No. 09-215

IN THE

SUPREME COURT OF THE UNITED STATES

SPRING TERM 2020

TULANIA SIRENS FOOTBALL TEAM,
Petitioners,
v.

BEN WYATT; THE CENTER FOR PEOPLE AGAINST SEXUALIZATION OF WOMEN'S BODIES,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

BRIEF FOR PETITIONERS

January 21, 2020

Team 1
Counsel for Petitioner

QUESTIONS PRESENTED

I. Does the Tulania Sirens' new mascot fall into the narrowly defined category of unprotected, obscene speech, traditionally reserved for hardcore pornography?

II. Does Wyatt have a viable negligence claim against the Tulania Sirens, given that the Sirens provided an adequate warning of the imperfection on the playing surface of Yulman Stadium?

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Tulania is reported at *Ben Wyatt and the Center for People Against Sexualization of Women's Bodies v. Tulania Sirens Football Team*, No. 09-AC-0214 (S.D.T. 2019). The opinion of the United States Court of Appeals for the Fourteenth Circuit is reported at *In the Matter of: Tulania Sirens Football Team v. Ben Wyatt*, No. 09-2108 (14th Cir. 2019).

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fourteenth Circuit upon granting a writ of certiorari pursuant to 28 U.S.C. section 1254(1).

STANDARD OF REVIEW

This Court reviews questions of law de novo. *Pierce v. Underwood*, 478 U.S. 552 (1988).

STATUTES INVOLVED

The relevant language from Tulania Penal Code can be found in Appendix A.

STATEMENT OF THE CASE

Statement of the Facts

The consolidated action before this Court arose after the Tulania Sirens ("Sirens") hosted the New Orleans Green Wave ("Green Wave")[1] at their home field, Yulman Stadium, for a widely anticipated Thanksgiving Day game. (R. 5, 17.)

The first cause of action stems from the display of the Sirens' new mascot. Given the popularity of the event, the Sirens used the game as an opportunity to reveal their redesigned mascot, a topless mermaid ("the Mascot"). (R. 12.) As part of their rebranding campaign, the Sirens mailed pamphlets to citizens of Tulania that featured the Mascot and promoted the game. (R. 12.) Following the pamphlet's distribution, the Center for People Against Sexualization of Women's Bodies ("PASWB") lobbied the city of Tulania to prohibit future distribution. (R. 12.) In response to the complaints, the city passed a law that criminalized distribution or exhibition of

[1] The record is silent as to whether the Sirens and Green Wave are franchise teams under the National Football League ("NFL"). For the purposes of this Brief, Petitioner does not assume that the parties participate in the NFL, but rather in a similarly situated organization because the teams employ professional football players. (R. 9.)

any "obscene matter" within the city. (R. 12.) Undeterred, the Sirens continued their rebranding campaign at the game by unveiling a large version of the Mascot and distributing leaflets to those who walked by Yulman Stadium. (R. 12.)

The second cause of action arises after Ben Wyatt, a wide receiver for the Green Wave, sustained an injury on the field of Yulman Stadium during the game. (R. 17.) During pregame warmups, a Sirens player dove to catch a pass roughly 10 feet behind the left side of the endzone, with turf jamming into his facemask as he landed. (R. 17.) When the player got up, he removed a portion of the turf that was stuck in his facemask, thus creating a divot on the field. (R. 17.) Sirens staff placed an orange cone over the divot prior to kickoff. (R. 17.) During the fourth quarter, Wyatt ran to catch a pass in the back-left corner of the endzone; however, his momentum carried him outside the endzone near the cone. (R. 17.) Unable to stop, Wyatt attempted to avoid the cone. (R. 17.) In doing so, Wyatt stepped on the divot then slipped and fell. (R. 17.) Wyatt alleges that the fall caused injury to his left-knee, rendering him unable to play for the remainder of the season. (R. 17.)

Procedural History

Following the game, Wyatt filed two separate claims in the United States District Court for the Southern District of Tulania. (R. 13.) First, Wyatt and PASWB jointly brought suit to enjoin the Sirens from the use and display of the Mascot, claiming it was obscene material. (R. 5, 12.) Second, Wyatt, individually, alleged that the Sirens were negligent in their maintenance and upkeep of Yulman Stadium and werre thereby liable for the injuries he sustained. (R. 5, 17.) The district court consolidated the cases in the interest of judicial efficiency. (R. 5.)

The district court found in favor of the Sirens and ruled that the Mascot was protected under the First Amendment; however, the court found that the Sirens were liable for Wyatt's

injuries. (R. 16, 20.) As to Wyatt and PASWB's obscenity claim, the district court accepted that the Mascot does not meet the strict definition of obscenity under contemporary community standards. (R. 13.) Therefore, the court found that the Mascot, as speech under the First Amendment, did not fall in an unprotected category, thereby denying the injunction. (R. 14.) As to Wyatt's negligence claim, the court found in Wyatt's favor, ruling that the negligent upkeep of Yulman Stadium proximately caused Wyatt's knee injury. (R. 20.)

The parties appealed their respective adverse judgments to the United States Court of Appeals for the Fourteenth Circuit. (R. 4–5.) The circuit court reversed the district court's decision as to the Mascot but affirmed its judgement as to the negligence claim. (R. 10.) The circuit court stated that the district court misapplied the *Miller* test, holding that the Mascot falls under an unprotected category of speech, thus subjecting it to censorship. (R. 8.) With respect to the district court's finding of negligence, the circuit court affirmed the judgement of the lower court's decision that the Sirens breached their common-law duty to maintain a safe workplace.

The Tulania Sirens Football Team filed a petition for a writ of certiorari in the United States Supreme Court requesting an appeal from the Fourteenth Circuit's two rulings. (R. 1).

SUMMARY OF THE ARGUMENT

The Fourteenth Circuit erroneously held the Mascot to be obscene material. As a threshold matter, the Mascot is speech deserving of protection under the First Amendment. Under the three-prong test outlined by this Court, Respondent's claim fails. Rather, the district court appropriately found that the Mascot does not meet the test of obscenity because an average community member would not find the work appeals to the prurient interest. Under further analysis, the Mascot should not be censored because the Tulania statute does not

specifically define any patently offensive sexual conduct and the Mascot carries serious political value.

Similarly, the Fourteenth Circuit incorrectly upheld the negligence theories proffered by the district court. The Sirens owed no duty to provide a safe workplace to Wyatt, as there was no established employer-employee relationship. Even if the Sirens owed a duty of care under premises liability theory, the Sirens satisfied their duty by providing an adequate warning of an unsafe condition on the field. Accordingly, Petitioner respectfully requests that this Court reverse the judgement of the Fourteenth Circuit.

ARGUMENT

I. WYATT AND PASWB CANNOT CENSOR THE DISPLAY OF THE SIRENS' MASCOT UNDER THE GUISE OF OBSCENITY BECAUSE THE MASCOT QUALIFIES FOR PROTECTION UNDER THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT.

Central to the privilege of a free society is the right of the people, guaranteed under the First Amendment, that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. This freedom extends to messages that may be interpreted as demeaning, disparaging, or even hateful. *See Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (plurality opinion); *see also United States v. Schwimmer*, 279 U.S. 644, 655 (1929). The protections offered by the First Amendment are not limited to verbal speech, but also include "pictures, films, paintings, drawings, [] engravings," and symbolic speech. *Kaplan v. California*, 413 U.S. 115, 119–20 (1973); *see also Spence v. Washington*, 418 U.S. 405, 411 (1974) (holding that the display of an American flag superimposed with a peace sign upside down was a form of speech protected by the First Amendment.) "[T]he context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol." *Spence*, 418 U.S. at 410; *see Matal*, 137 S. Ct. at 1764 (explaining that "trademarks do not simply identify the source of a

product or service but go on to say something more, either about the product or service or some broader issue.").

While the Free Speech Clause carries broad protections, "[t]here are certain well-defined and narrowly limited classes of speech," that are not shielded from censorship. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942). Specifically, speech that is deemed "obscene" is unprotected and, therefore, may be regulated or prohibited by state actors. *See Miller v. California*, 413 U.S. 15, 23 (1973); *see Roth v. United States*, 354 U.S. 476, 484 (1957). According to this Court, for speech to be determined as obscene, the trier of fact must consider:

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest,
(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller, 413 U.S. at 24. All three prongs of the *Miller* test must be satisfied to classify speech as obscene. *See United States v. Various Articles of Obscene Merch., Schedule No. 2102,* 709 F.2d 132, 135 (2d Cir. 1983); *see also Penthouse Int'l, Ltd. v. McAuliffe*, 610 F.2d 1353, 1363 (5th Cir. 1980).

This Court has acknowledged on multiple occasions that nudity alone does not amount to obscenity, even when presented to minors. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975) ("Clearly all nudity cannot be deemed obscene even as to minors,"); *see also Jenkins v. Georgia*, 418 U.S. 153, 161 (1974) (deciding that depictions of nudity and ultimate sex acts in the film, "Carnal Knowledge" were not patently offensive and, therefore, not obscene); *see also Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 490 (1962) ("Of course not every portrayal of male or female nudity is obscene."). Moreover, many lower courts have found nudity to be obscene only where sexual activity is involved. *Compare Hunt v. Keriakos*, 428 F.2d 606, 608

(1st Cir. 1970) ("no photograph of the female anatomy, no matter how posed if no sexual activity is being engaged in . . . can be held obscene,"); *and Penthouse Int'l, Ltd. v. McAuliffe*, 454 F. Supp. 289, 303 (N.D. Ga. 1978) (deciding that magazines, taken as a whole, were not obscene where the images rarely depicted sexual acts or conduct); *with Huffman v. United States*, 470 F.2d 386, 402 (D.C. Cir. 1971) (finding that images were obscene because they portrayed ongoing or imminent lesbian sexual activity).

As a preliminary matter, the Mascot is speech protected by the Free Speech Clause and the Fourteenth Circuit's decision must be reversed. Whether in the form of a pamphlet, flier, or painted on the field, the Mascot is an artistic image and, therefore, is speech. *See Kaplan,* 413 U.S. at 119–20; (*see* R. 12). Therefore, Wyatt and PASWB ("Respondents"), cannot censor the Mascot under the guise of obscenity and this Court should not affirm the lower court's order granting an injunction. Further, Respondent has the burden of satisfying the *Miller* test but fails to demonstrate that all three prongs have been met. *See* 413 U.S. at 24.

A. The Fourteenth Circuit Incorrectly Held that Under Contemporary Community Standards, an Average Person Would Find That the Mascot Appeals to the Prurient Interest.

The finding of whether a work appeals to the prurient interest under contemporary community standards is a question of fact determined by a jury or judge. *See Smith v. United States,* 431 U.S. 291, 309 (1977); *see also Miller*, 413 U.S. at 30. The trier of fact must determine the views of the average member of the local community, not national. *Hamling v. United States*, 418 U.S. 87, 104 (1974); *see Miller*, 413 U.S. at 30. This Court instructed that the reviewing court shall judge material that is not aimed at a deviant group "by its impact on an average person rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one." *Miller*, 413 U.S. at 33. Although particularly sensitive individuals may be

considered when determining the average member's viewpoint, "[t]he vice is in focusing upon the most susceptible or sensitive members when judging the obscenity of materials." *Pinkus v. United States*, 436 U.S. 293, 300 (1978). Notably, children are not to be considered as part of the "community" when determining whether a work is obscene. *Id.* at 297. As such, the resulting average community member should embody "the synthesis of the entire community." *United States v. Treatman*, 524 F.2d 320, 323 (8th Cir. 1975).

1. This Court should defer to the factfinder's determination that the Tulania community would not find the Mascot appeals to a prurient interest.

The district court correctly found that the average community would not find that the Mascot appeals to prurient interests. (*See* R. 15.) As the trier of fact, the district court "searched hard to find a contemporary community standard that would find a topless mermaid *so* obscene that it appeals to the prurient interest," but "[t]he result [was] sparse." (R. 15.)

The Fourteenth Circuit's assertion that the district court "exercise[ed] its own, personal judgement," is unfounded and unsupported. (*See* R. 7.) A trier of fact "is entitled to draw on his own knowledge of the views of the average person in the community . . . for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law." *Hamling*, 418 U.S. at 104–05; *see also Various Articles of Obscene Merch.,* 709 F.2d at 136 (stating that a "trial judge may rely upon his own experience in the community" to decide the view of an average person). As the Ninth Circuit aptly stated, "the issue of obscenity must, in the first instance, be left to the trier of fact, be it a properly instructed jury or a trial judge." *United States v. Cutting*, 538 F.2d 835, 839 (9th Cir. 1976). Here, the trial court, not an appellate court, is better equipped to assess the opinions of its local community. As such, this Court should defer to the district court's finding, as the trier of

fact, that, under contemporary community standards, the average member of Tulania or New Orleans would not find that the Mascot appeals to prurient interests.

2. Even if this Court supplants the district court's findings of fact, the Mascot should not be deemed to appeal to prurient interests.

This Court has a duty to review decisions wherein speech is deemed unprotected with a sharp eye so as to uphold the protections of speech that the Constitution affords. *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504–05 (1984). Upon closer examination, this Court should agree with the district court that Respondent cannot satisfy the first prong of the *Miller* test because the Mascot does not appeal to a shameful or morbid interest in sex in the context of a football game. *See* 314 U.S. at 24.

This Court has long recognized that "sex and obscenity are not synonymous." *Roth*, 354 U.S. at 487. Rather, obscene material is that "which deals with sex in a manner appealing to prurient interest." *Id*. While the term "prurient" typically takes its definition from a relevant statute or as understood by the trier of fact, the *Roth* Court suggested that the term may be defined as "[i]tching; longing; uneasy with desire or longing;" or "a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters." *Id.* at 487, n.20. The work depicted must be considered as a whole, meaning the context as well as the content must be fully evaluated. *See Kois v. Wisconsin*, 408 U.S. 229, 230–31 (1972).

Appeal to prurient interest is distinguishable from appeal to normal sexual interest. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 498–99 (1985). For example, the Second Circuit found that a film which included graphic portrayals of sex, masturbation, and a gynecologist examination did not appeal to a prurient interest. *United States v. 35 MM. Motion Picture Film "Language of Love"*, 432 F.2d 705, 711 (2d Cir. 1970). There, the court

distinguished between "representations of sexual matters which . . . import a debasing, 'shameful or morbid' quality into the expression or depiction of human sexuality," and those that merely arouse a sexual interest. *35 MM. Motion Picture Film "Language of Love"*, 432 F.2d at 711–12. Were prurient interest to include any depiction or description that arouses sexual interest, the majority of advertisements would be at risk of prosecution. *Id.* at 712. However, one district court found that a series of literary stories graphically depicting abhorrent sex acts, such as incestuous abuse between a father and his six-year-old daughter, appealed to a prurient interest because it appealed to "more than [an] ordinary interest in sex." *United States v. McCoy*, 937 F. Supp. 2d 1374, 1379 (M.D. Ga. 2013).

As the adage goes, "sex sells." While the Mascot may be aimed at inciting interest in the team, it does not do so through appeal to a morbid or shameful interest in sex. *See Roth*, 354 U.S. at 487, n.20. One need not look far in the world of professional football to find exploitation of sex to pique fans' interests. Cheerleaders of professional football teams wear suggestive outfits and perform sexually alluring routines. Advertisements, such as those of the notorious company, GoDaddy.com, often subject viewers at home to commercials with sexual undertones and nudity. *See* Tim Calkins & Derek D. Rucker, *Why GoDaddy's Offensive Super Bowl Ads Worked*, Fortune (Feb. 4, 2016, 10:00 AM), https://fortune.com/2016/02/04/godaddy-super-bowl-50/. The magazine juggernaut Sports Illustrated's yearly Swimsuit Edition consistently features scantily dressed models and, in 2010, the magazine advertised the FIFA World Cup by featuring players' wives and girlfriends completely nude, covered only in body paint. *World Cup "WAGS" Rocking Body Paint,* Sports Illustrated, 2010. Despite the sexually suggestive nature of the material within, courts have declined to rule such a publication to be obscene. *See Heard v. Bravo*, No. CV 13-1236 KG/WPL, 2015 WL 13658597, at *2 (D.N.M. Aug. 24, 2015)

("Plaintiff requests this Court to definitely determine whether every volume of the Sports Illustrated Swimsuit Edition is, under a legal definition, 'obscene.' The Court declines this invitation.").

As demonstrated, sexual appeal permeates every corner of the sports-industry. Given this, it is unreasonable to claim that the Mascot appeals to a prurient interest. Rather, the Mascot captures the attention of viewers by appealing to a normal, healthy interest in sex, as is common in the industry. Therefore, this Court should hold Respondent cannot satisfy the first prong of the *Miller* test, thus precluding Respondent's claim. *See* 413 U.S. at 24.

B. Respondent Cannot Prevail Under the *Miller* Test Because the Tulania Statute Does Not Specifically Define "Patently Offensive Sexual Conduct."

In redefining the test of obscenity, the *Miller* Court took care to include a second prong, affirmatively requiring that legislatures specifically define the sexual conduct to be deemed patently offensive by factfinders. *See* 413 U.S. at 24–25. This provision was intended to preserve the state's authority to legislate within their borders while also providing notice to dealers of potentially obscene materials as to what would be prohibited. *See id.* at 25–28. Precision in such statutes protects speech by opening the door of regulation "only the slightest crack necessary to prevent encroachment upon more important interests." *Roth,* 354 U.S. at 487; *see also Gooding v. Wilson,* 405 U.S. 518, 522 (1972) ("the statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression,"); *see also Speiser v. Randall*, 357 U.S. 513, 521 (1958) (explaining that states must place procedural safeguards to prevent infringement on such "rights which we value most highly and which are essential to the workings of a free society.").

Tulania's obscenity statute, codified at Penal Code section 12, insufficiently prevents the encroachment on citizens' right to freedom of speech; rather, the statute is vague because it only

specifies prohibited conduct and never defines the term "obscene." (*See* R. 12.) Although "obscene" is a term of art, *Miller* requires a specific definition of the sexual conduct to be found patently offensive. 413 U.S. at 24. Thus, factfinders are caught in a circular analysis as the obscenity test of *Miller* requires looking to the statute, but the Tulania statute requires looking to the test of *Miller*. *See id.* at 24. Such confusion as to what is prohibited under the law silences protected speech.

The statute's vagueness has a chilling effect on potential speakers as they have no notice regarding which materials are restricted. *See Bella Lewitzky Dance Found. v. Frohnmayer*, 754 F. Supp. 774, 782–83 (C.D. Cal. 1991). When lacking proper notice as to what behavior or action is criminalized, individuals may "steer far wider of the unlawful zone," to avoid penalty. *Speiser*, 357 U.S. at 526. Additionally, the statute's vague language leaves judges and juries no guidelines for enforcement. As such, factfinders must resolve issues subject only to their own discretionary opinions, which may result in prohibiting otherwise lawfully protected speech. *See United States v. Loy*, 237 F.3d 251, 262 (3d Cir. 2001). Absent a specific definition of sexual conduct, the statute, as currently written, is ripe for abuse. The statute fails to provide the necessary safeguards contemplated in *Miller*. *See* 413 U.S. at 24. As such, the vague statute is insufficient to meet the second prong of the *Miller* test, thus causing Respondent's claim to fail. *See id.*

C. The Mascot Has Serious Political Value.

Obscene speech may be regulated only because it is "of such slight social value as a step to truth" in that it lacks "serious artistic, literary, political, or scientific value." *Chaplinsky*, 315 U.S. at 572; *Miller*, 413 U.S. at 25. To determine the value of the alleged obscenity, the work, in its totality, must be evaluated under a reasonable person standard, not a community standard as

used in the first two prongs. *See Pope v. Illinois*, 481 U.S. 497, 500–01 (1987). Under this objective standard, the Mascot is unlike truly obscene material which carry little value because it has serious political value.

The term "political" is "broad enough to encompass that which might tend to bring about 'political and social changes.'" *United States v. Various Articles of Merch.*, 230 F.3d 649, 658 (3d Cir. 2000). Just as a magazine featuring nude individuals engaging in non-sexual activity could promote a positive view of nudists' lifestyles, promoting the Mascot, a bare-chested fictional creature, encourages viewers to see the female form in a new light. *See id.* at 658. Normalizing female toplessness is regarded by some as a necessary step in the movement towards creating equality amongst genders and minimizing violence against women. *See* Nassim Alisobhani*, Female Toplessness: Gender Equality's Next Frontier*, 8 UC Irvine L. Rev. 299, 324 (2018). Thus, the district court appropriately found that "such a progressive and empowering mascot [is] *necessary*" as a "catalyst for women's strength in a sport clouded by male dominance." (*See* R. 16) (emphasis in original).

The Fourteenth Circuit erred in discounting the Mascot's political value merely because of its affiliation with a sports team. Conversely, social movements are frequently born on the field. (*See* R. 8.) For example, Colin Kaepernick's act of kneeling during the national anthem in 2016 sparked a national dialogue regarding race inequality in America. The Sirens' popularity provides them a platform to incite a political debate as is central to the First Amendment's purpose "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *See Roth*, 354 U.S. at 484. As such, the Mascot has serious political value that should be protected.

Accordingly, Respondent fails to carry the burden of satisfying all three prongs of the *Miller* test to deem the Mascot obscene. *See* 314 U.S. at 24. Therefore, this Court should uphold the sanctity of the Free Speech Clause and afford the Mascot the protection it deserves.

II. WYATT'S NEGLIGENCE CLAIM FAILS UNDER BOTH THEORIES PROFFERED BY THE COURTS BELOW BECAUSE THE SIRENS SATISFIED THEIR COMMON-LAW DUTY WHEN WYATT BECAME INJURED DUE TO AN IMPERFECTION ON THE FIELD AT YULMAN STADIUM.

As a preliminary matter, the Sirens concede that the district court correctly determined that any duties they owed Wyatt "arise out of common-law . . . and not out of any particular terms in the [Collective Bargaining Agreement] . . . because they derive from and can be adjudged in accordance with the standards set forth in the Tulania common law [sic]." (R. 18.)

Under Tulania common-law, a viable negligence claim requires that the plaintiff prove that the defendant failed to perform a duty owed to the plaintiff and that the defendant's failure to perform its duty proximately caused the plaintiff's injury. *See Green v. Ariz. Cardinals Football Club LLC*, 21 F. Supp. 3d 1020, 1027 (E.D. Mo. 2014); *see also L.A.C., ex rel. D.C. v. Ward Parkway Shopping Ctr. L.P.*, 75 S.W.3d 247, 257 (Mo. 2002) (en banc); *see also Bush v. St. Louis Reg'l Convention*, No. 4:16CV250 JCH, 2016 WL 3125869, at *2 (E.D. Mo. June 3, 2016); (*see* R. 17). "The touchstone for the creation of a duty is foreseeability." *Madden v. C&K Barbecue Carryout, Inc.*, 758 S.W.2d 59, 62 (Mo. 1988) (en banc). Duty of care may arise where it is foreseeable that "particular acts or omissions will cause harm or injury." *Id.* A defendant breaches its duty where its conduct falls below the reasonable person standard. *See Sacco v. Gau*, 199 N.W.2d 605 (Neb. 1972); *see also Krehnke v. Farmers Union Co-op. Ass'n*, 260 N.W.2d 601 (Neb. 1977). In the same vein, this standard means that the defendant need not "protect against every possible injury which might occur," thus, negligence must be viewed in

light of the particular facts and circumstances and determined on a case-by-case basis. *Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc.*, 700 S.W.2d 426, 431 (Mo. 1985) (en banc).

In sports-related negligence claims, courts determine which "possible variations of [the reasonable person standard] relates to the multitudinous varieties of sporting conduct." Walter T. Champion, Jr., *Fundamentals of Sports Law* (2019). These variables include, but are not limited to, the specific type of sport involved, risks which are inherent to that sport but those which are outside the scope of foreseeability, and "degree of zest with which the game is being played." *Ross v. Clouser*, 637 S.W.2d 11, 14 (Mo. 1982) (en banc).

Although professional athletes are expected to comply with certain codes of conduct while participating in competitive sports, the risk of injuries cannot be completely eliminated. *See generally*, Walter T. Champion, Jr., *Fundamentals of Sports Law* (2019). With the knowledge of inherent risks present in professional sports, Justice Cardozo famously cautioned, "the timorous may stay at home." *Murphy v. Steeplechase Amusement Co.*, 166 N.E. 173 (N.Y. 1962). This is especially apparent in contact sports like football, where the "plaintiff has freely assumed commonly known risks inherent in the sport." *Shay v. Contento*, 937 N.Y.S.2d 706 (2012). "Primary assumption of risk [thus] negates any duty on the part of a defendant to safeguard the plaintiff from those risks." *Id*. While tort law seeks to deter unreasonable conduct, the expectation that the defendant's conduct comports with the reasonable person standard must be balanced against the plaintiff's voluntary assumption of the risks associated with playing professional football. *See Ross*, 637 S.W.2d at 14. Without proper balancing, the "fear of civil liability stemming from negligent acts occurring in an athletic event could curtail the proper fervor with which the game should be played and discourage individual participation." *Id.*

A. Both Lower Courts Erred by Concluding that the Sirens Owed a Duty to Provide a Safe Workplace Which Arises Out of an Employer-Employee Relationship, Even Though No Such Relationship Exists Between the Parties.

Where the parties share an employer-employee relationship, the employer owes the employee certain nondelegable duties. *See Kleinknecht v. Gettysburg College*, 989 F.2d 1360 (3d Cir. 1993); *Carman v. Wieland*, 406 S.W.3d 70, 76 (Mo. App. E.D. 2013). "The duty to provide a safe workplace is only one of the nondelegable duties that an employer owes to its employees, and the employer cannot escape its duty by delegating the task to another." *Carman*, 406 S.W.3d at 76.

1. The Sirens do not employ Wyatt and, therefore, they do not owe Wyatt a duty to provide a safe workplace.

Both lower courts erroneously concluded that an employer-employee relationship existed between the parties merely because Wyatt, a professional football player, participated in a game at Yulman Stadium. (*See* R. 9, 18.) Logically, the Sirens cannot employ Wyatt because he played for the Green Wave when he incurred his injury. (*See* R. 17.) Rather, had the game taken place at a stadium owned or leased by the Green Wave and had Wyatt suffered the same injury due to the same premise imperfection, then the Green Wave would have owed the common-law duty to provide a safe workplace to Wyatt. Further, had this scenario played out, both lower courts' reliance on *Carman* would have been appropriate because Wyatt's injuries resulted from an unsafe workplace. *See* 406 S.W.3d at 70; (R. 9, 18).

A football field may be considered a football player's "workplace," in a general sense. (*See* R. 9.) However, if this Court adopts the reasoning proffered by the lower courts in the case at bar, trial courts would be flooded with negligence claims whenever a professional athlete becomes injured while playing on any football field, even though no employer-employee

relationship exists. This broadening of liability would also allow employer-teams to dodge the legal duties owed to employee-athletes.

2. Alternatively, the parties may be deemed co-employees of the parent league and, thus, do not owe each other a duty to provide a safe workplace.

As a threshold matter, both lower courts erred in broadly designating football stadiums as "workplaces" without first identifying the proper employer and failing to acknowledge this issue before applying *Carman*. *See* 406 S.W.3d at 70; (*see* R. 9.) In *Carman*, a firefighter sued her co-worker for causing injuries by negligently backing up a firetruck. 406 S.W.3d at 73. Specifically, the firefighter claimed that her co-worker's negligent driving created an unsafe workplace. *Id.* at 76. The Missouri Court of Appeals concluded that the firefighter could not maintain her suit against her co-worker because the co-worker's duty to exercise ordinary care and safety when driving the firetruck within the course of employment fell within the city-employer's nondelegable duty to provide a safe workplace. *Id.* Thus, absent an independent breach of duty separate from the city's nondelegable duties, the firefighter did not have a viable negligence claim against her co-worker. *Id.* at 77; s*ee also Smith v. S. Ill. & Mo. Bridge Co.*, 30 S.W.2d 1077, 1083 (Mo. App. E.D. 1930); *see also Peters v. Wady Indus., Inc.*, 489 S.W.3d 784 (Mo. 2016) (en banc).

Even under an alternative theory where both parties are employed by a single parent league, Wyatt cannot establish a breach of duty independent from an employer's common-law duty to provide a safe workplace. The parties could alternatively be considered co-employees of the league, although this is not an issue raised on cert. For instance, it is legally unclear whether the NFL employs all athletes who play for individual franchise teams. However, even if the parent-league in the case at bar employs both the Sirens and the Green Wave, the Sirens, as the

co-worker, would not owe Wyatt a duty to provide a safe workplace. *See Carman*, 406 S.W.3d at 76; *see also Williams v. Nat'l Football League*, 27-CV-08-29778, 2010 WL 1793130 (Minn. Dist. Ct. May 6, 2010) (concluding that the NFL employs individual athletes because it exercises requisite control that employers assert under common-law and based on the state statute at issue that governs drug testing in the workplace); *but see Brown v. Nat'l Football League*, 219 F. Supp. 2d 372, 383–84 (S.D.N.Y. 2002) (concluding that individual professional football players are employees of the clubs, not the NFL); *see also* Adam Finkel, et. al, *The NFL as a Workplace: The Prospect of Applying Occupational Health and Safety Law to Protect NFL Workers*, 60 Ariz. L. Rev. 291 (2018) (recognizing that it is not clear in the legal sense that the NFL employs all professional football players within the league, even though each franchise team employs individual athletes. For instance, "apart from the clubs, it is important to clarify the players' relationship vis-à-vis the NFL . . . [meaning] *whether NFL players can be considered employees of the NFL,* in addition to being employees of an individual club.") (emphasis added).

As such, Wyatt cannot sustain his negligence claim against the Sirens on the basis of a duty arising out of a nonexistent employer-employee relationship because the Sirens do not employ Wyatt. Because Wyatt's injuries arose from an imperfection on the playing field and, therefore, at the "workplace," Wyatt's negligence claim more appropriately rests on the parent-league's duty to maintain a safe workplace than on any duty owed by the Sirens. (*See* R. 9.) Alternatively, the Sirens, as Wyatt's "co-worker," would not have owed him the employer parent-league's nondelegable duty to provide a safe workplace. Wyatt cannot show an independent, nondelegable duty even under an alternative theory where both the Sirens and Wyatt are co-workers in the parent-league. While Wyatt's negligence claim fails under the theory of duty which arises from an employer-employee relationship, the Sirens acknowledge

that it only owed Wyatt a duty under premises liability theory. However, the Sirens still satisfied this duty and, therefore, Wyatt cannot demonstrate any breach of duty that proximately caused his injuries.

B. Instead, this Court Should Hold that the Sirens Owed and Comported with the Duty of Care Required Under Premises Liability Theory.

Under premises liability theory, the landowner "has a duty to exercise reasonable care to make the premises safe for invitees." *Austin v. Kroger Texas, L.P.*, 465 S.W.3d 193, 202 (Tex. 2015). An "invitee" is a person who enters the premises with the express or implied invitation of the landowner for a purpose connected with the landowner's business. *Alexander v. General Accident Fire & Life Assur. Corp.*, 98 So.2d 730, 732 (La. Ct. App. 1 Cir. 1957); Restatement (Second) of Torts § 332 (1965). Specifically, the landowner owes the invitee the duty to "make safe or warn against any concealed, unreasonably dangerous conditions" that the landowner knows or should know of, but the invitee does not. *Austin*, 465 S.W.3d at 202.

Here, assuming that the Sirens own or lease Yulman Stadium, the Sirens owed a duty to provide an adequate warning of the divot behind the endzone. This duty was satisfied, however, when the Sirens placed an orange cone to warn players of the defect underneath.

1. The Sirens satisfied their duty as a matter of law by giving an adequate warning when placing an orange cone over the divot.

Landowners who provide "adequate warnings act reasonably as a matter of law, and since there is no need to warn against obvious or known dangers, a landowner generally has no duty to warn of hazards that are open and obvious or known to the invitee." *Austin*, 465 S.W.3d at 204. Landowners also ordinarily satisfy this duty by providing an adequate warning even if the unreasonably dangerous condition remains. *See State v. Williams*, 940 S.W.2d 583, 584 (holding that a landowner has a duty to warn or make safe unreasonably dangerous conditions but not

both) (Tex. 1996); *see also TXI Operations, L.P. v. Perry*, 278 S.W.3d 763, 765 (Tex. 2009) (concluding that the landowner could have satisfied its duty by repairing the dangerous condition or providing an adequate warning sign).

Here, the Sirens satisfied their duty as a matter of law by providing an adequate warning when it placed the orange cone over the divot. The Fourteenth Circuit, however, misstates the common-law rule by requiring that the Sirens repair the divot before kickoff in addition to providing an adequate warning, even though either action would have been sufficient, and the team was not required to do both. *See Williams*, 940 S.W.2d at 583; *see also Perry*, 278 S.W.3d at 765 (Tex. 2009); (R.9). Grounded on this misstatement of the law, the Fourteenth Circuit further provides an erroneous analogy of the orange cone over the divot to that of placing a sticky note in front of a large gaping hole, rather than repairing the hole. (*See* R. 9.) However, even if the Sirens could have repaired the divot before kickoff, such a haphazard repair would likely have been prohibited by league-wide standards. For example, the NFL's Game Operations Manual prevents the suggestion put forth by the Fourteenth Circuit. Specifically, the Manual provides:

> All clubs that own or lease their stadiums are required to certify that their fields are in compliance with Recommended Practices for the Maintenance of Infill and Natural Surfaces for NFL Games . . . The playing surface must be retested and certified as being in compliance prior to game day.

National Football League, *League Governance: Game Operations Manual*, https://operations.nfl.com/football-ops/league-governance/ (last visited Jan. 20, 2020); *see also* Mike Florio, *NFL Require Certification of Field Fitness Within 72 Hours of Kickoff*, NBC Sports (Jan. 8, 2013, 4:24 PM), https://profootballtalk.nbcsports.com/2013/01/08/nfl-requires-certification-of-field-fitness-within-72-hours-of-kickoff/.

As illustrated by the NFL Operations Manual, the Sirens could not have timely repaired the divot in compliance with the parent-league's standards in the case at bar because the divot was created during pregame warmups on the day of the game. Thus, an adequate repair of the divot would not have been reasonable within the timeframe of this case and the repair would likely have not remedied a dangerous condition.

2. The divot was an open and obvious condition that Wyatt may have been expected to discover or know of prior to kickoff.

A landowner "is not an insurer of [a] visitor's safety." *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 769 (Tex. 2010) (quoting Restatement (Second) of Torts § 344). An open and obvious condition is one that the invitee either knows of or is so obvious that the invitee may be expected to discover it. *See* Restatement (Second) of Torts § 343A (1965). A landowner may "reasonably assume that [the invitee] will protect himself by the exercise of ordinary care, or that he will voluntarily assume the risk of harm if he does not succeed in doing so." *Id.*

Here, the Sirens player created an open and obvious condition when he created the divot in the field; however, because this occurred during pregame warmups, Wyatt may have been expected to discover the divot before he became injured during the fourth quarter of the game. (*See* R. 8.) This may be reasonably inferred from the record, where Wyatt, as a critical pawn in his team's offensive scheme, "was on the field more times than not," meaning that he likely had several opportunities to gain actual knowledge of the divot, either while playing or observing on the sidelines during the forty-five minutes or more of gameplay prior to the fourth quarter. (*See* R. 17.) However, should this Court hold the divot to not be open and obvious, Wyatt's claim still fails as he assumed a risk of injury by participating in a professional football game.

C. Even if this Court Finds that the Sirens Breached their Duty, Wyatt's Claim Fails Because He Assumed the Risk of Sustaining an Injury by Playing Professional Football.

"Defendants have no legal duty to eliminate risks inherent in a sport, but they owe a duty not to increase those risks." *Stringer v. Minnesota Vikings Football Club, LLC*, 705 N.W.2d 746 (Minn. 2005). Plaintiffs, on the other hand, assume the risks inherent in a sport by voluntarily encountering those risks, as well as by accepting the possibility of the harm or danger resulting from those risks. Restatement (Second) of Torts § 496A (1965). By assuming the risk of harm or danger, the defendant is relieved of any duty it may have owed the plaintiff. *Shay*, 937 N.Y.S.2d at 707 (explaining that voluntary assumption of risk "negates any duty on the part of a defendant to safeguard the plaintiff from those risks."); Restatement (Second) of Torts § 496D (1965).

Furthermore, this Court should take into account that football is a contact sport, meaning that physical contact between athletes is inevitable and certain common injuries may occur. *See Pfister v. Shusta*, 657 N.E.2d 1013 (Ill. 1995); *see also Keller v. Mols*, 509 N.E.2d 584 (Ill.1987); *see also* Dean Richardson, *Player Violence: An Essay on Torts and Sports*, 15 Stan. L. & Pol'y Rev. 133 (2004) (explaining that the injury rate was highest in football, where 1,083,000 of the 5,783,000 professional football players who played in 2002 were injured).

Both lower courts recognized the existence of certain risks which are inherent in playing professional football but did not apply the voluntary assumption of risk principles as to the Sirens' duty under premises liability theory. (*See* R. 9, 18.) Particularly, as the record states, Wyatt's injuries were the result of coming into contact with the divot, rather than colliding into another player. (*See* R. 17.) As such, the Sirens' defense of voluntary assumption of risk traces

back to their initial duty owed to Wyatt—that of a landowner to an invitee. *See* Restatement (Second) of Torts § 496C (1965).

As previously stated, the Sirens owed and met their duty of care as a landowner by providing a warning of the divot, thus, this Court should hold that Wyatt voluntarily encountered the foreseeable harms or dangers which existed from playing football with the divot unrepaired. Wyatt not only assumed the risk of an open and obvious condition but, specifically, the risks associated with playing a contact sport rife with the possibility of sustaining severe injuries. *See* NFL.com, *NFL Releases Injury Data for 2017 Season*, National Football League (Jan. 26, 2018, 5:48 PM), http://www.nfl.com/news/story/0ap3000000911123/article/nfl-releases-injury-data-for-2017-season. Further, it is reasonably foreseeable that athletes may need to move beyond the four corners of the playing field. Therefore, Wyatt also assumed the risk of potentially moving beyond the endzone even with the divot unrepaired but of which adequate warning was still provided. (R. 17.)

Finally, if Wyatt contends that he did not know about the divot and, therefore, did not voluntarily and knowingly assume the risk by participating in the game, this Court should remand the case so that the factfinder can properly and definitively resolve the issue of Wyatt's knowledge of the divot as related to the Sirens' voluntary assumption of risk defense. However, because Wyatt played on the field frequently in this particular game and because Wyatt is a professional athlete, Wyatt most likely knew and appreciated the risks of injuries associated with playing a contact sport. (*See* R. 9.)

Accordingly, this Court should reverse the Fourteenth Circuit's decision and hold that Wyatt's negligence claim fails because the Sirens satisfied their common-law duties.

CONCLUSION

As articulated, the Mascot does not fall into the narrowly defined category of unprotected, obscene speech, traditionally reserved for hardcore pornography. Furthermore, Wyatt does not have a viable negligence claim against the Tulania Sirens, given that the Sirens provided an adequate warning of the imperfection on the playing surface of Yulman Stadium. As such, this Court should reverse the judgement of the Fourteenth Circuit Court of Appeals.

Appendix A

Tulania Penal Code

Tulania Penal Code Section 12 is as follows:

Every person who knowingly: sends or causes to be sent, or brings or causes to be brought into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his/her possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor.