FLYING HIGH AND FALLING HARD: HOW THE WISCONSIN SUPREME COURT’S DECISION IN NOFFKE v. BAKKE SHEDS NEW LIGHT ON THE APPLICATION OF A HEIGHTENED NEGLIGENCE STANDARD BETWEEN CO-PARITICIPANTS IN A RECREATIONAL ACTIVITY

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This note examines the Wisconsin supreme court’s recent holding in Noffke v. Bakke. The Noffke court overruled the appellate court’s finding that co-participants engaged in cheerleading were subject to an ordinary negligence standard, finding instead that a statutorily imposed recklessness standard applied. In doing so, the Noffke court raised a number of important and interesting questions concerning the nature and current state of cheerleading – an activity that has evolved tremendously over the past two decades.

The rapid evolution of cheerleading, and the difficulty in characterizing it as an activity or sport, competitive or non-competitive, contact or non-contact, has the potential to place courts evaluating negligence actions between co-participants in a judicial quagmire. The Noffke court applied a rigid test based on the relevant statutory language, however, the court failed to provide a flexible test capable of consistent, equitable application by lower courts. This note examines the rich doctrinal background underlying co-participant liability, and formulates a workable test that is capable of consistent application by Wisconsin courts.

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“Cheerleaders main asset to men is their ability to jiggle”¹

I. INTRODUCTION

¹ Maria Jo Fisher, Cheerleading is not a sport, THE MOM BLOG, June 2, 2008, http://themomblog.freedomblogging.com/author/mfisher/ (noting cheerleaders main asset to men is their ability to “jiggle” and comparing athleticism involved in cheerleading to that of pole-dancing).
“Cheerleading is not a sport.” Some find this succinct statement to be a self-sustaining axiom, impervious to cultural evolution and time itself; but to others this imbedded dogma is beginning to show its age. Disagreement aside, cheerleading has developed considerably from its nascent form into a crucible of athletic competition defined by gymnastic-like routines and a multitude of “flying” exercises that launch participants high into the air. One disturbing result of this trend is the dramatic increase in injuries suffered by cheerleading participants. Between 1982 and 2007 ninety-three

2 Mary Virginia Moore Johnson, Beth A. Easter, Article, Legal Liability for Cheerleading Injuries: Implications for Universities and Coaches, 17 J. LEGAL ASPECTS OF SPORT 213, 215-16 (2007) (discussing definition and history of cheerleading). Cheerleading began in 1898 when Johnny Campbell, a University of Minnesota football fan, stood up from his seat to lead the crowd in verse meant to support their team. See id. Cheerleading continued to grow from these humble beginnings, and by the 1960’s it was prevalent in schools across America. Id.

3 See Fisher, supra note 1 (concluding cheerleading is not sport), see also Howard Wasserman, The significance of defining sport, PRAWFSBLAWG, Dec. 29, 2008, http://prawfsblawg.blogs.com/prawfsblawg/2008/12/the-significance-of-defining-sport.html (discussing what constitutes classification as sport, and concluding cheerleading does not meet this standard). Professor Wasserman proposes a four-pronged test to determine whether an activity is or is not a sport. Id. The test defines ‘sport’ as consisting of four elements: (1) large motor skills, (2) simple machines only, (3) objective scoring or at least the possibility of determining a winner by something other than subjective judging; and (4) competition among contestants. Id. Professor Wasserman concludes that cheerleading satisfies prongs one and two, fails to satisfy prong three, and may or may not satisfy prong four. Id.

4 National Federation of State High School Associations, Index of Recognized Sports: Spirit (Cheerleading), http://www.nfhs.org/web/2006/08/spirit.aspx (recognizing ‘spirit’ as high school sport). The NFHS further provides an index of responsibilities pertaining to coaches and participants, and addresses rule changes necessary due to the greater athleticism inherent in the sport. Id.

5 Rob Stein, Rooting for Safety: Cheerleading is Risky but Ill-regulated, WASH. POST, Sep. 9, 2008, at HE01, http://www.washingtonpost.com/wp-dyn/content/article/2008/09/05/AR2008090503099.html?hpid=smartliving (noting cheerleading has evolved from “prim sideline squads leading fans in the school fight song into glitzy, high-intensity, acrobatic competitive extravaganzas”).

6 Risks of Cheerleading: Two-thirds Of Severe Sports Injuries To Female Students Due To Cheerleading, SCIENCE DAILY, Aug. 12, 2008, http://www.sciencedaily.com/releases/2008/08/080811200423.htm (noting cheerleading accounted for over two-thirds of all catastrophic injuries among female high school athletes). The article further quotes Frederick O. Mueller, Ph.D., professor of exercise and sports science at UNC’s College of Arts and Sciences, as stating the increase in injuries is due to “the change in cheerleading activity…. involv[ing] gymnastic-type stunts”. Id.
incidents resulted in death, head injury or permanent disability. In addition, during the period between 1980 and 2004, the number of cheerleading-related emergency room visits increased from 4,954 to 28,414. All toll, cheerleading now accounts for over two-thirds of all injuries among female high-school athletes. Despite these staggering estimates, there is no system in place to properly report all injuries sustained, thus it remains likely that an even greater number of injuries go unreported. The private physical and emotional burden cheerleaders suffer as a result of injuries sustained during training and competition humanizes an often-stigmatized activity, and has forced the public to reassess pre-conceived notions of the sport. All this has led one expert to conclude “the whole term "cheerleading" is a misnomer. It's not leading the crowd in cheer anymore…. [i]t's competing at a high level of gymnastics with stunts and tricks.”

8 Id. (further discussing statistics released as part of National Center for Catastrophic Sport Injury Research study).

<table>
<thead>
<tr>
<th>Direct Fatalities &amp; Catastrophic Injuries (Women’s High School Sports)</th>
<th>Number of Injuries</th>
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<tr>
<td>Cheerleading</td>
<td>18</td>
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<tr>
<td>Gymnastics</td>
<td>9</td>
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<tr>
<td>Track</td>
<td>3</td>
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<td>Swimming</td>
<td>2</td>
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<td>Volleyball</td>
<td>1</td>
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<td>Total</td>
<td>39</td>
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10 See Stein, supra note 3 (noting there is no system in place to report cheerleading-related injuries, and inferring from this that injuries must be under-reported).
11 See id. (discussing tragic, but not isolated story of Krista Parks). Parks, a 21-year-old junior at the University of Memphis, fractured three vertebrae in her neck after plummeting twenty feet in the air following a flawed throw. Id. Parks concedes she is a casualty of the “dark-side” of cheerleading, and, despite living to tell her story, still suffers from irreparable nerve damage, memory problems, and unrelenting pain in her neck, back and head. Id. The article also cites Frederick O. Mueller, a leading sports injury expert, as stating “people…. think about the girls with the pompoms jumping up and down…. [t]hey don't think about someone being thrown 25 feet in the air and performing [risky] flips with twists”. Id.
In addition to their traditional role cheering on athletic teams, cheerleading squads increasingly square off in competitions that reward high-risk performances. With prize money and scholarship opportunities present, the potential spoils of success have never been higher. Moreover, the advent of sophisticated competition has bred privately funded and trained cheering squads to square off against traditional high-school teams. With the cheering ranks swelling, an activity once seen as effeminate is drawing a considerable number of male participants as well.

A defining element of the typical cheerleading injury is that it is not incurred by the individual acting in isolation. Rather, the main sources of injury are stunts performed by two or more cheerleaders working in tandem. Partner stunts, assisted by two or more cheerleaders, can lead to severe injuries. Dr. Sally Harris, sports medicine and pediatric specialist with Palo Alto Medical Foundation, noted that cheerleading injuries are often indirect, stemming from the lack of recognition of cheerleading as an official school sport.

See Stein, supra note 5 (noting that increasing competition has been pushing teams to attempt more difficult stunts), see also Nicole Weisensee Egan, Is Cheering Safe?, PEOPLE, Jan. 19, 2009, at 74 (noting cheerleading has evolved from an activity “defined by increasingly daring gymnastic moves”). See id (noting that competitions can include monetary rewards), see also College Cheerleading Scholarships, http://www.collegescholarships.org/scholarships/sports/cheerleading.htm (last visited March 11, 2009) (providing list of cheerleading scholarships available at universities). The article provides advice for those seeking a cheering scholarship, providing in part: “Exploring your options for a cheer scholarship? Be ready to compete head-to-head in fast-paced tryouts, with others just as talented and spirited.” See also Legal Liability for Cheerleading Injuries, supra note 2 at 216 (noting University of Maryland classifies their competitive cheerleading program as varsity sport). Further, the University of Maryland offers full athletic scholarships to competitive cheerleaders. The University also is the first to attempt to use cheerleading scholarships to comply with Title IX requirements, which are aimed at giving equal opportunity to male and female collegiate athletes. Despite the University of Maryland’s position, the NCAA does not consider cheerleading a sport. See id. at 217.

See Stein, supra note 5 (noting competitive cheerleading teams, many organized by private gyms and some fighting for prize money, have been proliferating across country increasing number of cheerleading participants sharply).

See Risks of Cheerleading, supra note 6 (noting almost 95,200 female students take part in high school cheerleading annually, along with about 2,150 males).


Dr. Mark R. Hutchinson, MD, Cheerleading Injuries: Patterns, Prevention, Case Reports, THE PHYSICIAN AND SPORTS MEDICINE, Vol. 25, No. 9, p83-86, 89-91, 96, Sep. 1997. The statistics were as follows:

High School Cheerleading Injuries (percent)
landings, spotting, and pyramids combined account for 61.7% of all cheer-related injuries, with individual skill sets such as gymnastic and cheer routines accounting for the remaining 31.7%. Over time the trend in injuries has migrated from those encountered by the individual to those defined by collaborative efforts among co-participants. Seemingly then, through pleasure and pain, cheerleading is as much an activity defined by the collective as it is the individual.

One prominent cheer-safety advocate asserted, “the state of cheerleading today is a national crisis.” Despite this concern, cheerleading is still widely regarded as an activity, not a sport; a modern analogue to the chess club. Still, many cheerleaders are as fiercely competitive as they are effervescent, characterized more by their “sure, this might break my neck, but let’s go!” attitude than their presence as a sideline distraction. The data suggests that the national conscious is in need of a collective wake-up call, but many view cheerleading as an antiquated pom-pom parade worthy of attention but not respect. Girls who risk life and limb in pursuit of glory against ambitious, well-trained competitors are not simply engaged in a beauty pageant.
The heightened negligence standard traditionally afforded to participants in ‘contact’ sports such as football has largely been the result of pragmatic considerations and prudential concerns. As Justice Cardozo famously observed, “[o]ne who takes part in such a sport accepts the dangers that inhere in it.” Cardozo found it self-evident that a fencer accepts the risk inherent in the thrust of their opponents’ foil, but the evolving nature of gender-equity in sports and the changing dynamic in competitive events has rendered the notion of hermetically sealing ‘contact’ sports from their recreational counterparts somewhat moot.

From a jurisprudential standpoint defining the term ‘sport’ has been an exercise largely reserved to academics. Even delineating between ‘sport’ and ‘non-sport’ often misleads or mischaracterizes the judicial analysis. Despite the ambiguity, judicial application of a heightened negligence standard in a negligence action between co-participants in a recreational activity can have dramatic implications for the participants and the activity itself.

The rapid evolution of cheerleading, and the difficulty in characterizing it as activity or sport, competitive or non-competitive, contact or non-contact, has the potential to place courts evaluating negligence actions between co-participants in a judicial quagmire. But asking whether cheerleading is a sport, a ‘contact’ sport, or a recreational activity seems to oversimplify the actual question at hand. Since the result of characterizing cheerleading in a certain way imputes upon or eliminates liability between co-participants, the actual question should ask why cheerleading is judicially characterized as it is, and whether this assessment is consistent with the objective realities of participating on a specific cheerleading squad.

now participate in cheerleading, a figure that has grown exponentially in recent years.

See id. (citing ESPN).


Murphy v. Steeplechase Amusement Co., Inc., 250 N.Y. 479, 482 (1929).

See id.

See Pfister v. Shusta, 657 N.E. 2d 1013, 1017 (Ill. 1995) (noting that rigid terms such as ‘sport’ or ‘contact’ often do not adequately cover cases where novel or non-traditional activities are at issue).

See Wasserman, supra note 3 (discussing judicial characterization of sport).

See Pfister, 657 N.E. 2d at 1017.

See Denner, supra note 28 at 210 (noting judicially heightened negligence standard promotes vigorous competition among participants and avoids flood of litigation arising from injuries among co-participants).

For a further discussion on the evolution of cheerleading, see supra notes 1-26 and accompanying text.

See Ordway v. Superior Ct., 198 Cal. App. 3d 98, 104-05 (Cal. Ct. App. 1988) (discussing previous distinction based on character of plaintiff as superficially anomalous). The Ordway court reasoned that classifying the actions of a plaintiff as “reasonable” or “unreasonable” as a means of either barring liability in the latter and
The Wisconsin supreme court recently addressed the issue of co-participant liability resulting from an injury sustained during a cheerleading stunt in Noffke v. Bakke. This note will first examine the factual and procedural background of Noffke as the case progressed through the Wisconsin appellate court to the Wisconsin supreme court. Next, this note will briefly survey the complex doctrinal background underlying co-participant liability stemming from recreational and sporting activities. Further, this note will examine the various negligence standards, and will briefly review Wisconsin jurisprudence leading up to Noffke.

After reviewing the Noffke court’s reasoning, this note will argue that the holding, although proper in outcome, was constructed upon an unnecessarily rigid framework of analysis. Further, this note will argue that the evolving character of cheerleading requires a more nuanced exploration of the doctrines that underpin co-participant liability, and that the classification of a recreational activity should turn more on the assumptions of the participants and the objective realities of the activity than a rigid exercise in semantics. Finally, this note will assert that conventional definitions of cheerleading, and the resultant standard of negligence applied between co-participants, should be replaced with a case-by-case analysis turning on the character and practices of the program at issue.

II. FACTS

Brittany Noffke, a ninth grade student at Holmen High School, was the flyer in a routine cheerleading stunt called a “post to hands” maneuver. Also taking part in the proceeding to a contributory negligence assessment in the former was missing the point. The court concluded that the important distinction is found “in the expectation of the defendant. He or she is permitted to ignore reasonably assumed risks and is not required to take extraordinary precautions with respect to them.” See id. For a further discussion of the factual and procedural background of Noffke, see infra notes 43-82 and accompanying text. For a further discussion of the doctrinal background underlying co-participant liability stemming from recreational and sporting activities, see infra notes 78-127 and accompanying text. For a further discussion of the various negligence standards and Wisconsin jurisprudence leading up to Noffke, see infra notes 128-194 and accompanying text. For a further discussion of the Noffke decision and relevant analysis, see infra notes 194-285 and accompanying text. For a further discussion of the Noffke decision and relevant analysis, see infra notes 194-285 and accompanying text. For a further discussion of the Noffke decision and relevant analysis, see infra notes 194-285 and accompanying text. For a further discussion of the Noffke decision and relevant analysis, see infra notes 194-285 and accompanying text. See Noffke v. Bakke, 308 Wis. 2d 410, 416 (Wis. Ct. App. 2008) (discussing pertinent facts behind suit). The cheerleading team was practicing prior to a high school basketball game. Id.
stunt were two other cheerleaders, one of whom was Kevin Bakke. The three cheerleaders involved had not previously performed the stunt. Bakke’s responsibility was to post and spot the stunt, which involved lifting Noffke into position on the shoulders or hands of the base cheerleader, and supervising the progress of the stunt to preempt any potential injuries resulting from error or misfortune. After Bakke had assisted Noffke into her proper position atop the shoulders of the base she fell backward severely injuring her head on the hard tile floor below. Although Bakke was meant to go behind the base, he instead went to the front, leaving no one to catch Noffke as she fell.

As a result of the injury, Noffke brought an action against Bakke and his insurance provider alleging negligence for failing to properly spot her during the maneuver. Before the circuit court Bakke moved for summary judgment asserting immunity from liability predicated on the operation of the Wisconsin statute governing liability for co-participants in contact team sports. The circuit court held that the governing statute imposed a reckless standard of care to co-participants in a contact sport, and thus granted Bakke’s motion for summary judgment. On appeal, Noffke contended

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45 See id. (noting three cheerleaders were involved in “post to hands” maneuver).
47 See Noffke, 308 Wis. 2d 410, 416 (discussing roles of three cheerleaders). Noffke was the flyer, Kevin Bakke was the spot and post, and Hall was the base. Id. There were no secondary spotters present, and no mats were used. See id. at 417.
48 See id. (discussing pertinent facts).
49 See Noffke, 2009 WI 10, 4-5 (discussing undisputed facts).
50 See Noffke, 308 Wis. 2d 410, 416 (discussing Noffke’s cause of action against Bakke). Noffke also sued the school district and their insurer alleging the cheerleading coach was negligent. Id. Noffke contended the coach violated a ministerial duty alleging the coach failed to provide adequate spotting, and failed to ensure mats were properly in place. Id. The school district moved for summary judgment on a theory of governmental immunity under the applicable Wisconsin statute. Id. Because this note focuses on the liability of co-participant’s in a competitive activity, the second prong of the Wisconsin Appellate Court’s decision will not receive further analysis.
51 See id. The relevant statute, Wisconsin Stat. § 895.525(4m)(a) provides in full:

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 an other 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.

Wis. Stat. § 895.525(4m)(a).
52 See id. (discussing circuit court’s holding). Before the circuit court Bakke asserted two further grounds for summary judgment: (1) that no evidence supported Noffke’s negligence claim, or, alternatively, that Bakke’s negligence was not a substantial factor in causing Noffke’s injury; and (2) that Noffke’s negligence exceeded his own as a matter of law. See id. at 415. The appellate court notes that the circuit court denied these
that the governing statute did not apply to the facts of the case, and consequently that her negligence action could not be barred.\(^{53}\)

A. Appellate Review

Reviewing the circuit court’s grant of summary judgment de novo, the appellate court narrowly tailored the issue on appeal as one of statutory interpretation.\(^{54}\) The court proceeded to adjudicate two correlated issues; (1) the court interpreted the meaning of the term “physical contact” as it applied to the governing statute, and (2) the court determined whether cheerleading was a contact sport within the meaning of the statute.\(^{55}\) Importantly, the court noted that questions of statutory interpretation upon which reasonably well-informed persons could differ required consultation of extrinsic sources such as legislative history, and the title of the relevant statute.\(^{56}\) Under that framework, the appellate court concluded that the mere presence of physical contact in a sport was not a sufficient indicator of whether that sport was within the contemplation of the legislature’s use of the term “physical contact” in the governing statute.\(^{57}\) As a result, the court determined the statutory “physical contact” requirement was ambiguous, and that consultation of extrinsic sources was required to ascertain the true intent of the legislature.\(^{58}\) To resolve the ambiguity the court consulted the title of the relevant statute

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\(^{53}\) See id. (discussing Noffke’s argument on appeal).

\(^{54}\) See id. at 418 (discussing standards of review and principles of statutory interpretation).

\(^{55}\) See id. (discussing disputed issues in Noffke’s negligence action against Bakke).

\(^{56}\) See id. at 418-19 (discussing purpose and intent of statutory interpretation). The Noffke court emphasized that the purpose of statutory interpretation is to affect the policy choices of the legislature. See id. at 418. To this end, the court noted that words and phrases are given their “common, ordinary, and accepted meaning”. See id. at 419. Further, the court acknowledged that statutory language is interpreted in context, and that reasonable effect must be afforded to every word. Id. Finally, the court stated that although effect is given to a non-ambiguous statement according to its plain meaning, an ambiguous statute may require consultation of extrinsic sources. Id.

\(^{57}\) See id. at 420 (discussing issues of statutory interpretation). The Noffke court assumed, without deciding, that the cheerleading squad was an amateur team sports team as defined by the statute. See id. The focus, therefore, was on whether “cheerleading involves the sort of physical contact between persons contemplated by the legislature.” Id.

\(^{58}\) See id. at 420-21 (concluding phrase “physical contact between persons in a sport” is not self-defining). The court did acknowledge that cheerleaders “engage in stunts which involve physical contact with other participants”. Id. For the court the ambiguity lie in the boundaries of the term “physical contact”, and more specifically, what kind of contact was sufficient to trigger the protection of the recklessness standard under the statute. See id.
which included the term “contact sports”.

Concluding cheerleading was not a contact sport under the commonly accepted meaning of the phrase, the court determined Bakke was not subject to the reckless standard of negligence afforded by the statute at issue.

Thus, under an ordinary standard of negligence, the court held that Noffke’s claim of negligence was not barred by statute, and accordingly, that the circuit court’s grant of summary judgment was reversed and remanded for further proceedings.

B. The Wisconsin Supreme Court Reverses

On review of the appellate decision, the Wisconsin Supreme Court examined whether Bakke was immune from a negligence suit arising out of an incident that occurred while he was participating as a cheerleader. The Noffke court examined the Wisconsin statute at issue on appellate review to expound and affect the full and proper intent of the legislature.

Not persuaded that the relevant statute was inherently ambiguous, the court noted statutory interpretation involves a textual analysis examining “the statute as a coherent whole” and “involves the ascertainment of meaning, not a search for ambiguity.” Practically speaking, the Noffke court recognized statutory ambiguity is not the product of mere semantic disagreement, but rather, requires that “well-informed persons should have become confused [by the statutory language].”

To assess whether Bakke was immune from liability, the Noffke court promulgated a four prong test requiring a defendant be “(1) participating in a recreational activity; (2) that [the] recreational activity must include physical contact between persons; (3) the persons must be participating in a sport; and (4) the sport must involve amateur teams.” The Wisconsin statute defining recreational activity was broadly drafted, and easily encompassed cheerleading. Moreover, the court found the requirements of prongs three and four were satisfied.

59 See id. at 421 (noting term “contact sport” was significant to analysis of legislative intent). The Noffke court consulted Webster’s New College Dictionary to define “contact sport” as “any sport that necessarily involves physical contact between opponents.” Id. See id. (concluding cheerleading does not fit commonly accepted meaning of “contact sports”). Without further elaboration, the court acknowledged “the risks and the athleticism involved in cheerleading are comparable to those in contacts sports. Nonetheless, cheerleading does not fit the commonly accepted meaning of “contact sport.”” Id.
61 See id. at 422-23 (concluding Noffke’s negligence claim was not barred).
63 See id. at 10 (noting case required examination of Wis. Stat. §§ 895.525(4m)(a)).
64 See id. at 11-12 (discussing methods of statutory interpretation).
65 Id. at 12 (finding statute ambiguous if two well-informed individuals are capable of discerning different meanings from text). The Noffke court stressed that the actual language of the statute had to reasonably give rise to disagreement, thus negating the inference that divergent opinions alone could justify a finding of ambiguity. Id.
66 Id. at 16
67 See id. at 15 (discussing Wisconsin statute defining recreational activities). The statute defines recreational activity as “any activity undertaken for the purpose of exercise, relaxation or pleasure, including practice or instruction in any such activity.” Wis. Stat. §
and four met by reference to the respective literal meanings of “sport” and “team.” Therefore the central inquiry involved whether cheerleading involved “physical contact between persons.”

Relying on the common, ordinary conception of the phrase “physical contact,” the Noffke court refused to characterize the necessary contact as “aggressive.” Instead, the court appeared to endorse a conception of physical contact that embraced mere incidental contact among co-participants in a recreational activity. Seemingly hesitant to require only incidental contact, the court also emphasized that cheerleading involved “forceful interaction” and a “significant amount of contact” between participants.

Concerned about uncertain application of a bright line distinction, and contemplative of legislative purpose, the Noffke court diminished the distinction between “incidental” and “aggressive” contact in favor of the plain meaning conception.

895.525(4). Examples of recreational activities provided by the legislature include hunting, bowling, billiards, picnicking, exploring caves, dancing, horse-shoe pitching, bird-watching, cutting or removing wood, animal training, and harvesting the products of nature. Id. at 17 (defining “sport” and “team”). Referencing The American Heritage Dictionary of the English Language, the court found cheerleading is a sport because “a sport is “[a]n activity involving physical exertion and skill that is governed [sic] by a set of rules and customs.” Id. Further, the court found cheerleading satisfied the amateur team requirement because a team is “[a] group organized to work together” and that the Spirit Rules governing cheerleading defined cheerleading as “a group dedicated to leading fan participation and taking part in competitions.” Id. at 18.

See id. at 19 (defining “physical” and “contact”). The Noffke court defined “contact” as “[a] coming together or touching, as of objects or surfaces…. [t]he state or condition of touching or of immediate proximity[,]” and “physical” as “[o]f or relating to the body as distinguished from the mind or spirit…. involving or characterized by vigorous bodily activity: a physical dance performance.” Id.

See id. at 29 (declining Noffke’s proposed requirement that sport involve requisite amount of aggressive conduct).

See id. at 24 (finding Noffke’s assertion that more than incidental contact required to trigger statutory protection unpersuasive).

See id. at 23 (noting physical contact in cheerleading exceeded plain meaning definition espoused by court).

See id. at 28. The statute denotes the legislative purpose as:

“intend[ing] by this section to establish the responsibilities of participants in recreational activities in order to decrease uncertainty regarding the legal responsibility for deaths or injuries that result from participation in recreational activities and thereby to help assure the continued availability in this state of enterprises that offer recreational activities to the public.”

Wis. Stat. § 895.525(1).
of “physical contact”.\textsuperscript{75} By implementing a less-restrictive plain meaning standard, the court meant to lend “certainty regarding the legal responsibilities and liabilities of those who participate in recreational activities.”\textsuperscript{76} Further, the court rejected Noffke’s contention that the statute required an element of “competition” in order to trigger the heightened negligence standard.\textsuperscript{77} Again, the Noffke court cited concerns about inconsistent application, and dismissed the “competition” requirement as incongruous with the plain meaning of the statutory language.\textsuperscript{78} Despite this, the court still noted that cheerleaders often do engage in both organized and informal competition against rival squads.\textsuperscript{79} Further, after recognizing the “public debate” over whether cheerleading is a sport, the court concluded that it was, and reasoned that construing it otherwise would offend the purpose of the statute.\textsuperscript{80}

Applying the four-prong test, the Noffke court concluded Bakke was immune from liability because he was participating in a recreational activity that included physical contact between persons in a sport involving amateur teams.\textsuperscript{81} Upon concluding their analysis, the Wisconsin Supreme Court took a moment to perhaps reflect on the uncertain

\textsuperscript{75} See id. at 24-29 (discussing why interpretation of statute to include “aggressive contact” requirement not appropriate). The Noffke court gave three reasons why both the “aggressive contact” standard proposed by Noffke, and the “contact sport” definition framework proposed by the appellate court were inappropriate. Id. at 24. First, the appellate court, by relying on the title of the statute, created unnecessary ambiguity. Id. at 25. Further, the court noted that the appellate court’s conception of “contact sport” was unworkably narrow, provided no clear intent, and was not faithful to the legislature’s stated purpose. See id. Second, the court considered the “aggressive” interpretation as restrictive in application, and noted the legislature could have clearly denoted such a narrow conception of the statutes protection. See id. at 27. Finally, the court found the “aggressive” contact standard would be difficult to apply, and would create uncertainty. See id. at 28.

\textsuperscript{76} Id. at 29

\textsuperscript{77} See id. at 30-31 (disagreeing with Noffke’s contention).

\textsuperscript{78} See id. at 31-33 (noting three reasons why statute does not apply solely to competitive sports). First, the court noted no competition requirement exists in the plain language of the statute, and that the legislature could have inserted such a requirement if it so sought. See id. at 31. Second, the court reasoned that their interpretation of the statute was consistent with the legislative intent and traced the plain meaning of the statutory language. See id. at 32. Finally, the court found the potential for inconsistent results untenable, noting, for example, that if a competition requirement were in force, football players would be protected by the statute during a game against an opponent, but not at practice among co-participants. See id. at 33.

\textsuperscript{79} See id. at 31 (noting cheerleaders “often engage in competition with the opponent’s cheerleaders not only during a game but also during organized competitions.”).

\textsuperscript{80} See id. at 32 (finding that “construing sport to exclude cheerleading would defeat the purpose of the statute, as shown by its plain language” and “we conclude that cheerleading is a sport”).

\textsuperscript{81} See id. at 2 (stating holding).
implications of their holding. In a candid appeal, the *Noffke* court opined “we encourage the legislature to once again review this important statute and consider our interpretation and application to the facts of this case and how the statute may apply to such school team sports as golf, swimming, or tennis.”

### III. BACKGROUND

The *Noffke* court reached their holding through a rigid application of the applicable statute, asking simply whether cheerleading was consistent with the dictionary definitions of the statutory language. While this analysis did establish a clear outcome, it concurrently failed to provide a workable framework to determine whether an activity in Wisconsin is subject to a statutorily-heightened negligence standard. The court’s strict semantic approach perceived the issue from a top-down perspective satisfied by the commonly accepted understanding of the relevant statutory language, but this approach seems to bypass the rich doctrinal history underpinning co-participant liability.

Perceiving the ultimate issue not as one of statutory construction, but rather as one involving the effect a classification of an activity will have on the liability of the co-participants transposes the frame of analysis from top-down to bottom-up.

This section will broadly canvas the various doctrines underpinning co-participant liability in recreational activities including the assumption of the risk and inherent risk doctrines. Next, this section will examine the various negligence standards that impact co-participants in recreational activities. Further, this section will examine the intersection of the various doctrines in an attempt to further understand and synthesize the judicial, legislative, and social motivations that define liability between co-participants in recreational activities. Finally, this section will briefly canvas relevant Wisconsin jurisprudence concerning co-participant liability in a recreational activity.

#### A. Assumption of the Risk

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82 See id. at 34 (discussing holding).
83 Id.
84 For a further discussion of the *Noffke* decision and relevant analysis, see infra notes 194-285 and accompanying text.
85 See id.
86 See id.
87 See id.
88 See id.
89 For a further discussion of the various doctrines underpinning co-participant liability in recreational activities including the assumption of the risk and inherent risk doctrines, see infra notes 91-127 and accompanying text.
90 For a further discussion of the various negligence standards impacting co-participants in a recreational activity, see infra notes 128-173 and accompanying text.
91 For a further discussion of the intersection of the various doctrines, see infra notes 128-173 and accompanying text.
92 For a further discussion of relevant Wisconsin jurisprudence, see infra notes 174-194 and accompanying text.
Broadly speaking, the assumption of the risk doctrine serves either to negate the duty prong of a plaintiff’s prima facie case of negligence or to mitigate the defendant’s liability to the plaintiff as a result of the plaintiff’s voluntary participation in an inherently dangerous activity. Under either context, the defense is particularly appealing in the context of sports because of the dangers that inhere in participation. Thus the argument follows that one who participates in a sport consents to the unforeseen and unintentional injuries associated with participation in that sport.

The phrase assumption of the risk is often the cause of confusion because there is no clear connotation attached to it. Assumption of the risk can be either express or implied, and can also be considered primary or secondary. Past convention has required two general elements for an assumption of the risk defense to operate effectively; (1) the plaintiff must possess knowledge and appreciation of the inherent dangers of the activity, and (2) despite the presence of the known risks, the plaintiff must proceed in participation voluntarily.

93 See Denner, supra note 28, at 209 (discussing general theory behind defense of assumption of risk).
94 See id. at 210 (noting defense is rooted in common law and traditionally acted as complete bar to plaintiff’s recovery).
95 See id. (discussing general tenets of assumption of risk doctrine).
96 Alexander J. Drago, Article, Assumption of Risk: An Age-Old Defense Still Viable in Sports and Recreation Cases, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 583 (2002) (noting that phrase causes confusion in legal community because it has several meanings and can be applied without recognition of these differences).
97 See Denner, supra note 28, at 212-13 (discussing types of assumption of risk). Primary assumption of the risk operates as a complete defense, and if proven will bar a plaintiff’s recovery in a negligence action. See id. at 214. Primary assumption of the risk is not a true defense in that it acts to negate the duty prong of the plaintiff’s prima facie case. See id. In operation, for primary assumption of the risk to operate, the parties must be co-participants in an activity. See id. In contrast, secondary assumption of the risk functions more as a true defense because a plaintiff will establish a prima facie negligence claim, however, a defendant will argue that the plaintiff should be held partly responsible for their injury because of voluntary participation in spite of a known risk or risks. See id. at 215. In the context of this note only primary assumption of the risk is relevant as it applies to co-participants, while secondary assumption of the risk can apply to coaches, instructors, schools, and organizations. See id. at 216. Because the distinctions between types of assumption of the risk overlap, this note will focus on the implied and express assumption of the risk doctrines.
98 See id. at 210-11 (discussing traditional elements of assumption of risk defense). The first general prong of the defense is satisfied by a subjective standard that assesses the plaintiff’s knowledge and appreciation of the risk. See id. This subjective standard differs from the objective standard used to evaluate contributory negligence. See id. Subsequently, a plaintiff who does not know or cannot appreciate the situation because of their experience, intelligence, or age will not have the requisite knowledge imputed on them, and the defense will fail. See id. Because the contributory negligence standard is
Acting as a complete bar to recovery, express assumption of the risk involves a plaintiff who, by contract or otherwise, agrees expressly to assume the risk of harm inherent in a defendant’s reckless or negligent conduct. The extent of the assumptions and expectations of the parties is an important element under express assumption of the risk, as the parties must express their intent in clear, unequivocal language. A plaintiff who expressly assumes the risk of a defendant’s ordinary or recklessly negligent conduct will still maintain a cause of action against a defendant who acts in an intentional,

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99 See Restatement of Torts (Second) § 496 (b) (defining express assumption of risk). See also Drago, supra note 96, at 585 (noting that agreement that defendant owes no duty of care to plaintiff is often made in advance reflecting assumptions and expectations of parties prior to possible tortuous conduct). See id. at 585-86 (noting that for release to insulate party from liability parties must express their intent clearly). Although exculpating releases are legal, they are generally subjected to close scrutiny by the courts. See id. This is because courts seek to avoid agreements that are intended to exculpate a party from the consequences of their own negligence. See id. Thus an exculpating agreement is meant to allow a plaintiff to expressly assume both the risk of their own actions as well as a degree of risk posed by a defendant’s actions, but a defendant can not exculpate themselves from any and all tortuous acts with a broadly drafted agreement. See id. See also, Denner, supra note 27, at 211-12 (noting that exculpating agreements or waivers are valid per the principles of contract law). Thus, a bargained for exchange for valuable consideration in the form of a waiver will usually be valid. See id. Also, because the expectations of the parties is paramount, an expressly stated desire by an athlete to assume the risk, rather than a written contract, can also trigger the assumption of the risk defense. See id. See generally Rita Hanscom, Assumption of Risk Defense in Sports or Recreation Injury Cases, 30 AM. JUR. PROOF OF FACTS 161, 3 (3d ed. 2002) (discussing express assumption of risk).
wanton, or willful tortuous manner. In short, a defendant’s conduct is only exculpated
to the degree the plaintiff assumes the risk as his or her own and no further.

In contrast, implied assumption of the risk can arise as a matter of law simply by a
plaintiff’s participation in a sport or recreational activity. This tacit consent recognizes
that the plaintiff knowingly enters a relationship with a defendant that involves a known,
potential risk of injury, and the plaintiff thereby relieves the defendant of a duty of care to
refrain from tortuous conduct. However, the relationship created does not relieve the
defendant from liability resulting from the defendant’s intentional or willful misconduct
that exceeds the scope of conduct within the normal contemplation of the activity. As
the California Appellate Court simply stated, “the individual who knowingly and
voluntarily assumes a risk, whether for recreational enjoyment, economic reward, or
some similar purpose, is deemed to have agreed to reduce the defendant’s duty of
care.”

Finally, some states have merged the assumption of the risk defense with
comparative fault principles, and others have eliminated it altogether. Moreover, a

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101 See Drago, supra note 96, at 585-86 (discussing further principles of express
assumption of risk). The exculpation agreement must be perfectly clear on its face, and
must state that the negligence relieved is the negligence of the party attempting to be
relieved of a duty of care. See id. Further, the term “negligence” or comparable
language should, as a rule of thumb, appear in the writing of the agreement, or should be
expressly discussed in the absence of an agreement. See id. With regard to a written
exculpatory release, other factors may be considered by a court to determine the
enforceability of the release. See id. at 587-88. These factors include the degree of
disparity of bargaining power between the parties involved, whether or not a statute is
contravened by the operation of the release, and the public policy considerations that
underpin and influence the courts judgment under the relevant circumstances. See id.
Moreover, with respect to minors, courts have found that parents have the authority to
bind their children to exculpatory agreements. See id. at 589.

102 For a further discussion of express assumption of the risk, see supra notes 99-100 and
accompanying text.

103 See Drago, supra note 96, at 590 (discussing implied assumption of risk).

104 See id. (noting that many activities, sports in particular, have inherent risks that cannot
be avoided or eliminated by the exercise of reasonable care). Thus a standard of ordinary
negligence, requiring the exercise of reasonable care, is not achievable in certain settings.
See id.

105 See id. at 590-91 (noting that liability attaches despite an assumed risk by plaintiff if
defendant’s acts were intentional or willful).

106 See Ordway v. Superior Ct., 198 Cal. App. 3d 98, 104; see also Prosser & Keeton,
Torts (5th ed. 1984) § 68, 481. Noting a plaintiff who “voluntarily enters into some
relation with the defendant, with knowledge that the defendant will not protect him
against one or more future risks that may arise from the relation . . . may then be regarded
as tacitly or impliedly consenting to the negligence, and agreeing to take his own
chances.”

107 See Denner, supra note 28, at 209 (noting that although some states have merged
doctrines, assumption of risk defense can still be powerful defense).
number of states that have merged implied assumption of the risk with comparative fault analysis have excluded certain activities. Under a comparative fault analysis a defendant’s liability is mitigated by the culpability of the plaintiff. Wisconsin operates under a contributory negligence framework operationally equivalent to a modified comparative responsibility regime. However, under both methods of analysis the plaintiff’s culpability and resultant actions are considered essential to the analysis and ensuing liability, or lack thereof, apportioned to the defendant.

1. **Inherent Risk and Consent Doctrines**

   Notions of inherent risk and consent must be considered in concert with the principles and justifications underlying the assumption of the risk defense. To more


109 See Denner, *supra* note 28, at 209 (noting that in some jurisdictions doctrine of comparative fault has been merged with primary and secondary assumption of risk). Further, in jurisdictions that recognize comparative fault and implied primary and secondary assumption of the risk as distinct defenses, such as California, primary assumption of the risk remains a complete bar to plaintiff’s recovery, while secondary assumption of the risk is analyzed under comparative fault standards. See id. See also Goldberg, Sebok, Zipursky, *Tort Law: Responsibilities and Redress*, 408-09 (discussing implied assumption of risk as comparative fault). The editors note that in jurisdictions where assumption of the risk has been eliminated by statute or judicial decision a defendant is still free to argue to the jury that the plaintiff was aware of a risk of injury and voluntarily chose to encounter it, however, the defendant who successfully proves this argument is not afforded a complete defense, and instead, the proof offered by the defendant is factored into the jury’s percentage allocation of fault. See id. Notably, in a modified comparative fault regime, if the jury finds the assumption of the risk argument indicative of the plaintiff being more at fault than the defendant, then the argument can act as a complete defense. See id.

110 See id. at 388 (discussing Wisconsin version of comparative responsibility). The editors illustrate this point by example: “[In Wisconsin] a plaintiff suing a single defendant will have her suit dismissed as a matter of law if the jury assigns more fault to her than to the defendant – that is, anything more than 50 percent of the responsibility”. *Id.* This system is described as ‘modified’ because in a pure comparative fault system a plaintiff could be found ninety-nine percent responsible for their injuries and still recover the remaining one percent from the defendant. See id.

111 See id. at 213-14 (discussing various methodologies employed by states).

112 See *Ordway*, 198 Cal. App. 3d at 104 (noting that inherent risks in sport or activity define plaintiff’s reasonable expectations and reciprocally limit duty owed by defendant). The *Ordway* court articulated its rule as follows, “If the defendant's actions, even those which might cause incidental physical damage in some sports, are within the ordinary expectations of the participants -- such as blocking in football, checking in hockey.... no cause of action can succeed based on a resulting injury.” *See id; see also Knight v.*
properly define a defendant’s liability, a court often must examine not only if the plaintiff assumed a risk, but what risk was assumed. A way of reaching this conclusion involves analyzing and assessing the inherent risks of a sport or activity. Therefore a defendant’s duty of care owed to a plaintiff is defined not only by a voluntary accession to the risk, but also a characterization of the risk as it was understood or should have been understood by the plaintiff.

The analysis of inherent risk is a multifarious doctrinal pursuit without a consistent jurisprudential grounding. Whereas some courts analyze the inherent risks in an activity under the framework of assumption of the risk, other courts look to an analysis of the duty or standard of care owed by the defendant. No matter which way it is analyzed, each participant’s duty is defined and limited by the commonly accepted or known risks inherent in participation in the activity. This assessment can be defined

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Jewett, 3 Cal. 4th 296 (1992) (noting “the nature of a sport is highly relevant in defining the duty of care owed by the particular defendant.”); Cohen v. Massapequa Union Free Sch. Dist., 728 N.Y. S.2d 94 (App. Div. 2001) (holding that “by engaging in a sport or recreational activity, the plaintiff consented to all of the risks which were inherent in and flowed from his activities”). Wertheim v. United States Tennis Ass'n, 150 A.D. 2d 157, 158 (discussing risks inherent in position as tennis line judge). In Wertheim the plaintiff filed a wrongful death action based on the claim that the decedent tennis line judge death was based on the Tennis Association’s negligent breach of duty. See id. In finding against the plaintiff, the court held “a participant in a sporting event assumes the risk of injuries normally associated with the sport…. Being hit by a tennis ball is surely a risk normally associated with the sport…. Here, the decedent was fully aware of the risk”. Id.; see also Kelly v. McCarrick, 155 Md. App. 82, 97 (Md. 2004). In Kelly the court noted that although a sporting event participant does not consent to all possible injuries, they consent to the "foreseeable dangers" that are "an integral part of the sport as it is typically played." See id. at 877; Am. Powerlifting Ass'n v. Cotillo, 401 Md. 658 (Md. 2007) The Cotillo court found “risks, that are inherent to a particular sport, [that] are all foreseeable consequences of participating in that sport, and as they are obvious to a person of normal intelligence, voluntary participants in those sports assume those inherent risks.” Id. at 670. See id. at 670-71 (noting risks inherent to particular sports are relevant to analysis).

See id. at 671 (discussing inherent risks of sport). In Cotillo the plaintiff was a competitive powerlifter injured during a bench press event in which two spotters failed to catch the bar after the plaintiff lost control of it during a repetition. See id. at 664. The court found that the plaintiff “assumed the risk that the spotters may have negligently failed to catch the bar because he knew that type of injury was foreseeable, he appreciated that risk, and he voluntarily accepted that risk by participating in the powerlifting competition.” Id. Thus knowledge, appreciation and acceptance of a particular risk or set of risks inherent in an activity was at the forefront of the court’s analysis.


See Goldberg, Sebok, Zipursky, Tort Law: Responsibilities and Redress, 409 (noting statutes referencing “inherent” risk can often be unhelpful). The editors note that if
both by the actual expectations of the participant, as well as the reasonable dangers that inhere in the activity. As one court has noted, “[t]he imposition of a duty is the conclusion of a rather complex analysis that considers the relationship of the parties, the nature of the risk…. and the impact the imposition of a duty would have on public policy.”

Some courts look only to the objective realities of the activity itself, and seek to avoid the pitfalls of examining the subjective expectations of the participants. The determination of duty based on objective factors turns on the common conception of the sport, and whether this conception understands the sport to involve ‘contact’. To supplement this common conception analysis, courts have found guidance in the accepted rules and regulations of an activity, as well as rules and regulations promulgated by national or recognized governing bodies.

“inherent” means inevitable is analogous to a restatement of the common law principle that a plaintiff cannot prevail without proving breach. See id. The term apparently describes certain forms of careless conduct that arise out of an activity, i.e. conduct “inherent” to the activity. See id; see also Kiley at 586 (noting duty defined by “participants’…. consenting to an invasion of personal interests or rights by taking part in the subject contest”); see also Bourque v. Duplechin, 331 So. 2d 40, 42 (La. Ct. App. 1976) (inherent risks of softball include risk of "standing in the base path and being spiked by someone sliding into second base[,]" but not having base runner run full speed into second baseman standing outside base path by five feet); see also Craw v. Campo, 643 A.2d 600, 603-04 (discussing case in which catcher in game of pick-up softball was injured when defendant slid into him).

See id. at 604 (discussing analysis of duty in light of inherent risks of activity).


See id. at 715 (defining softball as ‘contact’ sport). The Landrum court analyzed an injury inflicted upon one co-participant by another during the course of a softball game. See id. at 714. The plaintiff argued that since he had never seen a participant injured at a softball game it was reasonable that he did not expect to be injured, and thus did not assume the risk of an injury. See id. Thus the plaintiff asserted that the defendant owed him an ordinary standard of care under the states negligence framework. See id. In rejecting this subjective expectations argument, the court determined that “unlike downhill skiing or golf, physical contact is part of the game of softball.” See id. at 715. Further, the Landrum court assessed the objective factors inherent in softball to include runners being "tagged by opposing players; fielders inevitably collid[ing]; players are occasionally struck with an errantly thrown ball. Moreover, the fact that the ball may be hit or thrown into the baserunner's path necessarily means that, at times, runners and fielders will collide.” See id.

See Tavernier v. Maes, 242 Cal. App. 2d 532, 545 (noting rules and custom of game help define duty owed by co-participant). The Tavernier court supplied an illustrative golfing example:

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The concepts of express and implied consent further append, and often are distinguished from, the doctrine of assumption of the risk. Understanding the relationship between these superfluous doctrines in a vacuum would be difficult, as one court noted, “a kinship exists with doctrines expressly dealing with consent as affecting the existence of a right of action for intentional invasions of one's rights.”

Thus, express consent, as examined above, is more aptly considered under the express assumption of the risk framework, however, analysis of implied consent is often done in concert with an inherent risk assessment.

From the consent perspective, the question becomes whether a participant in a potentially hazardous activity impliedly consents to the potential harm flowing from that activity as a result of their participation in the activity. Under this framework a defendant’s duty, or lack thereof, is defined by those hazards of participation known to be within the range of possibility. Here the degree of consent implied by participation is defined relative to the scope and source of the potential hazards.

This sliding scale

“a person intentionally walking across in front of a player just about to swing..... [would] assume the risk.... [however] if the player's ball were on the green ready to be putted, a person walking across on the far side of the green.... would not assume the risk of a ball driven from the green, for the rules and custom of the game strictly forbid [this]”

_Id_.

123 See id. at 551.

124 For a further discussion on express assumption of the risk, see

125 It should be noted that consent, as a pure defense, is only applicable to intentional torts, and cannot be invoked in an action sounding in negligence; however, the concept is relevant to understanding the somewhat convoluted doctrines underlying assumption of the risk generally. See Ritchie-Gamester v. City of Berkley, 597 N.W. 2d 517, 532-33 (Mich. 1999) (Brickley, J., concurring) (noting “consent is a defense to an action alleging an intentional tort, but such consent cannot be a defense to a tort sounding in negligence. Indeed, the nearest thing to "consenting" to negligence is the doctrine of assumption of the risk”).

126 See Tavernier at 550-51 (noting “in cases of participation in activities in which there are common hazards.... the true approach is to determine whether there has been a consent to the invasion of rights which subsequently occurs.”).

127 See Kelly v. McCarrick, 155 Md. App. 82, 106 (Md. Ct. Spec. App. 2004) (noting that anticipation of precise source of injury is immaterial). In Kelly a young girl was injured by a sliding base-runner while participating in a softball game. See id. at 105. The court rejected the notion that the girl’s appreciation of the risk dictated the amount of risk she assumed by participation. See id. at 106-07. The court noted that common sense alone informs a player that risk of injury inheres in attempting to tag out a sliding base-runner. See id.

128 See id. at 106 (noting that standard is defined relative to activity participated in). The Kelly court also notes that the risk assumed is not unique to any single player, but is that
approach is cognizant of the parties expectations, but the analysis is not limited by them.\footnote{129}{See Goldberg, Sebok, Zipursky, \textit{Tort Law: Responsibilities and Redress}, 591 (2004) (noting implied consent “often requires judges and juries to make judgments turning on factors such as the age, gender, and sophistication of the parties, their relationship, if any, and various other circumstances associated with their interaction.”).}

B. What’s at Stake: The Negligence Standards

A court presented with a negligence action brought by an injured plaintiff against a defendant co-participant in a recreational activity must determine what standard of proof the plaintiff must establish in order to succeed in the action.\footnote{130}{See Ian M. Burnstein, \textit{Liability for Injuries Suffered in the Course of Recreational Sports: Application of the Negligence Standard}, 71 U. Det. Mercy L. Rev. 993, 996 (1994) (discussing possible causes of action in civil liability).} The negligence standard the court adopts is influenced by the previously mentioned concepts of assumption of the risk, inherent risk and consent.\footnote{131}{See id. at 998 (noting knowledge of dangers inherent in activity defines duty and justifies potential liability).} As Noffke demonstrated, the negligence standard applied by a court -- and a courts understanding of what the application of a particular standard entails -- is critical both to a plaintiff’s ability to recover for their injuries and to a defendant’s ability to avoid judgment.\footnote{132}{See id; see also Crawn v. Campo, 136 N.J. 494, 604-05 (noting application of negligence standard is a “multifaceted analysis, focusing on personal relationships, the nature of risks, and considerations of public policy and fairness…. must inform our determination of [the appropriate negligence standard]”).}

Generally three causes of action exist for a plaintiff injured during the course of a recreational activity: the first for intentional acts of a defendant, the second for recklessness, and finally for ordinary negligent acts.\footnote{133}{See id. at 995-96 (discussing possible causes of action in civil liability).} An intentional tort arises if a defendant engages in intentional, unprivileged, harmful or offensive conduct.\footnote{134}{See id. at 996 (defining intentional tort).} Because intentional conduct is rarely litigated in the context of co-participant liability, for those cases the important distinction is that between the reckless and ordinary standards of negligence.

The reckless standard of negligence holds an act reckless if an individual acts with knowledge of a danger or knowledge that an act will create danger.\footnote{135}{See id.} The reckless standard has been articulated a number of different ways, but it generally refers to a degree of negligence amounting to more than ordinary negligence, yet short of the
willful, wanton conduct that characterizes an intentional tort. A key aspect of recklessness is that while there is intent to commit the act, there is not intent to cause the particular harm that results. One court has characterized recklessness as “that degree of negligence which shows indifference to others as constitutes an utter disregard of prudence amounting to complete neglect.” Notably, the reckless standard is dependant on the circumstances, and is often defined relative to an objective “reasonable person” standard.

Reckless conduct differs from ordinary negligent conduct in that negligence amounts only to “mere inadventure, lack of skillfulness or failure to take precautions”. To establish a prima facie case for negligence liability a plaintiff must establish an injury suffered, a duty owed by the defendant to the plaintiff, a breach of that duty of care, and that the breach was the actual and proximate cause of the plaintiff’s injuries. Generally speaking, the plaintiff bears the burden of proof to demonstrate that the defendant did not act reasonably under the circumstances. Thus, under a reckless standard, the defendant owes a plaintiff co-participant no duty to refrain from ordinarily negligent conduct if that

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\[138\] See Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516, 524 (10th Cir. 1979) (discussing difference between reckless and intentional conduct, and noting issue is often matter of degree of intent).

\[139\] See Garnett, 574 S.E.2d at 260 (articulating standard for gross negligence). In Garnett a thirteen-year-old boy participating in a football practice was tackled by his coach causing injury. See id. at 260. Although the court noted that an injury sustained during a tackling demonstration may be a part of the sport, the coach aggressively tackled a smaller player, lifting him two feet from the ground and slamming him to the turf. See id. The coach’s knowledge of his greater size and experience, his instruction to remain passive throughout the drill, his previous practice of not tackling players, and the sheer force employed in the tackle indicated an utter disregard for the players safety upon which reasonable people could disagree. See id.

\[140\] See Noffke v. Bakke, 2009 WI at 36 (defining instructions promulgated by jury instruction committee concerning reckless standard). The instructions find recklessness where “a participant engages in conduct under circumstances in which (he) (she) knows or a reasonable person under the same circumstance would know that the conduct creates a high risk of physical harm to another”. See id. (citing Wis. JI - Civil 2020).

\[141\] See Hackbart, 601 F.2d at 524 (noting that “reckless misconduct…. involves a choice or adoption of a course of action either with knowledge of the danger or with knowledge of facts which would disclose this danger to a reasonable man”); see also Restat 2d of Torts, § 500 (Reckless Disregard of Safety).

\[142\] See Goldberg, et. al., Tort Law: Responsibility and Redress, at 48 (defining prima facie negligence case).

\[143\] See id. at 197 (noting the “onus of establishing that the defendant acted carelessly is on the plaintiff.”).
conduct is within the bounds of the activity that gave rise to the heightened reckless standard.  

1. **Policy Concerns and Practical Differences Between the Ordinary Negligence and Recklessness Standards**

   In early sports-injury cases courts permitted recovery on a showing of ordinary negligence.  Modern cases, however, demonstrate that the standard has shifted away from that of ordinary negligence to the recklessness standard.  The two main policy reasons underlying this shift are promotion of vigorous and unfettered competition in sports, and a concern over a potential influx of litigation if the standard were simple negligence.  Put another way, “[f]ear of civil liability stemming from negligent acts occurring in an athletic event could curtail the proper fervor with which the game should be played and discourage individual participation.” Further, applying a recklessness standard resolves pragmatic concerns that make imposing legal liability for ordinary negligence difficult.  For example, a player who, in the heat of the moment, carelessly and accidentally violates a rule of conduct applicable in a certain game may be subject to internal sanctions based on the rule, but should not necessarily be subject to legal liability for such an infraction - although under ordinary negligence a rule infraction might constitute a legal infraction as well.  This is not to say that the reckless standard is without bounds, as one court noted, “competition does not exist in a vacuum. Rather, some of the restraints of civilization must accompany every athlete onto the playing field.” The goal, then, for most courts is to strike a proper balance between vigorous participation and concern for the safety of the participants.

   Some courts have favored the ordinary negligence standard because they contend that a heightened negligence standard makes analysis unnecessarily complex and cumbersome. The argument for an ordinary negligence standard stems from the

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144 See Noffke v. Bakke, 2009 WI at 36 (noting in jury instruction that “[c]onduct which creates a high risk of physical harm to another is substantially greater than negligent conduct. Mere inadventure or lack of skill is not reckless conduct.”).  
146 See id.  
147 See id; see also Kabella v. Bouschelle, 672 P.2d 290, 294 (N.M. Ct. App. 1983) (noting ”[v]igorous and active participation in sporting events should not be chilled by the threat of litigation”).  
148 See Ross v. Clouser, 637 S.W. 2d 11, 14 (Mo.1982).  
150 See id.  
complexity of, and downright frustration with doctrines such as assumption of the risk and inherent risk analysis. It is argued that under an ordinary negligence standard “a co-participant who creates only risks that are ‘normal’ or ‘ordinary’ to the sport acts as a ‘reasonable [person] of ordinary prudence’ under the circumstances…. If the co-participant creates an unreasonably great risk, he is negligent.” Supporters are reluctant to normalize or encourage behavior that falls outside the bounds of the rules of an activity. It is asserted that participants only consent to conduct within the rules, and that a reckless standard leaves those injured by reckless behavior without a means of recovery for conduct they did not agree to.

Despite the arguments put forth in favor of an ordinary negligence standard, a great majority of jurisdictions favor the reckless standard of negligence in applicable circumstances. The application of an ordinary negligence standard seemingly relies heavily upon established norms or accepted rules governing an activity to determine what a reasonable standard of care entails. But in reality the line is not always so clear; as one court put it, “players in informal sandlot or neighborhood games do not, in most instances, have the benefit of written rules, coaches, referees or instant replay”.

a. Struggling for Certainty: The Contact Requirement

154 See Crawn v. Campo, 266 N.J. Super. at 605-06 (noting how assumption of risk “bedevils the law”).
155 See Id. at 607 (advocating ordinary negligence standard).
156 See Ritchie-Gamester v. City of Berkley, 597 N.W.2d 517, 532-33 (Mich. 1999) (Brickley, J., concurring) (noting “[w]e cannot assume most participants in such [recreational] activities consent to others' behavior that is either accidentally or purposefully outside those safety rules.”). The concurrence here points to safety rules promulgated by a governing body, or, in the case of recreational ice skating before the court, a set of “informal” rules known to participants to be essential to the safety of co-participants. See id. at 533.
157 See id. at 532-33 (promoting ordinary negligence standard). Further, one court, in adopting an ordinary negligence standard, noted that because the State Constitution required an assumption of the risk defense to be a matter of fact for the jury, the trial court was prevented from applying a reckless standard in granting summary judgment because it would presume, as a matter of law, that the plaintiff had assumed a degree of risk. See Estes v. Tripson, 188 Ariz. 93, 94-95 (Ariz. Ct. App. 1997) (noting State Constitution barred application of reckless standard because constitution required assumption of risk defense be question of fact for jury). Although the court denied application of the reckless standard, it nonetheless dismissed the action stemming from an injury incurred while playing softball on grounds that there was no evidence whatsoever of negligence or a breach of reasonable care. See id. at 96. The court noted that even in applying an ordinary negligence standard the court retained the ability to set “outer limits” of what could survive summary judgment. See id.
158 See Burnstein, supra note 108, at 998 (noting reckless disregard has emerged as prevailing standard).
159 See Kabella v. Bouchelle, 100 N.M. 461, 465 (N.M. 1983).
Deciding which negligence standard to apply between co-participants does not foreclose the lingering question of what activities give rise to a heightened negligence standard – noting difference between shopping and basketball, one court noted “it would be a breach of etiquette, and possibly the law, to battle with other shoppers for a particularly juicy orange in the grocery store, while it is quite within the rules of basketball to battle for a rebound.”

Thus, characterizing the activity engaged in acts as a precondition for applying a heightened negligence standard.

The element of competition has often been a centerpiece of analysis, for example one court characterized an activity as an “athletic competition” and subsequently adopted a reckless standard based solely on said characterizations. Building on this, courts have also looked to “contact” involved in participation, particularly contact which is unavoidable or inevitable, and not only incidental or accidental. This “inevitable contact” distinction is predicated on pragmatic concerns and recognizes that many, if not all of life’s activities are fraught with a degree of danger. In this sense requiring contact escapes the ambiguity of simply assessing the inherent dangers of an activity. Looking at inherent or inevitable contact can also avoid the pitfalls of drawing a bright-line distinction between organized and non-organized activities. Thus, looking to

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160 See Ritchie-Gamester, 597 N.W. 2d at 523.
161 See id.
162 See Ross v. Clouser, 637 S.W. 2d 11, 14-15 (Mo. 1982) (holding “a cause of action for personal injuries incurred during athletic competition must be predicated on recklessness, not mere negligence”).
163 See Gamble v. Bost, 901 S.W. 2d 182, 185-86 (discussing contact requirement necessary to trigger reckless standard). The Gamble court distinguished contact sports from other activities, such as bowling, due to the foreseeable risks traditionally associated with contact sports. See id. The court illustrated this concept by discussing skiing, an activity subjected to an ordinary negligence standard, by noting, "by one's participation in [skiing], one does not voluntarily submit to bodily contact with other skiers, and such contact is not inevitable." Id.
164 See id. at 186. In Gamble the plaintiff was injured at a bowling alley after being hit with a bowling ball in the head. See id. The court noted the risk of such an injury was neither inherent in the sport of bowling nor inevitable in participation; further, the court asserted that bowlers do not voluntarily submit to the risk of such an injury, and that ordinary negligence is thus the applicable standard. See id; see also Bangert v. Shaffner, 848 S.W. 2d 353 (declining to apply reckless standard to parasailing). The Bangert court explicitly declined “to adopt the reckless disregard standard for every recreational activity or sport that might be considered dangerous.” See id. at 356.
165 See id.
166 See Pfister v. Shusta, 657 N.E. 2d 1013, 1017 (Ill. 1995) (discussing negligence standard for game of “can kicking”). In Pfister four college students began spontaneously kicking a crushed soda can in a college dormitory lobby. See id. at 1014. The kicking progressed into a competition with two teams of two and goals set up against walls positioned at opposite ends of the lobby. See id. at 1015. During the competition one student pushed another causing the student to fall and sustain injury. See id. The Pfister court found that although no official rules regulated the competition, the physical
“contact” generally can supply a flexible standard that is capable of accommodating a range of activities united not by objective indicia such as formal organization or coaching, but rather by a practical examination of the particular circumstances surrounding a case.\textsuperscript{167} Interestingly, one court has also indicated a “rage” component to the inherent contact analysis finding that “the competitive nature of contact sports leads the participants to be more physically aggressive and less careful than they otherwise would be.”\textsuperscript{168}

In contrast, other courts employ a continuum or sliding scale analysis when deciding whether to apply a heightened negligence standard.\textsuperscript{169} One court noted the “contact-non-contact distinction does not sufficiently take into account that we are

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conduct engaged in by the parties was analogous to that found in floor hockey or soccer. \textit{See id.} at 1017. Because the participants engaged in an activity in which contact is both inherent and inevitable, the court found the reckless standard to be appropriate. \textit{See id.} \textsuperscript{167} \textit{See id.} (rejecting appellate court’s factual analysis of game’s rules and usages in favor of common sense approach examining inherent or inevitable contact). The \textit{Pfister} court concluded that:

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

\textit{Id.} at 1018.

\textsuperscript{168} \textit{See Zurla v. Hydel, 681 N.E.2d 148, 152 (Ill. App. Ct. 1997) (noting that in addition to participants knowledge of inherent contact involved in activity, encouraging physical aggression also warrants heightened reckless standard); but see Hill v. Bosma, 1993 Mass. App. Div. 128, 133 (noting that in “golf a player may wish to take certain shots to reduce his or her score. This determination should not be influenced by the possibility of litigation based on an ordinary negligence standard.”). Thus in Hill the court implied that temporal risk-taking was similar to the vigorous physical expectations traditionally associated with contact sports. \textit{See id.}} \textsuperscript{169} \textit{See Thompson v. McNeill, 559 N.E. 2d 705, 709 (Ohio 1990) (suggesting continuum approach rather than black and white distinction between contact, non-contact). In Thompson a participant in a game of golf was injured after being struck by another participants errant shot. \textit{See id.} at 706. The court found golf to be subject to a heightened negligence standard in part because:

“Shanking the ball is a foreseeable and not uncommon occurrence in the game of golf…. not every shot played by a golfer goes to the point where he intends it to go…. It is common knowledge…. that many bad shots must result although every stroke is delivered with the best possible intention”

dealing with a spectrum of duties and risks rather than an either-or distinction.”  

Under this form of analysis the standard of care owed to co-participants is increased as the inherent risk of the sport of activity decreases. This approach offers an equitable balancing test that takes account of the nature of the sport, the governing rules and regulations, the customs and practices generally accepted within the sport, and the facts and circumstances of the particular case. Similarly, other courts not explicitly adopting the continuum approach have nevertheless adopted heightened negligence standards for non-contact sports. Examples of this include “participants engaged in noncompetitive but active sports activity” and participants engaged in a recreational or sporting activity such as yachting.

2. A Brief History of Wisconsin Law

Wisconsin utilizes a contributory negligence standard to assess negligence actions in the state. Thus, an individual injured by another individual will be barred from recovering if the individual’s injury was proximately caused by his own negligence. Since Wisconsin employs a comparative negligence scheme under the general contributory negligence standard, this absolute bar is qualified. Despite a finding of contributory negligence, a plaintiff will not be barred from recovering damages if the plaintiff’s negligence does not exceed the negligence of individual against whom the suit is brought.

In Ceplina v. South Milwaukee School Board the plaintiff brought a negligence action after being struck with a bat by another participant in a sixth-grade softball

170 See Thompson, 559 N.E. 2d at 709.
171 See id. (noting “a golfer accepts the risk of coming in contact with wayward golf shots on the links, so golf is more dangerous than table tennis, for instance, but certainly not as dangerous as kickboxing”).
172 See id. at 708-09 (discussing factors into which court should inquire).
173 See Ford v. Gouin, 3 Cal. 4th 339, 345 (Cal. 1992) (extending reckless standard to water-ski-boat driver). In Ford the court reasoned that encouraging vigorous participation in an activity warranted application of the reckless standard. See id. Although not competitive, waterskiing is a thrilling sport that is conducive of risk-taking, both by the skier and the operator of the boat. See id. Extending liability to the boat driver for ordinary negligence would chill participation in the sport. See id.
174 See id.
175 See Pressler v. U, 70 Ohio App. 3d 204, 206 (Ohio Ct. App. 1990) (finding ordinary negligent conduct associated with yachting to be protected under heightened reckless standard).
177 See id. (discussing negligence law generally in Wisconsin).
178 See id. (noting aspects of Wisconsin negligence law).
179 See id. (discussing negligence law generally in Wisconsin).
The plaintiff argued that the defendant owed her a duty of care, and that this duty was violated by improperly controlling the bat. In reply, the defendant argued that the danger should have been open and obvious to the plaintiff. The Wisconsin Supreme Court found that the defendant did owe a duty to refrain from any act that would cause foreseeable harm to co-participants.

In *Strong v. Buran* the plaintiff was struck in the eye by a tennis ball struck by the defendant during a doubles tennis match. The plaintiff alleged the defendant’s negligence was the cause of his injury, while the defendant asserted he owed no duty of care to the plaintiff. The Wisconsin Supreme Court found a standard of ordinary negligence too restrictive and unreasonably burdensome on free and vigorous participation in sporting activities. Deciding recklessness was the standard, the plaintiff had no cause of action against the defendant, who was merely negligent.

In *Lestina v. West Bend Mutual Insurance Co.* the plaintiff sustained serious leg injuries after being slide-tackled in a game of adult recreational soccer. The league rules expressly prohibited slide-tackling. The plaintiff brought a negligence action asserting that the defendant was both negligence and reckless. The Wisconsin Supreme Court found that an ordinary negligence standard was sufficiently flexible to permit vigorous competition while also providing recourse for injuries resulting from negligent conduct of co-participants. Thus the standard articulated in *Strong* was reversed in favor of an ordinary negligence standard.

In response to the holding in *Lestina* the Wisconsin legislature passed Wis. Stat. § 895.525(4)(m) which permitted recovery by co-participants in a contact sport only upon a showing of reckless or willful conduct.

IV. ANALYSIS

A. Narrative Analysis

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181 See Survey, supra note 176 at 434 (discussing facts and holding in *Ceplina*).
182 See id. (recalling facts and holding in *Ceplina*).
183 See id. (noting facts and holding in *Ceplina*).
184 See id. (discussing facts and holding in *Ceplina*).
186 See Survey, supra note 176 at 434-35 (discussing facts and holding in *Strong*).
187 See id. (noting facts and holding in *Strong*).
188 See id. (discussing facts and holding in *Strong*).
189 See id. (recalling facts and holding in *Strong*).
190 See *Lestina v. West Bend Mutual Insurance Co.*, 176 Wis. 2d 901 (Wis. 1993).
191 See Survey, supra note 176 at 435 (discussing facts and holding in *Lestina*).
192 See id. (recalling facts and holding in *Lestina*).
193 See id. (noting facts and holding in *Lestina*).
194 See id. (discussing facts and holding in *Lestina*).
195 See id. (reporting facts and holding in *Lestina*).
196 See id. (discussing aftermath of *Lestina*).
In the aftermath of *Lestina*, the Wisconsin Legislature sought to provide immunity from ordinary negligence actions for participants in a sport involving amateur teams that included physical contact between participants.\textsuperscript{197} Years later the *Noffke* court had the task of providing a workable framework to apply and interpret the legislative enactment.\textsuperscript{198} In doing so, the court applied a four-pronged test to establish whether a defendant could obtain the benefit of immunity.\textsuperscript{199} The test required a defendant be (1) participating in a recreational activity; (2) that recreational activity must include physical contact between persons; (3) the persons must be participating in a sport; and (4) the sport must involve amateur teams.\textsuperscript{200}

1. **On Recreation and Sport**

Prongs one and three are distinct from one another raising the question of what judicially elevates a recreational activity to characterization as a sport? Although the issue of whether cheerleading was a recreational activity went undisputed, reference to the relevant Wisconsin statute indicates a recreational activity is “any activity undertaken for the purpose of exercise, relaxation or pleasure, including practice or instruction in any such activity.”\textsuperscript{201} The activities listed in the statute are illustrative, not exhaustive, and the language indicates “any other sport, game, or educational activity” will be included.\textsuperscript{202} Hence, defining a recreational activity seems more restricted by the imagination than by actual possibilities.\textsuperscript{203}

Although recreational activity is statutorily defined, in *Noffke* the concept of ‘sport’ is judicially constructed.\textsuperscript{204} The term is assigned its dictionary definition of “[a]n activity involving physical exertion and skill that is governed [sic] by a set of rules or customs.”\textsuperscript{205} Noting that the issue of whether cheerleading is, or is not, a sport has incited a degree of controversy, the court devoted little attention to the matter and found

\textsuperscript{197} See *Noffke* v. Bakke, 2009 WI 10, 26 (Wis. 2009) (noting Wis. Stat. § 895.525(4m)(a) passed in response to holding in *Lestina*).
\textsuperscript{198} See id. at 10 (noting case required court to interpret statute).
\textsuperscript{199} See id. at 16 (describing four-pronged test applied to interpret statute).
\textsuperscript{200} See id.
\textsuperscript{201} See id. at 15 (defining recreational activity) (referencing Wis. Stat. § 895.525(4)). A cursory examination of the statute reveals a broad array of eligible activities including “ballooning, curling, throwing darts, hang gliding, [and] hiking”. See id.
\textsuperscript{202} Wis. Stat. § 895.525(4)
\textsuperscript{203} See id. With activities such as bird watching, nature study, removing wood, sight-seeing, and harvesting the products of nature included, one would be hard-pressed to propose an activity that would not be recreational under the statute. See id. Notably, a recreational activity can be undertaken by a person acting in an individual capacity without the participation, competition, or assistance of other individuals. See id. The statute only requires an activity be undertaken for “the purpose of exercise, relaxation or pleasure” to qualify. Id.
\textsuperscript{204} See *Noffke*, 2009 WI at 17 (defining sport as applied in prong three of test).
\textsuperscript{205} See id. (defining sport) (citing The American Heritage Dictionary of the English Language 1742 (3d ed. 1992)).
that cheerleading meets the proposed definition of sport. Further, the court found that excluding cheerleading from the definition of sport would be inconsistent with the purpose of the statute, which was to establish the responsibilities of participants in recreational activities, and to decrease uncertainty surrounding such responsibilities.

In response to this finding, the concurring justices observed that resort to dictionary definitions could prove problematic if a court selects “a friendly definition it likes from the many offered without explaining its choice.” Specifically troubling to the concurrence was the element of competition suggested by the dictionary definition and largely ignored by the majority. In light of this, the concurrence suggests that although cheerleading could be considered a sport, the question presented upon engaging in statutory interpretation is not could it be so, but whether it is the common, ordinary, and accepted practice to use the word in such a manner.

Both the majority and concurrence agree that cheerleading is a sport under the relevant statute because such a construction furthers the purpose of the statute. Thus,

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206 See id. at 32 (finding “[c]heerleading is a sport”). The court adds that whether or not cheerleading is a sport is a matter of public debate, and disregards the debate in favor of their judicially-crafted definition of the term. See id.

207 See id. at 28 (citing statute). The applicable statute reads in relevant part:

(1) Legislative purpose. The legislature intends by this section to establish the responsibilities of participants in recreational activities in order to decrease uncertainty regarding the legal responsibility for deaths or injuries that result from participation in recreational activities and thereby to help assure the continued availability in this state of enterprises that offer recreational activities to the public.

See Wis. Stat. § 895.525(1).

208 See id. at 60 (Abrahamson, J. concurring, joined by Bradley, J.) (noting dictionaries may aid court in determining statutory meaning, but not in this case). Turning to Justice Scalia for analogy, the concurrence noted such a practice might amount to “the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one’s friends.” See id. (citing Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J. concurring)).

209 See id. at 61 (discussing dictionary definition of sport). Removed from the majorities definition of sport taken from the American Heritage Dictionary was the phrase “and often undertaken competitively”. See id. The majority did briefly address this issue, but dismissed it as “not required” by the definition. See id. at 17. Further, the concurrence cites another definition of sport as “a game or contest esp. when involving individual skill or physical prowess on which money is staked.” See id. at 61 (citing Webster’s Third New International Dictionary, at 2206 (1961)).

210 See id. at 63 (noting “a court must not overlook “the distinction between how a word can be used and how it ordinarily is used” when interpreting statutory text.”) (citing Smith v. United States, 508 U.S. 223, 242 (1993) (Scalia, J. dissenting)).

211 See id. at 32, 67 (finding that construing “sport” to exclude cheerleading would defeat purpose of statute). To the majority cheerleading appears to be considered a sport more as a consequence of the statute’s stated purpose than a self-evident proposition relating to
for a recreational activity to be considered a sport it must (1) involve physical exertion and skill that is governed by a set of rules or customs; and (2) its classification must further the legislative policy of creating certainty and establishing responsibility of participants in the activity.212

2. The Amateur Teams Requirement

As with the definition of sport, the fourth prong of the test requiring “amateur teams” was judicially crafted in the Noffke case.213 Referring again to the dictionary definition, the majority found team to encompass “a group organized to work together.”214 In light of the Spirit Rules, which defined cheerleading as a group dedicated to leading fan participation and taking part in competitions, the Noffke court easily fit cheerleading into its loose conception of team.215 Notably the court refused to draw the inference that the statute required a competition element flowing from the legislatures use of the plural form of team (“teams”) in the statute.216 In defense the court asserted (1) that if the legislature desired such an element it would have been clearly stated; (2) that a single letter (“s”) could not be elevated to absurd importance; and (3) that the result of such a construction would restrict the intended scope of the statute.217 Suring up its conclusion, the court added that cheerleaders “often engage in competition with the opponent’s cheerleaders not only during the game but also during organized competitions.”218

Again, the concurring justices took issue with the majority’s use of dictionary definitions to supply statutory interpretations.219 Suggesting that the majority executed the nature of cheerleading itself. See id. at 32. This, however, is unclear in the opinion. Compare id. at 32 (finding “[c]heerleading is a sport because a sport is an activity involving physical exertion and skill that is governed by a set of rules or customs.”) (quotations omitted) with id. (noting “because construing sport to exclude cheerleading would defeat the purpose of the statute…. we conclude cheerleading is a sport”).212 See id. at 32 (providing two reasons why cheerleading is sport).213 See id. at 17. 214 Id. (citing The American Heritage Dictionary of the English Language 1842 (3d ed. 1992)). 215 See id. 216 See id. at 30-31 (refusing to construe statute as requiring competition). Noffke contended that the statute applied only to competitive sports, and further that to not require competition would render a portion of the statute superfluous. See id. at 30. 217 See id. at 31 (stating reasons for not finding plural form). One commentator, in response to this finding, noted “[b]asically, they ignored the ’s’ and were, therefore, able to find that players of contact sports need not ever compete.” See Mike Nichols, If cheerleading is a contact sport, then fetch me a sled, WISCONSIN JOURNAL SENTINEL ONLINE, Jan. 30, 2009, http://www.jsonline.com/news/opinion/38725487.html. 218 Noffke at 31. 219 See id. at 60 (noting dictionary definitions not proper aid in case).
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an interpretive slight-of-hand in choosing an alternate definition of “team”. The concurrence notes that the definition of team likely connotes competition, and that the squad in question did not participate in any organized competitions. Despite this, the concurrence still concluded that construing cheerleading as a team sport furthered the purpose underlying the statute.

3. The Central Question: The Physical Contact Requirement

Having disposed of the requirements of prongs one, three, and four, the Noffke court devoted the majority of its analysis to deciding whether cheerleading involves “physical contact between persons.” Maintaining a consistent approach, the court consulted the dictionary definitions of both “physical” and “contact.” The court defined “physical” as “a. relating to the body as distinguished from the mind or spirit. b. Involving or characterized by vigorous bodily activity” and “contact” as “a. A coming together or touching, as of objects or surfaces. b. The state or condition of touching or immediate proximity.”

220 See id. at 61 (noting majority opinion chose alternative definition of team). The concurrence notes “[i]nexplicably, the majority opinion skips over American Heritage’s sports-specific definition of “team” in favor of an alternative definition that obviously is meant to apply in broader contexts”. Id. The definition supplied by the majority did not contain the example provided in the dictionary: “a team of engineers.” See id. at 61. The concurrence, looking at this alternative definition, asserted that the sports-specific one was the most relevant definition for purposes of the statute at hand. See id. The concurrence suggests that the cheerleading squad at issue did not compete in organized competitions, but cites an ambiguous portion of the majority opinion in support of this proposition. See id. at 62 (noting majority “stat[ed] only that Noffke was a varsity basketball cheerleader; not mentioning any…. competitions”).

221 See id. at 61 (finding definition of team, when considered with definition of sport, clearly suggested competition). Although the majority did not choose the definition supplied in the sports and games section of the dictionary, it nonetheless provides team as “a group on the same side, as in a game”. See id. at 61. The concurrence, looking at this alternative definition, asserted that the sports-specific one was the most relevant definition for purposes of the statute at hand. See id. The concurrence suggests that the cheerleading squad at issue did not compete in organized competitions, but cites an ambiguous portion of the majority opinion in support of this proposition. See id. at 62 (noting majority “stat[ed] only that Noffke was a varsity basketball cheerleader; not mentioning any…. competitions”).

222 See id. at 67 (finding “because cheerleading can be construed as “a sport involving amateur teams” and such construction furthers the purpose of [the statute], I conclude that [the statute] covers high school cheerleaders.”).

223 See id. at 18 (noting central question to be answered was whether cheerleading involves physical contact between persons).

224 See id. (noting “we utilize a dictionary to guide our interpretation and ensure that we have accurately defined the common, ordinary phrase at issue”).

225 See id. at 19 (citing The American Heritage Dictionary of the English Language 406 (3d ed. 1992)).

226 See id. (citing The American Heritage Dictionary of the English Language 1366 (3d ed. 1992)).
From these definitions the Noffke court inferred three types of contact involved in cheerleading: (1) incidental touching; (2) physical contact; and (3) forceful interaction. The court vaguely implied that mere incidental touching did not, in itself, give rise to statutory protection. However, the amount and degree of necessary physical contact necessary to trigger statutory protection was itself ambiguous. Referencing the informative illustrations provided in the Spirit Rules governing cheerleading, the court concluded that incidental touching, physical contact, and forceful interaction were all present in cheerleading to different degrees. In sum, the court determined that the statutory physical contact requirement was sufficiently carried because cheerleading “involves a significant amount of contact among participants that at times can produce a forceful interaction between the cheerleaders.” Thus, it is unclear whether an activity that includes physical contact, but not forceful interaction, would receive statutory protection.

Adding clarity to their definition of “physical contact”, and perhaps outlining general outer limits to that definition, the court responded to Noffke’s contention that the statute required “aggressive” or “competitive” contact. Discussing the former, the

227 See id. at 18-22 (discussing physical contact requirement). The Noffke court began by recognizing “it is undeniable that cheerleaders touch one another…. we use a dictionary to guide our interpretation”. See id. at 18. In doing so, the court implicitly recognized that the type of contact incidental to cheerleading, and many activities generally, was not necessarily the type of contact required by the statute. See id. Next, the court, after defining “physical contact”, noted “cheerleading involves a significant amount of physical contact between the cheerleaders”. See id. at 20. This statement was colored by reference to the Spirit Rules governing cheerleading which illustrated the many cheerleading moves executed by cheerleaders. See id. Simply by assessing the illustrations the court was able to determine there was a level of physical contact that rose above incidental contact; contact that was itself an element of the activity. See id. Finally, the court added “[i]n addition to the physical contact discussed…. some of the stunts performed by the cheerleaders produce a forceful interaction between the participants.” See id. at 22. Again by referencing the illustrations provided in the Spirit Rules the court distinguished a new form of contact also incident to the activity, but in a way more deserving of judicial recognition. See id.

228 See id. at 18 (discussing physical contact requirement). The court recognized that there was a degree of touching undeniably present in cheerleading, but sought to properly define the term “physical contact” as it was meant to be applied in the statute. See id.

229 See id. at 20-22 (discussing physical contact inherent in cheerleading). The court seems to vacillate between a discussion of physical contact, and an aside concerning “forceful interaction”. See id. In concluding that cheerleading possessed the statutorily required physical contact the court added that, at times, cheerleading produced “forceful interaction”. See id. at 23. This makes unclear what proportion of physical contact to forceful interaction is necessary to trigger statutory protection.

230 See id. at 18-22 (discussing physical contact inherent in cheerleading).

231 See id. at 23.

232 See id. at 24 (discussing Noffke’s argument). Noffke contended that cheerleading did not give rise to the type of physical contact contemplated by the statute. See id. Further,
court expressed doubt that the legislature would limit the statutory protection to protect only aggressive contact sports such as football and hockey. Further, the court noted that the plain language of the statute does not restrict its application, but rather acts as a broad grant of statutory protection. With respect to “competitive” contact, the court found such a proposition inherently contradictory and against the purpose of the statute. The court illustrated this point noting it would be illogical if “when a hockey or football team practices but is not in competition with another team there is no immunity, but when the team plays a game [there is].”

B. Critical Analysis

1. Noffke’s Ambiguous Standard

The Noffke concurrence insightfully noted that the majority “resolve[d] th[e] vexing issue of statutory interpretation in one short paragraph, relying on dictionary definitions of the key statutory words.” In a sense the concurrence was on to something; the majority applied a test that nearly copied the statutory language verbatim, then managed to define the major terms with a dictionary “without explaining [their] choice” of definition. Further, each prong of the four-prong test applied was satisfied with little in the way of judicial analysis, settling instead for self-evident propositions and circular reasoning. One could speculate that the majority opinion was deliberately

Noffke looked to the title of the relevant statute, “Liability of contact sports participants”, to support her contention. This argument was accepted by the Court of Appeals, and resulted in an application of the statute based on the definition of “contact sport”. See id. at 26 (discussing legislative intent). The statute at issue in this case was passed in the wake of the holding in Lestina which concluded that ordinary negligence was the proper standard to govern the conduct of soccer match participants. See id. The court seems to imply that the legislature would not have gone out of its way to overturn the holding in Lestina only to afford protection to a limited class of sports participants. See id. at 27 (noting language of statute does not restrict its application). The court further notes that if the legislature intended a narrower construction, they could have placed such a restriction in the text of the statute. See id. at 33 (noting competition requirement would produce inconsistent results).

Id. at 59.

See id. at 60 (discussing disagreement with majority use of dictionary to define statutory terms).

See Fallacy: Circular Reasoning, SJSU.EDU, http://www.sjsu.edu/depts/itl/graphics/adhom/circular.html (last visited March 9, 2009) (discussing circular reasoning). In the fallacy of circular reasoning, which is often called begging the question, one assumes to be true what they are supposed to be proving. See id. It’s like saying, “A is B, therefore A is B.” See id. In Noffke, for example, the court states “Cheerleading is a sport because a sport is [the definition of sport]”. Without
vague in the wake of their holding being statutorily overridden in *Lestina*.\(^{240}\) Certainly the request for legislative review at the conclusion of the opinion expresses at least some degree of uncertainty in Wisconsin concerning co-participant liability – in particular “school team sports [such] as golf, swimming, and tennis.”\(^{241}\)

The Wisconsin Supreme Court hears a matter if it is “one that should trigger the institutional responsibilities of the [court]”\(^{242}\) and maintains “appellate jurisdiction over all courts.”\(^{243}\) Although the court has been described as one possessing a “strong interest in devising and imposing its own solutions… rather than deferring to the political process”,\(^{244}\) the opinion in *Noffke* does exactly the opposite, and provides inadequate guidance to lower courts grappling with the issue of whether or how to apply the heightened negligence standard provided in the Wisconsin statute.

2. **A Different Perspective**

Courts in various jurisdictions have addressed issues similar to those presented in *Noffke*, and if the previous discussion clarified anything, it would be that the jurisprudence is anything but clear.\(^{245}\) What has emerged is a general framework of doctrines and judicial analysis that rationalize application of a heightened negligence standard among co-participants in a recreational activity.\(^{246}\) Although the reckless standard was imposed in Wisconsin by statute, the court nonetheless could have explaining their reasoning both for using the dictionary definition and this particular definition, the court essentially says *A* (cheerleading) is *B* (a sport) because *A* is *B*.\(^{240}\) See *Lestina v. West Bend Mutual Insurance Co.*, 176 Wis. 2d 901

\(^{241}\) See *Noffke*, 2009 WI at 34 (encouraging “the legislature to once again review this important statute and consider our interpretation and application to the facts of this case”).


\(^{243}\) See *id.* at 3 (detailing internal operating procedures).

\(^{244}\) See Diane S. Sykes, *A New Direction for the Wisconsin Supreme Court*, Dec. 2006, [http://www.wpri.org/WIInterest/Vol16No3/DSykes.16.3/DSykes16.3.html](http://www.wpri.org/WIInterest/Vol16No3/DSykes.16.3/DSykes16.3.html) (discussing current direction of Wisconsin Supreme Court). Judge Sykes was a former justice on the Wisconsin Supreme Court from 1999-2004. See *id.* Of the three justices who presided in the *Noffke* case, two (Abrahamson, C.J. and Bradley, J.) were on the court the entire period in which Judge Sykes was on the court, while the third justice, Ziegler, J., was elected in 2007. See Current Supreme Court Justices, [http://www.wicourts.gov/about/judges/supreme/index.htm](http://www.wicourts.gov/about/judges/supreme/index.htm) (last visited March 9, 2009) (listing justices and providing biographical information).

\(^{245}\) For a further discussion of various doctrines underpinning co-participant liability, see *supra* notes 91-174 and accompanying text.

\(^{246}\) For a further discussion of various doctrines underpinning co-participant liability, see *supra* notes 91-174 and accompanying text.
promulgated a workable framework in which a lower court could assess negligence actions between co-participants in a recreational activity.\(^{247}\)

In the wake of Noffke potential litigants in actions arising from judicially ambiguous activities such as “golf, swimming, and tennis” are left facing the very uncertainty the legislature sought to resolve.\(^{248}\) In light of this, the court could have developed a functional recklessness standard, cognizant of the legislative purpose, while also rooted in the interests, expectations, and societal goals underpinning the application of a heightened negligence standard.

a. Looking to Assumption of the Risk and Related Doctrines

The assumption of the risk defense is not recognized in Wisconsin, and is instead subsumed under the doctrine of contributory negligence.\(^{249}\) Although the assumption of the risk doctrine often provides a theoretical foundation for applying a reckless standard, the Wisconsin Supreme Court has noted that a reckless standard can apply with equal force under the contributory negligence framework.\(^{250}\) Moreover, it has been noted that often “it makes no difference” whether contributory negligence or assumption of the risk is invoked.\(^{251}\) Thus in assessing the statutorily imposed reckless standard, the Wisconsin

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\(^{247}\) See Noffke, 2009 WI at 28 (noting purpose behind Wisconsin statute is to decrease uncertainty).

\(^{248}\) See Id. at 34 (requesting legislature review courts holding).

\(^{249}\) See Lestina v. West Bend Mutual Insurance Co., 176 Wis. 2d at 911 (noting Wisconsin applies contributory negligence). However, by examining Wisconsin’s modified comparative responsibility framework, it is evident that in application Wisconsin’s regime resembles one in which assumption of the risk is a true defense. See Goldberg, et. al., Tort Law: Responsibility and Redress, at 388 (discussing Wisconsin modified comparative fault regime). The difference being that in a jurisdiction that recognizes assumption of the risk, the defense, if proven, acts as a complete defense, whereas in Wisconsin a defendant arguing that the plaintiff impliedly consented to otherwise tortuous conduct would have to prove that the plaintiff was more responsible than the defendant in order to construct a complete bar to recovery by the plaintiff. See Id.

\(^{250}\) See id. (discussing plaintiff’s contention). In Lestina the plaintiff asserted that other “courts established a recklessness standard because they recognize the doctrine of assumption of risk.” See id. The Wisconsin Supreme Court disagreed, providing “plaintiff’s analysis of the relationship between the recklessness standard and the assumption of the risk defense does not hold true for all the cases.” See id. In support the court cited a number of other jurisdictions that recognized a reckless standard while also applying contributory negligence. See id; but see Estes v. Tripson, 188 Ariz. at 95 (finding that if assumption of risk is not defense, reckless standard cannot apply).

\(^{251}\) See Restat 2d of Torts, § 496A(d) (noting “[t]he same kind of conduct frequently is given either name, or both. Ordinarily it makes no difference which the defense is called.”). Further, the Restatement notes:

“In theory the distinction between the two is that assumption of risk rests upon the voluntary consent of the
Supreme Court could gain judicial insight by first examining assumption of the risk and related doctrines which temporally support the logic and policy underlying a heightened standard of negligence.

Consulting the doctrine generally, a court could ascertain a number of foundational principles. If A voluntarily enters a relation with B, co-participant in an activity, knowing that B will not protect A against certain future risks arising from the relation, A may be regarded as impliedly consenting to the future negligent conduct. If in the context of the specific relationship formed, A assumes or acknowledges that injury resulting from B’s negligence is possible – this assumption partly defines A’s reasonable expectations.

Reciprocally, upon A’s voluntary participation, B’s duty to A is limited to B’s reasonable expectations concerning the specific relationship formed. B thus assumes that injuring A is both possible and permissible if B’s conduct is reasonably within the bounds of the specific relationship formed. Because a lack of congruence can naturally flow from subjective analysis of A and B’s respective understanding of the relationship formed, the objective nature and inherent characteristics of the relationship are highly relevant. As a result, A and B’s reasonable expectations are defined and limited by the nature of the activity upon which they formed their specific relationship, however, courts have struggled to strike an exact balance between subjective expectations and objective or inherent risks. To reconcile the divide, a court should assess foreseeable risks associated with a particular activity in light of the specific circumstances.

plaintiff to encounter the risk and take his chances, while contributory negligence rests upon his failure to exercise the care of a reasonable man for his own protection. Where the plaintiff voluntarily consents to take an unreasonable chance, there may obviously be both.”

See id.

252 See Prosser & Keeton, Torts (5th ed. 1984) § 68, 481 (discussing relation between assumption of risk and defendants duty of care owed to plaintiff).

253 See id. (discussing assumption of risk); see also Ordway v. Superior Ct., 198 Cal. App. 3d 98, 104 (noting if defendants actions within expectations of participants no cause of action can succeed based on resulting injury).

254 See id.

255 See id.

256 See Knight v. Jewett, 3 Cal. 4th 296 (noting “the nature of the sport is highly relevant in defining the duty of care owed”).

257 For a further discussion of the varied means of analysis employed by courts concerning inherent risks and related concepts, see supra notes 91-174 and accompanying text.

258 Under this framework the objective element is the foreseeable risks associated with a particular activity, while an analysis of the specific circumstances tempers the equation with a subjective element and also allows for a degree of flexibility in the analysis. Golf is illustrative of an activity that demands such flexibility. For example, if a player is struck by a golf ball errantly hit by a participant on another hole the struck player could be said to have assumed the foreseeable risk of playing golf, i.e. being hit as a result of
b. Reckless v. Ordinary Negligence: The Legal Consequences of Judicial Choice

Characterizing an activity and the respective assumptions and duties of the participants ultimately establishes what standard of negligence a court will apply. Despite the arguments advanced for establishing an ordinary negligence standard, the reckless standard affords participants in an activity a much broader latitude of acceptable conduct. Thus the way in which a court characterizes an activity and applies a negligence standard has a very personal and profound effect on participants in that activity.

The magnitude of the potential liability stemming from an injury incurred in the course of participation in a recreational activity demands a corresponding degree of certainty reflected in a court’s jurisprudence. Thus, in Wisconsin, the legislature explicitly intended to establish the responsibilities of participants in recreational activities another participants negligence, however, if the player is struck by a ball hit by another player in their own group while on a green, where the player would normally forsee only putting by another member of their group, the player could be said not to have assumed the risk, and consequently the player who struck the ball would be deemed reckless. See Tavernier v. Maes, 242 Cal. App. 2d 532, 545 (noting rules and custom of game help define duty owed by co-participant). Also, the Pfister case is illustrative of the need for a flexible framework for analysis that combines objective and subjective factors. There, a game of “kick the can” elevated into an all out competition resulting in injury to a participant. In response the court employed a common sense approach that examined the nature of the activity and the expectations of the participants. The fact that the participants had set up goals and were engaged in competition drove the courts analysis. Thus in Pfister the particular circumstances defined the foreseeable risks of an otherwise difficult to characterize activity. Although the foreseeable risks will often outweigh the particular circumstances, such as in a game of organized high school football, there are other times when a novel activity or unique set of circumstances must be assessed to reach a proper outcome. For a further discussion of Pfister, see supra notes 166-67 and accompanying text.

For a further discussion of potentially applicable negligence standards, see supra notes 121-174 and accompanying text.

See id.

See Fatalities and Catastrophic Injuries, supra note 9 (showing percentage of catastrophic injuries attributable to cheerleading). As the chart demonstrates, the potential civil liability associated with the death of a participant resulting from the simple negligence of another participant is very high. Id. For example, in Noffke the defendant Bakke went to the wrong position causing Noffke to fall to the ground causing injury. See Noffke v. Bakke, 2009 WI 10, 5 (noting instead of going to back of base Bakke moved to front). Under an ordinary negligence standard a court could look to the rules and regulations that would show where a spotter should be positioned and from this could determine Bakke violated the rules and was thus negligent. For a further discussion of application of ordinary negligence, see supra notes 151-155 and accompanying text.
in order to increase certainty concerning legal responsibilities.\textsuperscript{262} To provide this certainty courts must maintain an analytical distinction between the characterization of an activity, the resultant standard of negligence applied, and the application of that standard to the specific facts of the case.\textsuperscript{263}

Thus, the way in which a court applies the specific facts and circumstances of a case to determine the proper standard of negligence should be a separate and distinct analysis apart from the determination of whether the chosen negligence standard is satisfied.\textsuperscript{264} The application of that standard should revisit the specific facts in light of the relevant framework for the applicable negligence standard.\textsuperscript{265} This bifurcated analysis strikes a proper balance between the recurring policy goals of vigorous participation, legal certainty, and reduced litigation while also protecting participants against unforeseen and unreasonable conduct.\textsuperscript{266}

c. The Curious Case of Cheerleading

Applying an ordinary negligence standard to a competitive cheerleading squad is problematic because the nature of the activity has changed so dramatically in recent

\textsuperscript{262} See Noffke, 2009 WI at 28 (discussing legislative purpose).

\textsuperscript{263} For example, in the Gamble case a plaintiff was injured while bowling, the court first established that the risk of such an injury was not inherent in bowling and further, that bowlers do not voluntarily submit to the type of risk which caused the injury. See Gamble v. Bost, 901 S.W. 2d 182, 186 (Mo. Ct. App. 1995). As a result, the court invoked an ordinary negligence standard, and then applied the standard to the facts of the case. See id.

\textsuperscript{264} See id.

\textsuperscript{265} See id. at 34-35. In Noffke the court first established the relevant negligence standard before applying that standard to the specific facts of the case. See id. The court determined Bakke did not demonstrate a “conscious disregard for the safety of the plaintiff.” Id. at 37. This standard, however, does not provide blanket immunity between co-participants, and it is conceivable, for example, that if Bakke had pulled out a cell-phone to answer a call while Noffke was in the air it would have amounted to recklessness, i.e. participating “in conduct under circumstances in which he knows or a reasonable person under the same circumstances would know that the conduct creates a high risk of physical harm to another”. Id. at 36 (citing Wis JI—Civil 2020).

\textsuperscript{266} For a further discussion of application of various negligence standards, see supra notes 121-174 and accompanying text. To different degrees, the safety of participants in a recreational activity relies heavily on the skill of participants and the instruction of coaches. See Todd Neagle, Cheerleading Causes Most Severe Sports Injuries in Young Women, MEDPAGE TODAY, Aug. 12, 2008 (discussing various safety precautions necessary in cheerleading and finding some cheerleaders may not be capable of performing certain stunts). Cheerleading in particular presents a novel challenge in assessing liability because the nature of the sport has changed dramatically while the training, coaching, and assessment of the athletes has not made corresponding gains. See id. Thus competitors may attempt stunts they are not capable of, but feel they should attempt to remain competitive. See id.
years. For example, a participant might not be adequately skilled or prepared to perform a stunt that places another participant in significant danger. Nevertheless, the squad may attempt the stunt to remain competitive, and by doing so the participants impliedly consent to the foreseeable consequences. As the current research indicates, the foreseeable risks flowing from competitive cheerleading stunts ranges from minor injury to death.

In this example, an injury occurring as a result of negligent performance of the stunt is more the result of a cheerleading squad biting off more than they could chew than reckless conduct. Despite this, an ordinary negligence standard might impose liability on the negligent participant for lack of skill or violation of the rules and standards governing the proper performance of the stunt. In effect, this would punish an individual for a risk collectively undertaken by a team even if the risk undertaken was itself unwise.

This hypothetical outcome under an ordinary negligence framework is inequitable and goes against the doctrines underlying co-participant liability. Further, the potential application of an ordinary negligence standard, especially in an activity without well-established or developed norms such as cheerleading undermines the legal certainty courts and legislatures have sought to create between co-participants in a recreational activity. Cheerleading presents a truly unique activity that falls on the edge of the ordinary and reckless negligence standards. In practice it can be both a benign pep squad and a fiercely competitive gymnastics-based team. For a court to provide certainty to participants in recreational activities, and to reach equitable, common-sense conclusions regarding liability between them, a flexible framework is necessary to determine which negligence standard is applicable in a given circumstance.

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267 See id. (noting over past twenty-five years cheerleading has moved beyond sideline activity to highly competitive sport requiring more difficult skills to be successful). A prominent cheerleading expert further noted “[a] major factor in this increase has been the change in cheerleading activity, which now involves gymnastic-type stunts…. [if these activities] keep increasing in difficulty, catastrophic injuries will continue to be a part of cheerleading.” See id.

268 See id. (recommending “[a] qualification system should be implemented to ensure that cheerleaders are only attempting stunts they are capable of completing.”)

269 For a further discussion of implied consent and consent generally, see supra notes 91-121 and accompanying text.

270 For a further discussion of the risks associated with cheerleading, see supra notes 1-26 and accompanying text.

271 For a further discussion of the ordinary negligence standard, see supra notes 51-55 and accompanying text.

272 For a further discussion of the general doctrines underlying co-participant liability, see supra notes 91-121 and accompanying text.

273 See Hill v. Bosma, 1993 Mass. App. Div. 128, 133 (noting that golf player may desire to take riskier shots to lower scores and this competitive spirit should not be dampened by threat of litigation based on ordinary negligence).

274 For a further discussion of the current state of cheerleading, see supra notes 1-26 and accompanying text.

275 See id.
3. **A Functional, Flexible Test**

To provide the legal certainty the Wisconsin Legislature desired, the *Noffke* court could have established a more flexible framework designed to illicit the kind of equitable, consistent results necessary to properly guide lower courts.276

Often when seeking judicial clarity courts stumble into a minefield of terms and distinctions that appear clear in application, but are less so when assessing unorthodox activities such as cheerleading.277 Because competition can arise in many forms and forums – from organized football to an impromptu game of kick the can – a court should ground its analytical framework in judicial common sense rather than a strict test predicated on dictionary definitions and preconceived stereotypes.278 The framework should be bifurcated:

1. A court should assess the foreseeable risks associated with a particular activity in light of the specific circumstances. If there is foreseeable risk resulting either from the conduct of co-participants in the activity or the nature of the activity itself, the reckless standard of negligence should govern the next step of analysis.279

Here a continuum approach is appropriate to determine whether circumstances are more indicative of foreseeable risks or whether the nature of the particular activity is instructive.280 One end of the continuum will be marked by well-established, regulated

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276 For a further discussion on the duties and responsibilities of the Wisconsin supreme court, see *supra* note 242-243 and accompanying text.

277 For a further discussion of cases reflecting the diversity of terms and distinctions used in evaluating co-participant liability, see *supra* notes 91-174 and accompanying text. A sampling of terms of distinction applied in these cases include: competition, non-competition, contact, no contact, inherent contact, inevitable contact, organized and non-organized activities, inherent physical aggression, active sports activity, and sporting activity.

278 See Pfister v. Shusta, 657 N.E.2d 1013, 1015-17 (Ill. 1995) (revising standard originally adopted by court to invoke common sense approach to unconventional activity such as “can kicking”).

279 This is in accord with *Wis. Stat.* § 895.525(4m)(a). As *Wis. Stat.* § 895.525(4) demonstrates, a recreational activity is nearly unbounded by definition. The physical contact between persons required is easily subsumed under the foreseeable risk framework, however, the proposed foreseeable risk framework includes the products of a participants physical contact, so that a golf ball struck by the physical contact of a participant will be an extension of that contact if it strikes another participant. Further, the sport and amateur teams requirement is easily satisfied as both of these are broad concepts that contemplate a variety of activities that include multiple participants. Finally, these assertions are supported by the stated legislative purpose of providing legal certainty to participants. Certainty requires that the reckless standard sweep broadly under step one of the proposed bifurcated process, and that step two assesses specific circumstances to determine reasonableness, which is itself a sliding scale analysis.

280 See Thompson v. McNeill, 559 N.E.2d 705 (Ohio 1990). *Thompson* employs the concept of a continuum approach to distinguish between contact and non-contact
activities, the other by impromptu, novel, developing, or non-traditional activities. In a traditional setting, such as organized high school football, the governing rules and regulations coupled with the customs and practices generally accepted within the sport largely dictate the foreseeable risks.

In the other extreme, an analysis pertaining to a non-conventional activity whose participants foresee, or reasonably should foresee risks arising from their participation in the activity is driven primarily by the specific circumstances and the reasonable expectations drawn either from the circumstances or by analogy to similar circumstances in a more traditional setting. Further, the precise nature of the injury should be considered in light of the specific circumstances, and should be attributable to participation in the activity.

See id. Ultimately this approach determines what negligence standard is applicable in a certain situation. See id. Instead of drawing a bright line distinction between contact and non-contact, as many courts have, the Thompson court determined this approach properly considered the spectrum of duties and risks inherent in the analysis. See id. The framework advocated in this note also attempts to establish a continuum approach, but one predicated on balancing foreseeable risks and specific circumstances.

See id. at 709 (noting “a golfer accepts the risk of coming in contact with wayward golf shots on the links, so golf is more dangerous than table tennis, for instance, but certainly not as dangerous as kickboxing”). The Thompson court thus found a golfer accepts more risks associated with ordinary negligence than a table tennis player, while a kickboxer accepts greater risk than the golfer. See id. It should be noted that this approach contemplates a continuum approach interconnected with the different negligence standards. See id. For example, under the Thompson rationale golf is subject to a heightened negligence standard, while kickboxing is more heightened than golf. See id. Under the Wisconsin statute it should be clear whether ordinary negligence or recklessness applies, therefore the continuum approach proposed in this note is meant to be a flexible method to determine whether to apply the reckless standard. See Noffke, 2009 WI at 36 (citing Wis JI—Civil 2020). Further, in practice these two approaches accomplish similar results. Once the reckless standard is applied, the determination of whether a defendant acted recklessly is dependent on the circumstances, hence the determination of what a reasonable person under the circumstances would understand to be high risk conduct in golf and kickboxing would be different. Simply put, a golfer could not kick another golfer during a match under the reckless standard.

See id. at 708-09 (discussing factors into which court should inquire).

See Pfister v. Shusta, 657 N.E.2d 1013 (III. 1995). Pfister is illustrative of this point because of the novel activity, a competitive game of “can-kicking”, at issue in the case. See id. In Pfister the competitive nature of the activity gave rise to a judicially cognizable set of expectations and duties among the participants. See id. The court chose to recognize a reckless negligence standard by analogizing the activity to hockey or soccer. See id. Thus the specific circumstances (mutual competition among co-participants) took precedence over the amorphous nature of the activity (can kicking).

See Gamble v. Bost, 901 S.W. 2d 182, 186 (applying ordinary negligence standard to bowling). In Gamble the court noted that bowlers do not voluntarily submit to being hit
(2) If a court determines there is foreseeable risk resulting from participation in an 
activity that is a product of either the co-participants conduct, or the nature of the activity 
itself, the reckless standard should be applied.\textsuperscript{285} Application of the reckless standard 
relies heavily on both the specific circumstances and the nature of the activity at issue, 
and should be assessed using a sliding scale approach.\textsuperscript{286}

Certainty requires that the reckless standard sweep broadly under step one of the 
proposed bifurcated process, and that step two assess specific circumstances to determine 
reasonableness, which is itself a sliding scale analysis. This proposed analysis is both 
cognizant of the rich body of doctrine underlying co-participant liability and the 
requirements set forth by the Wisconsin legislature.

V. CONCLUSION

Cheerleading was the catalyst that divided the Wisconsin appellate and supreme 
courts.\textsuperscript{287} This comes as no surprise. The theories and assumptions that underlie co-
participant liability are not always well-suited to handle non-traditional activities, or 
activities that are redefining themselves over time.\textsuperscript{288} Cheerleading’s ascent from benign 
pep-squad to competitive sport is a journey not yet completed, as many still regard it as 

with a bowling ball in the head. \textit{See id.} This illustrates that the injury must be related to 
the activity participated in. If an individual is injured by an unrelated, outside actor while 
participating in an activity the resulting negligence action should not be assessed under 
this framework. In contrast, if a participant is injured by another participant in the same 
activity, no matter how flagrant or unprecedented the injury, it should still be analyzed 
under this framework because under the second prong of the bifurcated test the defendant 
would fail the circumstantial reasonableness assessment.\textsuperscript{285} This note does not discuss the application of the reckless standard at length, as this 
note focuses mainly on the legal consequences of choosing to apply the standard and the 
reasoning behind it. For a more thorough discussion of the reckless standard and its 
application \textit{see }().\textsuperscript{286} \textit{See Pfister v. Shusta, 657 N.E. 2d 1013, 1016} (defining willful or wanton conduct). 
The Pfister court defined their heightened negligence standard, willful or wanton 
conduct, as: 

\begin{quote}
[A] hybrid between acts considered negligent and behavior 
found to be intentionally tortious. Under the facts of one 
case, willful and wanton misconduct may be only degrees 
more than ordinary negligence, while under the facts of 
another case, willful and wanton acts may be only degrees 
less than intentional wrongdoing. 
\end{quote}

\textit{Id.} This resembles a sliding scale approach that could be applied in 
Wisconsin under the reckless standard of negligence.\textsuperscript{287} For a further discussion of the holding in \textit{Noffke, see supra} 43-90 and accompanying 
text.\textsuperscript{288} For a further discussion of the theories and assumptions that underlie co-participant 
liability, see \textit{supra} notes 91-174 and accompanying text.
an activity not a sport. But such bright line distinctions are becoming antiquated as courts increasingly face activities that defy conventional understanding and require a more flexible framework for analysis that accurately reflects the expectations of the participants and the nature of the activity in question.

Pre-conceived notions of cheerleading and its participants should not prevent a court from extending to participants the protection against liability arising from ordinary negligence. This protection, however, should always remain cognizant of the specific circumstances unique to each case presented before a court. Cheerleading is an activity in transition, and as such, there are squads that engage in no physical contact or competition. Under the flexible bifurcated proposed test a negligence action arising from an injury suffered between co-participants in a squad of this character would be assessed under the ordinary negligence standard, as there would be no rationale to elevate the judicially afforded protection. The Wisconsin Supreme Court, although faithful to the statutory text, could have provided a more flexible framework under which lower courts could assess negligence actions between co-participants in a recreational activity with certainty. This would be in accord with both the legislative purpose, and the theories and doctrines underlying co-participant liability.

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289 For a further discussion of the current state of cheerleading, see supra notes 1-26 and accompanying text.
290 For a further discussion of the relevant analysis of the Noffke holding, see supra notes 194-286 and accompanying text.
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