The Resurrection of the Competitive Sports Doctrine in Texas

Introduction

The Competitive Sports Doctrine became popular in the late 1990'd and early 2000's as a growing nationwide trend to limit liability for injury to voluntary participants involved in competitive sports. The Texas Supreme Court considered it in 2002 and declined to adopt it. Despite this, the Texas Legislature, through passing The Equine Activity Act and the Recreational Use Statute, resurrected the Competitive Sports Doctrine in Texas.

History

In 1975, the Texas Supreme Court abolished the "assumption of the risk" doctrine and adopted a comparative negligence standard for determining civil liability. *Farley v. M.M. Cattle Co.* 529 S.W.2d 751 (Tex.1975). Under this standard, the issues were whether the defendant's negligence proximately caused the collision and, if so, what percent was the defendant at fault. The effects of the percentage findings changed and evolved over time, but the duty question—was the defendant negligent—remained the same. This applied to all injury cases, including injuries occurring during the playing of competitive sports.

In the late 1990's and early 2000's the United States saw a trend to prohibit voluntary participants in competitive sports from being able to file lawsuits against property owners (i.e. owner of stadiums, fields, tracks, courts) and sports participants. The theory being, there is some assumption of risk injury any time you play a competitive sport. Globally, this has been referred to as the "Competitive Sports Doctrine." Needless to say, personal injury lawyers fought against adoption of such a heightened standard, but for the most part states adopted the standards regardless. As state courts grappled with the issue, two distinct duty standards under the Competitive Sports Doctrine emerged: the "reckless or intentional" standard and the "inherent risk standard."

The "Reckless or Intentional" Standard

The majority of state courts addressing the issue have adopted the "reckless or intentional" standard. *Southwest Key Program, Inc. v. Gil-Perez*, 81 S.W.3d 269, 271, (Tex.2002). Under this standard, the plaintiff must prove that the defendant's conduct was either reckless or intentional. *Id*. At 271. Mere negligence is not enough. The party must have done some act or created a danger over and above the usual dangers inherent in the sport. *See Kline v. OID Assoc*., 80 Ohio App.3d 393, 609, 609 N.E.2d 564, 565 (1992). Effectively, the participant assumes the risk of a negligent act.

The "Inherent Risk" Standard

The "inherent risk" standard states that other participants and premise owners owe no duty to protect a participant from a risk inherent in the sport or activity in which he has

chosen to participate. See *Davis v. Greer*, 940 S.W.2d 582, 582-3 (Tex.1996) (Gonzales, J. opinion on denial of application for writ of error)(comparing the "inherent risk" and "reckless or intentional" standards.) This standard focuses on whether the risk itself is inherent, not the specific injury. *Lee v. Loftin*, 277 S.W.3d 519, 526 9Tex.App.—Tyler, 2009). This something like a pot hole in a playing filed would not be an 'inherent risk' that the participant in a sporting match has assumed the risk of whereas a leg-breaking tackle would be. See Pivateau, *Tackling the Competitive Sports Doctrine*, 9 Tex.Rev.Ent.& Sports Law at 119.

Texas Supreme Court Declines to Adopt Either

In 2002, the Texas Supreme Court declined to adopt either the "reckless or intentional" standard and the "inherent risk" standard. In the case of *Southwest Key Program, Inc. v. Gil-Perez*, 81 S.W.3d 269, 271, (2002), the Texas Supreme Court acknowledged that there were valid public policy reasons for adopting both standards. They then held that in that case, the plaintiff had failed to meet the normal negligence standard. They went on to state it was "unnecessary" to adopt either standard, thereby leaving negligence as the applicable standard in Texas. *Id*. At 272. Thus, it seemed as though Texas had rejected the Competitive Sports Doctrine entirely.

The Equine Activity Act of 2005

In 2005, the Texas Legislature enacted V.T.C.A., Civ.Prac & Rem.Code §87.003, known as the "Equine Activity Statute." Most states now have a similar statute to this. *Lee v. Loftin*, 277 S.W.3d 519, 523 (Tex.App.—Tyler, 2009). (as of 2009, 44 states had similar statutes.) Under Texas Equine Activity Act, no person is liable for property damage, personal injury or death of a participant in an "equine activity or livestock show" if the injury, death or damages "results from the dangers or conditions that are an inherent risk of an equine activity or the showing of an animal on a competitive basis in a live stock show…" V.T.C.A. Civ.Prac.& Rem.Code §87.003. The statute goes on to list things specifically included such as things related to an animal's unpredictability, behavior, conditions on the land itself, collisions between animals and the "potential of a participant to act in a negligent manner that may contribute to the injury of the participant or another…" In applying this statute, the Tyler Court of Appeals specifically used an inherent-risk test. *Lee v. Loftin*, 277 S.W.3d 519, 526 (Tex.App.—Tyler, 2009). This statute revived the "inherent risk" standard of the Competitive Sports Doctrine as it applies to property owners and participants in equine activities.

The Recreational Use Statute of 2007

In 2007, the Texas Legislature enacted V.T.C.A., Civ.Prac.& Rem.Code § 75.002, commonly known as the "Recreational Use Statute." This Statute took away many of a recreational visitor's rights against a landowner. Under the Recreational Use Statute, an owner, lessee or occupant of agricultural land owes no duty of care to trespassers and can only be held responsible if he/she is grossly negligent toward a trespasser. Section 75.002(a)(1-2). Furthermore, if a person is on the property with permission and is injured,

the person is owed no duty by the owner than the duty owed to a trespasser. Section 75.002(b)(1-3). Thus, permissive guests, who historically have received greater protection under the eyes of the law because they are invitees, are stripped of their protection by this statute as well. In addition to the above, Subpart (c) extends the abrogation of duty occupants "of real property other than agricultural land" who give permission to a guest to enter for recreational purposes. The statute goes on to specify a list of recreational sports and activities that are covered by this act. However, the list is non-exhaustive. See: *The University of Texas Health Science Center at Houston v. Garcia*, 346 S.W. 220 (Tex.App.—Houston[14th] Dist, 2011 n.w.h.) (Statute used to bar a sand volleyball player's cause of action against the premise owner despite activity not being on list.)

The Recreational Use Statute effectively limits all landowner's liability for injuries during recreational activities (including sports) to liability for gross negligence since "willful and wanton acts" are really just a reiteration of the Texas gross negligence standard. Under Texas Gross Negligence standards, you must prove that the liable party acted with recklessness or actual malice. "Malice" being an intentional act or act involving ill will. Said another way, to hold a landowner responsible for an injury sustained by a voluntary participant in a competitive sport, the participant will have to prove that the landowner acted with recklessness or intentionally. This statute only addresses the liability of the person in charge of the property, however. Thus, a participant in a sport itself who injuries anther participant is not protected by this statute.

Conclusion

The Texas Supreme Court declined to adopt either of the two competing standards other state courts have employed under Competitive Sports Doctrine when they addressed the issue in 2002. Prior to that time, the lower courts had been in conflict as to which to use. The Supreme Court opted for the existing negligence standard. After the Supreme Court's ruling, the Competitive Sports Doctrine seemed a non- issue in Texas. However, in 2005 and 2007, the Legislature decided to revisit the issue. The first time they resurrected the "inherent risk" standard and applied it to equine activities. The second time they resurrected the "reckless or intentional" standard with regard to land holders. For a premise liability lawyer, this case represents a door closed when sports and recreational activities result in the injury. However, neither statute reached so far as to cover liability of one participant to another in a non-equine sporting event. This was left for the conflicting lower courts to resolve on their own. In any event, these statutes demonstrate that the rejected Competitive Sports Doctrine is alive and well in Texas.