TORT LAW—RECREATIONAL ACTIVITY—STANDARD OF CARE—CO-PARTICIPANTS IN RECREATIONAL ACTIVITIES OWE EACH OTHER A DUTY NOT TO ACT RECKLESSLY—*Ritchie-Gamester v. City of Berkley*, 597 N.W.2d 517 (Mich. 1999).

I. INTRODUCTION

Tort law has long been a part of the common law, developed over the years, first in England, then in America. A tort is defined as a violation of a legal duty.[1] Consequently, a primary controversy in tort law arises over what duty people owe each other in different situations. When an individual is injured, it is often difficult to determine who is liable for damages – the person injured or someone else. The answer is never easy, and varies in different contexts.

Two people walking down the street on the sidewalk toward each other do not normally walk directly into each other, causing injury. They each have a common sense understanding of what is acceptable conduct. A set of expectations attaches to these situations. What happens if similar injuries occur, only outside of the sphere of day-to-day activities?[2] Does the duty of care change when two participants in a pick-up basketball game are both driving down the court and bump into each other, causing the same kind of injuries? What about two friends playing hockey who crash into each other while going for the puck? Do co-participants in recreational activities owe each other the same duty that people owe to one another while engaging in everyday activities, or would this lead to an inordinate number of people collecting damages from one another? Do

1. *See* BLACK'S LAW DICTIONARY, 1489 (6th ed. 1990). The word tort comes from the Latin word "torquere," meaning to twist. *See id.* There must always be a violation of some duty owing to the plaintiff, and generally such duty must arise by operation of law and not by agreement between the parties. *See id.*

2. *See, e.g.*, Ritchie-Gamester v. City of Berkley, 597 N.W.2d 517, 523-24 (Mich. 1999).

voluntary participants in recreational activities assume some of the inherent dangers of these sports?[3] There must be a standard of care that is better suited to co-participants in recreational activities, governing the conduct of people who voluntarily suspend the rules governing ordinary situations. The courts are often presented with this issue, and the answer varies from jurisdiction to jurisdiction.[4]

This was the issue that faced the Supreme Court of Michigan in the recent case of *Ritchie-Gamester v. City of Berkeley*.[5] Specifically, the court determined the duty of care owed by one ice skater to another while both participated in a free skate period at their local rink.[6] One ice skater crashed into another while skating backward, injuring the other's knee.[7] The injured party sued, claiming that the negligence of the backward skater caused the collision.[8] The court held that the appropriate standard of care between co-participants in a recreational activity is one of reckless misconduct, and found that the trial court properly granted summary disposition for the defendant because she complied with her duty to not act recklessly.[9]

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3. *See* 30 AM. JUR. 3d *Proof of Facts* § 161 (1995) for a background discussion of assumption of risk as it applies to the recreational injuries context. "The traditional definition of assumption of risk requires two elements: (1) knowledge of the risk and appreciation of its magnitude, and (2) voluntarily proceeding in the face of that known risk." *Id. See also* PROSSER & KEETON, TORTS § 68 (5th ed. 1984).

4. *See* Ritchie-Gamester v. City of Berkley, 597 N.W.2d 517, 521 (Mich. 1999); *compare with* Lustina v. West Brand Mut. Ins. Co., 501 N.W.2d 28 (Wis. 1993).

5. *See id.* at 518.

6. *See id.* A free or open skate period is a time that an arena opens up for the public to skate. *See id.*

7. *See id.*

8. *See Ritchie-Gamester,* 597 N.W.2d at 518.

9. *See id.*. Michigan Court Rule 2.116(C)(10), the rule regarding summary disposition reads, in pertinent part: a party is entitled to summary disposition when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." Mich. Ct. R. 2.116(7C)(10).

II. *RITCHIE-GAMESTER V. CITY OF BERKLEY*, 597 N.W.2d 517 (MICH. 1999)

A. Statement of the Facts

Jill Ritchie-Gamester and Halley Mann were participating in an 'open skating' session at the Berkley Ice Arena, owned by the city of Berkley, Michigan.[10] Halley Mann, twelve years old at the time, collided into Ritchie-Gamester while skating backwards.[11] The crash knocked Ritchie-Gamester to the ice, causing severe injury to her knee.[12] Mann contended that she had been keeping the proper lookout behind her, both by looking for herself and by relying on others checking for her.[13] Ritchie-Gamester alleged that the defendant acted in a "careless, reckless, and negligent manner" by colliding with her while skating backwards.[14]

B. Procedural History

In the original complaint, Ritchie-Gamester sued the City of Berkley as owner of the rink, D. Hendricks, an employee of the rink, and Halley Mann, the minor who crashed into her at the Berkley Ice Arena.[15] Both the City of Berkley and Hendricks were dismissed from this action by agreement between the parties.[16]

Mann moved for summary disposition of the case, pursuant to MCR 2.116(C).[17] Mann claimed that she did not

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10. *See Ritchie-Gamester*, 597 N.W.2d at 518.

11. *See id.*

12. *See id.*

13. *See id.* at 534 (Brickley, J., concurring). Mann's testimony indicated that other people who faced her while she skated backwards would tell her if there was anyone behind her that she might hit. *See id.* at 533. In effect, Mann relied on others at the free skate to help her skate safely. *See id.* The plaintiff contended that skaters, not others, have the responsibility to check behind themselves while skating backward. *See id.*

14. *Ritchie-Gamester*, 597 N.W.2d at 518.

15. *See id.* Douglas K. Mann II was also sued as guardian ad litem for Halley Mann. *See id.*

16. *See id. See also* 27A AM. JUR. 2d, *Entertainment and Sports Law* § 84 (1996). Operators of skating rinks have the duty to use reasonable care to guard patrons against reasonably foreseeable risks. *See id.* Further, they have a duty to protect against the reckless conduct of other skaters. *See id.*

17. *See Ritchie-Gamester*, 597 N.W.2d at 518; *see also* Mich. Ct. R.

act in a negligent manner, that occasional bumps and collisions are expected while skating at a crowded ice rink.[18] The lower court granted defendant Mann's motion for summary disposition, positing that ice rinks are inherently dangerous and that "defendant's actions were not contrary to the rules governing skating."[19] In making its decision, the lower court applied a reckless misconduct standard.[20]

The court of appeals subsequently reversed the trial court's decision, finding there to be a genuine issue of material fact on the negligence issue when applying a standard of ordinary care.[21]

The Supreme Court of Michigan entertained the defendant's appeal in order to determine the appropriate standard of care in this case: negligence or reckless misconduct.[22] For purposes of the appeal, Mann conceded that a question of fact may exist as to whether her actions constituted negligence.[23] Likewise, Ritchie-Gamester conceded, for purposes of the appeal, that Mann's actions did not amount to recklessness.[24] Thus, if the court applied a standard of reckless misconduct, it would be compelled to reverse the decision of the court of appeals and reinstate the trial court's grant of summary disposition.[25] However, if the court applied a standard of ordinary care, the decision of the court of appeals should be upheld.[26]

The court held that the proper standard to be applied between co-participants voluntarily engaging in a recreational activity is one of intentional or reckless misconduct.[27] Thus, co-participants owe one another a duty

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2.116(C)(10).

18. *See Ritchie-Gamester,* 597 N.W.2d at 518.

19. *Id.* at 518. The court did not expressly state what specific rules of skating applied, however, the court seemed to imply that Mann's conduct fell within the confines of acceptable conduct at the free skate. *See id.*

20. *See id.* at 518.

21. *See id.*

22. *See Ritchie-Gamester,* 597 N.W.2d at 519.

23. *See id.*

24. *See id.* at 519. Further, plaintiff did not allege that Mann's conduct was intentional. *See id.*

25. *See id.*

26. *See Ricthie-Gamester,* 597 N.W.2d at 519.

27. *See id* at 525.

not to act recklessly.[28] Further, the court found that Mann did not violate this duty and, as a result, reversed the determination of the court of appeals and reinstated the trial court's grant of summary disposition for defendant.[29]

C. *Prior Law*

1. Prior Michigan Case Law

This was not a case of first impression for the Michigan courts.[30] However, in this context, the state of the law as to the appropriate standard of care was confusing and contradictory.[31] This issue has been the subject of extensive litigation in other jurisdictions, with varying outcomes.[32] Accordingly, the court began by examining a sample of conflicting caselaw in Michigan.[33]

In *Williams v. Wood*,[34] the court applied an ordinary care standard in a case involving an injury that arose during the course of a recreational activity.[35] Plaintiff and defendant were fishing when defendant Wood miscast his rod and struck plaintiff Williams, the fishing guide, in the eye, causing injuries that required plaintiff's eye to be surgically removed.[36] After reviewing earlier cases that dealt with similar recreational accidents, the court chose to apply an

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28. *See id.* at 519.
29. *See id.* at 527.
30. *See Ritchie-Gamester*, 597 N.W.2d at 527.
31. *See id.* at 519-20.
32. *See id.* at 521-23.
33. *See id.* at 519. While the court looked at decisions from both Michigan and other states, the court focused its discussion primarily on cases that adopted a reckless misconduct standard. *See id.* at 519-23. The court in *Ritchie-Gamester* joined the majority of jurisdictions in adopting this standard. *See id.* at 525.
34. 244 N.W. 490 (Mich. 1932).
35. *See id.* at 492. The *Williams* court decided that recovery may be obtained in a recreational injury context if that injury resulted from a breach of ordinary care. *See id.* Thus, the court reversed the trial court's directed verdict, remanding the case for a new trial because it warranted a jury determination on the negligence issue. *See id.* The court held that the plaintiff could only recover if the jury found that the defendant's cast was negligent. *See Williams*, 244 N.W. 490 at 492.
36. *See id.* at 491. Defendant, an experienced fisherman, was sitting in the bow of a rowboat. *See id.* Plaintiff was in the stern, approximately five or six feet away. *See id.*

ordinary care standard. [37]

The *Ritchie-Gamester* court next looked at the case of *Felgner v. Anderson*,[38] in which one duck hunter injured another.[39] The defendant shot the plaintiff at close range, creating a wound so serious that plaintiff's leg required amputation.[40] *Felgner* explored the concept of assumption of risk, a theory about which the defendant wanted the jury instructed.[41] The defendant alleged that he should not be held liable for the injuries sustained by the plaintiff because those who duck hunt assume the risk of being shot.[42]

After an exhaustive examination of the historical application of the doctrine, the *Felgner* court declined to apply assumption of risk in this case,[43] and for all intents

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37. *See id.* at 491-21. "Recovery may be had only if an injury is the result of negligence that could and should have been avoided by the use of ordinary care." *Ritchie-Gamester,* 597 N.W.2d at 519 (noting that *Williams* did not specifically touch upon the relationship between the risks and co-participants' duties to one another).

38. 133 N.W.2d 136 (Mich. 1965).

39. *See id.* at 139. The plaintiff and the defendant were duck hunting together in a small boat, seven feet long and three feet wide. *See id.* at 138. The parties were facing each other in the boat, the plaintiff at the stern and the defendant at the bow. *See id.* The defendant swung and shot at an approaching duck, which hurled him from the boat. After the defendant was thrown from the boat, the plaintiff was shot in the leg. *See Felgner*, 133 N.W. at 139. The parties diverged at this point in the facts, with the plaintiff averring that the defendant's gun went off a second time once he was thrown out of the boat, and the defendant claiming that his gun never fired another shot after the first one he fired at the duck. *See id.* at 138-40.

40. *See id.* at 140. The wound to plaintiff's leg, according to his testimony, was approximately the size of a closed fist. *See id.*

41. *See id.* at 140; s*ee also* 30 AM. JUR. *Proof of Facts* 3d §161 (1995). The court found that the trial court did not err in its jury instruction, which did not include an assumption of risk instruction. *See* Felgner, *supra* note 39 at 140. Instead, the court instructed the jury that if they decided that the defendant's gun injured the plaintiff, the defendant must prove himself free of fault, and therefore, not negligent. *See id.*

42. *See Felgner*, 133 N.W. at 140.

43. *See id.* at 153-54. The *Felgner* court found that assumption of risk only has a place in cases concerning negligence in an employment context. *See Felgner*, 133 N.W.2d at 153. The concurrence, written by Justice Black, pointed out that he would go so far as to do what New Jersey did in *McGrath v. American Cyanamid Co.*, 41 N.J. 272 (1964) and abolish the use of the term 'assumption of risk' all together to avoid any future confusion. *See id.* at 155 (Black, J., concurring). A second concurrence, written by Justice Smith and joined by Justice Adams, agreed with the majority's holding, but did not feel that assumption of risk was the specific issue before the court, and would thus have preferred to consider abolition of the doctrine at a time when it was appropriately

and purposes, abolished the use of the doctrine in most negligence actions. After *Felgner*, subsequent Michigan cases began to move away from the ordinary care standard.[44]

While many of the older Michigan cases applied an ordinary care standard, the trend began to change in more recent cases.[45] In *Overall v. Kadella*,[46] a fight ensued after an amateur hockey game, beginning with the defendant and a member of the opposing team.[47] The plaintiff was sitting on the bench when the defendant punched the plaintiff in the eye, causing him pain and suffering and permanent injury.[48] The defendant contended that due to "*volenti non fit injura*,"[49] he should not be held liable for the plaintiff's injury.[50] The Court in *Overall* declined to rely on *volenti non fit injura*, because defendant's intentional actions caused the injury to the plaintiff.[51] Intentional acts such as these are to be considered batteries.[52]

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before the court. *See id.* at 155 (Smith, J., concurring). The dissent in *Felgner*, authored by Justice Kelly, examined similar cases from several states that resulted in the use of an ordinary care standard. *See id.* at 157-161 (Kelly, J., dissenting). The justice opined that the *Felgner* court should have followed the reasoning of these cases, which were generally based on the notion that liability would attach to a defendant who did not act as a reasonable and prudent person would act in a similar situation. *See id.* Thus, the court should have continued to apply an ordinary negligence and due care standard. *See id.* at 160-161 (Kelly, J., dissenting). The dissent would have reversed the decision for the plaintiff. *See id.* at 161 (Kelly, J., dissenting).

44. *See Ritchie-Gamester*, 597 N.W.2d at 520.

45. *See id.*

46. 361 N.W.2d 352 (Mich. App. 1984).

47. *See id.* at 353.

48. *See id.* at 353-4. There was a factual dispute as to whether or not the plaintiff was sitting on the bench minding his own business or if he was poking or hitting the defendant with a hockey stick while the defendant was engaged in a fight with another player. *See id.* at 353. According to the rules of the Michigan Amateur Hockey Association, the bench is considered to be part of the playing field. *See id.* at 354.

49. *See id.* at 355. "He who consents cannot receive an injury." *Id. See also* BLACK'S LAW DICTIONARY, 1564 (7th ed. 1999) (defining *volenti non fit injura* as "the principle that a person who knowingly and voluntarily risks danger cannot recover for any resulting injury").

50. *See Overall*, 361 N.W.2d at 355.

51. *See id.* The court in *Overall* suggested in dicta that those who participate in a recreational activity "consent to those bodily contacts which are permitted by the rules of the game." *Id.* at 355 (citing RESTATEMENT OF TORTS, 2d, § 50, comment b.) However, this rationale did not apply to the facts of *Overall* due to the intentional nature of defendant's conduct. *See id.* at 355.

52. *See id.* (citing *Amusements and Exhibitions*, 4 AM. JUR. 2d § 86 (1995

Twelve years later the Michigan Court of Appeals applied an ordinary standard of care in *Schmidt v. Youngs*.[53] In this case, the plaintiff and defendant were playing golf together as part of a group.[54] Customarily, players are to stay behind the player hitting the golf ball for safety purposes.[55] Instead of following this custom, the plaintiff, impatient after waiting in a safe spot, moved in front of defendant, positioning himself next to a large tree.[56] Defendant's shot veered sharply to the right and struck the plaintiff in his eye.[57] The court in *Schmidt* held that the defendant did not have any duty to safeguard the plaintiff from the ordinary risks that are inherent in the game.[58] The court found no negligence on the part of the defendant.[59]

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interim pamphlet)). After examining relevant caselaw, the court held that tort liability can be found in cases where the injury resulted from a violation of safety rules. *See id.* at 355 (citing Nabozny v. Barnhill, 334 N.E.2d 258 (Ill. App. Ct. 1975)). The safety rules that governed this case are those adopted by the Michigan Amateur Hockey Association, which are designed to end violence in the sport. *See id.* at 354. The court held that an intentional battery is indeed a violation of such a rule. *See id.* at 355. This battery did not even take place during a game, it took place following one. *See Overall,* 361 N.W.2d at 355. Thus, the court reasoned, it does not logically follow that plaintiff consented to a battery after a game. *See id.*

53. 544 N.W.2d 743 (Mich. App. 1996).

54. *See id.* at 744.

55. *See id.*

56. *See id.* Plaintiff originally waited behind a tree for protection. *See id.* However, the plaintiff tired of waiting there after it took the defendant several minutes to prepare for his shot. *See Schmidt,* 544 N.W.2d at 744.

57. *See Schmidt,* 544 N.W.2d at 744

58. *See id.* at 746. The plaintiff asserted that the defendant acted negligently by not issuing a warning and by hitting a wayward shot in the plaintiff's direction. *See id.* at 744. The trial court granted the defendant's motion for summary disposition. *See id.* at 746. The court of appeals affirmed, finding that the plaintiff knew the defendant was preparing to hit the ball and, nevertheless, removed himself from his position of safety. *See Schmidt,* 544 N.W.2d at 745. The court of appeals also referenced the fact that the trial court's assumption of risk analysis was not inappropriate. *See id.* The court explained that assumption of risk was only mentioned in its "primary sense," in that defendant owed no duty to the plaintiff or defendant did not breach any duty to the plaintiff. *See id.*

59. *See id.* at 746. "A person who engages in the game of golf . . . is only required to exercise ordinary care for the safety of persons reasonably within the range of danger. . . . [T]here is no duty to give advance warning to persons who are on contiguous holes or fairways, and not in the line of play, if danger to them is not reasonably to be anticipated." *Id.* at 744 (quoting *Amusements and Exhibitions,* 4 AM. JUR. 2d § 87 (1995 interim pamphlet)).

The dissent in *Schmidt*, written by Judge Kelly, believed that the majority applied assumption of risk in an inappropriate context. See id. at 757 (Kelly, J., dissenting). Further, the dissent found that summary disposition was premature, because no court should decide such an issue without

Earlier, the *Overall* court had discussed in dicta the inherent risks assumed when playing a game.[60] This became the focus of the conclusions in *Higgins v. Pfeiffer*,[61] decided only a short time after *Schmidt*. The *Higgins* court found that participants in recreational activities assume inherent risks in playing a game.[62] In that case, the plaintiff and defendants were members of the same amateur baseball team participating in an organized league.[63] Pfeiffer was warming up on the sideline by throwing to the catcher, facing the dugout.[64] The plaintiff was seated in the dugout and was not paying attention to the warm-up on the field.[65] The catcher signaled for the pitcher to throw a rising fastball.[66] The pitcher obliged, and the pitch went out of control, over the catcher's head, and struck the plaintiff in the eye.[67]

The court in *Higgins* applied a reckless misconduct standard, based on the reasoning suggested in *Overall*, finding that the injury was one to which the plaintiff had impliedly consented through his participation in the game, especially considering the peculiarities of this particular playing field.[68] Thus, the defendants were not held liable for the injuries to the plaintiff.[69]

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testimony of golf experts. *See id.* (Kelly, J., dissenting). Thus, the dissent found that the majority erred in holding that the defendant was under no duty to avoid negligent conduct as a matter of law. *See id.* at 747 (Kelly, J., dissenting).

60. *See Overall*, 361 N.W.2d at 351.

61. 546 N.W.2d 645 (Mich. App. 1995).

62. *See id.* at 646.

63. *See id.* Defendant Pfeiffer was the pitcher, defendant David McCullough was the catcher, and defendant Robert McCullough was the acting coach of the team. *See id.* As the coach, Robert McCullough was charged with negligence for permitting the pitcher to throw in the direction of the dugout. *See id.* at 645.

64. *See id.* at 645. Defendant was no longer warming up on the mound because it was the other team's turn to use it. *See id.* Further, the field where the accident occurred did not have a bullpen. *See Higgins*, 546 N.W.2d at 646.

65. *See id.*

66. *See Overall*, 361 N.W.2d at 645.

67. *See id.* at 645.

68. *See Higgins*, 546 N.W.2d at 647. The court found that even though *Felgner* abolished the doctrine of assumption of risk in this context, that did not mean that a question of fact exists in every case. *See id.* Participants are aware of the inherent dangers in the sport and consent to certain risks other than those injuries that arise out of a breach of a contest rule imposed for safety reasons. *See id.* at 646.

69. *See id.* Judge Kelly dissented, arguing that, in effect, the majority's

2. Prior Law in Other Jurisdictions

The *Ritchie-Gamester* court next explored the rationales that other jurisdictions used to justify the adoption of a reckless misconduct standard over an ordinary care standard in the recreational activity context.[70] Some states use assumption of risk as a rationale for the adoption of this standard.[71] Those states that have abandoned the use of the assumption of risk doctrine base their rationale for the reckless misconduct standard on consent; that the plaintiff agreed in advance to bear the responsibility for what would otherwise be considered an intentional tort.[72]

A number of cases that have adopted the reckless misconduct standard offered public policy as their rationale.[73] These cases call for this standard of care to avoid discouraging vigorous participation in recreational sports.[74] A reckless misconduct standard in the recreational activity context allows people to be rougher during their participation in sports than they are in their ordinary day to

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decision allowed recovery only when a defendant's actions were reckless or intentional. *See Higgins*, 546 N.W.2d at 647 (Kelly, J., dissenting). The dissent worried that although *Felgner* abolished assumption of risk, the *Overall* court re-introduced it. *See id.* The decision in *Higgens* relied on *Overall*, which the dissent found inapplicable because *Overall* dealt with an intentional tort. *See id.* Further, the dissent opined that a trier of fact should have been permitted to decide certain questions. *See id.* Among the facts causing the dissent's concern were the speed of the pitch (90 miles per hour), the pitcher's tendency to warm up as fast and as hard as he could, and the fact that the plaintiff had just sat down. *See id.*

70. *See Ritchie-Gamester*, 215 N.W.2d at 522. The court cited examples from a variety of jurisdictions, including Connecticut, Kentucky, New Jersey, Texas, California, Ohio, Massachusetts, New York and Missouri. *See id.* at 521-22. Although the court cited several cases from jurisdictions that apply an ordinary care standard, it did not analyze them. *See id.* at 521. *See also* 33 A.L.R. 3d 316 (1971) (discussing Moe v. Steenberg, 275 Minn. 448 (1966), the only reported case between an injured ice skater and another skater). The court in that case found that general principles of tort law apply. *See id.* To discover whether the plaintiff had assumed the risk of injury, the court looked to see if plaintiff (1) "had knowledge of the risk," (2) had appreciation of the risk, and (3) had the opportunity to avoid the risk, and "voluntarily chose to incur it." *Id.*

71. *See* Marchetti v. Kalish, 559 N.E.2d 699, 703-04 (Ohio 1990), (involving injuries arising when children were playing kick the can).

72. *See* Turcotte v. Fell, 502 N.E.2d 964, 967-68 (N.Y. 1986) (consent implied through participation).

73. *See Ritchie-Gamester*, 597 N.W.2d at 523.

74. *See* Ross v. Clouser, 637 S.W.2d 11, 14 (Mo., 1982). *See also* Crawn v. Campo, 643 A.2d 600, 607 (N.J. 1994).

day activities.[75]

Finally, the court discussed *Jaworski v. Kiernan*[76], a Connecticut case that applied an elevated standard of care, as opposed to one of ordinary negligence, to prevent an abundance of litigation that might arise from every "inadvertent violation of a contest rule."[77] Many courts based similar decisions on these aforementioned public policy reasons.[78] Without examining the reasons why other jurisdictions have adopted an ordinary care standard, as opposed to one of reckless misconduct, the *Ritchie-Gamester* court agreed with a majority of other jurisdictions, and decided to adopt a reckless misconduct standard.[79]

D. Opinion of the Richie-Gamester Court

The *Ritchie-Gamester* court, per Justice Young, began its analysis of the standard of care required between co-participants in recreational activities by examining the nature of recreational activities themselves.[80] The court noted that because this society encourages sports and recreational activities, it is important to adopt rules and codes of conduct to accompany them.[81] According to the court, these rules allow co-participants to tolerate certain acts in the context of sports and recreational activities that would otherwise be intolerable.[82]

In its decision to adopt a reckless misconduct standard, the court touched upon the ideas of consent and notice.[83] Recreational activities are of such a nature, explained the

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75. *See Crawn*, 136 N.J. at 508.

76. 696 A.2d 332 (1997).

77. *Id.* at 338. The court also considered the expectations of the participants and the encouragement of vigorous participation, as well as the prevention of an abundance of litigation. *See id.* at 336.

78. *See Ritchie-Gamester* 597 N.W.2d at 523.

79. *See id.* at 525. The court opined that participants in recreational activities do not expect to be liable for mere careless actions. *See id.*

80. *See id.* at 523.

81. *See id.* at 523. The court used the example that it is acceptable for two basketball players to "battle" for a rebound while it is unacceptable for two shoppers to battle to purchase an item in a store. *See id.* This shows the distinction between the conduct that people tolerate in a sporting context but not elsewhere. *See id.*

82. *See Ritchie-Gamester* 597 N.W.2d at 523.

83. *See id.*

court, that it is implied that co-participants consent to whatever risks may be built-in to each sport.[84] The court noted that participants are aware of these risks ahead of time and this prior knowledge may be enough to protect co-participants from liability for injuries inflicted upon another.[85]

The court also rationalized that the adoption of the reckless misconduct standard comports with the proposition that an implied contract exists between the participants not to hold one another liable for injuries that occur within the course of the recreational activity.[86] The court pointed out that these rationales share the same underlying theme.[87] Co-participants owe each other a duty not to act recklessly, as opposed to a duty not to act carelessly, because willing participants in sporting activities subject themselves to inherent and foreseeable risks.[88]

The court in *Ritchie-Gamester* applied the reasoning from the seminal case of *Murphy v. Steeplechase Amusement Co.*[89] in reaching its decision.[90] In *Murphy,* the plaintiff was injured on a ride at Coney Island called the Flopper, which consisted of a moving belt that inclined upward.[91] Passengers could sit or stand on the belt, which was powered by an electric motor.[92] The plaintiff was injured when the ride jerked suddenly causing him to fall to the floor.[93] He sued the amusement park company, alleging their negligence was the cause of his injuries.[94] In that decision, Judge

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84. *See id.*

85. *See id.* The court explained, "a participant's knowledge of the rules of a game may be described as 'notice' sufficient to discharge the other participants' duty of care." *Id.*

86. *See Ritchie-Gamester* 597 N.W.2d at 524.

87. *See id.*

88. *See id.* at 525.

89. 166 N.E. 173 (N.Y. 1929).

90. *See Ritchie-Gamester,* 597 N.W.2d at 524. This case involved an injury to a man while on an amusement park ride. *See Murphy,* 166 N.E. at 173.

91. *See Murphy v. Steeplechase Amusement Co.,* 166 N.E. at 173.

92. *See id.*

93. *See id* at 174.

94. *See id.* Plaintiff suffered a fractured knee-cap as a result of his fall. *See id.* The plaintiff alleged that the ride was violent in nature and not properly equipped to prevent injuries to those who did not have knowledge of its dangers. *See id.* He also claimed that the ride did not have the proper mechanisms to prevent falls. *See id.*

Cardozo recognized that people who participate in sports accept those dangers that are a foreseeable part of the activity.[95] The very nature of the activity was dangerous, and this was the risk passengers assumed when choosing to ride the Flopper.[96] According to Cardozo, if one does not want to accept such risks, "the timorous may stay at home . . . One might as well say that a skating rink should be abandoned because skaters sometimes fall."[97] The court in *Ritchie-Gamester* extended this same rationale when it adopted the reckless misconduct standard in the area of recreational activities.[98]

Although ice-skating is not considered a contact sport, the court determined that a recklessness standard of care is the correct one to be applied because of the nature of the sport itself.[99] Ice, as the court pointed out, is hard, slippery and dangerous, especially when combined with the nearness of co-participants during a free skate period.[100]

Thus, as the court pointed out, co-participants owe each other a duty not to act recklessly toward one another.[101] In the opinion of the court, this standard will lead to the most common sense application by judges and juries, although the court did note that this rule will be applied through a case-by-case analysis.[102] The court believed that people do not anticipate being sued for breaches of ordinary negligence while participating in recreational sports.[103] Further, the court reasoned, the reckless misconduct standard will prevent an abundance of litigation, while still affording

95. *See Murphy*, 166 N.E. at 174-75.
96. *See id.* at 174.
97. *Id.* at 175.
98. *See Ritchie-Gamester*, 597 N.W.2d at 524.
99. The court analogized the situation at bar to that in *Hathaway v. Tascosa Country Club, Inc.*, 846 S.W.2d 614, which extended the reckless or intentional standard used in contact sports to include non-contact sports like golf, due to the fact that conduct on the golf course is just like that on a playing field for a contact sport. *See Ritchie-Gamester*, 597 N.W.2d at 524.
100. *See Ritchie-Gamester* 597 N.W.2d at 525.
101. *See id. See also* 27A AM. JUR. 2d *Entertainment and Sports Law* §97 (1996). "An ice skater assumes the risk of falling because of such imperfections and inequalities on the surface of the ice as are reasonably to be anticipated, and also the normal risk of colliding with other skaters" *Id.*
102. *See Ritchie-Gamester*, 597 N.W.2d at 525 n.9.
103. *See id.* at 525.

protection from injuries that are the result of flagrant misconduct by a co-participant.[104]

Therefore, the Supreme Court of Michigan reversed the decision of the court of appeals.[105] The court found that the plaintiff could not prove that the defendant acted recklessly when she bumped into her while skating backwards.[106] The court held that Halley Mann had a duty not to act recklessly toward her co-participants in the open skating period and she did not breach that duty, as she kept the proper lookout behind her.[107] Thus, the court reinstated the trial court's grant of summary disposition for the defendant.[108]

Justice Brickley, writing the concurring opinion, suggested that the majority applied the wrong standard.[109] The concurrence believed that the decisions in *Felgner* and *Williams* should control, as the court in Michigan had already abolished the assumption of risk doctrine.[110] Further, according to the concurrence, common sense did not support the rationales offered by the majority.[111]

The concurrence found no basis for the rationale that recklessness is the appropriate standard of care to apply to prevent a lack of vigorousness in recreational activities.[112] Conversely, the concurrence posited that such a standard may encourage dangerous behavior in recreational activities and leave injured co-participants without a means of recovery.[113] Ultimately, the concurrence was concerned with the majority's disregard of the prior Michigan decisions that abrogated assumption of risk.[114]

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104. *See id.*

105. *See Ritchie-Gamester* 597 N.W.2d at 525.

106. *See id.*

107. *See id.* The court pointed out that the plaintiff's allegations about Mann's conduct amount to negligence at most. *See id.*

108. *See id.* at 527.

109. *See Ritchie-Gamester* 597 N.W.2d at 528-29 (Brickley, J., concurring).

110. *See id.* at 529 (Brickley, J., concurring).

111. *See id.* at 528 (Brickley, J., concurring).

112. *See id.* at 529 (Brickley, J., concurring). The concurrence found no empirical evidence to support the majority's reasoning on this point. *See id.* "[T]his Court should not attempt any social engineering in this area by altering long-existing rules of tort law." *Id.*

113. *See Ritchie-Gamester* 597 N.W.2d at 530 (Brickley, J., concurring). The concurrence argued that this, too, could discourage vigorous participation. *See id.*

114. *See id.* at 532 (Brickley, J., concurring).

The concurrence indicated that co-participants agree to abide by safety rules in their recreational activity.[115] That did not mean, according to the concurring opinion, that co-participants agree to subject themselves to the conduct of others that falls outside of those rules.[116] Engaging in conduct not within the rules of the activity, the concurrence suggested, should give rise to an actionable duty to a co-participant.[117]

Despite disagreeing with the majority's reasoning as to the applicable standard of care, which was the central issue in this case, the concurrence did agree with the decision to reinstate the trial court's grant of summary disposition for the defendant.[118] The concurrence found that Mann's conduct did not fall outside the rules of ice skating, and thus, she did not breach her duty of ordinary care to the plaintiff.[119]

III. CONCLUSION

Before this case was determined, Michigan caselaw conflicted on this issue.[120] When such conflicts arise, a final determination, like the one in *Ritchie-Gamester,* can create many benefits. Most importantly, once a specific standard is adopted, potential litigants should no longer be confused as

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115. *See id.*

116. *See id.* at 533 (Brickley, J., concurring).

117. *See Ritchie-Gamester* 597 N.W.2d at 533 (Brickley, J., concurring). Thus, the conduct would then be examined to see if it was reasonable. *See Ritchie-Gamester,* 597 N.W.2d at 532 n.14 (Brickley, J., concurring). For example, in this case, the rule is that people skating backwards must look behind them. *See id.* That is reasonable conduct. *See id.* If one skater did not do so and then injured another, this would be a breach of ordinary care. *See id.*

118. *See id.* at 533 (Brickley, J., concurring).

119. *See id.* At the end of its opinion, the majority rebutted the concurrence's conclusion that an ordinary care standard should be applied. *See id.* at 525-26. If there was an ordinary care standard, as the concurrence suggested, the majority believed that there was a genuine issue of material fact as to whether or not defendant's conduct was negligent. *See id.* at 526. Judge Young opined that this distinction would prove to be confusing to both participants and the courts. *See id.* at 526-27. The majority suggested that the distinction the concurrence made between safety rules and non-safety rules was unworkable, as the distinction disregards the injuries that are foreseeable in the activity, regardless of what type of "rule" was being enforced. *See id.* at 526. The majority found its own decision to be more applicable to common sense than that of the concurrence. *See id.*

120. *See id.*

to what duty applies to the facts of their case.

As unfortunate as it is, people do get injured while participating in recreational activities. What starts out as fun or harmless competition can end in injury. In today's litigious society, the issue of responsibility for such injuries repeatedly arises. There is no doubt that it is important to determine this issue, as medical bills can be extremely costly. This means that somewhere, a line must be drawn to determine where a participant's liability to another begins and ends.

The majority's reasoning in *Ritchie-Gamester* is sound. A mere ordinary care standard, coupled with the high risk of injury in recreational activities, could potentially create a flood of litigation between co-participants. If co-participants in recreational activities owed each other a duty not to act carelessly, the courts might find themselves awarding damages to every athlete injured at the hands of another, even though those athletes were aware of the potentially dangerous nature of the activity.

Anyone who plays sports, or even simply watches them, knows that a potential for danger exists even in non-contact activities. Anyone who has ever ice-skated knows that it is easy to be injured. This is so ingrained in the activity that the sport itself can not be separated from its dangerous nature. This is common sense, which was one rationale stressed by the *Ritchie-Gamester* court in its holding. In situations like *Ritchie-Gamester*, it is easily foreseeable that one skater in a crowded arena may inadvertently injure another. Holding co-participants responsible for every careless move they make assigns others no responsibility for assuming the inherent risk of the activity in which they knowingly engaged.

There is indeed a place in this society for an ordinary care standard of negligence. For example, as previously noted, it is the appropriate standard to govern individuals in ordinary situations. In these situations that do not involve inherently dangerous activities, it is not foreseeable when one will be injured at the hands of another. The same can not be said for people who voluntarily chose to participate in a recreational activity. Such participants know of the potential injury and they participate in spite of the risk. It is logical

that they should assume some of the risk while engaging in such activities. Even cases such as *Ritchie-Gamester* that do not expressly rely on the assumption of risk doctrine, the same conclusion is reached when participants voluntarily engage in recreational activities; they have, in effect, consented to the risks inherent in the sport.[121]

This is not to say that co-participants can never be liable for injuries they cause to another while in the course of their activity. Intentional acts toward a co-participant will lead to liability for resulting injuries. The recklessness standard adopted by the court in this case is reflective of the reasonable expectations people have when they engage in a recreational activity. Jill Ritchie-Gamester reasonably should have foreseen the potential for injury while participating in the free skating period at the Berkley rink. Defendant Halley Mann did nothing to breach her duty to her fellow skaters while skating backwards around the rink. She took all of the necessary precautions by looking behind her. Had she not taken these protective measures the court could have found that she was reckless and therefore responsible for the injuries to the plaintiff's knee. As suggested by the court, this standard appeals to the common sense of most participants.

Further, the reckless misconduct standard strikes a balance between protecting participants and encouraging participants to play with intensity. This is not to say that this standard is meant to encourage participants to completely disregard the safety of those around them. On the contrary, it attempts to provide a standard that will encourage people to participate in recreational activities without creating a fear of liability for every careless move they make toward one another and, at the same time, still hold them responsible for consequences of their reckless acts.

As the concurrence suggested, the court could have supplied more evidence in support of its rationale for adopting this standard.[122] For example, is there any evidence that if an ordinary care standard was applied,

121. *See Ritchie-Gamester*, 597 N.W.2d at 524.
122. *See id* at 529.

people would participate with less vigor in their recreational activities?[123] It is doubtful that in the middle of playing a sport, when adrenaline is flowing and the competition is in full swing, participants would consciously conform their conduct to what would or would not breach their duty of care. It is equally doubtful that participants in a recreational activity even know the applicable standard of care, let alone allow it to interfere with their play.[124] Even if participants were aware of the standard, could the ordinary participant know how to apply it?

Nonetheless, there needs to be a duty of care between co-participants in a recreational activity, even if only to determine who owes damages to whom. The court in *Ritchie-Gamester* adopted the standard of care that most accurately reflects the nature of recreational activities and the expectations of those who participate in them. In this and similar cases, the adoption of the reckless misconduct standard reflects good public policy.

Melissa Cohen

123. *See id.*
124. *See id.* at 527.