ORAL ARGUMENT — 1/13/99
98-0601
PHI DELTA THETA V. MOORE

BAIR: Rarely will this court have an opportunity to consider a case which will have such a significant impact on the recreational lives of middle America in Texas. This is punctuated by the fact that we have representatives from the Little League Baseball Inc. before the court today.

This case has a foundation based upon *Connell v. Payne*, which is a 1991 writ denied out of the Dallas court written by Justice Baker. That case serves the foundation from the basis of the summary judgment which was filed in the TC and tracks through the CA and before the court today.

Clearly the court considered in that case what the proper standard should be under the competitive contacts sports doctrine in Texas. That is a doctrine which was formerly adopted in that case from an Ohio case. The court at that time in the *Connell* case took an opportunity to clearly review and define what the competitive contacts sports doctrine entailed. It weighed the pros and the cons of what types of causes of action and remedies should be available to one who chooses to involve themselves into a competitive contact sport, weighed some policy considerations with respect to that, and then determined rightfully that only when someone is held to have acted recklessly or intentionally in a competitive contact sport should liability then be visited upon them.

ENOCH: It seems to me there are two questions here for us to look at. One is, What is the competitive contact sports doctrine in Texas? And the other one is whether or not it ought to apply to a sponsor of a sporting event as opposed to participants? On the first question, you've referred to the *Connell* case. *Connell* was written in the context of sort of an assumed risk. Justice Gonzales on this court has written in the *Davis* case kind of an inherent risk issue, which is it seems to me it's a variation on a theme. Have you thought of what this doctrine should mean? Should it be sort of a revival of an assumed risk notion, sort of a defensive estoppel kind of thing, or should it be more like a no duty issue, sort of an inherent risk? Have you thought about that and what do you recommend it ought to be?

BAIR: Absolutely. I think really what we're dealing with here today and what the court is faced with is a challenge to actually formulate this doctrine. And the question becomes whether or not the test underneath the doctrine is going to be the reckless or intentional or whether you're going to follow the *Davis v. Greer* language. The answer to that can be both. And let me just step back and ask the court to put a frame if you will about the entire conduct of a competitive sport. A person who in the ordinary course of his life chooses to step out and look at whether or not they are going to be involved in a competitive sport weighs the pluses, the minuses, the rules, the equipment, the circumstances of that, who's in charge, who's not, what the risks are involved and then weighs that against what kind of fun, exhilaration and excitement that they are going to get out

of it. They then make a decision to step within that box of the competitive sport. Now by doing so they have weighed what are the inherent risks of that sport. And they decided, that's okay. I'm willing to accept getting hit, shot, cut, bruised, scraped, whatever in exchange for an opportunity to run or tackle or shoot somebody else with a paint gun before they shoot me. And that's all fine. Inside this box of the competitive sport doctrine then is contained within it what the inherent risks are. Therefore, everybody that is involved, both sponsors and the active participants who are involved in that, understands what these inherent risks are. Liability should only attach. If you step into that box liability should only attach when conduct exceeds that which the participant, the player, has understood and agreed going in. That is, if for some reason a sponsor in this case does something which is reckless, intentional, or does something which substantially increases the risk. In other words, it changes the box. It changes what the player agreed to do when he stepped in to it.

HECHT: Like providing goggles that didn't work?

BAIR: No, absolutely not. In that particular situation...

HECHT: Did they work?

BAIR: Oh, yes, sir. Yes, they worked.

HECHT: If they didn't work?

BAIR: Well in this particular case...

HECHT: If they didn't work would that be? The pellet just came right through the goggle.

BAIR: Well I think in that particular circumstance if the goggles were in fact not of a sufficient kind in quality to prevent a paint ball from bouncing off of it, then I would agree with the court. Of course, that's not the facts in this case.

HANKINSON: Where does the box get drawn? It seems to me that it's a little bit difficult to draw that definite line and Judge Hecht's example points that out. Because the wearing of the goggles in a paint-ball game is part of playing the game.

BAIR: It certainly is.

HANKINSON: And if we have some conduct - so you can't say it's not associated with the game, and yet, that makes it a more difficult question. Another example you talking about little league for example. We have a little league baseball league that's playing. Someone who is running that league makes the decision whether or not the games go forward when the weather gets bad.

Now we don't have as big a difficulty it seems to me if lightning is striking out in the outfield and the sponsors say the game goes on, and someone is injured by the lightning. We may have reckless conduct there. But what if we have spring thunderstorms in Texas and no one from little league ever checks with the national weather service to see what the weather is like and the game goes on and sure enough it really is a thunderstorm with dangerous lightning and someone was injured. Is that inside your box or outside? The conduct is negligent at that point, perhaps not reckless, maybe it is reckless but let's say it's negligent. Does that go in the box or out of the box? It's associated with the game.

BAIR: I'm glad you raise that point. And that is because if the conduct of the person making the decision in your example makes a decision which changes the inherent risk involved in that game. In this particular situation getting struck by lightning is not an inherent risk that little leaguers accept when they sign on to play the game. And therefore, if that decision or the conduct on behalf of the sponsor or the person in charge changes that risk such that it then is something which everyone would agree. And if there is any doubt as to what is an inherent risk of a particular game, whatever, then you can have somebody come in and give an expert report as to okay this is what the parameters of soccer is, and this is why this is an inherent risk. And everybody knows that. In fact nine times out of 10 and why the competitive sports doctrine ought to be recognized is that particular to competitive sports you almost always have a set of rules and regulations and you almost always have a referee or an official or someone else who is there to see that the game is in fact played within the confines of what the rules and regulations are.

OWEN: What about paint-ball? Was there a referee or any kind of rules or regulations?

BAIR: There is not a referee in paint-ball. There is some basic rules that ought to be followed as to who wins and who can shoot and that kind of thing.

OWEN: If these goggles were defective in the since that the strap had an inadequate clasp and allowed the goggles to fall off of the person that was wearing them while they were running, and that person was hit in the eye with a paint-ball, would the injured person have a products liability cause of action against the manufacturer?

BAIR: Oh, I would think so. I think what we are talking about here with respect to the competitive sport doctrine is not whether or not the integrity of the products used in the sport - for instance let's say that there was a bat that had a defect in it where they could not be seen, and that when the bat was used it caused it to crack or splinter in an unusual manner that caused injury to someone else.

OWEN: Why not under products liability law why wouldn't you also hold the person who in the chain supplied the goggles or the defective bat to the participant, or would you also hold them liable in a product's theory or negligence theory?

BAIR: No, I think in those circumstances and of course those aren't the circumstances in this case, but if you've got an actual product defect you are talking about the manufacturer if they represent to the supplier.

OWEN: And the person in the chain?

BAIR: If they represent to the supplier, the person in the chain, that these goggles can in fact withstand certain types of pressures and durability and in fact if they don't then of course there's a cause of action there against the manufacturer. With respect to the...

ENOCH: What happens if the manufacturer is a sponsor of the event and the manufacturer makes the goggles but just provides the goggles there on the paint ball field to the manufacturer sponsors? Isn't a risk inherent in a contact sport where you are wearing equipment? Isn't one of the risks that your equipment is going to break?

BAIR: Absolutely. But the question is whether or not the equipment is in fact of a reasonable quality. In other words you have a helmet...

ENOCH: But obviously if it breaks that's some indication that it wouldn't withstand whatever the anticipated concussion is going to be from the competitive sport, and so you never get a summary judgment in competitive sports doctrine because somebody will always raise the question or bring forth some evidence that the equipment they were wearing was defective even though it was a risk that they knew that the equipment would break when they engaged in this, but you would still have a trial - although the risk was somehow enhanced however incrementally by a product that was somewhat less than what it would have withstood this concussion?

BAIR: I think we're talking about two separate issues here. But they do fold back into the same analysis with regard to the competitive sport doctrine. And that is that if you have a defective product that is used in a competitive sport and the participant relies upon the integrity of that product and that product fails, that unnecessarily increases the inherent risk to that player and therefore liability would attach. The problem comes in is where if you have a manufacturer that's out of business and then you've got the supplier of the product being the sponsor of the event.

OWEN: Well what if the goggles were fine as designed, but they've been used over and over again in so many paint ball conflicts that the elastic or whatever was lose and the provider continued to use goggles that had become worn out?

BAIR: Again, we get back to the level of can the goggles stay on? If it's a reasonable - if the condition of the equipment that is provided in the competitive sport doctrine is such that it substantially raises the inherent risk associated with playing the game, then liability can attach. That's the threshold.

OWEN: So if you provide goggles that don't stay on when the participants are running across the terrain then you might have liability?

BAIR: It depends on what the circumstances are as to why they don't stay on. In this particular case, Mr. Moore was running through the woods and a limb dislodged the goggles. Normally, someone in their right mind would place their goggles back on before they stood up to continue on into the game, and he did not, and he got shot.

OWEN: But they've alleged in this case that the equipment was defective. What's the summary judgment evidence about the goggles other than the tree branch?

BAIR: At the TC level we pled the competitive contact sports doctrine and at that time the burden - and we put into evidence with respect to the nature of the game: what was being done; how he was playing; how the goggles became dislodged; and how he was hurt. The nature of our defense at that time necessarily included the fact that and the *Connell* case was the law. The plaintiff came forward with no evidence, not one shred of summary judgment evidence in the TC to refute not only whether it was reckless or intentional conduct with respect to providing of the goggles, not that the goggles were defective in any way, and didn't even come forward with any evidence with respect to ordinary negligence.

HANKINSON: Well under your theory that you're proposing, would the question about providing goggles that were worn out, not a defective manufacturing or design question or anything associated with a products claim, but you have the worn out goggles provided by the sponsor, is that subject to negligence or a reckless standard of conduct?

BAIR: No. I think this court has to keep separate with respect to the competitive sports doctrine ordinary negligence considerations. I think the consideration must be: Does the conduct about the worn out goggles, providing of the worn out goggles, does that conduct increase the risk that leads to the injury? In other words, if somebody provides worn out goggles and nothing ever happens and the risks are not increased and there is no injury thereby, there's no cause of action.

HANKINSON: Once the conduct increases the risks inherent in the game, then the standard to which the sponsor or nonparticipant is held goes to the negligence standard?

BAIR: No, it never goes to the negligence standard. The question is simply only whether or not - it's almost a question of whether or not the - if the inherent risk was changed by the conduct of the sponsor. It doesn't matter whether it was negligent or intentional or what.

HANKINSON: But the standard for liability is always reckless regardless of how removed from the actual playing of the game was the cause of the injury. It's always reckless. There's never negligence at issue?

BAIR: In the *Connell v. Payne* decision, that is the basis in law upon that. You have to weigh that against the opinion of Justice Gonzalez in the *Davis v. Greer* matter, who has a completely different standard.

HANKINSON: Your box analogy which is something I keep visualizing in my head and what's in the box and what's outside the box. Everything in the box would include the equipment decisions and it's always subject to a recklessness standard?

BAIR: That's true.

GONZALES: For example: If I play hockey, I assume the risk that I may tear up my knee playing hockey. But let's say the sponsor is negligent in maintaining the ice, and as a result, I tear up my knee. Under your theory, I could not recover?

BAIR: If the condition of the ice was such that it would be expected that it increases the risk of the skating and that an injury of that type is going to occur, then absolutely I think liability would attach. If, however, the condition of the ice was...

HANKINSON: Would you attach negligence or reckless conduct? That's what I am having a hard time understanding.

BAIR: It's difficult for me too, because of the *Connell v. Payne* and *Davis v. Greer*. Those two decisions and the language of those are not completely consistent. They come once from the subjective viewpoint and...

HANKINSON: I know. But help us. You are asking us to decide this area of the law. What should the rule be?

BAIR: I think it should still be the reckless and intentional.

HANKINSON: So there's never a circumstance under which a nonparticipant, no matter how far removed from the actual playing of the game and the contact caused the injury. For example: condition of the field; condition of equipment; weather condition, whatever. We never get to a negligence standard with anything to do with a competitive sports, that we are always dealing with reckless conduct?

BAIR: That's absolutely correct. And the reason is it's a tradeoff. It's a tradeoff because the plaintiff and the player once he has stepped inside the box necessarily has a tradeoff of giving up negligence, which is his protection in the ordinary course of life. Once you agree to step inside the box and become involved in a competitive sport where you are going to have _____ injuries, then you give that up. That's a tradeoff.

HANKINSON: Yes, but why wouldn't if children are involved with playing little league it would be good public policy for people to be more careful than just avoiding being reckless with whether or not they let little league games being played in lightning storms or make sure that there's good equipment for hockey games for children or whatever? Why in the world with children going out and playing wouldn't those who are responsible for decisions at some point in your spectrum fall over into the category of being - held to a standard of acting reasonable?

BAIR: Well there are two reasons. Number one, the court must always remember that it's an election on behalf of the parent, if you will in little league, whether or not to allow their child to participate. They are under no force of law for that child to go out and play in any storm. If they are a member of the team and they say, I disagree, my child was not going to play out there in that storm, that's their' right and that's their option. And so they can withdraw from that. There's another reason and that is with respect to the fact that there are rules and regulations in 90% if not more of all competitive contact sports that deal with that.

HANKINSON: But don't I have some expectation if I sign my child up for little league that he or she is going to go out and play on a field that is well maintained and that the equipment that is going to be provided by little league will be a good helmet for a baseball game so that if my child is hit in the head by a ball, he or she is protected? Don't I have some expectation that there is some responsibility on the part of little league to make sure that those kinds of things are taken care of so that the game can be played and my child only be subject to the risks inherent without any increased risks?

BAIR: It's a two way street. While you do have some reason to believe that that will exist, you also have an obligation on yourself. If you are going to enter into a...

HANKINSON: I understand your argument about the obligation on the parent. But I am now asking you about the obligation on the part of the sponsor of the activity.

BAIR: Right. And I think that if they are involved in some reckless or intentional conduct which causes injury or damage, there is a remedy there. It's not as if you are without some remedy. But as a player you make a choice, you make a decision whether to get involved or not get involved. You cross over into the box. And when you do it's a tradeoff. But there's still other protections that you have with regard to the rules, regulations and coaching and so forth.

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RESPONDENT

ENOCH: Your primary argument it seems to me is that you don't want the competitive sports doctrine whatever it may be to apply to sponsors of the event. You want to limit it essentially to the participants. The guy who shot the paint gun shouldn't be liable to the guy who got injured by the paint gun pellet, but that's different than the people who sponsored the event.

HANBY: That's my position, that was my position in the CA. I think petitioner has changed the issue somewhat before this court.

ENOCH: So I've built this baseball field and it generally meets the conditions of a field, and the folks are out there racing along and somebody slides into first base and breaks their ankle because the base - there's a better and safer base out there that's a breakaway. How could your standard be permissible and not fly in the face of the policy for having a competitive sports doctrine in the first place, which is to allow people to participate in a sport. If I said the sponsors don't get that benefit, then who's going to build the field where the competitors can go out and play the game?

HANBY: The standard is ordinary care. Perhaps your example is holding this sponsor to some sort of extraordinary care standard. The example I gave in response to my petition for review is the fields not maintained, the center fielder falls in a huge 2-ft deep chug hole in the middle of centerfield while he's trying to catch a fly ball and breaks his leg. Now who is the person who sponsored the game is maintaining the baseball field liable under ordinary care principles to conduct a reasonable inspection and do something to fill in the chug hole. I think the answer in every state in the union is yes, there's potential liability here because the sponsor has this opportunity and he's not in the heat of competition at the time when he's making the decisions on the maintaining the field. And it doesn't have anything to do with the competitive sports...

BAKER: Well that's just traditional premises liability law that you are arguing there. But confined to the facts of this case an injury that happens to the participants because of the particular facts why shouldn't the sponsor enjoy the same protections so to speak that the doctrine affords?

HANBY: Because this is a traditional negligently conducted activity case which is just as traditional as premise liability law.

BAKER: But then is it your view you shouldn't have the contact sports doctrine in any fashion and just apply ordinary negligence to everything across the board?

HANBY: No. I completely agree that it makes perfect sense for the courts not to be involved in judging whether that particular block or tackle that broke somebody's leg was a negligent block or tackle or not. The competitor's there. He's trying his hard as he can to tackle the other player. You can't judge the competitor, the defendant competitor's conduct by an ordinary negligence standard.

ENOCH: Is there liability on the part of a manufacturer for that broken helmet or the sponsor who provided the helmets for that game under ordinary negligence principles?

HANBY: Yes, if they show it's a defective helmet.

ENOCH: Well I have no idea whether it was defective, but I know this guy was intending to break his helmet.

HANBY: Well that's a different question. If the player is going out and definitely I am going to try and break my equipment today, I mean there is no liability, but that's on a different ground.

ENOCH: Does that fit within the box though of we're not going to be independently after the fact judging whether or not the person who's leg got broken by a hard tackle out on the field that also broke a helmet is that inside the box of the risk we're facing or is that outside the box?

HANBY: No, it's way off in some other box. The defendant probably has a defense in your scenario on the ground that the plaintiff intentionally injured himself, which there is no contention that my client intended to put his eye out in this case or even intended to break the goggles.

OWEN: Let's talk about the goggles just for a minute. There seems to be a fact question raised by the defendant in this case or at least there is some evidence that the goggles came off because they were pulled off by a tree limb. What evidence is there in the record that the goggles came off for a reason other than being caught by a tree limb?

HANBY: In the record there is no evidence in the record, but you have to read his motion for summary judgment. His motion for summary judgment in the second ground, the one that was granted by the TC said basically, Plaintiff cannot recover unless plaintiff proves recklessness or intentional injury. The trial lawyer in the TC conceded he couldn't prove recklessness. All he had was evidence of negligence that the goggles were improper. He didn't put on his case because the summary judgment didn't put him on notice that his case was relevant to the contention in the summary judgment.

HANKINSON: Well was there an alternative ground in the summary judgment motion that the goggles came off, not because there was something wrong with them, but because they got hooked on the tree?

HANBY: No.

HANKINSON: There was no ground for summary judgment in the motion relating to how the accident happened?

HANBY: No. There were two grounds for summary judgment. The first one was rejected by the TC; they didn't cross appeal. That issue had to do with the recreational use of the real(?) estate(?) Statute. The second one asserted plaintiff cannot recover unless he proves reckless or intentional conduct. That was their ground for summary judgment, that was the ground the TC

apparently sustained. Trial counsel's evidence on negligence on what was wrong with the goggles was totally irrelevant to the summary judgment that was filed. So he did not choose to prove his case in response to their summary judgment. He conceded to the TC: I can't make a case of recklessness or intentional misconduct here. All I've got is this evidence on negligence, and that's not going to defeat the summary judgment that they have pleaded if their requirement that the plaintiff prove recklessness or intentional misconduct.

ABBOTT: You claim that the sponsor should be responsible for negligence?

HANBY: I contend that the sponsor should be responsible for negligence.

ABBOTT: And why do you claim that there is negligence?

HANBY: Because the goggles were not proper goggles.

ABBOTT: And the sponsor here should have insured that proper goggles were provided because of the inherent danger of having a ball hit you in the eye?

HANBY: You're causing me to go out of the record here, but to the goggles that were provided were basically chemistry laboratory goggles. There are specially designed paint ball goggles that won't come off on a tree limb.

ABBOTT: Why is there a duty for the sponsor to even provide goggles?

HANBY: Because the sponsor has organized the game, arranged for the playing field, and it has invited the various pledges to come play, it has accepted the rules of the game.

ABBOTT: Under the framework that you're talking about now, let's say we rule in your favor along those lines, why would it not then be a requirement for all sponsors of little league games to provide goggles to all little league baseball players?

HANBY: I would say all sponsors of little league games have an obligation to provide a batting helmet. A game is incredible dangerous without a batting helmet.

ABBOTT: No. A batting helmet will not guard your eyes from being hit in the eye by a fastball. So why would little league sponsors not be required to provide goggles to little league players?

HANBY: Because we have experience with the game of baseball and we know that the primary risks of injury that's serious injury is not being hit in the eye, but being hit in the temple and getting brain damage with the ball. Their negligence duty only extends to guarding against the normal risks of the game of providing the ordinary ususal equipment that is provided for the game.

Paint ball, the primary risk is eye damage and they have a duty if they are going to sponsor a paint ball game.

ABBOTT: Using your standard applying that to football would it be necessary for sponsors of football to ensure that adequate padding and adequate helmets whatever the case may be are provided?

HANBY: Yes. There are several - at least two cases cited in the brief one of which the sponsor of the game had a "jungle" football game in which there was no padding provided and the court held they could be held liable under an ordinary care standard.

ABBOTT: Would you say then that a sponsor would be responsible for ensuring that padding is provided for a game of rugby?

HANBY: I'm not that familiar with the game of rugby.

ABBOTT: But the point being is that in the game of rugby part of the game is the fact that you don't have pads. In other words there are certain different types of games that have different types of dangers involved and it would be ridiculous to require proper protection to be provided in a rugby game. Similarly, why would the same argument not apply to a game involving paint ball where there are inherent dangers and the people who participate in rugby know they have a greater likelihood of getting injured than someone who goes out and plays flag football; likewise the person who plays paint ball realizes there's a greater possibility of getting injured than someone who goes and plays bowling?

HANBY: You're honing in on why the court perhaps shouldn't have granted this writ in the first place. His inherent risks theory wasn't presented to the TC, and had it been so there would have been evidence put into the record on the nature of paint ball and what the _____ customary equipment is to play paint ball. We know almost by judicial knowledge that when you play football, you normally expect to have pads and the courts at least in other states would impose liability on a sponsor who carried out a football game with no padding. Another example, the other case cited in the brief, they supplied helmets and padding, but they didn't have enough helmets so the third string players had to play without the helmets. The court said there was potential negligence liability here.

HANKINSON: Judge Taft in his dissenting opinion from the denial of the en banc hearing in the CA criticized the majority opinion from Houston because it didn't talk about the public policy reasons that supported treating participants and nonparticipants differently under the law. What public policy arguments support your position that participants get held to a recklessness standard but nonparticipants should be held to a lesser standard?

HANBY: I don't know if it's a public policy reason, but the entire rationale in the first

place of imposing the reckless standard only logically applies to the fellow participants. The rationale behind that standard is, you're in the middle of a big football game or something, everybody's running around as fast as they can, they are hitting the other player as hard as they can, that you cannot apply a negligence standard to the conduct of that nose guard who's crashing into the football player because his conduct is deliberate, but it's within the rules of the game, and how do you distinguish a negligent crash in to the fullback from a nonnegligent one. And if you decide you are going to impose liability on the nose-guard for his negligent crash into the fullback, isn't that going to change the game by causing this nose-guard to hold back a little bit and not hit as hard as he can for fear of legal liability when his competitive duty to his team is to hit as hard as he can. Imposing negligence liability on a sponsor of an event doesn't raise that quandary and that's the underlying rationale.

HANKINSON: But they raise the quandary that people will be unlikely to sponsor events like little league events if when the two 9-year old football players go crashing head to head and someone is hurt and we can't do anything to a football player so we decide to get the coach who has volunteered his time because we don't like the helmet.

HANBY: That's a consideration anytime the court imposes liability.

HANKINSON: And that's why I am asking you about the pubic policy arguments.

HANBY: Well the public policy arguments are that someone who is sponsoring an event or an activity normally has a duty of ordinary care to persons at least certainly people they invite to come in contact with that...

OWEN: Should we draw a distinction between purely personal private recreational events in organized competitive sports?

HANBY: None of the courts in other jurisdictions have drawn any such distinction. I believe to quote an Illinois court, the same rules apply whether the sport is organized or disorganized, competitive or otherwise, and the same rules have been applied all the way from formal organized games to one of the cases involves a backyard game of kick the can and they applied competitive sports contact rule to the participants. The courts in every jurisdiction have always applied an ordinary negligence standard to the sponsor at least as far as maintaining the fields, applying the equipment, providing rudimentary instruction.

OWEN: Let's assume that this fraternity just on a Saturday afternoon had a pick up football game and didn't supply any pads or helmets and someone was injured when they were tackled. Would the fraternity have liability under those circumstances?

HANBY: I would think certainly so. Now if the fraternity doesn't have the funding or the personnel to get proper paint ball equipment, then maybe the fraternity ought to have some rush

activities...

OWEN: Such as football where they don't have the money for helmets or pads.

HANBY: Or some other safer rush activity rather than sending the pledgees out to play paint ball with masks that I think the court must be presume on this record, because the plaintiff never got to put on his case, was inappropriate for the game that was being played.

PHILLIPS: You just made an illusion to the other parts of your pleadings when you talk mainly about equipment here. The original pleadings include: sponsoring an unreasonably dangerous activity; failing to properly train the individual who played; failing to properly train the fraternity members; and failing to monitor and failing to set up adequate rules of the game. Now do you think all of those under your review of ordinary negligence or something that someone who sponsors or permits a game to occur on property they own or have some control over should be responsible?

HANBY: I don't want to disagree with counsel. I agree with all of them except no. 1. I don't think sponsoring a paint ball game in and of itself without doing anything that increases the risk of the paint ball game states a cause of action. Now in the abstract, I can imagine activities that perhaps the mere fact of sponsoring them would state a cause of action. If somebody were sponsoring a Russian roulette tournament for first graders surely merely sponsoring the activity in itself would be negligent.

HECHT: What about no goggles for paint ball?

HANBY: I would think that that would be contrary to the normal way in which paint ball is played and it certainly would give rise to a cause of action for negligence.

HECHT: But we want to increase the fun of it by not wearing goggles, that way you have to protect your head. You would say you can't do that.

HANBY: I would say that if he does that, he ought to make warnings to the participants that people have lost their eyes playing paint ball, which isn't obvious to me that being hit by a little paint ball is necessarily going to put your eye out.

ENOCH: You have suggested that there are some cases in other states involving the failure to provide football equipment that was thought of. Are those states that have a competitive contact sports doctrine and is this an exception to it or is this predicated on that doesn't apply to sponsors of the game? Under what basis - you say ordinary negligence, but any case there that dealt with the competitive contact sports doctrine?

HANBY: No. I think they predate that terminology. If you go through the cases out of

state, they all come to basically the same result. If you are dealing with a competitor they all except a few early ones that say no liability under any circumstances all come to the recklessness or intentional or whatever terminology they use in that state standard for a competitor. If dealing with a sponsor they all end up in the place. If the sponsor did nothing other than sponsor an event and didn't increase the risk in any way, there is no liability in one way or another either through assumption of the risk through no negligence, through no duty the terminology changes. But in every state if the sponsor did something like fail to maintain the grounds - the tennis court case where the guy broke his ankle by tripping on the broken net, or failed to provide proper equipment then the courts impose liability or a potential liability.

HANKINSON: For negligence?

HANBY: For negligence.

BAKER: Following up on CJ Phillips that the allegations also involve negligently organizing, instructing and supervising. And your client sued three different defendants: the particular person as I gathered who caused the injury; the local chapter; and the national fraternity. How high up does your theory go on those claims for negligence?

HANBY: You've decided a case two-weeks ago involving the Kirby vacuum cleaners that raises a similar kind of issue.

BAKER: What control, if any, does the national chapter have on the paint ball game where the injury occurred?

HANBY: The record is silent on that. That issue wasn't raised in the motion for summary judgment. I don't know whether there has been any discovery on that issue. We don't know at this point whether they maintain control or not. If they did under your *Kirby* case, then there would be potential liability. If they completely delegated it to an independent contractor, which they can do under the law, then we're going to lose our case against the national at the trial.

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REBUTTAL

BAIR: Judge Hankinson, if I could go back to a question that you asked a moment ago, and it's one that I had struggled with and I am going to try to offer the court a little better explanation than the one I gave initially. Trying to equalize or at least make congruent the finding or the doctrine in *Davis v. Greer* with that in *Connell*. The court asked a moment ago with respect to whether or not a negligent standard should be adopted. I say clearly that a negligent standard should not. I said that a doctrine of intentional or reckless should be the standard and I still maintain that position.

I would submit to the court though, and the point I wanted to make is that in fact I don't believe that the *Davis v. Greer* foreseeable and unexpected doctrine is really that far away from the reckless or intentional. In other words, it should not be foreseeable or expected that a participant in a game when he agrees to what the boundaries of the game are and what the risks are that he is going to be submitted to reckless or intentional conduct. And for that basis, I don't think that those doctrines are really that far apart. The big difference comes in is in how do you go about judging the activity. Is it a subjective standard with regard to whether or not the person intended to be reckless or intentional or the objective standard when someone stands back and says is the conduct foreseeable or is it unexpected? And so I don't think those are too far apart. So I don't think that there would be any real inconsistency between *Connell* and *Davis v. Greer*. It's just simply that the viewpoint about which it is the standard or that the review is conducted would be different.

Also I wanted to point out with respect to the pleadings before the court at the time that the summary judgment was filed an amended answer was filed in which we had pled assumption of the risk in general and along with that the competitive sports doctrine specifically. The plaintiffs came back with no evidence at all. They took their time in their response to our summary judgment to attack the Texas Civ. Pract. & Rem. Code §75 ground for our summary judgment and simply did nothing. They offered no evidence whatsoever with respect to our claim under the assumption of the risk.

HANKINSON: What were the grounds in your summary judgment motion though, because that's what we have to look to in reviewing the summary judgment?

BAIR: Two grounds. One was the ch. 75, which was denied; and the other was the assumption of the risk/competitive contact sports doctrine. Under that, we have the assumption of the risk, the plaintiff must necessarily involve himself in responding to that to put forth some type of evidence if he's going to try to refute that of conduct on behalf of us that could refute it. At no time was there any evidence whatsoever submitted by the plaintiff to refute assumption of the risk, ordinary negligence or anything. All of which he should have brought forth in some form at the time that he responded. And he did not...

HECHT: Why, if you're not moving on that?

BAIR: We moved on the ground of assumption of the risk and if he's going to have evidence that in fact the goggles were defective, well then he has to come in and say, Listen we've got evidence that my client didn't assume a risk of playing the game with a pair of protective goggles. My client assumed the risk of playing the game with a good pair of goggles that wouldn't come off with a lens stuck in them. And he didn't do that. And that was his obligation. He cannot come now before the court and say, Oh golly gee, we just didn't really want to contest that, but we were going to concede that. And I would submit to the court that nowhere in the record will you find the fact that they conceded to anything is simply that they failed to respond.

ENOCH: But assumption of the risk - if you are alleging assumption of the risk, the corollary to that is that their burden then is to show reckless and intentional conduct. Isn't that what overcomes assumption of the risk?

BAIR: Absolutely.

ENOCH: So their report to you - their response to you is not "we didn't assume the risk." Their report to you is, we raise a fact issue on reckless and intentional conduct. And all they did was concede, we don't have evidence of reckless and intentional.

BAIR: Well they didn't say that judge.

ENOCH: Well in effect they did because they didn't come forward with anything to raise a fact issue on reckless and intentional, but you still have to survive on your summary judgment as a matter of law that assumption of the risk applies here. And if the appellate court says, no, assumption of the risk doesn't apply here, then you don't get on your summary judgment is the point Mr. Hanby is saying.

BAIR: If in fact the court determines that ordinary negligence is the standard, I would still submit to the court that when we pled assumption of the risk, he did not come back in his response to summary judgment and say that a different standard applied, that's it's ordinary negligence and here's evidence of ordinary negligence on behalf of Phi Delta. That did not occur. I think that that chance and that opportunity for them passed and they are now complaining that they didn't do it.