

IV. INTERSCHOLASTIC ATHLETICS

Formed in late 1895, the Wisconsin Interscholastic Athletic Association

(WIAA) was the first statewide association regulating high school sports in America.[151] During the 2000-2001 academic year, the Wisconsin Independent Schools Athletic Association joined the WIAA so that the WIAA now regulates all public and private high schools in the state.[152] With this rich history it would seem that there would be many cases involving high school or interscholastic issues at the high school level, but until recently that has not been the case. The following cases focus on particular issues related to participation in sport at the interscholastic level in the state of Wisconsin.

Teubert v. Wisconsin Interscholastic Athletic Ass'n[153]

Kay Teubert was injured while participating in a gym class at Delavan High School. Teubert's mother sued the school district alleging that at the time of Kay's injury, Kay was covered by the WIAA's benefit plan. The WIAA refused to pay, arguing that because it was a voluntary association, it could not be sued like a corporate entity. The trial court disagreed ruled for the plaintiff.

The Wisconsin Supreme Court affirmed, finding that the WIAA sponsored the plan and represented that it would pay the benefits described in its prospectus. Therefore, Teubert could sue the WIAA to recover the expenses incurred as a result of her daughter's injury.

Richards v. Board of Education Joint School District No. 1[154]

William Richards was employed as a teacher and basketball and cross-country coach at North High School in Sheboygan. In 1971, Richards received his contract for the following year, which did not include the basketball coaching position. He petitioned for a grievance procedure in front of the school board. Richards was given an informal hearing where he was not allowed to cross-examine anyone or to ask questions. Following the hearing, the Board of Education decided not to renew Richards' contract to coach basketball. He sued the school board. The circuit court dismissed the

151. WISCONSIN INTERSCHOLASTIC ATHLETIC ASSOCIATION, 2004-2005 SENIOR HIGH HANDBOOK 5 (2004).

Two statutory sections also impact interscholastic athletics in Wisconsin. Section 118.045 provides that athletic contests and practices in the state cannot be held before September 1 of any given year. WIS. STAT. § 118.045 (2003-2004). Section 118.125 deals with pupil public records including participation in sports. WIS. STAT. § 118.125 (2003-2004).

152. Dennis Semrau, *Final Curtain Falling on WISAA*, CAPITAL TIMES (Madison, WI.), May 25, 2000, at 6C.

153. 99 N.W.2d 100 (Wis. 1959).

154. 206 N.W.2d 597 (Wis. 1973).

complaint, and Richards appealed.

The Wisconsin Supreme Court affirmed. Richards alleged that the board's failure to state the reasons for his dismissal from the coaching position, and the failure to afford him a hearing violated his Fourteenth Amendment due process rights. He also alleged that the board violated state law when it failed to give him notice in writing that his basketball coaching position would not be renewed. The supreme court found that Richards had no liberty or property interest in the renewal of his coaching position; therefore, his due process rights under the Fourteenth Amendment had not been violated.

The court also found that the school district did not impose a stigma on Richards that might hinder his ability to secure future employment as a coach. Therefore, Richards's due process rights were not violated because he had no right to a statement of the reasons for his dismissal or a hearing on the decision not to renew his contract. The court also found that section 118.22 of the Wisconsin statutes, requiring a school board to provide a teacher with written notice by a certain date if his or her contract is not going to be renewed, was not applicable to contracts for coaching positions. The court affirmed the decision of the circuit court.

School District of Slinger v. Wisconsin Interscholastic Athletic Ass'n[155]

This case arose from the WIAA's desire to move the Slinger School District to a different athletic conference, requiring Slinger to travel greater distances to compete in athletic events and forcing it to compete against high schools with significantly larger enrollments. Slinger attempted to enjoin the WIAA from implementing the suggested realignment plan.

The Circuit Court for Washington County granted Slinger's motion for a preliminary injunction, finding that the realignment plan would irreparably injure Slinger and its students in their participation in athletic and non-athletic competition. The court ordered the WIAA to place Slinger in an athletic conference reasonably close to Slinger that contained other schools of comparable size offering similar programs. The circuit court also found that the WIAA had not followed proper realignment procedures. The WIAA appealed.

The Wisconsin Court of Appeals determined that the lower court had erroneously granted Slinger's request for an injunction. Rather than simply using the injunction to maintain the status quo, the circuit court went beyond its authority and used the case as an opportunity to tell the WIAA into which athletic conference it could legally place Slinger.

155. 563 N.W.2d 585 (Wis. Ct. App. 1997).

The court of appeals next reviewed the WIAA's constitution and determined that it gave the WIAA wide discretion in making conference realignment decisions. The constitution stated that one of the criteria to be considered was travel distances and that such distances should be kept reasonable. However, the rules also stated "greater distances may be required."[156] Based upon this language, the court held that because the WIAA did in fact have the authority to require schools to travel greater distances if necessary, Slinger could not prevent the WIAA from realigning conferences for that reason alone. Additionally, Slinger did not have a contractual right to stop the realignment because, in their membership agreement, the member schools of the association had given all the power to make realignment decisions to the WIAA. The court of appeals reversed and remanded the case.

Munson v. State Superintendent of Public Instruction[157]

Barbara Munson, a Native American, and her three children, former students of Mosinee High School, sued the school, alleging that its logo and nickname, the "Indians," created a hostile environment and promoted racial harassment in violation of section 118.13 of the Wisconsin statutes.[158] The plaintiffs sought to have the school's logo and nickname eliminated.

The state superintendent of schools issued an advisory letter instructing school districts that used Indian mascots and logos to reconsider their use. Mosinee High School addressed the issue and considered changing the school's nickname and logo. Soon after, the superintendent sent letters to a number of school districts in the area, including Mosinee, stating that regardless of the legality of the use of Indian symbols, they are entirely inappropriate and steps should be taken to eliminate them. After the Mosinee School Board again voted against making any change to the school's logo, the Munsons filed a formal complaint "alleging discrimination on the basis of race, national origin and ancestry."[159] Ultimately, the school board decided against any change but did take actions to reduce the logo's use, including removing it from all team uniforms except for basketball, no longer using the team's mascot, a Native American woman, and no longer using cheers or songs with Indian themes. The school board decided that while the logo and mascot used by the school were offensive to the Munson family, it was not clear that a reasonable person similarly situated to the appellant would find

156. *Id.* at 588 n.2.

157. No. 97-1450, 1998 Wisc. App. LEXIS 165 (Feb. 17, 1998).

158. WIS. STAT. § 118.13 (2003-04). This statue will be discussed in more depth *infra* at p. 491-492.

159. *Munson*, 1998 Wisc. App. LEXIS 165, at *3.

that the logo presented a negative stereotype of American Indians. The Munsons appealed the board's decision to the circuit court, which affirmed the decision of the board. The Munsons again appealed.

The Wisconsin Court of Appeals affirmed, concluding that the school's logo was not discriminatory because a reasonable person would not find that it depicted a negative stereotype of Native Americans. The court found that the Department of Public Instruction's inquiry into the effects of the use of the Indian logo was satisfactory, and the department had correctly determined that a hostile environment did not exist at the school. Additionally, the court upheld the department's ruling that the school's use of the logo was not severe or pervasive, nor did it provide notice to the school district of a racially hostile environment. The court of appeals affirmed and dismissed the Munsons' complaint.

Butler v. Oak Creek-Franklin School District[160]

The plaintiff, Jamaal Butler, was suspended from participating in high school athletics at a Milwaukee area high school for the 2000-01 season, following multiple violations of the school's athletic code including; smoking, possession of marijuana, possession of alcohol, possession of fireworks, and disorderly conduct. Butler sought both a preliminary injunction to prevent the school from suspending him, and a declaratory judgment forcing the school to reinstate him, on the grounds that its actions had violated his constitutional liberty interest in participation in high school athletics.

The United States District Court for the Eastern District of Wisconsin found that even though there is no constitutional right to play sports, the rules governing participation in high school athletics must satisfy principles of due process and equal protection. Therefore, a student has the right to have his or her request to participate in athletics reviewed under rules that are constitutional. In a school setting this requires that a student receive notice of the charges against him or her and a hearing to defend the charges. The specifics of these requirements depend on the circumstances of the incident. After reviewing the procedures provided by the school, the district court found several potential due process violations concerning the specificity of the notice and the adequacy of the hearing provided Butler. Therefore, the district court scheduled a conference to determine if his due process rights were violated, and if so, whether he sustained any injuries.

160. 172 F. Supp. 2d 1102 (E.D. Wis. 2001).

State v. Kaster[161]

David Kaster was the boys' and girls' swimming coach at Ashwaubenon High School during the 1998-1999 school year. Shortly after the end of the season, Kaster was charged with sexually assaulting a student. The charges followed section 948.095 of the Wisconsin statutes that provides for specific criminal charges for sexual assault of a student by school instructional staff.[162] At trial, Kaster alleged that he was no longer a staff member of the high school when the events took place because the swimming season was over. The jury did not agree, convicting Kaster of two counts of sexual assault. Kaster appealed.

The Wisconsin Court of Appeals affirmed the convictions. Kaster argued that the trial court denied him of his ability to defend against the charges because the court refused to give a jury instruction limiting the definition of school staff to employees and those under contract. The court of appeals found that the statute was designed to protect students from anyone providing services at the school and this included employees, those under contract, and volunteers. In addition, Kaster was volunteering during the period of the assaults as a supervisor of the open swims at the high school pool. Therefore, the conviction was upheld because Kaster was providing services to the school, qualifying him as a staff member.

Mohr v. St. Paul Fire & Marine Ins. Co.[163]

Michael Mohr was injured while practicing shallow dives prior to practice for the Sheboygan North High School varsity swim team. While diving off a platform eighteen inches high into a pool that was three and one-half feet deep, Mohr hit his head on the bottom of the pool. Mohr brought negligence and strict liability claims against KDI, the manufacturer of the platform, the WIAA, and the National Federation of State High School Associations (NFSHSA). The claims against the WIAA and the NFSHSA were based on a rule promulgated by the NFSHSA and adopted by the WIAA concerning the proper water depth at the starting end of a pool. The trial court denied the NFSHSA's motion for summary judgment. The court decided as a matter of law that KDI was not negligent and granted summary judgment in favor of the WIAA. Mohr appealed.

The Wisconsin Court of Appeals reversed and remanded the case. Mohr

161. 2003 WI App 105, *rev. denied*, 2003 WI 126.

162. WIS. STAT. § 948.095 (2003-04).

163. 2004 WI App 5, *rev. denied*, 2004 WI 50.

alleged that there were disputed issues of material fact concerning whether KDI acted reasonably in not warning high schools that a minimum of five feet of water was necessary to safely use its product. KDI countered that they had no duty because high schools are knowledgeable about the issue, and the risk is open and obvious. The court disagreed, finding that KDI did not know anything about the high school's knowledge of safe water depths for its product and that there were disputed issues of fact concerning whether diving into three and one-half feet of water from an eighteen inch platform was an open and obvious danger.

Mohr also alleged that there were disputed issues of material fact concerning whether the WIAA was negligent in adopting the NFSHSA's rule and whether public policy precluded a liability action against the WIAA. The court concluded that there was a disputed issue of material fact as to whether the WIAA acted reasonably when it adopted the rule without making further inquiry. Additionally, the court of appeals found that a determination on the public policy issue could not be made until there was a resolution of the above factual disputes.

Summary of Interscholastic Athletics Cases

While the issues courts have faced in dealing with interscholastic sports have been varied, the one confusing case is *Butler*. The majority of courts in the United States have found that a student athlete at the interscholastic level has no right to participate in athletics;[164] therefore, he or she need not be provided with any due process or other constitutional protections when making decisions that impact his or her ability to participate in athletics. The *Butler* court agreed that there was no constitutional right to participate but still held that the rules governing participation in school athletics must meet due process requirements.[165] The impact of this case in providing some sort of constitutional protection to student athletes at the high school level is still unclear.

V. INTERCOLLEGIATE ATHLETICS

Although the area of intercollegiate athletics has seen an incredible amount of litigation in recent years in the United States, Wisconsin has not seen a similar rise in this area of litigation.

However, several Wisconsin statutes dealing with the University of

164. PAUL ANDERSON, SPORTS LAW: A DESKTOP HANDBOOK 13 (1999).

165. *Butler*, 172 F. Supp. 2d at 1110.

Wisconsin System specifically impact collegiate athletics. Section 20.285: University of Wisconsin System provides for appropriations to intercollegiate athletics.[166] Section 36.11: Powers and duties of the Board of Regents, provides for the pension plan for football coaches at the University of Wisconsin.[167] Section 36.39 bars any complimentary or reduced priced tickets to University of System athletic events except under certain conditions.[168] Finally, section 36.44 deals with license plate scholarship programs and allows for the use of fees under this program to provide funds for the University of Wisconsin-Madison's division of intercollegiate athletics.[169]

The following case deals with a claim by a collegiate athlete against a coach for defamation.

Bauer v. Murphy[170]

The plaintiff, Amy Bauer, a member of the University of Wisconsin's women's basketball team, was accused of having an inappropriate relationship with Michael Peckham, one of the team's assistant coaches. Bauer denied the allegation, but the university suspended Peckham indefinitely pending an investigation. Shortly thereafter, at a team meeting, Bauer was informed by the team's head coach, Mary Murphy, that she was a disgrace to the team and the university. Bauer subsequently quit the team. Later that year, Bauer and a former teammate agreed to rent an apartment together. Murphy informed the other player that she would have to choose between living with Bauer and remaining on the team. As a result, the other player told Bauer that she would not be able to live with her as planned. This prompted Bauer to sue Murphy for defamation, invasion of privacy, tortious interference with her apartment-sharing agreement, and intentional infliction of emotional distress. Murphy moved for summary judgment on the defamation and contract interference claims. The trial court granted Murphy's request for summary judgment on these two issues, with the other two issues going to trial. At trial, the jury ruled against Bauer on both counts, and the court dismissed her action. Bauer appealed.

The Wisconsin Court of Appeals noted that in order for Bauer to succeed on her defamation claim she had to prove that the statement was slander per se or prove special damages. While there was evidence that Murphy had indeed

166. WIS. STAT. § 20.285(5) (2003-04).
167. WIS. STAT. § 36.11(15m) (2003-04).
168. WIS. STAT. § 36.39 (2003-04).
169. WIS. STAT. § 36.44(2) (2003-04).
170. 530 N.W.2d 1 (Wis. Ct. App. 1995).

called Bauer a "disgrace," Murphy never specifically mentioned the alleged inappropriate relationship. While other members of the team's coaching staff may have done so, the court of appeals noted, "slander, unlike libel, is an individual, not a joint tort."[171] Although it could be inferred that Murphy's use of the word "disgrace" referred to Bauer's alleged behavior with Peckham, "the word does not reasonably carry with it an assertion of 'unchastity' or sexual misconduct, whether taken in isolation or in the context in which the remark was made."[172] Therefore, the court held that the statement by Murphy did not constitute slander per se, and because there was not a showing of special damages, summary judgment was properly issued on this claim.

VI. GENDER EQUITY

At the national level, no area of sports law has seen more litigation in the past thirty years than gender equity.[173] Most of this litigation surrounds the application of Title IX of the 1972 Education Amendments to the Civil Rights Act of 1964.[174] In Wisconsin, there have been relatively few cases in this area, and all have been at the high school level.

The Wisconsin Pupil Nondiscrimination Law also regulates gender equity issues at the high school level in Wisconsin.[175] This law provides that

> (1) No person may be denied admission to any public school or be denied participation in, be denied the benefits of or be discriminated against in any curricular, extracurricular, pupil services, recreational or other program or activity because of the persons sex, race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation or physical, mental, emotional or learning disability.[176]

Created with the assistance of the WIAA, it forces schools and school districts to develop written plans to comply with the provisions of the statute. The statutes mandate for nondiscrimination applies beyond gender equity concerns; however, for purposes of this report, the focus is on its mandate concerning nondiscrimination in athletics. Following this statute, the WIAA has implemented various regulations, among them a prohibition of coed

171. *Id.* at 5.

172. *Id.* at 6.

173. For a recent analysis of gender equity issues in sports see, Vol. 14, No. 1 of the *Marquette Sports Law Review*, which contains a symposium on "Title IX at Thirty."

174. 20 U.S.C. § 1681, et seq. (2005).

175. WIS. STAT. § 118.13 (2003-04).

176. *Id.* § 118.13(1).

competition in interscholastic sports.[177] This particular provision has been the subject of litigation in Wisconsin.

In addition, many gender equity cases concern questions of equal pay for female coaches in comparison to that paid to male coaches. At the federal level such claims are often brought under Title VII or the Equal Pay Act.[178] Although there have been no Wisconsin cases claiming violations of these federal laws in the sports context, the case below dealing with equal pay issues brings up similar concerns.

Kelly v. Wisconsin Interscholastic Athletic Ass'n[179]

The plaintiffs, two Washington High School female student-athletes and their mothers, sued under the Civil Rights Act, alleging that a WIAA regulation barring male and female students from competing with or against each other violated the Fourteenth Amendment of the United States Constitution. The plaintiffs sought an injunction prohibiting enforcement of the rule because it limited the opportunity of female high school students to participate on an equal basis with male students in varsity interscholastic competition. The defendants responded by filing several different motions to dismiss.

The court began by granting the defendants' motion to dismiss for lack of subject matter jurisdiction because the plaintiffs did not allege that the association was a state actor as required for their constitutional claims. The court denied the motion to dismiss the plaintiffs' complaints against the president of the Board of School Directors, the secretary-business manager of the Board, the superintendent of schools for the City of Milwaukee, the principal of Washington High School, and the Washington High School swimming and tennis coach, because these defendants allowed the enforcement of the WIAA regulation in question. The court believed that this claim presented a substantial constitutional question and deserved further examination.

Leffel v. Wisconsin Interscholastic Athletic Ass'n[180]

Female student-athletes sued the WIAA alleging that its regulation barring male and female students from competing with or against each other violated

177. WISCONSIN INTERSCHOLASTIC ATHLETIC ASSOCIATION, *supra* note 123, ART. VI, §6.

178. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-6 (2005); Equal Pay Act of 1964, 29 U.S.C. § 206 (2005).

179. 367 F. Supp. 1388 (E.D. Wis. 1974).

180. 444 F. Supp. 1117 (E.D. Wis. 1978).

the Equal Protection Clause of the Fourteenth Amendment.

While these actions were pending, Title IX of the Education Amendments of 1972 was enacted. As a result, the WIAA amended the challenged provision to comply with Title IX and claimed that because their regulation was in line with Title IX it was not subject to other constitutional claims. The district court found this argument to be without merit because enactment of Title IX did not remove the problem of sex discrimination from constitutional scrutiny and did not displace the plaintiffs' right to enforce the commands of the Fourteenth Amendment.

After analyzing the case under Title IX, the district court determined that the case presented two main issues; (1) whether the regulation violated the Equal Protection Clause by denying female high school students the opportunity to qualify for a position on a boys contact sport where no separate team is provided for girls or where the separate team provided does not have a comparable program, and (2) whether the Fourteenth Amendment requires that female high school students be permitted to attempt to qualify for a position on a boys varsity interscholastic team where the boys team has a higher level of competition than the corresponding girls team.

The court analyzed the first issue noting that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives. The WIAA claimed that prevention of injury to female athletes was their important governmental objective, justifying the regulation. The court determined that the exclusion of girls from all contact sports in order to protect them from an unreasonable risk of injury was not substantially related to a justifiable governmental objective. Schools are under no obligation to provide interscholastic athletics, but once they choose to do so, the opportunity to participate must be provided to all on equal terms.

The court then answered the second question in the negative, because there were no allegations that the defendants intentionally imposed different levels of competition on boys and girls. The court held for the plaintiffs and the defendants were ordered to refrain from enforcing the regulation at issue.

Reisner v. Labor and Industry Review Commission[181]

Barbara Reisner was the West Allis-West Milwaukee School District's head coach for both girls' high school track and swimming. She had also coordinated similar sports at the district's junior high schools. Reisner contended that because her pay for coaching those activities was much less

181. No. 80-1920, 1981 Wisc. App. LEXIS 3703 (Aug. 25, 1981).

than the head coaches for the equivalent boys' sports, the school district had discriminated against her based upon her gender. She sued the school district and the Department of Industry, Labor and Human Relations, for sex discrimination.

After a hearing, the department examiner concluded that Reisner had in fact been discriminated against based upon her gender, and thus, awarded her back pay. The school district appealed to the Labor and Industry Review Commission (LIRC). After considering the number of participants, length of season, and number of events, the Commission held that the school district had not discriminated against Reisner and reversed the findings of the department examiner. Following this decision, both Reisner and the West Allis-West Milwaukee Education Association petitioned for review in the circuit court. The court granted the requested relief and awarded back pay with prejudgment interest. The school district appealed.

The Wisconsin Court of Appeals held that the circuit court had erroneously disregarded the findings of fact of the Commission and exceeded the scope of its review because there was substantial evidence to support the department's original findings. The court then proceeded to review the determination of the LIRC. The court concluded that there was a rational basis for the LIRC's conclusion that no sex discrimination had taken place because the rates of compensation for coaches of all sports were based on collective bargaining agreements entered into between the school district and teachers' association. Additionally, the rate of pay was determined by the sport coached, not the genders of the coach, as all coaches for a particular sport were paid the same. The court of appeals reversed the decision of the circuit court and remanded the case with instructions to confirm the order of the Department.

VII. SPORTS CONTRACTS

The following cases deal with issues surrounding sports contracts in Wisconsin. As opposed to the earlier analysis of exculpatory contracts, the focus on these cases is on other sports contracts, such as player contracts, insurance agreements, building contracts, and other agreements. Some also focus on issues related to performance under the contract and the interpretation of the language of the contract itself.

Moha v. Hudson Boxing Club[182]

Bob Moha, a professional boxer, brought an action against Hudson Boxing Club to recover a portion of the gross receipts of a boxing match.[183] Moha entered into a contract with Hudson that stated he would earn twenty-two and a half percent of the gross receipts if he boxed Mike Gibbons for ten rounds. During the second round of the match, Moha struck Gibbons below the belt, and the referee stopped the fight. Moha alleged that the match should count as performance under the contract because it is customary in the boxing profession to consider a match a full contest even when one of the boxers gets knocked out or disabled by an accidental foul in the early rounds. The circuit court held that Moha failed to perform under the contract. Moha appealed.

The Wisconsin Supreme Court affirmed. In order to recover under the contract Moha had to prove he substantially performed his obligations. The contract was for ten rounds of boxing, and the match was stopped in the second round because Moha broke the rules by throwing an illegal punch; therefore, he did not substantially perform and could not recover under the contract.

Tollefson v. Green Bay Packers[184]

The plaintiff, Charles Tollefson, played professional football for the Green Bay Packers in both the 1944 and 1945 seasons. On May 4, 1946, Tollefson and the Packers entered into a contract, which was a pre-printed form that also contained handwritten additions by E.L. Lambeau, the general manager of the Packers. The contract stipulated that Tollefson would receive $300 per game, and a minimum of $3,600 for the season. Lambeau handwrote the $3,600 figure on the face of Tollefson's contract.

Tollefson was released after the second game of the season and was paid $900 for his participation in three practices and two league games. Tollefson sued the Packers to recover the remaining $2,700 on his contract. The Packers claimed that Tollefson failed to properly perform his end of the contract and was not entitled to the $3,600. Tollefson argued that the contract language "minimum of $3,600" entitled him to payment of that amount regardless of his performance. The trial court found for the Packers. Tollefson appealed.

The Wisconsin Supreme Court reversed, holding that where written provisions of a contract are inconsistent with printed provisions, the court will

182. 160 N.W. 266 (Wis. 1916).

183. This case is also discussed *infra* at pg. 525 in the section on the Regulation of Boxing.

184. 41 N.W.2d 201 (Wis. 1950).

uphold an interpretation that gives effect to the written provisions. Moreover, the court noted that if Tollefson were entitled to the $3,600 only if he completed the season, there would have been no reason for the insertion of the minimum clause. The court held that the clause meant that unless he was discharged for cause, he was entitled to the full $3,600 whether he participated in the games or not. The case was remanded to the trial court to determine whether the plaintiff had been discharged with cause.

Johnson v. Green Bay Packers[185]

Clyde Johnson signed a two-year contract to play for the Green Bay Packers. Johnson's contract contained a boilerplate provision (paragraph six) stating that he could be released at any time. While Johnson was negotiating his contract with general manager E.L. Lambeau, he insisted on a "season" contract, which would have prevented the club from releasing him during the course of the season. Lambeau initially denied this request, but subsequently agreed and inserted a handwritten phrase on the back of Johnson's contract that stated that Johnson would receive $7,000 for the 1948 and 1949 seasons. The NFL's standard contract practice was that contracts were signed in triplicate and sent to the league office, which would then keep one copy and send the remaining two to the team and player. When Johnson received his copy of the contract, Lambeau's handwritten additions were included, but paragraph six was not stricken as he had requested. Johnson immediately called Lambeau, who informed him that the league did not like to have clauses crossed out on contracts. Lambeau assured Johnson that his word was good on the season contract issue, whether the actual contract reflected the change or not. Johnson accepted Lambeau's explanation and decided to drop the matter.

Two exhibition games into the 1948 season, the Packers terminated Johnson's contract pursuant to paragraph six, claiming that he had not maintained himself in excellent physical condition. Johnson then played the remainder of the 1948 season for the Los Angeles Dons for the sum of $6,000. After the completion of the 1948 season, Johnson sued the Packers seeking damages for breach of contract. The trial court concluded that Johnson was entitled to the full contract amount less the sum he had earned while a member of the Los Angeles Dons. The Packers appealed.

The Wisconsin Supreme Court affirmed. The supreme court relied almost exclusively on the reasoning used in *Tollefson* to determine that Lambeau's writing on the back of Johnson's contract should be construed as part of his official contract. According to the court, when the handwritten provisions of

185. 74 N.W.2d 784 (Wis. 1956).

the contract are in direct conflict with the pre-printed provisions, the handwritten provisions govern. Therefore, the Packers had the burden of proving that Johnson was terminated for cause. The Packers offered no evidence of cause for Johnson's termination.

The court also dismissed the Packers' contention that Johnson was required to submit the dispute to the NFL Commissioner. The contract specifically stated that disputes relating to the constitution, by-laws, rules and regulations of the league were to be submitted to the Commissioner, but made no mention of disputes relating to player contracts. The court found Johnson's dispute over his player contract was an appropriate matter for judicial review. The court held that the Packers had to pay Johnson under the terms of the contract minus the amount he earned playing in Los Angeles.

Garriguenc v. Love[186]

Jossline Garriguenc was a spectator at a demolition derby. A car left the track and struck her in the infield area. She sued the organizer of the event, Donald Love, and his insurer to recover for her injuries. The defendants moved for summary judgment based on an exclusion contained in the insurance policy. The exclusion stated, "[t]he insurance does not apply [t]o bodily injury or property damage arising out of . . . [a]utomobile or motorcycle racing or stunting."[187] The trial court denied the motion, and the defendants appealed.

The Wisconsin Supreme Court reversed, entering judgment in favor of the defendants. The issue on appeal was whether a demolition derby was a race or stunt. The court found the contract to be unambiguous; therefore, the words were given their plain meaning. Finding a demolition derby to not fall within the plain meaning of both a race and a stunt, the court concluded that the plaintiff's injuries were not covered by the insurance policy. Thus, summary judgment in favor of the defendants was appropriate.

Fredenberg v. Peterson[188]

Burt Fredenberg filed an action against members of the board of directors of the Downtown Lions Girls Softball League of Green Bay alleging breach of contract and promissory estoppel, after he was not granted a head coaching position in the league. The circuit court awarded summary judgment in favor of defendants but rejected their claim that Fredenberg's suit was frivolous.

186. 226 N.W.2d 414 (Wis. 1975).

187. *Id.* at 416.

188. No. 93-3320, 1997 Wisc. App. LEXIS 911 (Wis. Ct. App. June 28, 1994).

The defendants appealed.

The Wisconsin Court of Appeals reversed. Fredenberg's claim was based on a theory of promissory estoppel. He alleged that by not granting him a position when one became available the organization acted contrary to its rules, which provided that coaching positions would be awarded according to seniority. The defendants countered by arguing that coaching positions were subject to board approval and Fredenberg's past misconduct disqualified him from acting as a head coach. Fredenberg had repeatedly violated league rules by "engag[ing] in conduct that sets a terrible example for anyone, particularly impressionable children."[189] The court found that the rule did not constitute a promise because all coaching appointments were subject to board approval.

Additionally, Fredenberg's claim was found to be frivolous because a reasonable person would know that the rules did not constitute a promise upon which a claim could be based. Therefore, the court reversed and remanded the case as to the frivolous suit claim, finding it was appropriate to award costs and fees to the defendants.

Downey, Inc. v. Bradley Center Corp.[190]

Downey, Inc., a subcontractor hired to work on construction of the Bradley Center, sued the defendants, a general contractor and a bonding company, for breach of contract. Downey alleged that the general contractor had caused delays and substantially altered its ability to complete its portion of the project and then refused to pay for the damages caused by these material changes, thereby breaching the terms of the subcontracting agreement. The trial court found for Downey, Inc., holding that the contract was ambiguous, and awarded damages based on its lost profits from other subcontracting projects. The defendants appealed.

Based on the oral and written complaints made by plaintiff to defendants, the Wisconsin Court of Appeals found that the plaintiff had given sufficient notice to the defendants that it was suffering damages due to the defendants' changes in the project. Further, the court determined that the damages caused to the plaintiffs related to the breach of contract were reasonably foreseeable as a result of a breach of the subcontract because the delays required the plaintiff to pull workers off other projects to meet the strict deadlines imposed by defendants. Because the defendants were experienced contractors they would be aware of the effects of these actions.

The court also held that there were sufficient grounds to support the

189. *Id.* at *3.

190. 524 N.W.2d 915 (Wis. Ct. App. 1994).

consequential damages claim by the plaintiff and that the consequential damages question was properly submitted to the jury. The court further held that the defendants were entitled to a reduction in interest, as interest was not to accrue after the judgment was paid to the court. However, the original judgment by the trial court was otherwise upheld.

Summary of Sports Contracts

Although no overall generalizations can be made about sport contract issues in Wisconsin the two cases dealing with the Green Bay Packers are particularly interesting. Both *Tollefson* and *Johnson* focused on pre-printed player contracts that were modified by written additions to the contract at issue. Today, as in all of the major professional sports leagues, the National Football League's Collective Bargaining Agreement provides for a much more detailed Uniform Player Contract (UPC) that all players must sign.[191] While addendums are still allowed in some fashion these types of issues are not as problematic because the UPC is much more detailed and its language would already cover these issues.

VIII. LABOR LAW

Several sports cases in Wisconsin have focused on aspects of labor law. However, these cases can be classified into two distinct areas, employment law, focusing on workers' compensation and unemployment compensation claims in sports, and child labor law, focusing on statutory provisions applicable to the employment of minors.[192]

A. Employment Law

Sports cases in the employment law area in Wisconsin have typically focused on workers' compensation and unemployment compensation claims.

Workers' compensation claims provide recovery for workers from their employer for injuries that occur during the scope of their employment. In the sports context, professional athletes may be entitled to workers' compensation

191. COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NFL MANAGEMENT COUNCIL AND THE NFL PLAYERS ASSOCIATION, as amended Feb. 25, 1998, App. C: NFL Player Contract.

192. The crane crash during the construction of Miller Park, the home of the Milwaukee Brewers, caused three deaths, other injuries, and significant lawsuits related to construction costs and responsibility for the accident. Although this situation dealt with a sports facility, the legal issues focused instead on Wisconsin employment law issues unrelated to sports. For a discussion of these issues, see Edward A. Fallone, *Reflections on the Accident at Miller Park and the Prosecution of Work-related Fatalities in Wisconsin*, 12 MARQ. SPORTS L. REV. 105 (2001).

recovery for injuries sustained during competition. However, amateur athletes, including those playing at the high school or college level, are not entitled to workers' compensation recovery, as they are not considered employees of their teams. The Wisconsin workers' compensation statute is section 102.03, which provides recovery for an employee injured while "performing service growing out of or incidental to his or her employment."[193]

Another area of Wisconsin employment law deals with unemployment compensation. Sections 108.03 through 108.06 of the Wisconsin statutes provide the eligibility requirements for receipt of unemployment compensation benefits from the state. Under these sections, employees who were released from employment for misconduct or unsuitability for their position are ineligible to receive unemployment compensation benefits.[194] The following cases cover employment law issues in the sports context.

Madison Entertainment Corp. v. Kleinheinz[195]

F.J. Kleinheinz played professional baseball for the Madison Blues. Kleinheinz was at Breese Stevens Field in Madison preparing for a game, but the game was cancelled due to inclement weather. As Kleinheinz left the field, he walked into an open casement window and sustained injuries. Kleinheinz sought workers' compensation benefits from Madison Entertainment. The Industrial Commission ruled in favor of Kleinheinz. Madison Entertainment appealed the judgment in circuit court. The circuit court upheld the award, and Madison Entertainment appealed.

The Wisconsin Supreme Court reversed. E.L. Lenahan owned and operated the Madison Blues. In an effort to draw larger crowds to the games, Lenahan entered into an agreement with Madison Entertainment to play the games in the evenings at Breese Stevens Field. Madison Entertainment leased the field from the City of Madison. In determining whether Madison Entertainment was obligated to pay Kleinheinz workers' compensation benefits, the supreme court focused on section 102.06 of the Wisconsin statutes.[196] At that time the statute provided that "[a]n employer . . . shall be liable for compensation to an employee of a contractor or subcontractor under him . . . in any case where such employer would have been liable for compensation if such employee had been working directly for such

193. WIS. STAT. § 102.03 (2003-04).

194. WIS. STAT. §§ 108.03 – 108.06 (2003-04).

195. 248 N.W. 415 (Wis. 1933).

196. WIS. STAT. § 102.06 (1932-33).

employer."[197] The issue was whether Lenahan was a contractor or subcontractor of Madison Entertainment. The supreme court concluded "that the statute was intended to deal with situations where a person or corporation discharges his or its duties under a contract by subletting work, or where such person or corporation delegates his or its usual business to another under contract."[198] In this case, Madison Entertainment was furnishing a venue for entertainment, it was not subletting its work or delegating its business to Lenahan; therefore, it was not liable to Kleinheinz for workers' compensation benefits.

General Accident Fire & Life Assurance Corp. v. Industrial Commission[199]

Thomas Larkin was employed as an athletic director at the Milwaukee Athletic Club when he was injured while stepping from one mat to another with a weight over his head. He was diagnosed with osteoarthritis and bone spurs. Larkin sought workers' compensation benefits, which the Industrial Commission awarded, finding him permanently disabled. The Milwaukee Athletic Club and its insurer, General Accident Fire & Life, appealed the commission's decision.

The Wisconsin Supreme Court affirmed. The Milwaukee Athletic Club argued that the commission acted beyond the scope of its powers. The court disagreed, finding that the commission adopted the findings of fact made by an examiner, made its award to Larkin within the time allotted by the statute, and correctly considered the findings of an impartial physician.

Next, the Milwaukee Athletic Club contended that the question whether

197. *Madison Entertainment Corp.*, 248 N.W. at 416. Portions of the decision in this case were overruled in *Green Bay Packaging, Inc. v. Department of Industry, Labor & Human Relations*, 72 Wis. 2d 26 (1976). In this case, Siemzuch was hired by Majeske to cut timber. Majeske did not carry any worker's compensation insurance for Siemzuch. Majeske had a contract with Green Bay Packaging for the sale of the timber. After a falling tree killed Siemzuch, his widow sued Green Bay Packaging, contending that Majeske was its contractor, and therefore, Green Bay Packaging should be liable under the 1976-77 version of Wisconsin Statute section 102.06. The Department of Industry, Labor & Human Relations found that Green Bay Packaging had substantial control over the details of the work that was to be performed under the contract and was therefore liable.

Green Bay Packaging appealed and the circuit court reversed, finding that based on prior decisions interpreting the statute, including the *Madison Entertainment Corp.* case, Majeske was not a contractor of Green Bay Packaging. The widow then appealed to the Wisconsin Supreme Court. The court reversed, holding that prior interpretations of the statute which held that a business like Green Bay Packaging was liable for compensation to an employee of a contractor when the contractor had not complied with the statute and where the employer would have been liable for compensation if the employee had been working directly for it, were wrong and contrary to the plain language of the statute.

198. *Id.*

199. 271 N.W. 385 (Wis. 1937).

the accident at work proximately caused Larkin's injury was a jurisdictional question, making the commission's findings inconclusive. Rejecting this contention, the court stated "[f]indings of the commission, whether upon jurisdictional facts or not, are conclusive if the record discloses any evidence to support them."[200] The court concluded that there was sufficient evidence to sustain the commission's findings that the trauma resulting from Larkin's accident at the club proximately caused his disability. After finding there was no fraud in the determination of the award of workers' compensation benefits, the court affirmed the commission's award.

Kammler v. Industrial Commission[201]

The plaintiff, Wilbert Kammler, played recreational league baseball for a team organized by the athletic board of the City of West Bend. During one of the team's games, Kammler fractured his leg. He sued the city for workers' compensation, alleging that he was an employee of the city at the time he was injured. Although Kammler was paid for his participation, the city denied his claim, stating that it had no authority to employ Kammler as a baseball player for exhibition games.

The Wisconsin Supreme Court agreed with the city. After a careful analysis of the relevant statutes, the court determined that the city had no authority to hire Kammler as a city employee to play baseball and that if the city had acted beyond its given authority, it had no legal obligation to pay Kammler workers' compensation claim.

Brynwood Land Co. v. Industrial Commission[202]

The plaintiff, Salvatore Fuggiasco, was a fifteen year-old caddy at Brynwood Country Club. He held this position for about a week until he was injured while playing a game in the clubhouse.

During the game, Fuggiasco lost control of a knife, which struck him in the eye, resulting in his partial loss of sight. Fuggiasco filed an application with the Industrial Commission for workers' compensation. Brynwood and its insurance carrier denied Fuggiasco any damages because they claimed that the injury did not arise out of his employment. However, the commission granted Fuggiasco's workers' compensation claim. The circuit court upheld this holding, which Brynwood appealed.

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200. *Id.* at 389.

201. 288 N.W. 778 (Wis. 1939).

202. 10 N.W.2d 137 (Wis. 1943).

The Wisconsin Supreme Court noted that the key inquiry was whether Fuggiasco's injury arose from his employment. The court stated that Fuggiasco was not required to report for duty unless he wished to and there was no obligation on his part to remain waiting for his turn to caddy. Reversing the decision of the circuit court, the court held that Fuggiasco's injury did not arise out of his employment, and therefore, he was not eligible for workers' compensation.

Weyauwega Joint School District No. 2 v. Department of Industry, Labor and Human Relations[203]

Sherry Pesch was an English teacher and varsity coach for girls' volleyball, basketball, and track for the Weyauwega School District's high school. After an upsetting incident with the volleyball team in October of 1975, Pesch missed several days of classes due to stress and illness. Her husband informed the school district that she was sick and on medication and that the coaching duties were too much work for her. When Pesch returned to school she brought a note from her physician that recommended she should reduce her coaching activities because she was under stress and was exhausted. Shortly thereafter, Pesch submitted a letter of resignation from her duties as basketball coach, and another teacher was hired to take her place for the 1975-76 season. In November of 1975, the board of education informed Pesch that it had not accepted her resignation. Upon hearing the school's refusal, Pesch requested a hearing before the school board. In January of 1976, the board issued a written statement again denying Pesch's request to resign from her basketball coaching position and instructing the school administrator to furnish her with assistance in her coaching duties. The board added that Pesch's failure to comply with its decision would result in dismissal because it was school policy to terminate teachers who refused to accept their additional coaching duties. Pesch refused to continue to serve as head coach, but offered to stay on as an assistant. The board refused Pesch's offer, and in January of 1976 voted to terminate Pesch's employment.

Following her termination, Pesch applied for unemployment compensation. The school district challenged her eligibility for payments claiming that she was discharged for misconduct, and therefore she was disqualified from receiving payments. An initial determination by the Department of Industry, Labor and Human Relations (DILHR) concluded that she had not been discharged for misconduct and was eligible for payments.

The school district appealed to a DILRH appellate tribunal, which

203. No. 79-268, 1980 Wisc. App. LEXIS 3590 (Apr. 25, 1980).

reversed the initial determination. Pesch appealed this finding to the Labor and Industry Review Commission, which reversed the appeal tribunal's holding and concluded that she had not been discharged for misconduct. The Dane County circuit court affirmed the decision of the Labor and Industry Review Commission, and the school district again appealed.

The Wisconsin Court of Appeals affirmed the Labor and Industry Review Commission's determination that Pesch had not been discharged for misconduct and was therefore eligible to receive unemployment compensation benefits. She had presented ample evidence of the school district's mistreatment of her, and the commission had a sufficient basis for determining that she was entitled to unemployment compensation. The court held that while the school district may have had an unofficial policy of terminating contracts with teachers who refused to accept their duties as coaches that policy was not written and had not been followed in every instance. The court determined that the commission's conclusion that Pesch had been treated differently than other teachers who were similarly situated was supported by credible testimony.

The court also concluded that Pesch's decision to resign as coach of the girls' basketball team did not amount to misconduct because it did not show a willful or wanton disregard of the school district's interests as necessary under the statute. The court concluded that Pesch's decision to resign, as head coach could be more accurately characterized as a failure in good performance as the result of inability or incapacity. The court affirmed the commission's decision, holding that Pesch was eligible for unemployment compensation.

CBS, Inc. v. Labor and Industry Review Commission[204]

Richard Kamps was hired by CBS to work as a "runner" at the 1994 Winter Olympic Games in Lillehammer, Norway. On one of his days off, Kamps went skiing and was injured. He filed an action for workers' compensation benefits with the Department of Industry, Labor and Human Relations (DILHR). An administrative law judge dismissed the claim because skiing was not proper conduct by a traveling employee. The Labor and Industry Review Commission (LIRC) reversed the finding because skiing was incidental to living in the area where Kamps was traveling for his job. The circuit court and court of appeals affirmed the LIRC's decision. CBS appealed.

The Wisconsin Supreme Court affirmed. CBS alleged that skiing was not necessary or incidental to living; therefore, Kamps should not receive workers'

204. 579 N.W.2d 668 (Wis. 1998).

compensation benefits. Under section 102.03(1)(f) of the Wisconsin statutes, a traveling employee is performing service for his or her employer except during a personal deviation, and "[a]cts reasonably necessary for living or incidental thereto shall not be regarded as such a deviation."[205] In determining acts incidental to living it is appropriate to analyze the location of the traveling employee. Therefore, the court found LIRC's finding that skiing was incidental to living in Lillehammer was reasonable and affirmed its grant of workers' compensation benefits.

Summary of Employment Law Cases

As the cases in this section indicate, the central focus in determining whether workers' compensation benefits should be awarded is the characterization of the injured individual as an employee. The court considers the obligations of both the injured party (potentially an employee) and the (alleged) employer when determining the relationship between the parties. If there is a continuing obligation by the individual to perform work for the alleged employer and an obligation by the employer to provide compensation or some other form of benefit for this work, there is likely an employment relationship that will demand workers' compensation coverage. However, if the relationship between the parties is voluntary on the part of either party, it is unlikely that workers' compensation will be provided, and the injured party will have to pursue other options for recovery.

With regard to unemployment compensation claims, the dismissed employee must be able to demonstrate that his or her removal from a job was not based on personal misconduct, but was based on a decision made by the employer, unrelated to the employee's work behavior.

B. Child Labor Law

Child labor laws exist on both the state[206] and federal[207] level. The federal child labor laws were adopted to prevent employment of children during periods of time in which they should be attending school. Further, these laws were an attempt to prevent and abolish the use of oppressive child labor in the production of goods. The child labor laws of Wisconsin limit both the type of employment opportunities available to minors and the periods of time minors

205. *Id.* at 673 (citing WIS. STAT. § 102.03(1)(f) (1993-94)).

206. WIS. STAT. § 103.65 (2003-04).

207. 29 U.S.C. § 212 (2005).

are able to work.[208] As with general labor law, child labor law is based on an employment relationship between an employer and a minor as an employee. When such a relationship does not exist, there is no application of the child labor laws. However, when an employment relationship is found, the employer may be strictly liable for injuries sustained by the minor.

Olson v. Auto Sport, Inc.[209]

James Olson, Jr. was killed while competing in a truck race at Lake Geneva Raceway, which was owned by Auto Sport, Inc. James was fifteen years old when he died. His parents brought a wrongful death action against Auto Sport. The Olsons alleged that Auto Sport employed James in violation of the child labor laws, making Auto Sport strictly liable for his death. The trial court disagreed, granting Auto Sport's motion for summary judgment. The Olsons appealed.

The Wisconsin Court of Appeals affirmed because there was no employer-employee relationship between James and Auto Sport. In regard to places of employment, the child labor law stated "[a] minor shall not be employed or permitted to work at any employment or in any place of employment dangerous or prejudicial to the life, health, safety, or welfare of the minor."[210] Racing was not included in the enumerated list of dangerous places of employment.

Additionally, James was not an employee of Auto Sport. Auto Sport had no authority over James, did not provide him with training and made no social security contributions on his behalf. The only connection between James and Auto Sports was that he received prize money from Auto Sport and paid an entry fee. The circuit court's grant of summary judgment was affirmed because James was not working for Auto Sport in violation of the child labor laws.

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208. WIS. STAT. § 103.65. In addition to the general provisions of this section, section 103.67 of the Wisconsin statutes provides minimum ages in various employments including that minors twelve and thirteen years of age may be employed as golf caddies, sideline officials for high school games, and "as officials for athletic events sponsored by private, nonprofit organizations in which the minor would be eligible to participate or in which the participants are the same age as or younger than the minor." WIS. STAT. § 103.67(d),(h) & (hm) (2003-04). In addition, eleven to thirteen year olds can be employed as ball monitors at high school football games and practices. § 103.67(i). Section 103.79 provides that minor golf caddies are employees of the course operator. WIS. STAT. § 103.79 (2003-04). Regulations regarding permits for minors to be employed are contained in WIS. STAT. §§ 103.70 & 103.71 (2003-04).

209. 651 N.W.2d 328 (Wis. Ct. App. 2002).

210. WIS. STAT. § 103.65(1) (2001-02).

IX. ANTITRUST LAW

Antitrust laws are designed to protect consumer interests by prohibiting business activities that would result in a decrease in competition in the market. The Sherman Anti-Trust Act prohibits both agreements among parties that would have an unreasonable restraining effect on trade,[211] as well as monopolies or attempted monopolies created by an individual firm.[212] Wisconsin does not have a specific antitrust statute; however, there is a broader statutory provision that serves "to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition by prohibiting unfair and discriminatory business practices which destroy or hamper competition."[213]

In the sports context, Major League Baseball holds a unique position as being exempted from antitrust liability on a federal level.[214] However, no sports team or league holds such an exemption when faced with a state antitrust claim. The following case discusses the intersection between state and federal antitrust claims in Wisconsin.

State of Wisconsin v. Milwaukee Braves, Inc.[215]

This case arose from an antitrust challenge brought by the State of Wisconsin in response to the Milwaukee Braves moving from Milwaukee to Atlanta and Major League Baseball's subsequent refusal to place a new team in Milwaukee. The defendants alleged that they were not subject to antitrust scrutiny, even state antitrust scrutiny, based on baseball's historic antitrust exemption. Further, if they were in fact subject to antitrust scrutiny, the defendants alleged that antitrust law only protects combinations and conspiracies related to trade and commerce of goods, not services. The defendant argued that as baseball is an entertainment service and not a product, there could be no application of antitrust law. The circuit court originally held that the defendants had violated state antitrust law by creating an unreasonable restraint of trade in unilaterally moving the team without creating a replacement. The defendants appealed.

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211. 15 U.S.C. § 1 (2005).

212. 15 U.S.C. § 2 (2005).

213. WIS. STAT. § 133.01 (2003-04).

214. For more information about the evolution of baseball's antitrust exemption see, Vol. 9, No. 2, the spring 1999 issue of the *Marquette Sports Law Journal*, which contains a symposium on the Curt Flood Act of 1998, 15 U.S.C. §26b (2005). The Act modified baseball's antitrust exemption by providing baseball players with the right to sue the league to challenge rules that restrict player movement or compensation possibly in violation of the antitrust laws.

215. 144 N.W.2d 1 (Wis. 1966).

The Wisconsin Supreme Court focused on whether a true conflict existed between the federal law, which might have exempted baseball from antitrust liability, and the Wisconsin state law, which might have found an antitrust violation. Although Congress was silent on the issue of antitrust liability for baseball, the silence was not considered a policy of allowing state regulation of the issue, but instead was an indication that baseball was not to be subject to the same antitrust liability as other industries. The court determined that application of federal antitrust law to baseball was inappropriate until such time that Congress decided to change the laws to require baseball to be subject to antitrust scrutiny.

The court held that applying state antitrust law to this situation would be in direct conflict with the federal law. Therefore, the court held that the defendants did not violate state antitrust law, and the original judgment was reversed. However, the court did suggest that changes be made by Congress to protect cities that lose franchises from the detrimental effects for which those communities have no other recourse.

X. TAX LAW

The imposition of taxes by federal or state authorities often causes disputes. In the sports world, the focus on taxation is often confined to issues related to the earnings of team owners or players and criticism of the use of taxpayer money to finance sports. The cases that follow show that in Wisconsin there have been a large variety of tax laws related disputes within different aspects of the sports industry.

Several of the cases deal with claims contesting the use of public tax dollars to finance sports facilities. Initially, section 59.79 of the Wisconsin statutes provides the Milwaukee County board with the authority to own or operate a professional baseball team and to even appropriate money to purchase a team.[216] It should not be surprising then that Milwaukee County provided a substantial portion of the public funding for the Milwaukee Brewers baseball stadium, Miller Park.[217] A number of other statutory provisions deal with the operation and funding of sports facilities:

- Section 42.11 provides for the operation and maintenance of the Pettit National Ice Center at the Wisconsin State Fair Park.[218] This

216. WIS. STAT. § 59.79 (2003-04).

217. Public funds were used for approximately sixty-six percent of the financing for Miller Park. National Sports Law Institute, *Appendix 1: Major League Baseball*, SPORTS FACILITY REPORT, Vol. 5, No. 1, Spring/Summer 2004, *at* http://law.marquette.edu/s3/site/images/sports/ MLB.updatechart.51.pdf (last visited May 11, 2005).

218. WIS. STAT. § 42.11 (2003-04).

section allows the State Fair Park Board to enter into a lease with a nonprofit organization to maintain and operate the Ice Center. Rents received under the lease are credited to the Park's appropriation for operational expenses.

- Sections 229.64 through 229.834 provide for the creation of a Professional Baseball Park District (now the Southeast Wisconsin Professional Baseball Park District) and provides that the provision of public funds to support the district serve "a statewide public purpose by assisting the development of a professional baseball park in the state for providing recreation, by encouraging economic development and tourism, by reducing unemployment and by bringing needed capital into the state for the benefit and welfare of people throughout the state."[219] This provision led to the public financing provided for the construction of Miller Park, the home of Major League Baseball's Milwaukee Brewers Baseball Club. In addition, section 77.705 provides the Baseball Park District with the power to impose a sales and use tax "at a rate of no more than 0.1% of the gross receipts or sales price."[220]

- Sections 299.820 through 229.834 provide for the creation of a Professional Football Stadium District (now the Green Bay/Brown County Professional Football Stadium District) and provides that the provision of public funds to support the district serve "a statewide public purpose by assisting the development of professional football stadium facilities in the state for providing recreation, by encouraging economic development and tourism, by reducing unemployment and by bringing needed capital into the state for the benefit and welfare of people throughout the state."[221] The provision lead to the public financing provided for the renovation of Lambeau Field, the home of the National Football League's Green Bay Packers.

- Sections 232.02 through 232.09 created the Bradley Center Sports and Entertainment Corporation which operates the Bradley Center, the home of the National Basketball Association's Milwaukee Bucks. These statutes delineate the duties of the Bradley Center's board of directors and the corporation's tax-exempt status.[222]

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219. WIS. STAT. § 229.64 (2003-04).

220. WIS. STAT. § 77.705 (2003-04).

221. WIS. STAT. § 229.820 (2003-04).

222. WIS. STAT. § 232.03 & § 232.05 (2003-04).

- Section 66.0923 of Wisconsin's general municipality law allows counties and cities to construct and maintain an auditorium by borrowing money, appropriating funds, and levying taxes.[223] The definition of an auditorium includes "facilities for sports."[224]

Taxpayer supported funding of sports facilities, as provided for in some of these statutes, is still very controversial nationwide.[225] Although the taxpayers of the State of Wisconsin have recently committed approximately $381 million toward the construction costs for the renovated Lambeau Field, and the newly built Miller Park,[226] indications are that the state's third major professional sports team, the Milwaukee Bucks, may also seek taxpayer support for a new or renovated facility.[227]

The cases that follow deal with sports facility funding issues and many other issues concerning tax law and its impact on various aspects of the sports industry.

State ex rel. Thomson v. Giessel[228]

The respondent, E.C. Giessel, the director of the department of budget and accounts for the State of Wisconsin, disputed the use of state funds for the construction of Camp Randall Memorial Arena in Madison, Wisconsin. He claimed that the use of state funds to construct the facility would violate the state constitution because, if the state lent its credit toward the completion of the building, it would result in a state debt greater than $100,000. The state countered by arguing that the financing of the arena would be through rental payments of $400 per month for fifty years. The state also contended that its

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223. WIS. STAT. § 66.0923 (2003-04).

224. *Id.*

225. Related to the taxpayer funding issue, another Wisconsin statute provides that public officials cannot accept "any discount on the price of admission or parking charged to members of the general public, including any discount on the use of a sky box or private luxury box, at a stadium that is exempt from general property taxes." WIS. STAT. § 19.451 (2003-04). In addition, section 100.173 provides that any promoter of an entertainment or sports event must allow for ticket refunds under certain conditions. WIS. STAT. § 100.173 (2003-04).

For further information on funding of sport facilities see, Vol. 10, No. 1 of the *Marquette Sports Law Journal*, which is a symposium issue devoted to "Sports Facilities and Development."

226. This amount includes, $169 million for the renovation of Lambeau Field and $212 million for the construction of Miller Park. National Sports Law Institute, *Appendix 1: Major League Baseball*, *supra* note 213; National Sports Law Institute, *Appendix 3: National Football League*, Vol. 5, Number 1, Spring/Summer 2004, *at* http://law.marquette.edu/s3/site/images/sports/NFLupdatechart.51.pdf (last visited May 11, 2005).

227. Don Walker, *Bradley Center Upgrade Has Kohl Support, If Not His Money*, MILWAUKEE J. SENTINEL, Sept. 17, 2002, at 1A.

228. 72 N.W.2d 577 (Wis. 1955).

credit would not be lent since it was not required to pay back the loan.

The Wisconsin Supreme Court held that the state did not violate the constitution in its efforts to build a new indoor-athletic-practice facility. The court held that when the state employs someone to perform a service, as was done here in the state's contracting for the construction of Camp Randall; the state's credit is not loaned. Instead, the state becomes liable to the other party. Since the rent payments are subject to available appropriations, the state was not legally required to pay rent at all. Also, the court held that the state's future rental payments did not create a debt. Therefore, the court ordered Giessel to approve the payment plan for construction of Camp Randall.

Telemark Co. v. Department of Taxation[229]

The plaintiff, Telemark Company, was the owner and operator of a ski hill. The ski hill consisted of ten slopes, each of which could be accessed either with the assistance of T-bar lifts and rope tows or by simply climbing the hill. Telemark charged a fee for use of the lifts and rope tows. Although skiers were not required to purchase daily T-bar or rope tow tickets in order to use the slopes for skiing, most did because of the difficulty in getting up the slopes without the aid of the mechanical devices.

The defendant, the Wisconsin Department of Taxation, sought to recover what it believed to be unpaid taxes from the sale of lift and rope tow tickets. Telemark argued that the lifts were simply transportation devices and were therefore exempt from taxation (transportation devices are not subject to taxation in the State of Wisconsin). The department characterized the lifts as being part of the larger facility of the ski hill, and not simply as transportation devices, which would have subjected them to taxation under the statute. After Telemark refused to pay the contested taxes, the Department sued. The trial court found for the department, noting that "[s]ki tows are certainly built and constructed to perform the particular function of pulling people on skis from the bottom of a hill to its top and thus facilitate the enjoyment of skiing."[230] Telemark appealed.

The Wisconsin Supreme Court affirmed, holding that the term "facility" could not be restricted only to Telemark's ski slopes, but must also included the ski tows. The court determined that the lifts and tows were in fact taxable.

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229. 137 N.W.2d 407 (Wis. 1965).

230. *Id.* at 409.

City of Racine v. Wisconsin Department of Revenue[231]

The plaintiff, the City of Racine, disputed the Department of Revenue's imposition of a tax on the gross portion of fees that the city charged teams and individuals to take part in city sponsored athletic activities. The city sued the Department of Revenue contending that the tax should only be imposed on the portion of fees applied to the actual use of physical facilities, not the overall amount collected. The city argued that it should be able to deduct its administrative expenses from the fees and only pay taxes on the net amount. The Wisconsin Tax Appeals Commission upheld the Wisconsin Department of Revenue's assessment of the tax deficiency against the city. The City of Racine appealed.

The Wisconsin Court of Appeals affirmed the Tax Commission's ruling, noting that "to allow an operator of a recreational or athletic facility to subtract its expenses would make the sales tax a tax on profits rather than on gross receipts"[232] and would go against the statute.

Wisconsin Department of Revenue v. Milwaukee Brewers Baseball Club[233]

The plaintiff, the Wisconsin Department of Revenue, claimed that the Milwaukee Brewers baseball team owed a use tax for promotional items and tickets it had purchased from out of state vendors. The Brewers argued that because the items purchased were to be distributed as promotional items, and the ticket prices were included in the cost of admission, they would be subject to double taxation if the items were also subject to a use tax on top of the sales tax already included in the admission price. The Tax Appeals Commission held that the promotional items and tickets could not also be subject to a use tax. The department appealed. The trial court affirmed with respect to the tickets but reversed as to the promotional items. The department again appealed. The Wisconsin Court of Appeals held that the promotional items and the tickets should be subject to a use tax.

The Brewers appealed to the Wisconsin Supreme Court, which affirmed the court of appeals' decision in its entirety. The court held that because the items and tickets were not for resale, according to the statute they should be subject to a use tax.[234] The sales tax applied to the admission into the event and not the physical ticket. The statute also precluded the Brewers from allocating any part of the admission price to either the tickets or the

231. 340 N.W.2d 741 (Wis. Ct. App. 1983).

232. *Id.* at 742.

233. 331 N.W.2d 383 (Wis. 1983).

234. *Id.* at 384 (citing WIS. STAT. § 77.51(4) (1975-76)).

promotional items. Therefore, the items and tickets could not constitute a resale and were subject to the use tax. According to the court, the sales tax is on the sale of an admission, unaffected by the accompanying promotional item, while the use tax is on the acquisition of the promotional items themselves.

Selig v. United States[235]

The plaintiff, Allan H. "Bud" Selig, owner of the Milwaukee Brewers, sought a refund for taxes he had paid on the purchase of the Milwaukee Brewers Baseball Club in 1970. Selig paid $10.8 million for the team, with $10.2 million allocated to player salaries, $100,000 to equipment and supplies, and $500,000 to the purchase of the franchise, including league membership. In 1979, the Internal Revenue Service (IRS) disallowed the entire $10.2 million allocation, attributed zero value to the player contracts, and made adjustments in Selig's tax liability for 1967, 1968, and 1970 through 1976. On December 27, 1979, Selig received deficiency notices totaling approximately $141,000. Selig paid the deficiencies plus interest and applied for a refund in 1980. In March 1981, the refunds were disallowed and Selig sued the IRS.

The district court determined that Selig's allocation of the franchise costs was accurate. The government appealed, arguing that the $10.2 million allocation to player contracts was incorrect. The government contended that most of the purchase price should be allocated to the league franchise, as opposed to player contracts because without a league to play in the team is worthless.

The Seventh Circuit Court of Appeals affirmed the district court's ruling, holding that Selig's allocations were not clearly erroneous. In its opinion, the district court had broad discretion on issues of credibility and in assessing the weight of the evidence. The appellate court determined that the allocation of the players' salaries was accurately based on the value of their contracts in the "club" market, as opposed to the player market or free agent market because Selig bought an entire team, not individual players. As a result, the court held that the district court's decision to grant more weight to Selig's figures was within its discretion. The court of appeals affirmed the district court's award to Selig of $151,608.78 in tax refunds.

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235. 740 F.2d 572 (7th Cir. 1984).

Senior Golf Ass'n of Wisconsin v. Wisconsin Department of Revenue[236]

The plaintiff, the Senior Golf Association of Wisconsin, is a nonprofit corporation designed to organize golf outings for its members. Members pay a fee to the association to participate in events. This fee is in turn used to pay for the association's administrative costs.

The Wisconsin Department of Revenue attempted to impose a sales tax on the association's initiation and dues payments, contending that the state could impose a tax on the sale of access to athletic or recreational facilities. The association refused to pay the tax, arguing that its members purchased access to the facilities through the charges for individual outings, not through their dues and initiation fees. The department responded by arguing that the initiation and dues payments were also access charges and were therefore taxable because nonmembers were excluded from the outings. The Tax Appeals Commission found for the department, and the circuit court affirmed. The association appealed.

The Wisconsin Court of Appeals affirmed, finding that the initiation fees and dues payments were taxable under the statute because members of the association must pay these charges to gain access to the golf courses.

Trustees of Indiana University v. Town of Rhine[237]

The Trustees of Indiana University have owned Camp Brosius, located in Rhine, Wisconsin, since 1921. The trustees leased the property to the Indiana University Alumni Association. In the place of rent, the association agreed to pay for up-keep and maintenance of the property. The camp was only used during the summer months. Every year, the physical education department of Indiana University conducts a mandatory three-week course at the camp that all students in the major are required to take. During the rest of the summer, the alumni association operates the camp as a family vacation spot for its members. The trustees paid no property taxes to Rhine until 1988, when the camp was placed on the town's tax rolls. The trustees paid taxes in excess of $43,000 for 1988 and 1989. The trustees then sought a declaratory judgment that the camp was tax-exempt and a return of the taxes paid. The trial court agreed with the trustees and ordered a refund of the taxes paid. The town appealed.

The Wisconsin Court of Appeals affirmed, finding the camp exempt from property taxes. Under section 70.11(3)(a) of the Wisconsin statutes, "grounds

236. No. 84-1092, 1985 Wisc. App. LEXIS 3862 (Nov. 5, 1985).

237. 488 N.W.2d 128 (Wis. Ct. App. 1992).

of any incorporated college or university, not exceeding 80 acres" are exempt from property taxes.[238] The town argued that the camp was not university ground because it was not located next to the university. The court found that the camp was part of the university grounds because the tax exemption stems from the use of the land, which was educational, and not its location.

The town argued that the tax exemption was destroyed when the trustees leased the camp property to the alumni association. The court found that the alumni association paid for maintenance of the camp property as its lease payments, and it would be exempt from property taxation in Wisconsin because it is "a nonprofit organization substantially and primarily devoted to educational purposes."[239] Therefore, the camp was exempt from property taxes, and the Town of Rhine had to refund the trustees the taxes previously paid.

City of Franklin v. Crystal Ridge[240]

The City of Franklin attempted to levy $8,150.24 in improvement-related property taxes against Midwest Development Corporation and Crystal Ridge, Inc. for the construction and use of a ski hill located in Franklin. Midwest, the company that had constructed the ski hill, disputed the tax claiming that it was exempt from any taxes because it had leased the land from Milwaukee County. The city sued to compel Midwest to pay taxes on the ski hill. The circuit court dismissed the complaint, holding that the county was the beneficial owner and the property was exempt from taxation.

The city appealed, and the Wisconsin Court of Appeals reversed. The court relied on a clause in the contract entered into between Midwest and the county requiring Midwest to pay all licenses, fees, and taxes levied by the proper authorities. The court held that by signing this clause, Midwest had waived its exemption, and thus, as a third party beneficiary, the City of Franklin could enforce this contractual provision and require Midwest to pay the disputed property taxes. Midwest appealed.

The Wisconsin Supreme Court reversed the court of appeals' decision. Rather than examining specific contractual provisions, the key issue on appeal was whether the county was the beneficial owner of the ski hill. If Midwest were found to be the beneficial owner of the property, it would be required to pay property taxes. However, if the county were found to be the beneficial owner of the property, Midwest would be exempt from property taxes unless

238. WIS. STAT. § 70.11(3)(1) (1991-92).

239. *Id.*

240. 509 N.W.2d 730 (Wis. 1994).

the lease agreement required Midwest to pay the taxes despite the tax-exempt status of the property.

After conducting a balancing test of ownership attributes between the county and Midwest, the court noted that both parties showed some indicia of ownership. However, the court concluded that the county exercised more control over the ski hill because the county made decisions regarding the activities, fees, restaurant menus, and hours of operation of the ski chalet, and the county collected the majority of the profits from the ski facility. In addition, financial institutions did not recognize Midwest as the owner of the facility. Based upon this analysis, the court concluded that the county was the beneficial owner of the ski facility, and that nothing in the lease agreement indicated that Midwest had voluntarily waived its tax-exempt status. Thus, the court held that Midwest was exempt from the property taxes.

Kickers of Wisconsin v. City of Milwaukee[241]

The plaintiffs, the Milwaukee Kickers soccer club, a youth soccer organization, sued the City of Milwaukee after being assessed over $56,000 in property taxes in 1992. The Kickers owned a fifty-acre piece of property in the City of Milwaukee. The organization sought a tax exemption under section 70.11(4) of the Wisconsin statutes for ten acres of this property, which it claimed was used exclusively for educational purposes. The Kickers filed a motion for partial summary judgment, claiming to be the beneficial owners of the ten acres at issue. The trial court initially granted this motion, but after cross-motions for summary judgment, the court concluded that the Kickers were not entitled to the exemption. The Kickers appealed.

The Wisconsin Court of Appeals noted that in order to qualify for a tax exemption, the Kickers needed to prove that it was an educational association, that it owned and used the property exclusively for the purposes of the association, that the property was less than ten acres, that it was necessary for convenience and location of buildings, and that it was not used for profit. The Kickers contended that its purpose was to teach children to play soccer and conduct training programs for referees and coaches, so that it qualified as an educational association. Finding that the Kickers programs were not primarily educational, the court concluded that the Kickers's primary purpose was recreational. Therefore, the court held that the Kickers were not exempt from the property tax, and the team was ordered to pay the full $56,000.

241. 541 N.W.2d 193 (Wis. Ct. App. 1995).

Libertarian Party of Wisconsin v. State of Wisconsin.[242]

In 1995, the Wisconsin legislature passed the Stadium Act, 1995 Wis. Act 56, to create a new ballpark district for Milwaukee County. The district's purpose was to construct and operate a new baseball stadium for the Milwaukee Brewers. Following the passage of the Stadium Act and the creation of the ballpark district, sales taxes were raised by 0.1% in Milwaukee, Ozaukee, Racine, Washington, and Waukesha counties. The plaintiff, the Libertarian Party of Wisconsin, sued claiming that the Stadium Act, as a special or private tax law, both permitted the contracting of state debt without a public purpose, and pledged state credit in violation of the Wisconsin Constitution. The Libertarian Party also alleged that the Act violated both the internal improvements clause and the municipal debt limitations of the Wisconsin Constitution. Responding to a petition from the governor of the State of Wisconsin the supreme court accepted original jurisdiction in the case.

In its decision, the Wisconsin Supreme Court held that the Act was not a special or private tax. The court clarified that the Act's purpose was to create a baseball park district distinguished from the game of baseball itself. The court found that this was a valid public purpose. The court also agreed that the state constitution prohibits the use of the state's credit for private persons, but says nothing about grants of cash or subsidies in connection with a valid public purpose, as was done with the Stadium Act. Therefore, the court concluded that the Stadium Act did not violate the state constitution.

Summary of Taxation

The cases in the Wisconsin courts that have focused on tax law related issues impacting sports cannot be summarized in any useful manner because they deal with such diverse issues. Overall, it is clear that sport participants, be they taxpayers, team owners, or event organizers, will continue to contest the impact that the state's tax laws have on their sports participation.

XI. INTELLECTUAL PROPERTY LAW

Sports related intellectual property rights such as trademarks, tradenames, service marks, and copyrights generate billions of dollars annually for sports entities. These revenues come from many sources such as broadcasting rights for sporting events, licensed trademarks and logos, league, team and event sponsorship deals, merchandise, and other sources.

Chapter 132 of the Wisconsin statutes provides regulations for trademarks,

242. 546 N.W.2d 424 (Wis. 1996).

badges, and labeled products in Wisconsin. Section 132.01 provides for the registration of trademarks, while section 132.02 bars reproduction and duplication of registered marks.[243] Section 132.033 provides that an individual or entity "adopting or using a mark may proceed by suit to enjoin the manufacture, use, display or sale of any counterfeit mark identical to or substantially identical to that mark."[244]

The following Wisconsin cases discuss claims of infringement of sports trademarks and tradenames, copyright infringement and unfair competition, and trade secrets.

Boston Professional Hockey Ass'n v. Reliable Knitting Works, Inc.[245]

The plaintiff, the Boston Professional Hockey Association (BPHA), owners of the Boston Bruins National Hockey League franchise, sued Reliable Knitting Works, Inc., a Wisconsin corporation, for copyright infringement of its registered service marks, the "Boston Bruins" and "B" logos. The BPHA sought separate preliminary injunctions to prevent the company from manufacturing and selling products bearing the Boston Bruins name and logo. The defendant was selling knit caps bearing emblems consisting of the "B" device with the word "Bruins" beneath the device.

The court for the Eastern District of Wisconsin granted the plaintiff's request for a preliminary injunction barring Reliable from selling products bearing the Bruins name and logo, because defendant's sale of the knit caps was a use of a reproduction of plaintiff's registered marks without consent. However, the court denied another preliminary injunction request that would have barred the defendant from selling a black and gold (the Bruins' team colors) cap with the design of a hockey player over the word "Boston," on the grounds that no valid copyrights were involved in the design. According to the court, "[a] word which is primarily geographically descriptive, as the word 'Boston' is, is not a trademark unless it has attained secondary meaning, which has not yet been shown in this case."[246] Therefore, Reliable was preliminarily enjoined from producing and selling caps with the "B" or "Boston Bruins" logo until a trial on the merits.

243. WIS. STAT. §§ 132.01 & 132.02 (2003-04)

244. WIS. STAT. § 132.033 (2003-04).

245. No. 72-C-306, 1973 U.S. Dist. LEXIS 13858 (E.D. Wis. Apr. 27, 1973).

246. *Id.* at *15.

Hirsch v. S.C. Johnson & Son, Inc.[247]

Elroy Hirsch was a famous football player at the University of Wisconsin and for the Chicago Rockets and Los Angeles Rams. He was nicknamed "Crazylegs" because of his unorthodox running style. After S.C. Johnson & Son, Inc. used "Crazylegs" to market its shaving gel for women, Hirsch brought an action alleging misappropriation of a person's name for commercial use and trademark or tradename infringement. The circuit court granted the defendant's motion to dismiss, concluding that "a cause of action does not exist in Wisconsin for the unauthorized use of a person's name for the purpose of trade"[248] and that Hirsch did not provide proof of prior use of the name "Crazylegs" to identify goods or services.

The Wisconsin Supreme Court reversed and remanded the case. The court concluded that a common law cause of action for the unauthorized commercial use of a person's name does exist in Wisconsin. The defendants argued that the cause of action was similar to a right of privacy, which had been rejected by the Wisconsin courts at the time of this action. The court concluded that the two interests were different because "[t]he interest to be protected here deals primarily with the individual's 'right of publicity' and not the right to be let alone in the classical sense of privacy . . . [T]he tort represents the protection of a property interest."[249] Finding that the evidence at trial presented a prima facie case of misappropriation of Hirsh's nickname for commercial purposes, the court remanded the case to determine whether "Crazylegs" identified Hirsch.

The court also concluded that a prima facie case existed for tradename infringement. Evidence was presented at trial that "Crazylegs" designated Hirsch as a sports figure and that there was a likelihood of confusion when the defendant used "Crazylegs" to market its product. It was not necessary, as the trial court found, for Hirsch to prove that he had previously used "Crazylegs" to identify products and services. Therefore, the court also reversed the case for further findings of fact.

Spheeris Sporting Goods, Inc. v. Spheeris on Capitol[250]

Spheeris Merchandise Corporation operated a sporting goods store in Milwaukee. Andrew Spheeris and Paul Spheeris owned all of the stock in the corporation. In 1979, Lawrence Hankin acquired the assets of Spheeris and

247. 280 N.W.2d (Wis. 1979).

248. *Id.* at 132.

249. *Id.* at 133.

250. 459 N.W.2d 581 (Wis. Ct. App. 1990).

leased the building where the store was located for five years, keeping the previous name of the store, "Spheeris Sporting Goods." In 1989, Hankin and the Spheeris brothers were unable to negotiate a lease agreement, so Hankin relocated the store. The Spheeris brothers, who still owned all of the stock in Spheeris Merchandise, planned to reopen the store and sought to call it "Spheeris on Capitol." Hankin sued to prevent Spheeris Merchandise from using Spheeris in the name, alleging tradename infringement. The circuit court granted Hankin a preliminary injunction, but stated that Spheeris Merchandise could utilize the names "Spheeris Brothers" or "Spheeris Merchandise." Hankin appealed, challenging the scope of the preliminary injunction.

The Wisconsin Court of Appeals remanded the case for a determination of whether "Spheeris" had acquired secondary meaning. The court explained that when "a trade name has acquired a secondary meaning, the name is entitled to protection from unfair competition based on trademark infringement."[251] In order to prove secondary meaning, a plaintiff must prove that the name is identifiable with a product within a relevant market. Therefore, the case was remanded for determination of the facts concerning secondary meaning.

Foamation, Inc. v. Wedeward Enterprises, Inc.[252]

The plaintiff, Foamation Inc., sued Wedeward Enterprises, Scofield Souvenir, and several other companies alleging copyright and trademark infringement and unfair competition. Foamation developed and marketed "cheesehead" novelty hats, "a wearable sculpture in the form of a cheese wedge molded from polyurethane foam,"[253] and alleged that Scofield and several other defendants had violated copyright, trademark, and unfair competition laws by creating rival products. Scofield, developed and sold its own line of "cheesehead" hats called "Cheese Tops," and filed a counterclaim accusing Foamation of unfair competition practices for allegedly contacting a number of Scofield's customers and informing them of the company's copyright infringement. According to Scofield, these contacts caused it a tremendous loss of sales on their version of the hats.

In a previous proceeding, Scofield was granted a preliminary injunction against Foamation that barred Foamation from contacting Scofield's customers. At issue in this case was Scofield's motion for summary judgment and dismissal of Foamation's claim of copyright infringement based upon its

251. *Id.* at 587.

252. 970 F. Supp. 676 (E.D. Wis. 1997).

253. *Id.* at 678.

contention that Foamation's "cheesehead" hat was originally published without proper copyright notice.

The United States District Court for the Eastern District of Wisconsin granted Scofield's request for summary judgment and dismissed Foamation's claims. As to Foamation's claim for federal copyright infringement, the court found that Foamation held no valid copyright on its version of the "cheesehead" hats prior to 1996. The court viewed evidence that established that Foamation had never applied for a copyright on the hats until 1996, that any printing of a copyright on its products prior to that time was ineligible for protection, and that a substantial number of the hats were sold without any valid copyright. Under federal copyright law as it existed prior to 1989, "publication of a work without proper copyright notice dedicated the work to the public domain."[254] Thus, the court granted Scofield's motion for summary judgment on Foamation's copyright claim.

Foamation's claim for unfair competition was based upon the contention that its "cheesehead" hat was entitled to trade dress protection. According to the court, trade dress is the form in which a producer presents his brand to the market; it may include a label, a package, or even the product itself if its characteristics do not serve a functional purpose, but instead signify its source. Trade dress encompasses the total image or overall impression created by the product or its packaging.[255] Noting that under federal unfair competition law, trade dress is only protected if it is either inherently distinctive or has acquired distinctiveness through secondary meaning, the court found that Foamation's "cheesehead" hats lacked both of these characteristics. The court granted Scofield's motion for summary judgment on the federal unfair competition claim as well. Similarly, because state and federal trademark infringement claims require the same analysis, Foamation's claim for state trademark infringement was also dismissed.

NFL Properties v. Prostyle, Inc[256]

The plaintiffs, the Green Bay Packers and National Football League Properties, sued the defendants, Prostyle, Inc. and Sheri Tanner, for selling unauthorized Green Bay Packers memorabilia. The plaintiffs alleged unfair competition, trademark infringement, dilution, deceptive advertising, and misappropriation of trade secrets. They sought a temporary restraining order and permanent injunctions barring the defendants from further unauthorized

254. *Id.* at 682.

255. *Id.* at 685.

256. 57 F. Supp. 2d 665 (E.D. Wis. 1999)

use of the marks.

The defendants filed a motion to exclude the testimony of one of the plaintiffs' expert witnesses. The expert had prepared a survey that attempted to prove dilution under federal unfair competition laws. The survey was flawed in several respects, leading the court to find that the expert's testimony was neither relevant nor reliable. Thus, the district court barred the expert witness from testifying at trial without deciding the case on its merits.

Regent Insurance Co. v. Tanner[257]

The plaintiff, Regent Insurance Company, insurance provider to Prostyle Inc., sought a declaratory judgment to establish that a policy it entered into with the defendant, Sheri Tanner, owner of Prostyle Inc., provided no coverage for acts of intentional misappropriation of trade secrets. Tanner admitted to knowingly infringing trademarks owned by National Football League Properties and the Green Bay Packers Football Club. However, she claimed that her actions were covered by her policy with Regent Insurance Company. The circuit court granted Regent's motion for summary judgment, holding that the case was really an action for misappropriation of trade secrets falling outside any property damage or advertising injury as defined in the policy, and that Regent had no duty to defend itself against this claim. Tanner appealed, contending that the claim for misappropriation of trade secrets was covered under the advertising injury liability coverage in the policy.

The Wisconsin Court of Appeals concluded that even if the agreement encompassed misappropriation of trade secrets, the coverage was precluded by the policy exclusion for advertising injuries that "ar[ose] out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity."[258] The court held that because the "policy unambiguously preclude[d] coverage for intentional conduct[,]"[259] and Tanner acted willfully, maliciously, and deliberately, when she infringed on the trademarks of the NFLP and the Packers, coverage was properly denied.

XII. DRUG TESTING IN SPORTS

In recent years concerns over drug use in sports have pervaded the media. Drug use by athletes from the collegiate to professional levels has also been heavily scrutinized. At the high school level recent Supreme Court cases have allowed for drug testing of athletes and any students involved in

257. No. 98-2124, 1999 Wisc. App. LEXIS 1299 (Wis. Ct. App. Dec. 7, 1999).

258. *Id.* at *3

259. *Id.* at *6.

extracurricular activities.[260] Currently, the United States Congress has called the major leagues before it to review its drug testing policies.[261]

Chapter 961 of the Wisconsin statutes provides the state's Uniform Controlled Substances Act. Of particular importance, sections 961.395 through 961.495 define offenses and provide for penalties under the Act.[262] Section 961.396(1m) provides ways in which law enforcement can report occurrences of drug use by students to school administrators.[263] Section 118.127 then provides regulations for a school's use of and access to these records, including how this information can be used in connection to a school athletic code.[264] Finally, section 118.257 provides for immunity to school officials who refer a student to law enforcement authorities, or remove them from school or from participation in a school-sponsored activity, due to their possession or use of prohibited drugs.[265]

Even given this regulatory scheme, there have been no drug testing cases involving sports participants in Wisconsin.

XIII. REGULATION OF BOXING

The sport of boxing has a long history often made up of scandals and injuries. Several states set out their own regulations of the sport and Wisconsin is no exception.

Chapter 444 of the Wisconsin statutes provides extensive regulations for the sport of boxing in the state of Wisconsin. Among the many provisions within this chapter, section 444.01 defines amateur boxing contests as those where none of the boxers are compensated for participating.[266] The national governing body for boxing, USA Boxing, must sanction amateur contests.[267]

Professional boxing contests are those where the participants are compensated.[268] Professional contests are subject to several regulations including that they will not exceed ten rounds, or fifteen rounds for a

260. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (drug testing of high school athletes); Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County, v. Earls, 536 U.S. 822 (2002) (drug testing of students participating in extracurricular activities).

261. *See for example*, *Sports Give Drug-Testing Policies to Congress*, ASSOC. PRESS, Apr. 13, 2005, *at* http://abcnews.go.com/Sports/ESPNSports/story?id=666103 (last visited May 11, 2005).

262. WIS. STAT. §§ 961.395 - 961.495 (2003-04).

263. WIS. STAT. § 961.396 (1m) (2003-04).

264. WIS. STAT. § 118.127(2) (2003-04).

265. WIS. STAT. § 118.257 (2003-04).

266. WIS. STAT. § 444.01(1) (2003-04).

267. WIS. STAT. § 444.05 (2003-04).

268. WIS. STAT. § 444.01(2).

championship game, and that no person under the age of eighteen is allowed to participate.[269]

Sections 444.02 and 444.03 provide that the Department of Regulation and Licensing has the complete authority to grant licenses for any boxing contests in the state and that only licensed fights will be allowed to take place.[270] Sections 444.13 and 444.14 deal with sham contests. Clubs will lose their licenses if they conduct or hold sham or fake professional boxing contests.[271] Participants in sham contests can be subject to several penalties including barring them from boxing.[272] In addition, violations of any part of the entire chapter will be considered a misdemeanor.[273]

The following cases do not deal with Chapter 444; instead they deal with specific issues that developed as a result of boxing matches in Wisconsin.

Parmentier v. McGinnis[274]

During the rest period between the fifth and sixth rounds of a boxing match, John Parmentier fell unconscious and later died. His estate sued his opponent, the match's promoter, the referee, and two spectators who attended the match, alleging that John's death was the proximate result of his participation in the boxing match. Parmentier's estate argued that the boxing match was a prizefight, a characterization that would have made his opponent liable for damages under Wisconsin law. The jury returned a verdict finding the match to be an exhibition, not a prizefight. As such, all defendants were absolved from liability. Parmentier's estate appealed, arguing that the jury was affected by passion or prejudice and did not fairly decide the case.

The Wisconsin Supreme Court concluded that the jury was not necessarily influenced by passion or prejudice. The court found that enough evidence existed to support the jury's conclusion. Whether the match was an exhibition or a prizefight was a question of fact for the jury to determine and the court would not to interfere with that determination. Thus, the court affirmed the decision and dismissed the appeal.

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269. WIS. STAT. § 444.09 (2003-04).

270. WIS. STAT. §§ 444.02 & 444.03 (2003-04). More information on the Department of Regulation and Licensing, including the Amateur and Professional Wisconsin Code Book, can be found on its webpage http://drl.wi.gov/boards/rbx/code/codebook.htm.

271. WIS. STAT. § 444.13 (2003-04).

272. WIS. STAT. § 444.14 (2003-04).

273. WIS. STAT. § 444.16 (2003-04).

274. 147 N.W. 1007 (Wis. 1914).

Moha v. Hudson Boxing Club[275]

Bob Moha, a professional boxer, brought an action against Hudson Boxing Club to recover a portion of the gross receipts of a boxing match. Moha entered into a contract with Hudson that stated he would earn twenty-two and a half percent of the gross receipts if he boxed Mike Gibbons for ten rounds. During the second round of the match, Moha struck Gibbons below the belt, and the referee stopped the fight. Moha alleged that the match should count as performance under the contract because it is customary in the boxing profession to consider a match a full contest even when one of the boxers gets knocked out or disabled by an accidental foul in the early rounds. The circuit court held that Moha failed to perform under the contract. Moha appealed.

The Wisconsin Supreme Court affirmed. In order to recover under the contract Moha had to prove he substantially performed his obligations. The contract was for ten rounds of boxing, and the match was stopped in the second round because Moha broke the rules by throwing an illegal punch; therefore, he did not substantially perform and could not recover under the contract.[276]

State ex rel. Durando v. State Athletic Commission[277]

The plaintiff, Ernie Armando Durando, fought an opponent in a boxing match licensed by the State Athletic Commission of Wisconsin. During the fourth round of the fight, Durando knocked his opponent down. Subsequently, the opponent was given an eight count and was able to get up. Shortly thereafter, without being hit, Durando's opponent again fell, at which time the referee began another eight count. Again, Durando's opponent was able to get back on his feet without assistance. Later in the fight, Durando himself was knocked out.

After losing the fight, Durando filed a complaint with the State Athletic Commission of Wisconsin, claiming that, but for the referee's miscount, he would have won the fight. The commission dismissed the complaint, noting that it lacked jurisdiction unless he could make a showing of fraud on the part of the referee. Durando appealed to the circuit court. He cited a state boxing rule (Rule 121) that stated that after a boxer is knocked down, if he stands back up before the count of "eight," but subsequently falls back down without being hit, the count should resume at the point where the boxer had previously

275. 160 N.W. 266 (Wis. 1916).

276. The contract issue in this case also discussed *supra* pg. 495.

277. 75 N.W.2d 451 (Wis. 1956).

regained his footing, not back at "one." The court reviewed the order of the commission and remanded the proceedings to the commission with directions to determine whether the referee had violated Rule 121. The commission appealed this decision.

The Wisconsin Supreme Court reversed, noting that while the commission may indeed have adopted Rule 121, no rule promulgated by the commission gave it any express authority to reverse a decision of the referee in a boxing exhibition. Based upon this finding, the court determined that the commission had interpreted its rules to mean that an error by the referee in the application of Rule 121 may not be reversed in the absence of a showing of fraud on the part of the referee. The court recognized that this type of interpretation of its own rules should be accorded great weight unless the commission's interpretation is found to be erroneous or inconsistent with the regulations. The court held that the commission's conclusion that it did not possess the authority to reverse a referee's decision in the absence of a showing of fraud was not plainly erroneous or inconsistent with its regulations; therefore, the commission did not err in dismissing Durando's complaint.

XIV. REGULATION OF GAMBLING

Chapter 945 of the Wisconsin Criminal Code regulates gambling. Section 945.02 provides that "individuals who engage in gambling activities in violation of the provisions in the chapter will be guilty of a Class B misdemeanor."[278]

Of particular importance to those who gamble on sporting events, section 945.01 defines "bookmaking" as "receiving, recording or forwarding of a bet or offer to bet on any contest of skill, speed, strength or endurance of persons or animals."[279] Section 945.06 relates to gambling done by participants in a contest, "[a]ny participant in, or any owner, employer, coach or trainer of a participant in, any contest of skill, speed, strength or endurance of persons, machines or animals at which admission is charged, who makes a bet upon any opponent in such contest is guilty of a Class A misdemeanor."[280] Gambling on a sporting event could be covered under this provision. In addition, section 945.08 criminalizes bribery of participants in a contest as it provides that

> (1) Any person who, with intent to influence any participant to refrain from exerting full skill, speed, strength or endurance, transfers or

278. WIS. STAT. § 945.02 (2003-04).

279. WIS. STAT. § 945.01 (2003-04).

280. WIS. STAT. § 945.07 (2003-04).

> promises any property or any personal advantage to or on behalf of any participant in a contest of skill, speed, strength or endurance is guilty of a Class H felony.
>
> (2) Any participant in any such contest who agrees or offers to refrain from exerting full skill, speed, strength or endurance in return for any property or any personal advantage transferred or promised to the participant or another is guilty of a Class A misdemeanor.[281]

This provision seems particularly appropriate given the many scandals nationally in sports such as boxing.

In addition to this chapter, section 895.055 of the Wisconsin statutes voids any promises, agreements, or contracts, based on consideration for a bet on a race fight or other sporting event.[282] Section 895.056 then provides for certain methods for recovery of money wagered allowing an individual wagerer to sue to recover what they lost on a particular wager under certain conditions.[283]

Chapter 562 of the Wisconsin statutes provides for the Regulation of Racing and On-Track Pari-Mutuel Wagering. Of particular note is section 562.11, which prohibits off track wagering and sales or use of counterfeit wagering tickets,[284] and section 562.12, which prohibits activities such as accepting payment to fix a race or bribing individuals involved with a racetrack in an effort to fix a race.[285]

Although gambling on sports is a serious problem in the United States, only one Wisconsin case has discussed this issue.[286]

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281. WIS. STAT. § 945.07 (2003-04).

282. WIS. STAT. § 895.055 (2003-04).

283. WIS. STAT. § 895.056 (2003-04).

284. WIS. STAT. § 562.11 (2003-04).

285. WIS. STAT. § 562.12 (2003-04).

286. For further information about the gambling problem in sports, see Ante Udovicic, Special Report: *Sports and Gambling a Good Mix? I Wouldn't Bet On It*, 8 MARQ. SPORTS L.J. 401 (1998). Another Wisconsin statute that deals with gambling but does not deal specifically with sports is Chapter 569, which is devoted to Indian Gaming in Wisconsin.

Another area of regulation similar to gambling is the regulation of ticket scalping. Although several states specifically regulate ticket scalping, Wisconsin's only statute applicable to the issue is found in the chapter dealing with the State Fair Park Board. Section 42.07 regulates the sale of tickets involved with state fair park, mandating that these tickets may not be sold "for more than the price printed upon the face of the ticket." WIS. STAT. § 42.07 (2003-04). Beyond this statute, several cities in Wisconsin regulate ticket scalping by local ordinance.

The City of Milwaukee's ticket scalping ordinance was discussed in two recent cases. In *Arlotta v. Bradley Center*, the plaintiff was arrested for violating the city anti-ticket scalping ordinance. 349 F.3d 517 (7th Cir. 2004). After being arrested, he was held in custody for 4 hours. He sued the city for false arrest, illegal confinement and malicious prosecution. He claimed that he was not attempting to scalp any tickets, instead he was waiting for his father. Although the case did not focus on the

State v. George[287]

Defendants, Louis George and Robert Tollefson, were charged with felony commercial gambling for receiving bets on basketball and football games. At trial, twenty-nine of the thirty counts charged against George were dismissed and seven of the ten counts against Tollefson were dismissed on grounds of duplicity, multiplicity, vagueness, and indefiniteness. The state appealed.

The Wisconsin Supreme Court affirmed. The court found that the counts were multiplicitous because they alleged a series of continuous crimes by dividing a single charge into several counts. Additionally, the counts were duplicitous because they joined several transactions in a single offense; therefore, each count was alleging two or more crimes. Since the counts were duplicitous, the defendants were denied their constitutional right to prepare a defense because it was unclear what specific acts they were being charged with and at what specific time the alleged acts took place. Therefore, the court affirmed the dismissal of all but one of the counts against George and all but three of the counts against Tollefson.

XV. REGULATION OF ATHLETE AGENTS

Athlete agents are often the most identified and criticized individuals in sports. Agents are known for getting their athlete clients huge contracts and sponsorship deals and are often blamed for athlete holdouts and contract renogiations. At the college level, agents are often blamed for talking to athletes before their eligibility runs out, causing the athletes to be found ineligible under athletic association rules.[288]

As a result of the perceived problems associated with athlete agents, many states have adopted statutes regulating their conduct. In 2000, the National

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ticket scalping ordinance, the court defined the practice as "the reselling of tickets to popular entertainment or sporting events at 'greatly above the stated rates.' " *Id.* at 518. The Court of Appeals found that the city's policy to enforce the anti-ticket scalping ordinance was valid and upheld the trial court's grant of the defendant's motion for summary judgment.

The same ordinance was discussed in *Chortek v. City of Milwaukee.* 356 F.3d 740 (7th Cir. 2004). In this case, several plaintiffs were held for three to fourteen hours after being arrested for violating the ordinance. They sued, claiming that their arrests were unreasonable in violation of their constitutional rights. The court again found the ordinance, and the police department's actions in arresting individuals in accordance with it to be a valid. The court affirmed the district court's grant of the defendant's motion for summary judgment.

287. 230 N.W.2d 253 (Wis. 1975).

288. For more information on athlete agents, see Edward King, Jr., *Practical Advice for Agents: How to Avoid Being Sued,* 4 MARQ. SPORTS L.J. 89 (1993); Jan Stiglitz, *A Modest Proposal: Agent Deregulation,* 7 MARQ. SPORTS L.J. 149 (1997); George Cohen, *Ethics and the Representation of Professional Athletes,* 4 MARQ. SPORTS L. J. 149 (1993).

Conference of Commissioners on Uniform State Laws developed the Uniform Athlete Agent Act as a model for states to adopt into their statutes to regulate athlete agents.[289] Adopted in 2004, Wisconsin's version of the Act is found in sections 440.979 through 440.99.[290] These statutes set out the process for registration as an athlete agent,[291] fees for registration,[292] notice that must be provided to an educational institution when an agent signs a collegiate athlete,[293] prohibited conduct by agents,[294] and criminal penalties for violations of the statute.[295] Of special note, section 440.994 provides requirements for the form of the contract that an agent can enter into with an athlete.[296] In particular all such contracts must contain the following warning to the student athlete who signs it,

> IF YOU SIGN THIS CONTRACT:
>
> 1) YOU MAY LOSE YOUR ELIGIBILITY TO COMPETE AS A STUDENT ATHLETE IN YOUR SPORT;
>
> 2) IF YOU HAVE AN ATHLETIC DIRECTOR, WITHIN 72 HOURS AFTER ENTERING INTO THIS CONTRACT OR BEFORE THE NEXT SCHEDULED ATHLETIC EVENT IN WHICH YOU MAY PARTICIPATE, WHICHEVER OCCURS FIRST, BOTH YOU AND YOUR ATHLETE AGENT MUST NOTIFY YOUR ATHLETIC DIRECTOR; AND
>
> 3) YOU MAY CANCEL THIS CONTRACT WITHIN 14 DAYS AFTER SIGNING IT. CANCELLATION OF THIS CONTRACT MAY NOT REINSTATE YOUR ELIGIBILITY.[297]

In addition, section 440.995 allows the student athlete to cancel any such contract within fourteen days after it is signed and "the student athlete is not required to pay any consideration under the contract or to return any consideration received from the athlete agent to induce the student athlete to enter into the contract."[298]

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289. National Conference of Commissioners on Uniform State Laws, *Uniform Athlete Agent Act* (2000), *at* http://www.law.upenn.edu/bll/ulc/uaaa/aaa1130.htm (last visited May 11, 2005).

290. WIS. STAT. §§ 440.979 - 440.099 (2003-04).

291. WIS. STAT. §§ 440. 991, 440.992 & 440.9915 (2003-04).

292. WIS. STAT. § 440.9935 (2003-04).

293. WIS. STAT. § 440.9945 (2003-04).

294. WIS. STAT. § 440.996 (2003-04).

295. WIS. STAT. § 440.9965 (2003-04).

296. WIS. STAT. § 440.994 (2003-04).

297. *Id.*

298. WIS. STAT. § 440.995 (2003-2004).

The impact of this statute remains to be seen. As of May 3, 2005, thirty-two states and two territories had adopted some form of the Uniform Athlete Agent Act, while six states have other statutes regulating athlete agents.[299]

In addition, the federal government passed the Sports Agent Responsibility and Trust Act, which is very similar to the uniform act in that it also regulates athlete agent conduct.[300] Violations of this Act are treated as unfair and deceptive trade practices and both states and educational institutions are provided with the right to bring civil charges against athlete agents who violate the Act.[301]

To date, no Wisconsin cases have dealt with the conduct of athlete agents.

XVI. CONCLUSION

This survey can serve as a starting point for sports law practitioners in Wisconsin. As the cases and statutes in this survey demonstrate, Wisconsin courts and the Wisconsin legislature have been heavily involved in the development of the sports industry in the state. The area of tort law has seen the most litigation and statutory regulation in Wisconsin as it has throughout the United States. Presumably these claims, and other claims by sport participants, will continue to proliferate as participation in and attendance at sporting events continue to increase.

299. National Collegiate Athletic Association, *NCAA.org, Uniform Athlete Agents Act (UAAA) History and Status*, *at* http://www1.ncaa.org/membership/enforcement/agents/uaaa/history.html (last visited May 11, 2005).

300. 15 U.S.C. §§ 7801-7807, et. seq. (2005).

301. §§ 7803 & 7804.