In the

SUPREME COURT OF
THE UNITED STATES OF AMERICA

TULANIA SIRENS FOOTBALL TEAM,
Petitioner.

v.

BEN WYATT and THE CENTER FOR PEOPLE AGAINST SEXUALIZATION OF WOMEN'S BODIES,
Respondent.

ON WRIT OF CERTIORARI TO THE
APPELLATE COURT OF TULANIA

BRIEF FOR RESPONDENT

ORAL ARGUMENT REQUESTED

TEAM 15

QUESTIONS PRESENTED

I. WHETHER PROFESSIONAL SPORTS TEAMS ARE PROTECTED BY THEIR FIRST AMENDMENT RIGHTS TO DISPLAY AN OBSCENE MASCOT.

II. WHETHER AN OPPOSING TEAM CAN BE FOUND NEGLIGENT FOR A PLAYER'S INJURIES DURING A GAME THAT RESULTED FROM AN IMPERFECTION IN THE STADIUM.

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CONSTITUTIONAL PROVISIONS

First Amendment of Constitution of the United States of the America: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

STATEMENT OF FACTS

A star wide receiver for the New Orleans Green Wave ("Green Wave"), Ben Wyatt ("Wyatt") was set to play in the division rivalry Thanksgiving Day football game against the Tulania Sirens ("Sirens") at Yulman Stadium in Tulania. (R at 17) The Thanksgiving Day game between the Sirens and the Green Wave had been highly anticipated by fans of both teams. (R. at 12) The game was viewed in person or in the comfort in ones' home with family members, friends, and children. (R at 12)

The Sirens recreated their mascot portraying a topless mermaid. (R at 12) As a marketing tactic to promote the Thanksgiving Day game and introduce their new mascot, the Sirens mailed unsolicited pamphlets to residents of Tulania depicting the topless mermaid. (R at 12) Wyatt and his family were a recipient of the promotions despite not requesting such material. (R. at 12) Wyatt, along with many other community members and the Center for People Against Sexualization of Women's Bodies ("PASWB"), were offended by the topless mermaid Siren mascot and stated that such a mascot "appeals to the prurient interest and is not how the city of Tulania would like to be portrayed. (R at 12) In response to the community's concerns, the city of Tulania passed Section 12 of the Tulania Penal Code stating that "[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, any obscene matter is guilty of a misdemeanor." (R at 12)

Wyatt entered the Sirens' stadium on game day and was disturbed to see fans, as well as his wife and children, exposed to a giant topless mermaid in the middle of the field and several depictions of the same topless mermaid portrayed throughout the stadium including on the flyers

being passed to every ticket holder entering into the stadium. (R at 12) Still troubled by the Sirens' new mascot, Wyatt took to the field for pre-game warm ups. (R at 12,17)

During the pregame warmups for Thanksgiving Day football game against the Sirens in Tulania, a player on the Sirens dove for a catch and his face mask hit the turf and left behind a partially exposed patch of cement. (R at 17) The missing turf was located approximately ten (10) feet behind the left side of the end zone. (R at 17) A member of the Tulania staff placed an orange cone over the affected area of a "sizeable ditch". (R at 17,9) During the fourth quarter, Wyatt caught a pass and ran the ball into the end zone, and as his force was carrying him into the endzone, Wyatt saw the orange cone and attempted to avoid the cone by making a sharp right, but his foot landed in the cement patch that was not covered by the cone. (R at 17) Wyatt slipped and fell, injuring his left knee and ending his football career. (R at 17)

With his agile feet and steady hands, the New Orleans Green Wave relies on Wyatt to score touchdowns and ultimately win games, and as such is a vital asset in the team's offensive strategies. (R at 17) This injury has left Wyatt unable to play football, and has left the New Orleans Green Wave without their top preforming wide receiver. (R at 17)

The first action involving Wyatt and the PASWB was enjoined to bring a case against the Sirens' use of their topless mermaid mascot, and the second action involving Wyatt seeking to hold the Sirens' negligent for the injuries he sustained during the Thanksgiving Day game at Yulman Stadium due to missing turf, was brought to the United States District Court for the Southern District Court of Tulania and consolidated. (R at 11) The District Court for the Southern District Court of Tulania held that use Sirens' mascot was protected under the first amendment, in addition to holding that the Sirens' were the proximate cause of Wyatt's injury, thus allowing Wyatt to recover damages. (R at 16,20)

On appeal, the United States Court of Appeals for the Fourteenth Circuit reversed the District Court's decision regarding the Sirens' mascot holding that the mascot was indeed obscene in nature, and affirmed that Wyatt's injury was the result of the Sirens' negligence. (R at 10)

The Sirens' appeal the decision of the appellate court before this court.

SUMMARY OF THE ARGUMENT

The Appellate Court erroneously denied Wyatt's and PASWB's request to find the Sirens' mascot obscene. Obscenity is not protected by the First Amendment and therefore does not receive the same protections as other protected First Amendment speech. The Sirens topless mermaid does not fulfill the requirements established by the United States Supreme Court in *Miller v. California*, 413 U.S. 15 (1973). The Sirens topless mascot does not meet contemporary community standards, it offensively depicts sexual conduct, and it lacks serious artistic value. Therefore, it does not pass Constitutional muster and the mascot is denied protections provided for in the First Amendment.

The Appellate Court correctly affirmed the District Court's finding that the Sirens' negligence was the proximate cause of Wyatt's career ending injury. The Sirens' owed a duty of care to Wyatt in the form of providing a safe environment to play the game of football by avoiding exposing employees to unreasonable risks of harm and warning players of the existence of possible dangers which cannot be reasonably foreseeable. By not warning the Green Wave of the missing turf, and properly fixing the hazard, the Sirens' did not fulfill this duty and is therefore negligent. This negligence was the proximate cause of Wyatt's career ending injury and should be entitled to recover damages.

ARGUMENT

I. WHETHER PROFESSIONAL SPORTS TEAMS ARE PROTECTED BY THEIR FIRST AMENDMENT RIGHTS TO DISPLAY AN OBSCENE MASCOT.

A. Tulania Sirens' topless mermaid mascot is obscene.

"I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it…" *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964). In the words of Supreme Court Justice Stewart, it was then and still is now nearly impossible to concretely define obscenity. Since Justice Stewart's infamous words, the court has attempted to define and redefine obscenity to no avail. The most exact definition of obscenity can be found in what is known as the Miller Test. In *Miller v. California* 413 U.S. 15 (1973), the Supreme Court outlined three factors to consider when analyzing whether something constitutes obscenity: (a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appealed to the prurient interest, (b) whether the work depicted or described, in a patently offensive way, *sexual conduct specifically defined by the applicable state law*, as written or authoritatively construed, and (c) whether the work, taken as a whole, lacked serious literary, artistic, political, or scientific value. The purpose of this test was—and still is—to clarify, within the courts the "intractable obscenity problem" Id. at 16. and to "formulate standards more concrete than those in the past." *Id*. at 20. Although the Miller Test is more concrete than Justice Stewart's "I know it when I see it" definition, the court has not been able to be decisive in how the test is applied.

Because of this lack of certainty on the matter, this court should seek to provide a definitive, and well-rounded definition for obscenity, especially as it regards the obscenity of the Sirens

topless mascot. What is clear in this case is that the mascot was bare chested. That sort of display is often blurred out in movies, videos, or magazines, unless they are directed specifically toward consenting adults. "However, in considering the permissible meaning of 'obscene'…we must begin with the Supreme Court's treatment of that statute in Roth. That case contains the oft-quoted -- although difficult to apply -- statement that material is 'obscene' if: 'to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeal to prurient interest.' *United States v. Klaw*, 350 F.2d 155, 164 (2d Cir. 1965). It is not common practice to have bare chested women in the public eye, much less at a community gathering such as a football game. This simple fact contradicts the lower court's argument that a progressive society is more accepting of these types of displays. This argument is not completely accurate. Society has not so progressed that public nudity at a community gathering involving children is suddenly acceptable in the public eye, especially when it cannot be said that a woman can freely walk the streets or, more specifically, attend that very same football game bare chested without offending some, if not all, the people present.

Generally, mascots are the main cheerleaders of their respective sport. They can often be seen getting the crowd revved up by dancing, throwing prizes, or in photos on fan gear or with fans themselves. Fans sometimes wear gear with depictions of the mascot on it or even go as far as dressing up as the mascot itself. Assuming a fan was interested in dressing up as the Sirens topless mascot, this would require him/her to be bare chested. Assuming further that a woman, or several women, attended the Tulania Thanksgiving Day football game fully topless, this could in fact be seen as offensive, at least to some people, and it would most certainly appeal to the prurient interests of some men attending.

B. Contemporary community standards, taken as a whole, appeal to the prurient interest.

The majority in Miller unambiguously rejected the argument that what appeals to the "prurient interest" or is "patently offensive" should be governed by reference to a national standard. What matters are the standards of the local community where the event(s) took place. In the instant case, while society may have undoubtedly progressed at a national level, this does not mean that the people of Tulania have also joined in. Based on the decision in Miller, the local community standard need be applied, and according to the facts of the case, not only were Wyatt, his wife and their local organization offended by the mascot, the local community was also offended by the mascot as well. (R at 12).

Community standard aside, the obscene material, in its entirety, must appeal to the prurient interest. The court defined prurient as material that incites lustful thoughts and provoke normal healthy desires. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985). While it could be argued that an adult could control their lustful thoughts, this would not protect innocent children who may not have developed such discipline. "[T]he government can restrict expression that would be obscene from a minor's perspective—even though it would not be obscene in an adult's view—where minors are either a *captive audience* or the *intended recipients* of the speech. *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 305 (3d Cir. 2013). Here, minors were not the *intended recipients,* however, by attending the game and being exposed to the topless mascot, they are a *captive audience* subjected to the forced viewing of the mascot. Moreover, fliers depicting the topless mascot were handed out at the entrance to all those in attendance, there were also other materials around the stadium with depictions of the mascot, including the physical presence of the topless mascot herself.

> Material which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In

> other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined. Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults…

Ginsberg v. New York, 390 U.S. 629, 636, (1968). The court has found that sex and obscenity are not synonymous, "[a] reviewing court must, of necessity, look at the context of the material, as well as its content." *Kois v. Wisconsin*, 408 U.S. 229, 231, (1972). In the instant case, context as well as content matters heavily when determining whether the "dominant theme" –the topless mascot— appeals to the "prurient" interests of those attending. We argue that it does. Not only does a community in Tulania find the mascot offensive, the context for which the mascot is being presented includes children. Furthermore, if a female mascot with her breasts exposed could in some way entice fans to do the same, in no way would that depiction be acceptable by community standards and would most certainly appeal to the prurient interest of some, if not most people, in Tulania.

C. Sirens mascot depicts offensively depicts sexual conduct.

The Tulania Penal Code states the following: "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" Section 12 Tulania Penal Code (2019). The argument brought forth is that the Tulania statute is too vague and overbroad and therefore does not specifically define the meaning of obscenity. It is important to note however, that the statute was written as a result of the mailing and distribution of material mailed out to members of the community (R at 12), because

members of the community were offended by the depiction of a topless mermaid. When reading the statute, one can see the specificity in regard to mailing and distribution of obscene materials.

> That clearly drawn regulatory legislation to protect the public from the evils inherent in the dissemination of obscene matter, at least by the application of criminal sanctions, is not barred by the free speech guarantees of the First Amendment…the concept of obscenity has heretofore been accepted as an adequate standard… [I]n the *Winters* case (*Winter v. New York*, 333 U.S. 507, 518 (1948)), the court not only indicated that collocation of the very words found in section 1141 of our Penal Law, 'obscene'…, is sufficiently 'well understood through long use in the criminal law' to satisfy the due process requirements of definiteness and certainty"

Brown v. Kingsley Books, Inc., 1 N.Y.2d 177, 182, 151 N.Y.S.2d 639, 642, 134 N.E.2d 461, 463 (1956). The Tulania statute provides apt words such as "knowingly", "distribute" and "exhibit" obscene material. Since the Tulania statute was written as a direct result of members' in the community offense to the topless mascot, it cannot be said now that the football team did not know or could not have known what the statute sought to protect. Not only is the mermaid exhibited via pamphlets, fliers, fan gear and other images, but a physical mascot was also present at the game. This exhibition would constitute a violation of the Tulania penal code. The argument that the Tulania statute is vague or overbreadth is weak. "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. No one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids." *People v. Ridens*, 59 Ill. 2d 362, 365, 321 N.E.2d 264, 265 (1974). The statute is clear, any obscene matter exhibited, printed, published and sent is in violation of the Tulania statute. The stadium, nor the team, had any regard for the statute and continued to distribute and sale materials depicting the topless mascot in violation of the statute.

D. Sirens mascot lacks serious literary, artistic, political, or scientific value.

Determining what is considered "art" per se is vital to establishing if the mascot is in fact art. "For example, medical books for the education of physicians and related personnel necessarily use graphic illustrations and descriptions of human anatomy." *Miller v. California*, 413 U.S. 15, 26, (1973). The social redeeming value of the content should significantly outweigh the content or in this case depiction itself. In the medical book example from *Miller*, the social redeeming value is education, and therefore the content within it cannot be said to be offensive or obscene because it is literary, and scientific in nature. In the instant case, the topless mascot certainly does not meet the definition of literally, political, or scientific value, because there is no social redeeming value to its depiction. Furthermore, even if this court determines that the topless mascot is art by legal definition, the court must then decide whether it has serious artistic value. We would argue it does not. Nothing about the Sirens topless mascot is part of Tulania history or tradition, that would give it some sort of redeeming social value. The dominant theme of the topless mascot which is at the center of the issue presented is not necessarily the mascot itself, but the fact that the mascot is depicted with exposed breasts. While "contemporary community standards," *Roth* v. *United States*, 354 U.S., at 489, must leave room for some latitude of judgment, and while there is an undeniably subjective element in the test as a whole, the "dominance" of the theme is a question of constitutional fact. *Kois v. Wisconsin*, 408 U.S. 229, 232 (1972). The Supreme Court has found that obscene material coupled with art or literature can be seen to not be wholly obscene or offensive. Alone however, as is the case with the Tulania mascot, there is nothing about the mascot that expresses any artistic value. It is not a historically represented form of art in the community, it is not a political symbol of any sort, there is nothing scientific or literally about the mascot. There is, simply put, no redeeming social

value to having the mascot be depicted with exposed breasts. It is a mascot like other state mascots and therefore doesn't merit any special protections under the law.

E. Time, Place, and Manner restriction furthers significant government interest; therefore, the mascot is obscene.

PASWB is seeking to restrict the use of the Sirens topless mascot because it is offensive and obscene. "The First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 647, 101 S. Ct. 2559, 2564 (1981). Here, the Tulania football team's mascot will be displayed during a time and in a place where families and children will be present. Additionally, it will be displayed in a manner that has been viewed by PASWB and some members of the community as offensive and obscene. In order for the restriction to be upheld under the law as a reasonable time, place, and manner restriction, a statute must "(1) not be based on content or subject matter, (2) be narrowly drawn, (3) further a significant governmental interest, and (4) allow for sufficient alternative forms of expression." *Am. Booksellers v. Webb*, 919 F.2d 1493, 1495 (11th Cir. 1990).

First, the restriction which those opposed to the mascot are seeking to enforce are not based on the content or subject matter of the speech, but rather the act (or lack thereof) of the speech itself. "(1) content-based restrictions on speech survive constitutional scrutiny only under extraordinary circumstances; but (2) material judged 'obscene' under the appropriate constitutional standard is not protected by the First Amendment; (3) indirect burdens placed on protected speech in an effort to regulate obscenity must be supported by important state interests and should not be unnecessarily burdensome; and (4) the state's interest in protecting its youth

justifies a limited burden on free expression. *Am. Booksellers v. Webb*, 919 F.2d 1493, 1500-01 (11th Cir. 1990)

Secondly, because obscenity is not protected by the First Amendment, it must be narrowly drawn. This means it must use the least restrictive means to achieve its purpose. It is our contention that requiring the Sirens topless mascot to cover her breasts is the least restrictive means because it would allow the mascot to perform within her mascot duties without offending the Tulania community. Thirdly, the restriction furthers a significant government interest which is to protect the forced viewing of the mascot by children who were in attendance of the game or who may be exposed to any materials with the mascot on it. Lastly, there is no other restrictive means available to control the mascot except to require the mascot be removed or covered up.

II. WHETHER AN OPPOSING TEAM CAN BE FOUND NEGLIGENT FOR PLAYER'S INJURIES DURING A GAME RESULTED FROM THE IMPERFECTION OF THE STADIUM.

A. The Tulania Sirens failed to perform a duty to protect Ben Wyatt from his career ending injury.

A brief summary of the relevant facts regarding the second issue is warranted prior to analysis as a respectful reminder. (R at 17) Wyatt, was a wide receiver for the Green Wave. (R at 17) During the pregame warmups for Thanksgiving Day football game against the Sirens in Tulania, a player on the Sirens dove for a catch and his face mask hit the turf and left behind a partially exposed patch of cement. (R at 17) The missing turf was located approximately ten (10) feet behind the left side of the endzone. (R at 17) A member of the Tulania staff placed an orange cone over the affected area. (R at 17) During the fourth quarter, Wyatt caught a pass and ran the ball into the endzone, and as his force was carrying him into the endzone, Wyatt saw the orange cone and attempted to avoid the cone by making a sharp right, but his foot landed in the cement

patch that was not covered by the cone. (R at 17) Wyatt slipped and fell, injuring his left knee and ending his football career. (R at 17)

Due to his talented abilities, Wyatt was deemed a critical member of the Green Wave when it came to their offensive plays. (R at 17) This injury has left Wyatt unable to play football, and has left the Green Wave without their top preforming wide receiver. (R at 17) The Sirens are responsible for Wyatt's career ending injury as they failed to protect Wyatt from such an injury.

The Sirens, like all professional teams, are subject to a duty of care to all players, including their invitees. In order for to determine whether the Sirens were negligent, Ben Wyatt must prove that the Sirens failed to perform a duty in addition to the Sirens' failure proximately caused the injury he sustained during the Thanksgiving Day game. *Green v. Arizonia Cardinals Football Club LLC,* 21 F.Supp. 3d 1020, 1027 (E.D. Mo. 2014). Moreover, in any action involving negligence "the plaintiff must establish that the defendant's failure proximately caused injury, the defendant failed to perform that duty, and the defendant's failure proximately caused injury to the plaintiff." *L.A.C., ex rel. D.C. v. Ward Parkway Shopping Center Company, L.P.,* 75 S.W.3d 247, 257 (Mo. Banc 2002). In *Bush v. St. Louis Regulation Convention & Sports Complex Authority*, the United States District Court held the home team had a duty to warn the visiting team of the dangerous condition existing in the stadium. In this particular case, Bush was employed by the San Francisco 49ers and during an away game against the St. Louis Rams at the Edward Jones Dome in St. Louis, Missouri, he injured his left knee as he was trying to slow down after a play but slipped on a concrete surface surrounding the turf playing field. *Bush v. St. Louis Regulation Convention & Sports Complex Authority,* No. 4:16CV250 JCH, 2016 WL 3125869, at *2 (E.D. Mo. June 3, 2016). The negligence claim here is based on the "common law duty of care that sports teams owe their invitees". *Id.* In this case, the duty required the

Sirens to correct or, at the very least, warn the Green Wave of the dangerous conditions in the Yulman Stadium, including maintenance of the turf field, in a reasonably safe condition. Furthermore, the Supreme Court defines proximate cause as "any cause which, in natural or probable sequence, produced the injury complained of." *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 131 S. Ct. 2630, 2632, 180 L. Ed. 2d 637 (2011). It is obvious that Wyatt's career ending injury was proximately caused by the Sirens' complete lack of effort to properly fix the patch of missing turf. Finally, the Sirens' omitted to warn their invitees of the dangerous condition existing on ten (10) feet behind the left side of the end zone. Had the patch of missing turf been fixed, Wyatt's injury would not have occurred and he could have continued to play professionally.

The negligence claim arises out of common law duties to provide a safe working environment, to avoid exposing employees to an unreasonable risk of harm, or to simply warn employees of the existence of such possible dangers which they could not reasonably be expected to foresee. *Carmen v. Wieland*, 406 S.W. 3d 70, 76-77 (Mo. Ct. App. 2013). The team is the acting employer and, as such, it has such duties to their players as well as the invitees. To determine whether the Sirens provided as safe working environment, avoided exposing all players to an unreasonable risk of harm is measured by whether a reasonably prudent person would have anticipated such danger and could have mitigated against it. *Smith v. Dewitt & Associates*, 279 S.W. 3d 220, 224 (Mo. Ct. App. 2009). The patch of missing turf covered by a cone, was an unreasonable risk of harm that the Sirens' failed to warn the Green Wave football team. Wyatt, a seasoned professional football player, could not have reasonably anticipated a patch of missing turf, thus he was unable to provide against such danger. Wyatt tried to avoid the

missing turf only once he ran into the end zone by side stepping the affected area upon seeing the cone, however, that was what caused his life altering injury.

B. The Collective Bargaining Agreement does not preempt the Sirens' duty of care owed to Ben Wyatt.

The Petitioner insists that the contractual agreement of the Collective Bargaining Agreement ("CBA") eliminates the duty of care to Wyatt, however, there is no such standard of care included in the agreement that applies to Wyatt's claims. "[M]ere reference to part of the CBA is insufficient for preemption; the relevant inquiry is whether the resolution of the claim depends upon the meaning of the CBA." *Green*, 21 F. Supp.3d at 1028. In order to determine whether the CBA is preempted, the Court must assess the source of Wyatt's claims, or whether the claims are sustainably dependent upon an interpretation of the CBA. *Bush v. St. Louis Regulation Convention & Sports Complex Authority*, No. 4:16CV250 JCH, 2016 WL 3125869, at *2 (E.D. Mo. June 3, 2016)(quoting *Green*, 21 F. Supp.3d at 1027). The Sirens do not demonstrate how the interpretation of any section of the CBA is essential to Wyatt's case, only that the agreement eliminates the duty of care Wyatt is attempting to claim. Reference to the CBA is not necessary as the Sirens' do not specify a section of the CBA to interpret in the first place.

Wyatt's claim is solely founded upon common law employer-employee relationship and not out of the text of the CBA. And, even if CBA contained content regarding such standards of care, Wyatt's claims can be determined in by those standards set forth in the common law of Tulania. As previously touched upon, the negligence claim arises out of common law duties to provide a safe working environment, avoid exposing employees to an unreasonable risk of harm, or to simply warn employee of the existence of such dangers which they could not reasonably be expected to foresee. *Carmen v. Wieland*, 406 S.W. 3d 70, 76-77 (Mo. Ct. App. 2013). In other

words, the CBA does not eliminate the Sirens' duty of care as a duty warn of such dangerous field conditions exist outside the CBA.

As a wide receiver, Wyatt's main task was to score touchdowns. And, similar to any team partaking in the sport of football, that is the whole point of the game: to score as many touchdowns as possible. How could a player know, without a warning, that there was a sizable hole in the end zone? It is not a part of Wyatt's job description to be mindful of cones, torn up turf, and exposed concrete in the end zones. It can be rightly assumed, too, that all wide receivers playing at such a caliber of football would not be expected to be conscious of such dangers on the field, especially where the game is premised on entering into the end zone (at any angle) to score a touchdown.

C. An assumption of risk is not applicable as a complete defense for the Sirens since they created the risk of injury.

Of course, there is an inherent risk in football. As a professional football player, Wyatt, is well aware of this risk. However, those individuals participating in sports do not necessarily assume risks created by the team's negligence. *Martin v. Buzan*, 857 S.W.2d 366 (Mo. App. 1993). Furthermore, teams are not dismissed from liability for every failure to exercise due care merely because of an inherent risk in the sport. *See Sheppard v. Midway R-1 School District*, 904 S.W.2d at 264 (Mo. App. 1995). In this case, the assumption of risk does not constitute as a complete defense as the Sirens created the risk of injury by simply placing a cone over the missing piece of turf. This in itself is definitely not inherent to the game of football. Evidence established that the missing piece of missing turf was not fixed properly for the game and, therefore, unreasonably safe. Additionally, the evidence showed that Wyatt's injury resulted not from a bad-side step, which could be considered inherent to the sport of football, but rather from

the missing piece of turf. In turn, while Wyatt assumed the inherent risk of the sport, Wyatt did not assume of the Sirens' negligent precautions of their dangerous facility. The Sirens' lack of warning of the hazardous field condition, and not repairing the missing turf is undoubtedly the proximate cause of Wyatt's injury, thus damages should be awarded.

CONCLUSION

For the foregoing reasons, Wyatt and PASWB request that this Court reverse the decision of the Appellate Court of Tulania and hold that the Tulania Sirens is not protected by the First Amendment rights to display an obscene mascot. Additionally, Wyatt requests that this Court affirms the Appellate Court of Tulania's decision and hold Wyatt's injury was the result of negligence on behalf of the Tulanis Sirens'.