Docket No. 09-215

In The

SUPREME COURT OF THE UNITED STATES

THE TULANE MARDI GRAS INVITATIONAL
APPELLATE SPORTS LAW COMPETITION, 2020

TULANE SIRENS FOOTBALL TEAM,

Petitioner,

v.

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

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fourteenth Circuit

BRIEF FOR RESPONDENT

Team 13
Counsel for Respondent

ORAL ARGUMENT REQUESTED

QUESTION PRESENTED FOR REVIEW

1. Whether professional sports teams displaying, distributing and advertising obscene material should continue to be unprotected by the First Amendment under *Miller v. California*, 413 U.S 15 (1973).
2. Whether Petitioner is negligent for Ben Wyatt's career-ending injury under Tulania common law, where petitioner failed to repair a hole that exposed concrete next to a professional football field by only placing a small cone near it.

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The decision of the United States Southern District Court of Tulania is published at R. 11. The decision of the United States Court of Appeals for the Fourteenth Circuit reversing in part and affirming in part the judgment of the district court, is published at R. 3-4.

STATEMENT OF JURISDICTION

The District Court and the Appellate Court have subject matter jurisdiction over this case pursuant to 28 U.S.C § 1331 (federal question). In the interest of judicial efficiency, the District Court chose to consolidate the issue of negligence with the federal question issue.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Adjudication of this case involves the constitutional interpretation of the United States Constitution First Amendment. Additionally, adjudication of this case involves the statutory interpretation of § 185 of Title 29 of the Suits by and against Labor Organizations of 2019, 29 U.S.C. § 185.

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

Issue 1

Ben Wyatt is a professional wide receiver for the New Orleans Green Wave, who participated in a Thanksgiving Day football game against the Tulania Sirens. R. 12. The Green Wave and the Tulania Sirens are division rivals, so Wyatt trained untiringly for the crucial Thanksgiving Day game. *Id*. Members of both the Tulania and New Orleans communities watch the anticipated game either in person or at home, in which many families with children look forward to and enjoy. *Id*.

For the game, the Tulania Sirens chose to redesign their mascot to depict a mermaid with exposed breast. R. 5. The Tulania Sirens decided to promote their rebranding by mailing unsolicited pamphlets to the citizens of Tulania. R. 12. On the pamphlets depicted the new topless mascot and promoted the Thanksgiving Day game by listing the location and time of the game. *Id*. Using bold letters located on the bottom of the pamphlet, the Tulania Sirens inscribed the words "SHOW YOUR SUPPORT FOR OUR NEW MASCOT GEAR IN STORES AND ONLINE TODAY!" *Id*. Wyatt and his family received the promotional material in their mailbox despite not requesting the Tulania Sirens promotion. *Id*.

Numerous citizens of the Tulania community were offended by the Tulania Sirens new mascot. *Id*. In particular, the Center for People Against Sexualization of Women's Bodies ("PASWB") advocated that the new mascot "appeals to the prurient interest and is not how the city of Tulania would like to be portrayed." *Id*. Wyatt and his wife, Leslie Knope, are members of the PASWB. *Id*. Similarly, other groups and community members stated similar concerns. *Id*. Consequently, the city of Tulania passed a law stating "[e]very 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." Sec. 12 Tulania Penal Code (2019). *Id.*

To his horror, Wyatt entered the Tulania Sirens stadium for the Thanksgiving Day game and witnessed the giant, topless mermaid in the middle of the field. *Id*. More to Wyatt's dismay, the Sirens' new mascot was displayed in the stadium everywhere including on fliers that were distributed to every single community member who passed the stadium. *Id*. Wyatt's wife, Leslie Knope and the couple's young children were in attendance witnessing the Sirens' display and were exposed to the decorations and pamphlets with depictions of the topless mascot on them. *Id*. Hundreds of others were also in attendance of were viewing the game on television Thanksgiving Day. R. 5.

Issue 2

Ben Wyatt was a star wide receiver for the New Orleans Green Wave ("Green Wave") football team. R. 12. On Thanksgiving Day 2020, the Green Wave played division rival the Tulania Sirens ("Petitioner") at Yulman Stadium in Tulania. R. 17. Petitioner owns, manages, operates, maintains, possesses and controls Yulman Stadium. R. 5. Petitioner employs staff to ensure player safety and field maintenance. R. 17. Yulman Stadium is a turf playing field. R. 8. However, underneath the turf is concrete. R. 8.

Before the Thanksgiving Day game started, a Sirens wide receiver made a catch near the back-left corner of the endzone during pregame warmups. R. 8. After the catch his momentum drove his face mask into the turf and created a hole. R. 8. The hole was located approximately

three (3) yards from the back-left corner of the endzone. R. 17. The hole exposed the concrete underneath the turf. Id. When Petitioner learned about the field defect, they placed a small orange cone near the area. R. 10. The cone did not cover the hole. R. 19. The cone did not cover the then exposed concrete. Id. The cone did not repair or create a boundary around the unsafe surface. R. 19.

Many fans from Tulania and New Orleans anxiously waited the rivalry game kickoff. R. 12. Instead of postponing the game to fix the dangerous area, Petitioner allowed for the game to ensue. R. 17. Ben Wyatt took the field without knowledge of the slippery concrete located near the endzone. R. 9. The goal of a wide receiver is to catch touchdown passes that ultimately help his team win. R. 17. Petitioner allowed for the condition to remain throughout the game. R. 17. During the fourth quarter of an intense game, Ben Wyatt ran full speed to catch a touchdown pass in the back-left corner of the endzone. R. 17. Lurking just three (3) yards from the field of play where Wyatt ran was the small cone and exposed concrete. R. 17.

After making the catch inbounds Ben Wyatt tried to stop himself out-of-bounds but his momentum carried him from the endzone turf to the concrete surface. R. 8. The dangerous field condition caused Wyatt to lose his balance. R. 9. Wyatt slipped on the concrete surface and fell, injuring his left knee. R. 17. This injury ended his football season and as Wyatt would later find out, his entire football career. R. 17.

II. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

Issue 1

Wyatt and the PASWB brought suit in the United States District Court for the District of Tulania against the Tulania Sirens asserting that the promotion of a topless mascot is obscene. R. 13. Wyatt and the PASWB sought to enjoin the Sirens from further advertising and soliciting

their new mascot. *Id*. Wyatt and the PASWB argue "obscenity is not within the area of constitutionally protected speech or press" and that the Tulania mascot constitutes 'obscene material….unprotected by the First Amendment.'" *Miller v. California*, 413 U.S. 15, 23 (1973). R. 5.

The District Court determined that the Tulania mascot fails to satisfy the *Miller* test of obscenity and is protected by the First Amendment. R. 16. The District Court held that Wyatt and the PASWB may not enjoin the Tulania Sirens Football Team from using their topless mermaid mascot. *Id*.

Wyatt and PASWB then filed an appeal to the United States Courts of Appeals for the Fourteenth Circuit. R. 5. The Fourteenth Circuit reversed the District Court's decision and concluded that the image of the Sirens topless mermaid is obscene in nature R. 10. The Fourteenth Circuit reasoned that the mascot is "not a celebration of the female form, but a boorish attempt to gain the viewership of those who view the mascot as a sex symbol, and to shock and gain attention from viewers whether they are offended or not." R. 7. The Tulania Sirens Football Team filed a Petition for Writ of Certiorari asking to address the following issue: "Whether professional sports teams are protected by their First Amendment rights to display an obscene mascot?" R. 2.

Issue 2

The District Court judge detailed the finding of fact that it is expected for a grounds crew be present on game days and that a grounds crew could have fixed the hole before the game. R. 19. Judge Brees of the District Court further noted that substantial evidence was presented at trial to establish the hole was inadequately patched in preparation for the game and was not reasonably

safe. R. 19. Lastly, the Fourteenth Circuit Court of Appeals opined that Mr. Wyatt injured his knee because of the condition to the turf. R.19. There are no facts indicating Petitioner has repaired the hole in the turf.

SUMMARY OF THE ARGUMENT

Respondent, Ben Wyatt and the People Against the Sexualization of Women's Bodies, were prepared to enjoy a Thanksgiving Day football game between the New Orleans Green Wave and the Tulania Sirens, Petitioner. However, with all the anticipation of the game mounting, Petitioner, the Tulania Sirens unveiled their new mascot, a topless female mermaid. Petitioner advertised, distributed and displayed the mascot through a promotional mailing which was received, unsolicited by Ben Wyatt and members of the People Against the Sexualization of Women's Bodies. Outraged by the obscene material depicting a topless, female mermaid, members of the Tulania community voiced their concern over the mascot to the City of Tulania.

In response, the City of Tulania enacted legislation which outlawed the selling, distributing, and displaying of obscene material to combat the Petitioner's new mascot. Despite this, on the day of the Thanksgiving Day game, Ben Wyatt, his wife, a member of the People Against the Sexualization of Women's Bodies and their children went to game and witnessed the new mascot logo throughout the stadium and in the middle of the field. Therefore, the Petitioner violated the Tulania statute and this Court should affirm that their obscene mascot fails to be protected under the First Amendment freedom of speech.

Furthermore, Ben Wyatt was a professional football player participating in the Thanksgiving Day game against the Petitioner. During the pregame warmups, a Tulania Sirens player created a divot on the field, three yards behind the endzone. This divot revealed a concrete surface underneath the field, which was covered up with simply a cone. During the game, Ben Wyatt received a "touchdown" pass in the back-left corner of the endzone. Wyatt attempted to slow his momentum, but was unable to and lost his footing on the slippery concrete patch which

was covered by the cone. He sustained career ending injury to his left, and this Court should affirm that Petitioner was liable for his injuries under the theory of negligence.

ARGUMENT

I. THE DECISION OF THE FOURTEENTH CIRCUIT WAS CORRECT BECAUSE THE STATUTE PROHIBITING THE DISTIBUTION OF OBSCENE MATERIAL IS CONSITUTIONAL UNDER THE FIRST AMENDMENT

The First Amendment states that "Congress shall make no law…abridging the freedom of speech, or of the press…." U.S. Const. amend. I. The purpose is "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 484 (1957). Despite this, the First Amendment "was not intended to protect every utterance." *Id.* In fact, this Court reasoned that "[a]ll ideas having even the slightest redeeming social importance -- unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion -- have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests." *Id.* Essentially, the First Amendment protects the freedom of speech and of the press, but is not extended to speech that is considered obscene material. *See Kois v. Wisconsin*, 408 U.S. 229 (1972); *US v. Reidel*, 402 U.S. 351 (1971); *Roth v. US*, 354 U.S. 484 (1957).

This Court in *Miller v. California* acknowledged the inherent dangers in limiting any form of speech and held that State statutes regulating obscene material must be carefully limited to works which depict or describe sexual conduct. *Miller v. California*, 413 U.S. 24 (1973). Specifically, the state offense must be limited to works which, "taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Id.*

In *Miller*, this Court implemented the relevant standard to determine whether obscene material and thus unprotected under the First Amendment. This basic standard laid out is:

(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 16.

The Tulania Sirens' topless mermaid used in their promotional material and stadium design constitutes obscene material. This is so, because when applying contemporary community standards the mascot encourages sexual interests, falls within the definition of sexual conduct under Sec. 12 Tulania Penal Code (2019), and lacks serious artistic value.

A. This Court Should Find The Tulania Sirens Mascot Depicting A Topless Mermaid, Taken As A Whole, Appeals To The Prurient Interests Of The Average Person When Applying Contemporary Community Standards

The Fourteenth Circuit was correct in finding that a contemporary community is not to be read so broadly as to include the entirety of the United States in its definition. In Miller, this Court determined:

> "Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, *but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive*.'"

Miller, 413 U.S. 30 (emphasis added).

In applying Miller to the case at hand, this reasoning is illustrative. Fundamental First Amendment limitations on the powers of the States are valid across the board – each state is well within its rights to enforce a limitation on obscene material. It follows, however, that each state is not obligated to enforce limitations based on a fixed, uniform national standard of what appeals to the prurient interest. The *Miller* Court determined that "to require a State to structure obscenity proceedings around evidence of a national 'community standard' would be an exercise

in futility." *Id*. That is because nothing in the First Amendment "requires that a jury must consider hypothetical and unascertainable 'national standards' when attempting to determine whether certain materials are obscene as a matter of fact." *Id* at 32. In further explanation, this Court in *Miller* reasoned that jurors in Mississippi or Maine, for example, are not required to accept the public representation of obscene material in the same way as jurors in Las Vegas or New York City. *See Miller*, 413 U.S. at 32. Tastes and attitudes differ from state to state and the imposition of absolute uniform standards puts this diversity at risk. *Id* at 33.

Here, the state of Louisiana is within its right to enforce a limitation on obscenity. As stated in *Miller*, Louisiana should not be subject to broad, national standards in any rigid or fixed sense. A jury here, just as the hypothetical jury explained in Miller, should not be required to consider unascertainable national standards. Rather, it should use the standards of its community. As jurors in Mississippi and Maine are not required to accept the representation of obscene material in the same was as those in Las Vegas, jurors in Louisiana are not required to accept the same standards as more progressive states. Louisiana is a contemporary community in its beliefs and attitudes. It is subject to the First Amendment, and it is also within its rights to limit obscene material in the way it sees fit.

The standard here should the be one the City of Tulania adopted in Sec. 12 of the Tulania Penal Code in 2019. In response to community outrage sparked by the topless mascot, Tulania enacted a law based on its community standards by prohibiting persons from selling, publishing and distributing any obscene material. Sec. 12 Tulania Penal Code (2019); R. 12. The Fourteenth Circuit was correct in noting that topless mascot "is not a work of art, it is the mascot of a football team," and "is not a celebration of the female form, but a boorish attempt to gain the viewership of those who view the mascot as a sex symbol, and to shock and gain attention from

viewers whether they are offended or not." R. 7. In *Miller*, this Court found that the contemporary community standards of California were "constitutionally adequate" and as such, the contemporary community standards enacted by Sec. 12 Tulania Penal Code are likewise constitutionally satisfactory. *See Miller*, 413 U.S. at 34. Thus, the first prong of Miller has been established and this Court should uphold the decision of the Fourteenth Circuit.

B. Under The Second Prong Of *Miller*, The Topless Mermaid Depicts, In A Patently Offensive Way, Sexual Conduct Specifically Defined By Section 12 of the Tulania Penal Code

The Tulania Sirens topless mascot represents, in an overtly offensive fashion, sexual conduct as defined by Sec. 12 of the Tulania Penal Code. The second prong of *Miller* necessitates an establishment of "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law." *Miller*, 413 U.S. at 24. This requirement seeks to provide fair notice to a dealer, or in this case, the Tulania Sirens, that the distribution of obscene materials privately or publicly, may bring prosecution or consequence. *See Id* at 27.

In Tulania, under Sec. 12 Tulania Penal Code 2019, sexual conduct is specifically defined in the applicable statute. The statute clearly defines sexual conduct as:

> "[e]very 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."

Sec. 12 Tulania Penal Code (2019).

Here, the City of Tulania defines a very precise way in which sexual conduct and obscene material can be displayed, distributed and sold. That is with no exception. The topless mermaid here constitutes obscene material, as mentioned above, because the community of Tulania felt so

appalled by its appearance as to enact a statute. R. 12. The Sirens would clearly understand that a topless depiction of a female mermaid, displayed to children and families, all around Louisiana would constitute sexual conduct under the applicable statute. Thus, the selling, advertising, and displaying of the topless female mascot constitutes the distribution of obscene material and violates the specific definition enacted in Sec. 12 of the Tulania Penal Code. Therefore, this Court should adopt the ruling of the Fourteenth Circuit that the second prong of *Miller* is met.

C. Finally, The Topless Mermaid Mascot, Lacks Genuine Literary, Artistic, Political, or Scientific Value And Satisfies The Last Prong Of Miller As Obscene Material

The last and final prong of *Miller* requires an examination of "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller*, 413 U.S. at 24. The analysis is not "whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value, but whether a reasonable person would find such value in the material, taken as a whole. *Pope v. Illinois*, 481 U.S. 501 (1987). This prong was enacted to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth*, 354 U.S. at 484. However, the *Miller* Court correctly couldn't "see the harsh hand of censorship of ideas -- good or bad, sound or unsound -- and 'repression' of political liberty lurking in every state regulation of commercial exploitation of human interest in sex." *Miller*, 413 U.S. at 36. Instead, this Court in *Miller* reasoned "sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places." *Miller*, 413 U.S. at 25-26.

In the case at bar, the mermaid unquestionably lacks artistic value to the reasonable person. The female mermaid depicted by the Sirens' is presented as topless for no other reason than to stimulate and encourage the sexual interest of its viewers, whether at the game or on

television. The Fourteenth Circuit notes appropriately that this image is a "blatant attempt at garnering attention (whether it be from voyeuristic pleasure or from horrified shock)." R. 8. Moreover, in Tulania and in this country, only adults (above 18 years or older) are allowed to procure nude materials such as books, magazines, and film, but the Sirens' depiction here is quite literally broadcasted to minors and families present in the stadium and those all across the state watching on television sets. R. 12. As a professional football team, the image of a naked female mermaid plays no artistic role for the team other than to recklessly create an inescapable and constant image to attract the viewership of families who enjoy professional football in Tulania and in the state of Louisiana. *Id*. Therefore, the topless mermaid lacks serious literary, artistic, political and scientific value to the reasonable man and satisfies the third prong of the Miller test. Thus, this Court should adopt the holding from the Fourteenth Circuit that the Tulania Sirens mascot constitutes obscene material not protected under the First Amendment.

II. THE DECISION OF THE FOURTEENTH CIRCUIT SHOULD BE AFFIRMED BECAUSE PETITIONER WAS NEGLIGENT IN ITS UPKEEP OF YULMER STADIUM

Petitioner is liable for Ben Wyatt's injury because it chose to host the Thanksgiving Day game on a defective field. This Court lays out the standard for proving Petitioner's liability in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 161 (1981):

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.

Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 161 n.6 (1981); Restat 2d of Torts, § 343.

Ben Wyatt was an invitee of Petitioner. *Bush* at *2; Restat 2d of Torts, § 332. Petitioner is liable for Ben Wyatt's injuries that occurred on Petitioner's field. First, Petitioner knew about the dangerous concrete because they put a cone next to it and should have realized such action was insufficient. Second, professional football players wearing cleats are not expected to realize that only three (3) yards after scoring a touchdown they will have to avoid a patch of concrete. Had Mr. Wyatt known this he would not have played in the game. Finally, Petitioner failed to exercise reasonable care by placing a small cone on a sizeable hole in the turf instead of postponing the game. The District Court noted that the dangerous condition could have been fixed by a grounds crew that day. Therefore, under this Court's law, Petitioner is liable for Ben Wyatt's career ending injury.

A. Ben Wyatt's Claim Is Independent Of The Collective Bargaining Agreement And Is Governed By Tulania Common Law

Section 301 of the Labor-Management Relations Act of 1947 ("LMRA") preempts state-law claims that are substantially dependent upon the analysis of the Collective Bargaining Agreement ("CBA"). *Williams v. Nat'l Football League*, 582 F.3d 863, 874 (8th Cir. 2009). The LMRA is a federal statute that governs lawsuits for breaches of contract between an employer and a labor organization. § 301; 29 U.S.C.A. § 185. At issue here is the common law duty of care sports teams owe to their invitees, and not out of any particular terms in the CBA. *Bush v. St. Louis Regional Convention & Sports Complex Authority*, No. 4:16CV250 JCH, 2016 U.S. Dist. LEXIS 72518, at *13 (E.D. Mo. June 3, 2016). In *Williams* the Eighth Circuit ruled that the drug testing of NFL players was governed by state common law statutes and not the CBA. *Williams* at 868. The court reasoned that because the NFL did not *specifically advise its players* that a formerly accepted supplement contained a newly banned substance that the NFL drug test fell outside the scope of the CBA and is governed by local employment law. *Id.* at 873(emphasis added).

Therefore, state common law governed. Similarly here, Petitioner never informed Ben Wyatt of the concrete behind the endzone. Therefore, Ben Wyatt's claim extends beyond any collective agreement between Ben Wyatt and Petitioner. Ben Wyatt's claim is independent of the CBA. *Williams* at 874.

Even though Ben Wyatt signed a CBA to play professional football his claim against Petitioner for its negligent upkeep at its facility is independent of CBA analysis. *Lingle v. Norge Division of Magic Chef,* 486 U.S. 399, 412 (1988); *Bogan v. GMC*, 500 F.3d 828, 832 (8th Cir. 2007). The court provides a two-prong test in *Williams* that determines this case is not preempted by LMRA § 301. *Williams* at 874. First, the claim here is not based on a provision in the CBA. *Id.* The duties do not arise out of the CBA. R. 18. Second, Ben Wyatt's claim is not "dependent upon the analysis" of the relevant CBA and therefore requires the court to give a separate analysis of the CBA. *Id.*; *Bogan* at 832. Ben Wyatt has proved all elements of negligence separate than what is provided in the CBA. The crucial determination is whether resolution of a state-law claim depends upon the meaning of the CBA. *Williams.* at 877. It does not. Local law is a reflection of Tulania public policy and is more appropriate to resolve Ben Wyatt's negligence claim that happened outside the scope of football. *Id.* at 873. Ben Wyatt's claim is not preempted by the LMRA. Therefore, local law must apply.

B. Petitioner Owed Ben Wyatt A Duty of Care Where They Invited Him To Yulman Stadium And Disregarded His Safety

Under Tulania law Ben Wyatt has proven all necessary elements of common law negligence separately from the language introduced by the CBA. Wyatt has established that Petitioner had a duty to protect him from injury, the Petitioner failed to perform that duty, and the Petitioner's failure proximately caused Wyatt's injury. *L.A.C. ex rel. D.C. v. Ward Parkway Shopping Ctr. Co., L.P.,* 75 S.W.3d 247, 257 (Mo. banc 2002); *Green v. Ariz. Cardinals Football*

Club LLC, 21 F. Supp. 3d 1020, 1027 (E.D. Mo. 2014)[1]. As an invitee, Petitioner owed a duty of protection to Wyatt under "the common law duty of care that sports teams owe to their invitees." *Bush v. St. Louis Reg'l Convention*, No. 4:16CV250 JCH, 2016 WL 3125869, at *2 (E.D. Mo. June 3, 2016). At the time Petitioner invited Ben Wyatt to Yulman Stadium Petitioner owed Wyatt a duty to possess, operate, manage, maintain and control, individually and through its employees Yulman Stadium in a safe manner. Petitioner was required to provide Wyatt with a reasonable standard of care as stadium owner and operator. It must exercise reasonable care to make the facility safe for the purpose of the invitation. Restatement Second, Torts § 343. "Ordinary" or "reasonable care" is the degree of care that a reasonable person of ordinary prudence would exercise under the same circumstances. *Id*. When dealing specifically with a volunteer player in a dangerous game, Petitioner must still exercise ordinary reasonable care to protect athletes from "unreasonable, concealed, or unreasonably increased" risks. (*See Benitez v. New York City Bd. of Educ.,* 73 N.Y.2d 650, 541 N.E.2d 29 (1989). Having exposed concrete directly behind the endzone and concealing it with a cone created a much higher risk of injury for players. For injuries arising out of athletic competitions, courts will look to determine if there is a level of reckless conduct involved, specifically, whether the risk is foreseeable. *Gamble v. Bost*, 901 S.W.2d 182 (Mo. Ct. App. W.D. 1995). Here, Petitioner invited the Green Wave to play in a rivalry game on Thanksgiving Day. Petitioner then allowed almost an entire football game to take place with concrete next to the endzone. Petitioner was more concerned with starting the game on time than player safety. Petitioner owed Ben Wyatt a duty of care as an invitee and recklessly breached its duty.

[1] The standard of negligence is a question of local law to be applied by federal courts in diversity of citizenship. *Palmer v. Hoffman*, 318 U.S. 109, 118 (1943).

C. The Court Should Affirm The Fourteenth Circuit Decision That Petitioner Breached Its Duty of Care

The face mask of a Tulania wide receiver created a large divot next to the endzone. R. 8. This action exposed a slippery concrete slab underneath the soft turf that the athletes are accustomed to playing on. As a weak attempt to resolve the situation, Petitioner breached its duty of care by placing a small cone near the hazard. R. 9. Clearly Petitioner was aware that 1) the surface area was defective and 2) action was required, per their duties, to address this issue. Petitioner addressed the blatant endangerment by placing a small cone. As a business invitor, Yulman Stadium and the Tulania organization are liable for the conditions that caused harm to Ben Wyatt because Petitioner knew this condition existed and that it posed an unreasonable risk to player safety. *Whitlock v. Key Properties I, L.C.*, No. 04-369-CV-W-GAF, 2005 WL 1498845, at *5 (W.D. Mo. June 22, 2005)(*See also* Restatement Second, Torts § 343. Here, as the host of the facility to both spectators and players, Petitioner is required to uphold and maintain a reasonable standard for the players to perform their jobs. Concrete is not commonly found near football fields. *Bush* at *2. Petitioner breached its duty of care by placing a small cone near the dangerous condition. The lack of proper maintenance breached the duty of care owed to Respondent.

D. Petitioner Increased Ben Wyatt's Inherent Risk Of Danger By Having Him Participate In Sport Outside The Scope Of Its Rules

Petitioner's inherit risk defense fails. This defense "relates to the initial issue of whether the defendant had a duty to protect the plaintiff from the risk of harm." *Bennett v. Hidden Valley Golf & Ski, Inc*., 318 F.3d 868, 873 (8th Cir. 2003). While implied primary assumption of risk pertains to a party voluntarily engaging in incidental risks, this applies when the risk is reasonably

foreseeable. Generally, sports stadiums do not owe duties to athletes when the risk inherent in the sport. *Knight v. Jewett*, 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696 (1992). However, this changes when stadiums have a duty to not *increase* the risk more than what is inherent to the sport. *Allan v. Snow Summit, Inc.*, 51 Cal. App. 4th 1358, 59 Cal. Rptr. 2d 813 (4th Dist. 1996). As encompassed in the rule of torts:

> Participation in a game involves a manifestation of consent to those bodily contacts which are permitted by the rules of the game. Restatement Torts, 2d, § 50, comment b. However, there is general agreement that an intentional act causing injury, which goes beyond what is ordinarily permissible, is an assault and battery for which recovery may be had. 4 Am.Jur.2d, Amusements and Exhibitions, § 86.

Ritchie-Gamester v. City of Berkley, 461 Mich. 73, 79, 597 N.W.2d 517, 520 (1999).

Instead Petitioner "acted intentionally or recklessly in causing the plaintiff's injury". *Mammoth Mountain Ski Area v. Graham*, 135 Cal. App. 4th 1367, 38 Cal. Rptr. 3d 422 (3d Dist. 2006).

Petitioner fully acknowledged the hazard next to the endzone that players would inevitably encounter, but took inappropriate action to remedy it. Petitioner took no precautionary measures to cover the patch with a surface that would be more beneficial to the players and did not address it further than, literally, concealing it. Petitioner not only risked the health of Wyatt and the Green Wave but also increased the injury risk to its own team. Therefore, Petitioner cannot claim Wyatt assumed the inherit risk of sport because the patch of concreate was not foreseeable when he consented to play.

E. Petitioner's Actions Directly Caused Ben Wyatt's Injury

To prove causation, Ben Wyatt must prove that Petitioner's actions were the direct cause of his injury and a clear connection between the actions can be linked. *Whitlock v. Key Properties I, L.C.*, No. 04-369-CV-W-GAF, 2005 WL 1498845, at *10 (W.D. Mo. June 22, 2005). Similarly,

to prove Petitioner's negligence caused the injury, Wyatt must show that, "absent the negligent act, the injury would not have occurred." *Rose v. Thompson*, 346 Mo. 395, 141 S.W.2d 824, 829 (Mo.1940). Evidence must show that the result was a reasonable and understandable consequence to have occurred in the particular incident. *Davis v. Schroeder*, 291 F. 47, 49 (8th Cir.1923).

Here, a patch of concrete near an area where professional athletes are running full speed may cause injury. The Circuit court analogized Petitioner's action of placing the small cone as putting a sticky note on a portion of a floor that is going to collapse. R. 9. Respondent now takes it a step further. Petitioner placed a band aid over a bullet hole and now the blood is on Petitioner's hands. Therefore, Petitioner's failure to accurately maintain the field after the hole was made contributed Wyatt's career ending injury.

CONCLUSION

WHEREFORE, for the foregoing reasons, we ask this Court to affirm the decision of the Fourteenth Circuit Court of Appeals.

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Team 13,*Counsel for Respondent*