

Potential Civil Liability of “Gatorade Baths”

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It is a strange sports tradition: if a team is victorious in a particularly important game, the winning players will inevitably dump a cooler filled with Gatorade (or water) over the head of their coach. It does not matter what the temperature is either outside or inside the cooler, the Gatorade gets poured so that the coach is completely drenched when all is said and done. The origin of this weird but fun-to-watch ritual dates back first to the Chicago Bears in the 1984-85 season² and then to the New York Giants dousing their coach Bill Parcells during their Super Bowl Winning Season in 1985-86.³ Following the Super Bowl victory, this “Gatorade bath”, as it has come to be known, gained national attention and now nearly 27 years later, it has become almost customary.

Beyond the New York Giants’ Super Bowl-winning Gatorade bath, there are definitely some Gatorade baths that are more memorable than others; more memorable because of their potential for legal consequences. For example, there was the very violent Gatorade bath that occurred when the University of Alabama football team won the 2010 National Championship. The Alabama players nearly knocked over their coach Nick Saban with a hard hit that far exceeded

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² See DARREN ROVELL, FIRST IN THIRST: HOW GATORADE TURNED THE SCIENCE OF SWEAT INTO A CULTURAL PHENOMENON 90 (2006), *available at* <http://sports.espn.go.com/espn/page2/story?page=rovell/051014> (last visited Mar. 9 2013).

³ *Id.* at 79-82. Although Gatorade was not aware of the initial “baths”, once they found out, they not only condoned the baths but they also tried to capitalize on its immediate popularity by including a “How to Dunk” poster with the sale of their Gatorade coolers. *Id.* at 82.

normal expectations.¹ Saban’s anger was visible, not only to his players, but to millions of television viewers.² **This unwanted action prompted the question of whether there could be civil liability if a coach did choose to pursue a claim against his players for dumping Gatorade on him?**

At first glance, it seems like this may be an odd question to ask given that most coaches would never even consider bringing a lawsuit for something that is simply a way for their players to celebrate a victory. But, take for example, the Gatorade bath of 72 year-old football coach George Allen, the former Washington Redskins and Long Beach State University coach.³ While at Long Beach State, after a victory against the University of Nevada, Las Vegas, Coach Allen’s players dumped a cooler of ice water on him (not Gatorade specifically, but the same concept) and he passed away six weeks later.⁴ Shortly before his death, he had mentioned that his health had been compromised after some of his players had dumped a bucket of ice water on him.⁵ Coach Allen’s family, however, never filed a lawsuit or pursued any legal action against the players or anyone else.

Coach Allen’s death, along with injuries to several other coaches from Gatorade baths, demonstrate that the

¹ Anthony P., *Coach Nick Saban Cracked in Face by Gatorade Cooler*, TOTALPROSPORTS.COM (Jan. 8, 2010), <http://www.totalprosports.com/2010/01/08/coach-nick-saban-cracked-in-face-by-gatorade-cooler-video>.

² *Id.*

³ See George Allen, *Coach, Dead at 72; Led Redskins to Superbowl VII*, N.Y. TIMES (Jan. 1, 1991), <http://www.nytimes.com/1991/01/01/obituaries/george-allen-coach-dead-at-72-led-redskins-to-super-bowl-vii.html>.

⁴ See Brian Cronin, *Did a Gatorade Shower Kill George Allen?*, L.A. TIMES (May 17, 2012), <http://articles.latimes.com/2012/may/17/sports/la-sp-sn-gatorade-george-allen-20120517>.

⁵ See N.Y. TIMES, *supra* note 5 (noting that shortly prior to his death, George Allen stated that he had not been healthy since his players drenched him with ice water in celebration of Long Beach State University’s win over University of Nevada, Las Vegas).

possibility of civil liability from a Gatorade bath clearly exists, and this article will explore those potential legal ramifications. Part I of this article will discuss the origin, history, and development of the Gatorade bath. Part II will detail the more violent, unwanted and injury-plagued Gatorade baths. Part III will discuss the circumstances and death of Coach Allen. Part IV will outline the liability for injuries to participants and non-participants in sporting events and Part V will explain how Gatorade baths can potentially result in civil liability.

I. History of Gatorade Baths

For young people today watching sports, it may seem like the celebratory Gatorade bath has been around forever. But, this dousing is actually a relatively new feature to sports, which can be traced back to professional football in the 1980s. The origin, however, is actually under dispute.⁶ It had long been thought that the 1985-86 Super Bowl winning Giants were the “inventors” of the Gatorade bath; however, in the recent past, it came to light that the first documented evidence of a Gatorade bath occurred a season prior when Dan Hampton, a defensive lineman for the Chicago Bears claimed to have dumped Gatorade on his head coach, Mike Ditka.⁷ Hampton’s statement was subsequently confirmed from game film - - so the true inventors of the bath were actually the Chicago Bears.⁸ There is no disputing though that the Giants gave the Gatorade bath national attention the following season when Jim Burt and Harry Carson began dumping Gatorade on Coach Bill Parcells after each big victory on the way to winning the Super Bowl.⁹

⁶ Rovell, *supra* note 1, at 90.

⁷ *Id.*

⁸ *Id.*

⁹ See Chuck Culpepper, *Soaking it up*, SPORTS ON EARTH (Jan. 9, 2013), <http://www.sportsonearth.com/article/40897684>

Since that year, the Gatorade bath exploded in popularity and was showing up in almost all big or important games. Originally it was relegated to just football games, but then expanded to all types of sports, including even race car driving.¹⁰ It certainly seemed that Gatorade baths would at least be confined to outdoor sports, but Gatorade baths have shown up in indoor sports like baseball as well.¹¹ And, as what typically occurs when society watches professional sports, lower level sports began to mimic what the

¹⁰ See Kyle Busch, *Victory Lane: Race Winner Matt Kenseth, Roush Fenway Racing Ford Celebrates with a Gatorade Shower*, MOTORSPORT.COM, <http://www.motorsport.com/nascar-cup/photo/main-gallery/victory-lane-race-winner-matt-kenseth-roush-fenway-racing-ford-celebrates-with-a-gatorade> (last visited Mar. 9, 2013) (depicting Nascar Cup winner, Matt Kenseth after he received a Gatorade bath); see also Dan Devine, *Miami Heat Coach Erik Spoelstra Gets Gatorade Bath from Udonis Haslem After Winning NBA Title*, YAHOO! SPORTS (June 22, 2012, 3:00 AM), <http://sports.yahoo.com/blogs/nba-ball-dont-lie/miami-heat-coach-erik-spoelstra-gets-gatorade-bath-070738452--nba.html> (highlighting a Gatorade bath in the NBA); see also ‘Duk, Jo-Jo Reyes Gets Gatorade Bath After Halting Winless Streak at 28’, YAHOO! SPORTS (May 30, 2009, 11:30 PM EDT), http://sports.yahoo.com/mlb/blog/big_league_stew/post/jo-jo-reyes-gets-gatorade-bath-after-halting-winless-streak-at-28?urn=mlb,wp8185 (noting a Gatorade bath in Major League Baseball, after Toronto Blue Jays pitcher, Jo-Jo Reyes, pitched 28 straight wins); see also Cody Stanley, *Weekly Preview: Big Ten Soccer Begins*, BIG TEN NETWORK (Sept. 20, 2012, 11:24 AM), <http://bten.com/2012/09/20/weekly-preview-big-ten-soccer-begins> (contemplating which Big Ten Men’s Soccer Team would be giving their coach a Gatorade bath at the end of the season).

¹¹ See Troy Machir, *Billy Donovan Gets 400th Win and Celebratory Gatorade Bath (Video)*, NBC SPORTS COLLEGE BASKETBALL TALK (Jan. 19, 2013, 7:12 PM EDT), <http://collegebasketballtalk.nbcsports.com/2013/01/19/billy-donovan-gets-400th-win-and-celebratory-gatorade-bath-video> (highlighting Florida Gators men’s basketball coach, Billy Donovan, Gatorade bath after winning his 400th game); see also Devine, *supra* note 12; see also Darren Everson, *The Gatorade-Dunking Hall of Shame*, WALL ST. J., <http://online.wsj.com/article/SB10001424052748704081704574652821057756260.html> (last updated Jan. 12, 2010, 12:01 AM ET) (noting NBA’s head coach, Doc Rivers, receiving a Gatorade shower after a Boston Celtics win in 2008).

professionals were doing so saw Gatorade baths showing up in colleges,¹² high schools,¹³ and even levels below them.¹⁴ It is safe to say at this point in sports in America, the Gatorade bath can creep up in any sport, in any location, and at any level of play.

II Not all Gatorade Baths are Welcomed or Wanted by the Coaches

Just because something may have become customary in sports, it does not necessarily make it a part of the rules or even a part of the game. There are several coaches out there who would likely agree that Gatorade baths would fall under that category. Five coaches come to mind immediately: Nick Saban of University of Alabama, Gary Patterson of Texas

¹² See *Nick Saban's Gatorade Bath: The Alabama Coach May be Warming up to Getting Soaked*, HUFFINGTON POST (Jan. 9, 2013, 11:47 AM EST), http://www.huffingtonpost.com/2013/01/09/nick-saban-gatorade-evolu_n_2433837.html (highlighting University of Alabama head football coach, Nick Saban's, history with Gatorade baths); see also Chris Greenberg, *Erin Andrews Gatorade Shower: ESPN Reporter, Baylor SID Get Soaked with Robert Griffin III*, HUFFINGTON POST (Nov. 22, 2011, 4:48 PM EST), http://www.huffingtonpost.com/2011/11/22/erin-andrews-gatorade-baylor-robert-griffin-oklahoma_n_1108538.html (discussing Baylor college quarterback, Robert Griffin III's Gatorade bath after Baylor upset Oklahoma, and the inadvertent dousing of ESPN commentator, Erin Andrews).

¹³ See *Gatorade Shower: The Ice-Cold Chill Thrill of Victory*, A PHOTO SENSITIVE PERSP. (Jan. 11, 2013), <http://cmac2u.wordpress.com/2013/01/11/gatorade-shower-the-ice-cold-chill-thrill-of-victory> (depicting Granite Bay head varsity high school football coach, Ernie Cooper, getting drenched by a Gatorade shower in 2012); see also John Haley, *NJ Softball: Middlesex County: Bishop Ahr Simply the Best*, NJ.COM, http://www.nj.com/hssports/blog/softball/index.ssf/2010/06/nj_softball_middlesex_county_bishop_ahr_simply_the_best_a_look_at_the_move_to_43_feet.html (last updated June 1, 2010, 1:49 PM) (depicting high school softball coach, Missy Magyar, getting a Gatorade shower after a winning game).

¹⁴ See *Coach Gets Gatorade Bath!*, REDDING.COM (June 16, 2011), <http://infocus.redding.com/Media/View/1344003> (depicting a little league baseball coach receiving a Gatorade bath at the end of the last regular season game).

Christian University, Richard Thurin of North Platte Community College, Bill Curry of Georgia State University, and George Allen of Long Beach State University.

Nick Saban is the highly successful but equally serious coach of the University of Alabama’s football team, a college football powerhouse. He is known for not smiling very much and not really celebrating his victories. After his team won the 2010 National Championship, the cameras were ready and waiting when Saban’s players were coming to get him with the Gatorade Bath. Saban did not see it coming and he was blindsided with the Gatorade and even a part of the cooler.¹⁵ Indeed, the “bath” was actually pretty vicious. Saban was visibly upset; even more so than he usually looks and millions of Americans got to witness it.¹⁶ This particular bath was clearly unwelcomed but did not appear to result in any physical harm to Saban.¹⁷

Although we do not know if Saban told his players beforehand not to douse him, we do know that Gary Patterson, the head football coach of Texas Christian University (TCU) actually did.¹⁸ TCU was playing in the 2010 Rose Bowl and Patterson had told his players prior to the game specifically not to dump Gatorade on him if they

¹⁵ *Nick Saban: It was the Intensity of the Gatorade Bath That was the Problem*, AL.COM (Jan. 8, 2010, 4:27 PM), http://blog.al.com/live/2010/01/nick_saban_it_was_the_intensit.html (last accessed Mar. 9, 2013). At a press conference after the 2010 BCS National Championship Game where Nick Saban received a violent Gatorade bath, Nick Saban stated, “You know, it was a little chilly out, plus I don’t know if you noticed, but our defensive players did a pretty good job of hitting, but they’re not supposed to hit you in the head with the bucket either . . . I mean that – it was a surprise . . . I knew it was coming, but I wasn’t thinking about it . . . so the intensity of the dump was the problem.” *Id.*

¹⁶ See Everson, *supra* note 13.

¹⁷ See Saban, *Gatorade Bath*, *supra* note 14.

¹⁸ Graham Watson, *TCU Players Fake Gary Patterson into a Gatorade Shower*, YARDBARKER (Dec. 3, 2011), http://www.yardbarker.com/all_sports/articles/tcu_players_fake_gary_patterson_into_a_gatorade_shower/8493478.

won.¹⁹ TCU was victorious and his players ignored his command and dumped the Gatorade on him anyway by using deception to lure Patterson into the bath.²⁰ Patterson was not happy and although he too came away physically unscathed, the Gatorade bath was clearly an unwanted action against someone who did not buy into the “custom”.

Unfortunately, not all coaches have been as lucky as Saban and Patterson - - Saban and Patterson may not have wanted the Gatorade baths but at least they did not appear to be harmed. Recently, Coach Richard Thurin of the North Platte Community College Lady Knights Women’s basketball team suffered one of the scariest Gatorade baths during the tradition’s tenure. After he led the Lady Knights to the NJCAA Division II District F title game in March 2013, his players celebrated with the traditional Gatorade bath.²¹ Unfortunately, after Thurin was doused with Gatorade, he slipped on the liquid and fell face-first onto the court.²² This Gatorade bath highlighted the potential highs and lows of the activity. The crowd was in jubilation after the victory and cheered for the bath, but after Thurin’s hard fall forward, the entire crowd collectively gasped and feared for the health of their coach.²³ Additionally, a concerned fan who tried to assist Thurin slipped and fell hard on the basketball court as

¹⁹ *Id.* During the Gatorade bath’s inaugural season, Bill Parcells also told his players not to engage in the Gatorade bath if they won the NFC Championship because it was too cold outside, but the players ignored his request and did it anyway. See Rovell, *supra* note 1, at 81

²⁰ Watson, *supra* note 20.

²¹ *Basketball Coach Slips After Getting Gatorade Shower*, UPI (Mar. 12, 2013, 3:44 PM) <http://www.upi.com/blog/2013/03/12/VIDEO-Basketball-coach-slips-after-getting-Gatorade-shower/8551363117447> (Coach falls on stomach from Gatorade Bath).

²² *Id.*

²³ *Id.*

well.²⁴ Fortunately, Thurin and the fan were able to walk away from the falls relatively unharmed.²⁵

The same cannot be said for Georgia State University football coach Bill Curry. Curry suffered one of the worst hits from a Gatorade bath to date. Curry and his Georgia State football team were celebrating the team’s first ever victory when his players gave him a Gatorade bath.²⁶ The bath actually knocked Curry unconscious for at least fifteen seconds and he laid motionless on the ground while his players stood around in disbelief.²⁷ It appears that just before the Gatorade drenching, the top of the cooler came off and hit Curry in the head and knocked him unconscious.²⁸ Curry was able to recover from the hit, one of the more dangerous results from a Gatorade Bath, but it is another great example of the potential of legal consequences stemming from this celebratory custom.

Some coaches have been visibly upset about the unwanted Gatorade baths, others have warned their players not to do it, another suffered a harsh fall and still another has been knocked unconscious. There are certainly a number of incidents that have at least raised the question of civil liability

²⁴ *Id.*

²⁵ *See Id.*; see also *Gatorade Bath Goes Awry for North Platte Community College Girls*, NORTH PLATTE BULLETIN (Mar. 12, 2013) <http://www.northplattebulletin.com/index.asp?show=news&action=readStory&storyID=25033&pageID=3> (noting that the concerned fan was uninjured).

²⁶ Brooks, *GSU’s Curry Collapsed After Gatorade Bath*, YARDBARKER (Sep. 3, 2010, 5:32 PM), <http://www.sportsbybrooks.com/video-ga-st-coach-collapses-after-gatorade-bath-28934>.

²⁷ *Id.*

²⁸ *Id.*

from an injury caused by a Gatorade Bath.²⁹ However, the culmination of the Gatorade bath violence famously occurred with Coach George Allen of Long Beach State University. Following his Gatorade bath, Coach Allen actually passed away.

III. Did a Gatorade Bath actually kill a coach?

George Allen was the former coach of the Washington Redskins and eventually ended his career as the coach of Long Beach State University, where he tried to revitalize a struggling program.³⁰ Following the victory against the University of Nevada that capped the first winning season the program had seen in years, the players dumped a cooler of ice water on Coach Allen's head while he was giving a media conference.³¹

Following the bath of ice water, Coach Allen noted that he was not feeling well.³² Six weeks later, he died.³³ Apparently, Coach Allen died from a heart spasm caused by

²⁹Outside of the coaching realm, others have been injured by the Gatorade Bath. For example, former professional baseball player, Deion Sanders, gave a Gatorade Bath to baseball announcer Tim McCarver because of critical comments that McCarver made about Sanders, which left McCarver (by his own admission) injured Larry Stewart, *McCarver All Wet – Thanks to Sanders*, L.A. TIMES (Oct. 16, 1992), http://articles.latimes.com/1992-10-16/sports/sp-111_1_deion-sanders (“McCarver said the first time Sanders doused him, he was so shocked that he pulled a muscle in the right side of his back.”).

³⁰Brian Cronin, *Did a Gatorade Shower Kill George Allen?*, L.A. TIMES (May 17, 2012), <http://articles.latimes.com/2012/may/17/sports/la-sp-sn-gatorade-george-allen-20120517>.

³¹*Id.*

³²See George Allen, *Coach, Dead at 72; Led Redskins to Superbowl VII*, N.Y. TIMES (Jan. 1, 1991), <http://www.nytimes.com/1991/01/01/obituaries/george-allen-coach-dead-at-72-led-redskins-to-super-bowl-vii.html> (noting that shortly prior to his death, George Allen stated that he had not been healthy since his players drenched him with ice water in celebration of Long Beach State University's win over University of Nevada, Las Vegas)

³³Cronin, *supra* note 32.

arrhythmia.³⁴ His remarks that the Gatorade bath caused him to not feel well afterwards is what sparked wide-spread speculation and theories that the Gatorade bath actually caused his death.³⁵ Whatever the actual cause was, Coach Allen’s estate or family members never filed a lawsuit against the players or the school.

Although there were no legal consequences stemming from this unfortunate incident, there were popular culture references that emerged afterwards that once again alluded to the possibility of legal consequences for a Gatorade bath. In particular, in an episode of the popular television sitcom, “Seinfeld”, the lead character, Jerry, recalls a time when his neighbor, Kramer, told another character, Ritchie, to pour Gatorade on 67 year-old club owner Marty Benson’s head after a softball game victory. Ritchie did so, and Benson died soon after. The episode was meant as a joke, but it had real-life legal implications similar to the Allen situation.³⁶

³⁴ John Woolard, *Heart, Not Ice Water Dousing, is What led to Allen’s Death*, THE BALTIMORE SUN (Jan. 3, 1991) http://articles.baltimoresun.com/1991-01-03/sports/1991003178_1_allen-arrhythmia-capozzola.

³⁵ Cronin, *supra* note 32 (stating that the “story is most often told as George Allen died of pneumonia that he caught from being doused with cold water and continuing to give interviews for a long time after the game.”); *But see* Sam Borden, *A Splashy Tradition, Gatorade-Style*, N.Y. TIMES, Jan 20, 2012, <http://www.nytimes.com/2012/01/21/sports/football/a-splashy-football-tradition-gatorade-style.html> (noting that George Allen’s son disputes that Allen died from the Gatorade bath, stating: “He got a cold from it, but that was not the cause of his death . . . he had a heart arrhythmia . . . [his death] had nothing to do with the Gatorade Shower.”).

³⁶ *See* Larry David, *The Pez Dispenser*, SEINFELD SCRIPTS (Jan. 15, 1992) <http://www.seinfeldscripts.com/ThePezDispenser.htm> (last visited Mar. 29, 2013) (“What happened? The guy was like 67 years old, it was freezing out, he caught a cold, got pneumonia, and a month later he was dead.”); Joshua D. Winneker, *Can a “Gatorade Bath” Result in you Taking a Bath in Court?*, 17 COLLEGE SPORTS BUSINESS NEWS 27 (2011), <http://collegesportsbusinessnews.com/issue/june-2011/article/can-a-gatorade-bath-result-in-you-taking-a-bath-in-court>

While there is some dispute as to the severity of harm caused by Gatorade baths, there is little argument that Gatorade baths can cause harm, harm that could potentially lead to civil liability for the recipient of the "bath". Especially for a coach that has made it known that the Gatorade bath was unwelcomed and then was hit with a part of the cooler or slipped and fell from the Gatorade spill - civil liability is a real possibility.

IV. Liability at Sporting Events

The body of law that would apply to a potential lawsuit stemming from a Gatorade bath would fall generally under tort liability at sporting events.³⁷ Plenty of injuries occur during a sporting event but liability for those injuries is also a debated topic with strong proponents believing that the civil court system should simply stay out of the sporting arena.³⁸ While there are those that do not want sports to be affected by lawsuits, the unfortunate reality is that lawsuits exist for a reason. They serve to provide the injured party with an ability to recover for the damages that they have suffered. Not surprisingly, the court system had to react to the practical effect that lawsuits could have on playing sports and sports in general and what has resulted has been a compromise for both sides. Namely, negligence lawsuits have generally been rejected in favor of protecting sports and limiting what could amount to a floodgate of litigation.³⁹ Liability at sporting events breaks down to participant

³⁷ The body of law known as "tort" law consists of injuries caused by unintentional acts (negligence) and those consisting of reckless and intentional acts. Restatement (Second) of Torts § 281, §§ 1-12, §§ 500-03. In tort law, the injured party is typically seeking financial remuneration for his/her injuries. Restatement (Second) of Torts § 12(A).

³⁸ Wyatt M. Hicks, *Preventing and Punishing Player-to-Player Violence in Professional Sports: The Court System Versus League Self-Regulation*, 11 J. LEGAL ASPECTS SPORT, 209, 212 (2001) (highlighting the disadvantages of a civil court system regulating professional sports

³⁹ *Id.*

liability in contact and non-contact sports and then liability for non-participants at all types of sporting events.

A. Participant Liability in Contact Sports

Participant liability is very simply liability that results from actually playing (participating) in a sporting event.⁴⁰ When it comes to contact sports, courts have generally rejected a theory of negligence.⁴¹ Negligence simply does not suffice in contact sports such as football, hockey, basketball and soccer because unintentional contact, the basis for a negligence lawsuit, is simply a part of the game.⁴² If courts were to allow negligence lawsuits in contact sports there could be a lawsuit after almost every game.⁴³ This would create a “chill” on playing those sports and would completely re-shape and change the sports entirely.⁴⁴ It would likely result in no one wanting to play those sports anymore and those sports would eventually fade away.⁴⁵ In a society such as ours, where football is the most popular sport, and most

⁴⁰ See e.g., *Nabozny v. Barnhill*, 334 N.E.2d 258 (Ill. App. Ct. 1975) (holding the defendant not liable for injuries arising during a soccer game where one participant injured a co-participant in a participant liability suit).

⁴¹ See, e.g. *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516 (10th Cir. 1979) (holding that recklessness is the minimum standard for liability to a co-participant in professional football); *Nabozny*, 334 N.E.2d at 261 (rejecting negligence as the appropriate standard and holding that a player is liable for injury to a co-participant only when his conduct is deliberate, willful or reckless); *Knight v. Jewett*, 834 P.2d 696 (Cal. 1992) (holding that there is no liability against a co-participant for ordinary, careless or negligent conduct).

⁴² See *Knight*, 834 P.2d at 708.

⁴³ See e.g., *Nabozny*, 334 N.E.2d at 260 (stating that a negligence standard for participant liability cases in sport would result in “unwarranted judicial intervention” that would “inhibit the games vigor.”), *Knight v. Jewell*, 834 P.2d at 710 (stating that a participant’s normal energetic behavior often may be accidentally careless and holding a participant liable for such behavior may well alter the fundamental nature of a sport).

⁴⁴ *Id.*

⁴⁵ See *Nabozny*, 334 N.E.2d at 260 (stating that a negligence standard would place “unreasonable burdens on the free and vigorous participation” in sports).

lucrative, the court system would never allow for the sport to be subjected to that many lawsuits.

The problem though is that disallowing tort suits in participant contact sports entirely would leave many injured players without a remedy. The courts reached a compromise. Instead of banning all lawsuits in contact sporting events, the courts decided to allow participants to maintain lawsuits in certain situations: when the participant can allege that he/she was injured because of reckless; intentional conduct on the part of another participant; or, the participant acted outside the realm of the sport.⁴⁶

For example, in *Hackbart v. Cincinnati Bengals*,⁴⁷ in a National Football League game between the Denver Broncos and the Cincinnati Bengals, Broncos' defensive back, Dale Hackbart, was intentionally struck in the back of the head by the Bengals' Charles "Booby" Clark, who was frustrated because the Bengals were losing the game.⁴⁸ Hackbart sued Clark and the Tenth Circuit Court of Appeals ruled that the roughness of a sport is not a justification for courts to condone tortious conduct, especially when the conduct is not allowed by the rules of the game.⁴⁹ In rejecting a negligence standard of care, the court instead held that reckless conduct is the minimum standard needed for tort liability by a co-participant.⁵⁰ The court also provided a discussion into what constitutes reckless conduct, which is different than negligent

⁴⁶ See, e.g., *Hackbart*, 601 F.2d at 524 (holding that recklessness is the minimum standard for liability to a co-participant in professional football); *Karas v. Strevell*, 884 NE 2d 122 (2008) (holding that in full contact sports such as football and hockey the standard for participant liability should be intentional or conduct outside the realm of the sport).

⁴⁷ *Id.* at 516.

⁴⁸ *Id.* at 518.

⁴⁹ *Id.* at 520-521 (holding that Clark's intentional blow was expressly prohibited by NFL rules that "all players are prohibited from striking the head, face or neck with the heel, back or side of the hand, wrist, forearm, elbow or clasped hands").

⁵⁰ *Id.* at 524.

and intentional conduct.⁵¹ The court stated that recklessness involves making 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,”⁵² while negligence consists of “mere inadvertence [or] lack of skillfulness or failure to take precautions. . . .”⁵³ The *Hackbart* court then rejected Clark’s argument that his impulsive strike against Hackbart in the heat of the moment was really a negligent act because Clark actually admitted to intending to strike Hackbart.⁵⁴ Hackbart then was able to recover monetary damages for his injuries.

Although the *Hackbart* court found that Clark intended to strike Hackbart, the court did not hold that Clark’s conduct intentional, but was instead reckless.⁵⁵ The court noted that under a recklessness standard, the tortfeasor must intend to commit the misconduct, but does not intend to cause the harm that results from their misconduct.⁵⁶ In contrast, the court stated that intentional misconduct will be found when a tortfeasor intends both to commit the act and produce the resulting injury.⁵⁷ Therefore, the court believed that while Clark admitted to intentionally striking Hackbart, his conduct was because of frustration and committed in the heat of anger, so Clark actually did not “intend” to injure Hackbart.⁵⁸ However, because Clark did intend to strike Hackbart, the court found that Clark acted with reckless disregard to Hackbart’s safety.⁵⁹ A victim of intentional misconduct resulting in injury can also choose to bring a civil action for

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 524-25.

⁵⁶ *Id.* at 524.

⁵⁷ *See id.* at 525.

⁵⁸ *Id.* at 524-525 (holding that Clark intended to commit the act, but did not intend to cause the particular harm).

⁵⁹ *Id.* at 525.

monetary damages, but they can additionally file criminal charges for assault and battery.⁶⁰

This recklessness/intentional conduct compromise protects the integrity of contact sports but at the same time allows for injured parties to recover for the injuries they sustained at the hands of someone who was acting beyond what was expected in the sport.⁶¹ When playing a contact sport or any sport for that matter, the participants assume the risks that are inherent in that sport.⁶² Risks like being tackled, checked, boxed out or bumped are well-known and understood aspects of playing contact sports. As a result, negligence claims simply cannot suffice. Participants, however, do not assume the risks of reckless, intentional or conduct outside the realm of the sport.⁶³ No one plays a sport assuming that they could be intentionally harmed or be the victim of reckless behavior. Those risks are simply not understood.

B. Participant Liability in Non-contact sports

Having a higher standard of liability in contact sports certainly makes good judicial and practical sense given the level of unintentional contact in a contact sporting event and

⁶⁰ *Id.* In *Averill v. Luttrell*, the defendant was a catcher in a professional baseball game when he intentionally struck the *Id.* In *Averill v. Luttrell*, the defendant was a catcher in a professional baseball game when he intentionally struck the opposing teams' batter in the head, and knocked him unconscious. 311 S.W.2d 812, **814. The defendant was found liable for civil assault and battery because his actions were intentional and carried the intent to cause injury. *Id.* Although this paper focuses on civil actions only, criminal actions can also result from intentional misconduct. See *infra* note 95.

⁶¹ *Id.*

⁶² See, e.g., *Richmond v. Employers' Fire Ins. Co.*, 298 So.2d 118, 122 (1st Cir. 1974) (holding that being struck by a bat released by a co-participant is a foreseeable risk during a baseball practice).

⁶³ See *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516, 524 (10th Cir. 1979) (holding that the assumption of the risk defense applies to negligence and the recklessness standard overcomes the assumption of the risk defense).

the corresponding amount of lawsuits that could result with a lower standard. But what about participant liability in a non-contact sport? A participant in tennis or golf for example is not expecting to be touched by another participant when playing their sport. But, there are plenty of injuries that occur in non-contact sports, which do result in lawsuits. In these situations, the courts were left with another dilemma: will non-contact sports be severely affected by allowing negligence lawsuits as well? The courts are generally split on the issue. The negligence standard is recognized as the standard for liability in non-contact sports in some jurisdictions,⁶⁴ while in others, a recklessness standard applies much like in the contact sports cases.⁶⁵

For jurisdictions that reject the negligence standard and apply the recklessness standard, the reasoning behind it also goes back to assumption of risk.⁶⁶ When playing a sport, whether contact or non-contact, the participants assume the risks that are inherent in playing that sport. If a court were to allow negligence claims in tennis for example, that would mean that every time a player hits a ball that hits another player during the game then that hurt player could maintain a

⁶⁴ See e.g., *Duke’s G.M.C., Inc. v. Erskine*, 447 N.E.2d 1118, 1123 (Ind. Ct. App. 1983) (holding that a golfer who was stuck in the eye by a wayward golf ball did not assume the risk of the defendant’s negligence); *Novak v. Virene*, 586 N.E.2d 578, 580 (Ill. App. Ct. 1991) (applying a negligence standard to a case where a skier collided with another skier and was subsequently injured).

⁶⁵ See e.g., *Thompson v. McNeill*, 559 N.E.2d 705 (Ohio 1990) (holding that there is no liability for injuries caused by negligent contact in sporting events in a case where injuries were sustained by a golfer); *Hathaway v. Tascosa Country Club, Inc.*, 846 S.W.2d 614 (Tx. App. 1993) (holding that a sport participant cannot sue for another’s negligence); *Gray v. Giroux*, 730 N.E.2d 338 (Mass. App. 2000) (applying a recklessness standard to golf); *Schick v. Ferolito*, 767 A.2d 962 (N.J. 2001) (rejecting the negligence standard for golf torts).

⁶⁶ Brian P. Harlan, *The California Supreme Court Should Take a Mulligan: How the Court Shankd by Applying the Primary Assumption of the Risk Doctrine to Golf*, 29 LOY. ENT. L. R. 91, 93 (2008-2009).

lawsuit against the other player.⁶⁷ Tennis players constantly get hit with tennis balls during the game and tennis would cease to exist if lawsuits were allowed for every unintentional hit.

The same is true for golf. For example in *Shin v. Ahn*, a group of golfers were teeing off when one of them hit a ball that hit another player.⁶⁸ The injured player filed a lawsuit and claimed negligence as his cause of action.⁶⁹ The court rejected that claim and stated that golfers assume a certain risk when playing the sport, which includes potentially getting hit by a golf ball.⁷⁰ Additionally, the court stated “we hold that golfers have a limited duty of care to other players, breached only if they intentionally injure them or engage in conduct that is “so reckless as to be totally outside the range of the ordinary activity involved in the sport.”⁷¹

C. Liability for Non-Participant Injuries

Non-participants are those not playing the game, namely the spectators, cameramen, sideline reporters, and even coaches.⁷² Spectators are often injured at all types of sporting events. Baseballs and bats fly into the stands, hockey pucks ricochet into the stands, golf balls are hit into galleries and debris flies off at race tracks.⁷³ Spectators for years have been suing participants and stadium owners and anyone else they can think of to try to recover for their

⁶⁷ *Thompson v. McNeill*, 559 N.E.2d 705, 707 (Ohio 1990) (holding that shanking, slicing, hooking, or pulling of a golf ball is not uncommon and foreseeable or “built in” the game of golf).

⁶⁸ *Shin v. Ahn*, 42 Cal. 4th 482 (Cal Ct. of App. 2007).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See generally Ray Rossi, *Sports Injuries: High Liability Standard for Nonparticipants*, 98 ILL. BAR J. 200, 202 (April 2010) (stating that sports leagues, referees and coaches are non-participants).

⁷³ E.g., Greg Botelho, ET AL., *Injuries as debris flies into Daytona stands during fiery NASCAR crash* (Feb. 23, 2013, 11:07 PM), <http://www.cnn.com/2013/02/23/us/florida-daytona-crash>.

injuries.⁷⁴ Plenty of theories have developed over the years, like baseball’s limited duty rule that protects stadium owners from liability once they have filled their limited duty for providing protected seating in their stadiums.⁷⁵ The prevailing judicial response though was that spectators’ assume the risk of attending sporting events and most of these types of lawsuits based on negligence are not successful.⁷⁶

However, similar to the participant liability jurisprudence, non-participants can maintain lawsuits for reckless and intentional actions.⁷⁷ For example, Kobe Bryant of the National Basketball Association’s Los Angeles Lakers, faced a civil lawsuit after he fell into a fan on the sideline during a game.⁷⁸ Bryant fell into the fan and then used his

⁷⁴ See *Maisonave v. Newark Bears Prof'l Baseball Club, Inc.*, 881 A.2d 700 (N.J. 2005) (highlighting a spectator that was injured by a foul ball during a professional baseball game); *Moulas v. PBC Productions, Inc.*, 570 N.W. 2d 739 (Wisc. Ct. App. 1997) (involving a spectator whose injuries resulted from a hockey puck that flew into the stands); *Grisim v. TapeMark Charity Pro-Am Golf Tournament*, 415 N.W.2d 874 (Minn. 1987) (highlighting a spectator that was struck in the eye by a golf ball).

⁷⁵ See *Turner v. Mandalay Sports Entertainment, LLC.*, 180 P.3d 1172 (Nev. 2008) (establishing a duty owed by baseball stadium owners to protect spectators from foul balls). The limited duty rule though has not been adopted in every court and recently one court, the Idaho Supreme Court, had ruled that a spectator injured by a foul ball at a baseball game could pursue his negligence claim and they would not adopt the limited duty rule in their state. *Rountree v. Boise Baseball, LLC*, 296 P.3d 373 (Idaho 2013). The injured patron actually lost his eye. *Id.*

⁷⁶ See e.g., *Gentry v. Craycraft*, 802 N.E.2d 1116 (Ohio 2004) (describing assumption of the risk in the realm of sports); *Shin v. Ahn*, 165 P.3d 581 (Cal. 2007); *Roberts v. Boys and Girls Republic, Inc.*, 51 A.D.3d 246 (N.Y. App. Div. 2008).

⁷⁷ *Harlan*, *supra* note 66, at 106.

⁷⁸ *Geeslin v. Bryant*, 453 Fed.Appx. 637 (6th Cir. 2011).

forearm to push off the fan and get back into the game.⁷⁹ Bryant was sued after the man suffered an injured lung.⁸⁰ The trial court dismissed the fan's lawsuit because the fan assumed the risk of players falling into him when he sat courtside during an NBA game.⁸¹ The fan appealed though to the Sixth Circuit Court of Appeals and the court reversed in part allowing the fan's claim to go forward.⁸² Specifically, the Sixth Circuit stated that the fan did not assume the risk of intentional conduct on the part of a player.⁸³ The court did believe that he assumed the risk of incidental contact sitting courtside but he did not assume the risk of being forearmed in the chest by Bryant.⁸⁴ Bryant eventually settled the lawsuit but it certainly affirms that non-participants assume the risk of negligence but not of conduct that rises above that during a game.

The law then generally holds that in sporting events whether contact or non-contact and whether a participant or non-participant, negligence typically does not suffice as a valid cause of action because sports simply has certain risks assumed by both the players and the non-participants. But no one, not the players or non-participants, assumes the risks of reckless or intentional conduct or conduct outside the realm of the sport, and in those situations, a valid civil lawsuit can still arise.

⁷⁹ *Id.* See also *Notorious Kick Costs Dennis \$200 Grand in a Settlement*, DESERETNEWS.COM (Jan. 21, 1997 12:00 AM MST), <http://www.deseretnews.com/article/538654/NOTORIOUS-KICK-COSTS-DENNIS-200-GRAND-IN-A-SETTLEMENT.html?pg=all> (last accessed Mar. 13, 2013) (highlighting NBA veteran Dennis Rodman's settlement for \$200,000 after kicking a cameraman in the groin during a game).

⁸⁰ *Geeslin* at 637.

⁸¹ *In re Estate of Geeslin v. Bryant*, 2010 WL 2365329 (W.D. Tenn. 2010).

⁸² *Geeslin*, 453 Fed.Appx. 637 (6th Cir. 2011).

⁸³ *Id.* at 639.

⁸⁴ *Id.*

V. Potential Civil Liability for Gatorade Baths

As detailed above, Gatorade baths have been established as being the potential source of injury to coaches and eventually the severity of one of them will result in the need for a civil lawsuit.⁸⁵ Coaches are generally considered non-participants when lawsuits are filed for injuries that occur during the game.⁸⁶ Coaches in that way are like spectators.⁸⁷ Therefore, injuries to a coach by a participant in the sport would have to be caused by more than mere negligence; rather the actions must have been done recklessly or intentionally.⁸⁸ However, a Gatorade bath presents a unique situation where the participants are actually including the coach in a game custom, which would likely make the

⁸⁵ It may be argued that a coach would not want to sue his/her players. But, if a coach is seriously injured or dies from a Gatorade bath, the coach or the coach's family may not have a choice in order to fully recover for the extent of the damages. Moreover, workers compensation (if applicable) would likely not be a bar for a coach to file a civil lawsuit against the players, whether the players are considered co-employees or third-parties because reckless or intentional conduct by a co-employee causing an injury at work is typically outside the range of workers compensation coverage, along with injuries caused by third-parties. *See generally* Norfolk Shipbuilding & Drydock Corp. v. Garriss, 532 U.S. 811, 818-19 (2011) (expressly preserving all claims against third parties); Trivette v. Yount, 735 S.E. 2d 303 (N.C. 2012) (allowing claim against co-employee for reckless action).

⁸⁶ Trujillo v. Yeager, 642 F. Supp. 2d 86, 90 (D.Conn. 2009) (holding that a coach, as non-participant, is liable for injuries caused by players if the coach also acted recklessly or intentionally).

⁸⁷ *See* Ray Rossi, *Sports Injuries: High Liability Standard for Nonparticipants*, 98 ILL. BAR J. 200, 202 (2010) (stating that coaches are non-participants to a sporting event).

⁸⁸ *See Geeslin*, 453 Fed.Appx. at 637 (2011) (holding that mere negligence will not suffice; rather, intentional or recklessness are the acceptable standards giving rise to liability).

coaches “participants” instead.⁸⁹ In that case, the legal result would be the same - - in order to maintain a cause of action against another participant, the action would have to have been reckless or intentional.⁹⁰

A. Likely Cause of Action

Given the options expressed above, where does a cause of action from an injury from a Gatorade bath fall? Generally, negligence is likely not an option, and it really would not apply in this situation anyway.⁹¹ A Gatorade bath is likely not an intentional tort but instead would probably be considered a recklessness situation.

As noted above, an “intentional tort” requires the intent to injure another on the part of the tortfeasor, the one who committed the wrong. Intent has been defined as “the desire to bring about certain results.”⁹² Regarding Gatorade baths, it does not seem like they would be considered intentional torts because the players do not have the intent to injure their coach; rather the intended result is actually the complete opposite: to celebrate a victory with their coach. Intentionally throwing Gatorade on someone during a game can, however, have criminal consequences. For example, in 1991, former NBA player and Hall of Famer Charles Barkley

⁸⁹ Coaches have engaged in Gatorade Baths on their players as well. Larry Brown, *Rex Ryan Dumps Gatorade on Jason Taylor*, LARRY BROWN SPORTS (Sept. 26, 2010), <http://larrybrownsports.com/football/rex-ryan-dumps-gatorade-on-jason-taylor/31688> (last accessed Mar. 13, 2013) (discussing NFL coach, Rex Ryan, dumping Gatorade on one of his players after winning a game). Yet, further evidence that coaches are likely participants in this situation.

⁹⁰ See *Nabozny*, 334 N.E.2d 258 (1975) (rejecting negligence as the appropriate standard and holding that a player is liable for injury to a co-participant only when his conduct is deliberate, willful or reckless).

⁹¹ As noted above, negligence typically occurs in an accident or simply from an unintentional action. With Gatorade baths, negligence would likely not be the proper legal cause of action because it is not an accident or an unintentional act that the players are throwing Gatorade on their coach.

⁹² Restatement (3rd) of Torts §8A (1998).

was cited by City Prosecutors for disorderly conduct for throwing cups of Gatorade and water on a group of fans during a playoff game against the Milwaukee Bucks.⁹³ In contrast to a celebratory Gatorade bath, Barkley’s intent was obviously very different than the many players that douse their coaches.⁹⁴

The final theory, recklessness, as noted above, is a theory that falls between an intentional tort and negligence.⁹⁵ It is oftentimes described as a tort that occurs when one has the intent to commit an act, but no intent to cause harm.⁹⁶ It appears that of the three potential torts discussed above, recklessness would likely be the most viable possible cause of action by a coach (or the coach’s family members) in the event of an injury or death caused by a Gatorade Bath. The players obviously have the intent to throw the Gatorade onto their coach, but they lack the requisite intent to cause any harm. Recklessness, however, would still require proof of causation that the Gatorade bath was the cause of the injury or death,⁹⁷ which could be the greatest challenge for this type of

⁹³ *76ers’ Barkley Arrested for Battery in Milwaukee*, THE BALTIMORE SUN (Dec. 23, 1991), http://articles.baltimoresun.com/1991-12-23/sports/1991357077_1_barkley-milwaukee-police-winter-olympics (last accessed Mar. 14, 2013); See also Eric Goldschein, *LeBron Gets Mini-Gatorade Bath From a Displeased Celtics Fan After a Transcendent Game 6*, SPORTSGRID.COM (June 7th, 2012, 11:35 PM), <http://www.sportsgrid.com/nba/lebron-gets-mini-gatorade-bath/> (last accessed Mar. 14, 2013) (highlighting Celtics’ fans throwing Gatorade on LeBron James after a Celtics win).

⁹⁴ The same cannot be said for the Deion Sanders/Tim McCarver situation noted above, *supra* note 29. In that situation, Sanders’ intent certainly seemed to be to get back at McCarver for critical comments that McCarver made about Sanders. Additionally, the apparent motivation behind the Giants’ Jim Burt’s initial Gatorade Bath of Bill Parcells was also to get back at Parcells for comments that Parcells made to Burt. See *infra* note 99. Thus, it might be possible to prove intentional conduct on the part of the players in certain situations.

⁹⁵ Restatement (2nd) of Torts § 500.

⁹⁶ *Id.*

⁹⁷ *Id.* at §501.

lawsuit like in the George Allen situation, but would not be too hard to prove in the Bull Curry of Georgia State or Richard Thurin of North Platte situations. At the outset, however, it would appear that a potential plaintiff would likely be able to plead this type of tort in their complaint and also survive any initial attack on their pleadings.

A. Who does the coach (or coach's family) sue?

Having established that a potential cause of action for civil liability exists for a coach injured by a Gatorade bath, the next step is determining who the coach sues. For a coach of a professional team, the answer is easy: sue the players. The players make a lot of money and in some cases, a lot more than the coaches.⁹⁸ The players are "deep pockets" and would be viable defendants. Plus, there is not always a lot of love lost among professional coaches and their players.⁹⁹ A coach injured in this situation would likely be able to receive a monetary judgment from a financially able defendant.

Coaches at the high school level present a slightly different situation. The injured coaches can sue the players but also can sue the players' parents if the players are

⁹⁸ See Mason Levinson, *Girardi Agrees to Three-Year, \$9 Million Contract with Yankees, ESPN Says*, BLOOMBERG.COM (Oct. 28, 2010, 11:18 AM PT), <http://www.bloomberg.com/news/2010-10-28/girardi-agrees-to-three-year-9-million-contract-with-yankees-espn-says.html> (last accessed Mar. 14, 2013) (discussing head coach of the New York Yankees, Joe Girardi, \$3 million/year salary); *Contra* Ronald Blum, *A-Rod's Salary Nearly Equals Royals' Payroll*, NEW YORK POST (April 1, 2011, 1:35 PM), http://www.nypost.com/p/sports/yankees/rod_salary_nearly_equals_kc_payroll_AxxMP5E0ddBV57d1Q2Q4NM (last accessed Mar. 14, 2013) (New York Yankee Alexander Rodriguez made \$32 million in 2010).

⁹⁹ See Chuck Culpepper, *Soaking it Up*, SPORTS ON EARTH, (Jan. 9, 2013), <http://www.sportsonearth.com/article/40897684/>.

minors.¹⁰⁰ This leaves the coaches with at least the possibility of recovering a monetary judgment for their injuries caused by a reckless Gatorade bath.

The biggest problem would likely be faced by the college coaches who have athletes playing for them that are over eighteen and no longer under the supervision of their parents but they are not financially viable defendants as unemployed college students. The coaches can, however, still recover a judgment against the players.¹⁰¹ Given this particular situation though, a coach would have to suffer a serious injury or be left with no other choice except to pursue a legal action.

B. Causation/Damages

As mentioned above, recklessness still requires causation and damages.¹⁰² In some situations like Coach Allen’s, causation has been seriously disputed.¹⁰³ This does not mean that a complaint cannot be filed and causation

¹⁰⁰ See e.g., WIS. STAT. § 895.035 (2011) (stating that in the State of Wisconsin parents may be held liable for the negligent, reckless, or intentional acts of their minor child); CAL. CIV. CODE §1714.1 (West 2008) (stating that in California, parents will be held liable for the intentional misconduct of a minor child, including criminal acts, destruction of public or private property).

¹⁰¹ See e.g., *Livingston v. Naylor*, 920 A.2d 34 (Md. Ct. Spec. App. 2007) (ordering a writ of garnishment).

¹⁰² Restatement (2nd) of Torts §876 cmt. d (1979).

¹⁰³ Sam Borden, *A Splashy Tradition, Gatorade-Style*, NYTIMES.COM (Jan 20, 2012), <http://www.nytimes.com/2012/01/21/sports/football/a-splashy-football-tradition-gatorade-style.html> (last accessed Mar. 10, 2013) (noting that George Allen’s son disputes that Allen died from the Gatorade bath, stating: “He got a cold from it, but that was not the cause of his death . . . he had a heart arrhythmia . . . [his death] had nothing to do with the Gatorade Shower.”).

cannot be argued, it still can.¹⁰⁴ The situations at Georgia State and North Platte would be far easier to prove causation as there is no dispute that the Gatorade baths in question there clearly knocked one coach unconscious and another (and a fan) fell hard onto to the court because of the Gatorade spilled on the floor. In each of those situations, as well as in other similar situations, the damages would be obvious as they would be the medical bills and other issues associated with the injuries caused to the coaches (and fan).

C. Assumption of Risk

It is well settled that an injured party at a sporting event cannot assume the risk of reckless or intentional conduct; rather they assume the risk of negligent conduct.¹⁰⁵ Here, the Gatorade bath is likely reckless conduct and therefore assumption of risk should not be a viable defense.

However, it may be argued that because Gatorade baths have become so popular and customary in sporting events that coaches assume the risk of them. But, Gatorade baths are not part of the game in that they do not occur at every game or almost every game; rather they are reserved for certain very important games and even then they do not occur every time. Moreover, coaches do not assume the risk when they specifically tell their players not to partake in the Gatorade Bath like TCU's Gary Patterson and they also do not assume the risk that they will be hit with the cooler itself or the top of the cooler when a Gatorade bath is known to just be the liquid inside. Finally, Coaches like Coach Thurin of North Platte clearly did not assume the risk of "wiping out"

¹⁰⁴ See *e.g.*, *Sindell v. Abbott Lab.*, 607 P.2d 924 (Cal. 1980) (holding the defendant liable even though the plaintiff was unable to determine the actual tortfeasor that caused the plaintiff's injuries); *Summers v. Tice*, 199 P.2d 1 (Cal. 1948) (holding the defendant liable even though the plaintiff could not prove which defendant caused their harm).

¹⁰⁵ See *Hackbart*, 601 F.2d at 524 (1979) (holding that the assumption of the risk defense applies to negligence and the recklessness standard overcomes the assumption of the risk defense).

and falling face-first hard onto the court after slipping on the spilled Gatorade.

CONCLUSION

Granted, it is unfortunate that even a form of celebration and jubilation could result in a potential lawsuit or liability, but, just as storming the court after a basketball game victory can result in harm to players or others,¹⁰⁶ a Gatorade bath could also cause serious injury to a coach. Maybe instead of an ice-cold cooler of liquid awaiting a coach, schools and professional teams can provide an alternative substance to dump, such as confetti or rice? Either way, the next time you are contemplating the type of celebration you want to engage in following a victory, be mindful of the potential legal consequences of picking up that Gatorade cooler and drenching your coach.

¹⁰⁶See generally Ron Morris, *Morris: Time to end fines for fans storming the court*, THESTATE.COM (Jan. 31, 2010), <http://www.thestate.com/2010/01/31/1135648/morris-time-to-end-fines-for-fans.html> (discussing the SEC’s decision to fine The University of South Carolina 25,000 dollars for storming the court, a violation of SEC rules); Nicole Auerbach, *The forecast for college basketball: Storming the court*, USATODAY.COM (Feb. 7, 2013, 10:33 AM), <http://www.usatoday.com/story/sports/ncaab/2013/02/05/storming-rushing-the-court-college-basketball/1890851/> (noting how the SEC is still fining schools \$5,000 for the first offense, \$25,000 for the second and \$50,000 for anything after that); Cesar Tordesillas, *ACC may implement court storming fines after Krzyzewski incident*, GANTDAILY.COM (Mar. 1, 2013, 4:39 PM), <http://gantdaily.com/2013/03/01/acc-may-implement-court-storming-fines-after-krzyzewski-incident/> (Discussing how the Atlantic Coast Conference (ACC) encourages fans not to storm the court. Once that announcement is made any fan who runs onto the court takes responsibility for their actions. The ACC currently has no ban on rushing the court and might have to add one after eight have occurred so far this season.

Risk of Liability Threatens Nearly 30-Year-Old Tradition

Trevor R. Orme^{*} and Evan Schlack[†]

Upon reading Joshua Winneker's article, sports fans and those reminiscent of times past may well exclaim, "What next?!" - "Does this mean no more NASCAR or locker-room champagne celebrations because the cork may injure someone when popped off of a shaken, pressurized bottle?" "What about lifting a coach onto players' shoulders where he risks tumbling to the ground?" "Does 'the wave' pose too much risk of injury to fans?" "What does this mean for baseball dog piles upon winning a game?" "And, what about cutting the net off of the basketball hoop? They're using sharp scissors while balancing on a ladder after all!" Even Winneker's suggestion that schools and professional teams provide, in place of an ice-cold cooler of liquid, something like confetti or rice prompts an equally imaginable question: "What if the coach chokes after inhaling bits of confetti or falls after slipping on the rice?"

The reality is, like most industries, sports are intricately woven with and have necessarily evolved due to legal issues. That's why it is not hard to contemplate a scenario where even the "kiss-cam" may come under siege in the wake of controversial acceptance of nontraditional relationships and the changing definitions of marriage.¹ After reading Winneker's article, one may well argue that while

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¹ Chris Strauss, *Gay Jaguars fan objects to 'Kiss Cam' jokes*, USA TODAY, <http://www.usatoday.com/story/gameon/2013/03/20/gay-jacksonville-jaguars-fan-asks-to-end-cam/2003543>.

traditions do bring people closer together and bridge the past with the present, they shouldn't come at the expense of the individuals who they harm.

This note will take an alternative approach to the topic of the potential liability of Gatorade baths. It will demonstrate that, while Winneker's conclusions are ultimately supported, his analysis overlooks the possibility that Gatorade baths may be found not to be an inherent part of the sport, which would give rise to redressable claims by non-participants under a theory of negligence.

Winneker writes that civil liability at sporting events can arise in three separate instances within two categories: 1) liability for participants in contact and non-contact sports, 2) and liability for non-participant injuries. His examination of participant liability concludes that in order to have a redressable claim, the event's participants, whether in contact or non-contact sports, are often forced to demonstrate that the act was reckless or intentional. There is a twofold purpose supporting the theory: the first, a policy preference of the courts not to have a "chill[ing]" effect on sports, and second, the view that the players have "assumed the risk" of potential liability as an inherent part of the game.

The rest of Winneker's article focuses on liability for "non-participants." For the purposes of this argument, "non-participants" include the event's spectators, as well as the coaches.¹ His focus is directed to baseball's "limited-duty rule," a policy that forces injured non-participants to prove more than mere negligence to have a valid claim.

Baseball's limited-duty rule and the comparable rules for other professional sports are generally sufficient to force the plaintiff to prove more than negligence because, much like the risks that the athletes assume, some sports events

¹ *Trujillo v. Yeager*, 642 F. Supp. 2d 86, 88 (2009) (a coach, as non-participant, is liable for injuries caused by players if they also acted recklessly or intentionally).

have “common, frequent, and expected” risks.² This is the underlying basis for the limited and no duty rules: because the incidents are prevalent, non-participants are aware of the risks, and they have “assumed the risk” by attending the sporting events. Courts, however, have applied a simple negligence standard when it comes to the less “common, frequent, and expected” risks.³

Primary examples of limited-duty and no-duty rules can be seen in professional baseball and professional hockey, and, when one examines the statistics, the policy supporting the distinction appears valid. For instance, in Major League Baseball, (“MLB”), there are an estimated 4,000 foul ball injury-related incidents involving non-participants each year.⁴ With 30⁵ teams playing 162 games⁶, (a total 4,860 games), the statistics indicate an 82 percent chance that a fan will be struck by a foul ball in every MLB game. Similarly, in the National Hockey League, (“NHL”), one study found that 122 spectators were hit by flying pucks during a span of 127 games.⁷ Using this as a sample, the data would indicate that a spectator will be injured by a flying puck in 96% of hockey games.⁸ Due to the frequency of these injuries, courts throughout the country have concluded that spectators

² *Jones v. Three Rivers Management Corp.*, 394 A.2d 546, 551 (Pa. 1978).

³ *Id.*

⁴ Michelle Kaminsky, *Spectator Injuries at Sporting Events*, Legal Zoom, <http://www.legalzoom.com/lawsuits-settlements/personal-injury/spectator-injuries-sporting-events> (last visited Oct. 11, 2013); Avery Holton, *Into the Stands: How Safe is Pro Baseball?*, <http://reportingtexas.com/into-the-stands-how-safe-is-professional-baseball/> (last visited Oct. 11, 2013).

⁵ *Team-by-Team Information*, Major League Baseball, <http://mlb.mlb.com/team/> (last visited Oct. 11, 2013).

⁶ *Major League Baseball*, Wikipedia, http://en.wikipedia.org/wiki/Major_League_Baseball#Season_structure, (last visited Oct. 11, 2013).

⁷ Leigh Augustine, *Who is responsible When Spectators are Injured While Attending Professional Sporting Events?*, 5 UNIV. OF DEN. SPORTS AND ENTERTAINMENT L. J. 39 (2008).

⁸ *Id.*

“assume the risk” of these injuries.⁹ Specifically, courts have found that various factors, like foul balls being a “common, frequent, and expected” risk in baseball,¹⁰ “flying pucks [being] an integral and unavoidable part of [hockey],”¹¹ and broken bats being “an object inherent to the game,”¹² support the assumption of risk.

There are, however, non-participant injuries at sporting events that are not deemed “integral and unavoidable” parts of the game. Thus, they do not necessitate a showing of anything more than mere negligence. Non-participants have been able to recover in situations where they have tripped over support beams before falling down a staircase,¹³ fallen into a hole while at a concession stand,¹⁴ been struck with an iron gate,¹⁵ and attacked by surrounding

⁹ *Pestalozzi v. Philadelphia Flyers Ltd.*, 576 A.2d 72, 74 (Pa. Super Ct. 1990) (holding that the “risk of a spectator being struck by an errant puck, even for an individual sitting behind plexiglass, is common and reasonably foreseeable.”); see also *Pentrongola v. Comcast-Spectator, L.P.*, 789 A.2d 204 (Pa. Super. Ct. 2001) (spectator assumed the risk of being struck by errant puck); *Baker v. Mid Maine Medical Center*, 499 A.2d 464, 467 (Me. 1985) (“[t]he game of golf presents a known hazard, balls, hit by golfers, that do not always travel in the intended direction, and which are capable of causing serious personal injury.”); *Colclough, M.D. v. Orleans Parish School Bd.*, 166 So.2d 647, 648-49 (La. Ct. App. 1964) (plaintiff assumed risk of injury standing on the sidelines of a football game).

¹⁰ *Jones v. Three Rivers Management Corp.*, 394 A.2d 546, 551 (Pa. 1978) (citing *Brown v. San Francisco Baseball Club*, 222 P.2d 19, 20 (Cal. Dist. Ct. App. 1950) that “[Non-participant] ... subjects himself to certain risks necessarily and usually incident to and inherent in the game”).

¹¹ *Nemarnik v. Los Angeles Kings Hockey Club*, 103 Cal. App. 4th 631, 640 (Cal. Dist. Ct. App. 2002).

¹² *Rees v. Cleveland Indians Baseball Co., Inc.*, No. 84183, 2004 WL 2610531 (Ohio Ct. App. Nov. 18, 2004).

¹³ *Martin v. Angel City Baseball Ass’n*, 40 P.2d 287, 287 (Cal.App.2d 1935).

¹⁴ *Louisville Baseball Club v. Butler*, 160 S.W.2d 141 (Ky. 1942).

¹⁵ *Murray v. Pittsburgh Athletic Co.*, 188 A. 190, 191 (Pa. 1936).

fans for a souvenir football.¹⁶ These cases show that the infrequent and uncommon nature of an injury will increase a plaintiff's likelihood of recovering for his or her injuries.¹⁷

How courts categorize Gatorade-bath claims will determine whether a non-participant, either the spectator or coach, will be able to bring a claim under the negligence standard. How courts view this matter of first impression could lay the foundation for a new approach in dealing with lower likelihood injuries or blur the connection between high risk and assumption of risk. For example, take the recent and notable case of *Roundtree v. Boise Baseball, LLC*.¹⁸ In *Roundtree*, the Idaho Supreme Court first encountered a non-participant's (spectator) injury that resulted from being struck with a foul ball.¹⁹ While recognizing that the "majority of jurisdictions" have "adopt[ed] some variation of the Baseball Rule[,]," the court declined to submit to the trend.²⁰ Rather, the Idaho Supreme Court held the rarity of similar incidents led to the finding that such events are not an inherent part of the sport.²¹ Furthermore, the court felt that there was not a "compelling public policy" that existed within the Baseball Rule's rationale.²² Consequently, the court held that the spectator who had been injured from a flying foul ball could bring a claim under a theory of negligence.²³

The success of non-participant civil liability claims in the future, whether originating from a coach²⁴ or a spectator,

¹⁶ *Telega v. Security Bureau, Inc.*, 719 A.2d 2, 372, 377 (Pa. Super. Ct. 1998) (stating that "matter would compel a different result had Mr. Telega been injured by the areal football itself rather than the displaced fans intent on obtaining it.").

¹⁷ *Ratcliff v. San Diego Baseball Club*, 27 Cal.App.2d 733, 738 (Cal. Ct. Dist. App. 1938).

¹⁸ 296 P.3d 373, 377-78 (Idaho 2013).

¹⁹ *Id.* at 377.

²⁰ *Id.*

²¹ *Id.* at 379.

²² *Id.*

²³ *Id.*

²⁴ *Trujillo*, *supra* note 2, at 88.

will depend on the route of interpretation taken by the courts.. If future courts view the Gatorade baths in a traditional light, as a “frequent, common, and expected[,]” or as an “integral and unavoidable” part of the sport, it is unlikely that non-participants could establish a claim under a negligence standard. However, if the court viewing the claim does not believe that the Gatorade baths meet that standard or believe that public policy should not bar non-participants from injury claims, it may conclude that non-participants have not “assumed the risk” and that they may bring a claim under a negligence theory.

If future courts decide the assumption of risk issue based on the frequency of the occurrence, perhaps the infrequency of the Gatorade baths could be directly related to having a “bad” team: a team that historically loses important games. The quality of a state’s team may affect how the state’s courts view the risk associated with Gatorade baths and the assumption of risk. For example, the Arizona Cardinals have arguably the worst record over the history of their franchise.²⁵ If they play the Green Bay Packers (arguably the most winning team of all time²⁶) on Arizona turf, lose, and a Packer’s player drenches the Packer’s coach, a lawsuit brought in Arizona may find that player liable. On the other hand, if the case were brought in Wisconsin, then the coach might not recover because of the recognized risk.

Presently, no lawsuits have been filed claiming injury by Gatorade bath, but that doesn’t mean lawsuits won’t soon come. The unfortunate result may be the end or severe reduction in an almost 30-year-old tradition. Any avid sports fan who holds this tradition dear should begin his superstitious rituals, voodoo, and mojo and channel his

²⁵ Kerry Burne, *A CHFF epic: all-time franchise rankings*, COLD HARD FOOTBALL FACTS, Jun. 24, 2008, <http://www.coldhardfootballfacts.com/content/chff-epic-all-time-franchise-rankings/6520/>.

²⁶ *Id.*

positive vibes for the underdog because the law is coming to sack Gatorade baths.