NO.09-215

In the

Supreme Court of the United States

February Term, 2020

Tulania Sirens Football Team,

Petitioner,

v.

Ben Wyatt; The Center for People Against Sexualization of Women's Bodies;

Respondent.

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

BRIEF FOR BEN WYATT AND THE CENTER FOR PEOPLE AGAINST THE SEXULIZATION OF WOMEN'S BODIES

Team 19

Attorney for Respondents

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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?

Opinions Below

The opinion of the Tulania Court of Appeals is unreported but can be found in the Record on Appeal. (R. at 5-10). The unreported opinion of the United States District Court for the Southern District of Tulania can be found in the Record on Appeal. (R. at 12-20).

Jurisdiction

The Tulania Courts of Appeals issued its opinion after hearing the appeal from the United States District Court for the Southern District of Tulania pursuant to 28 U.S.C. §1291. This Court granted certiorari and has jurisdiction pursuant to 28 U.S.C. §1254(1).

Statement of Facts

Obscenity

Ben Wyatt ("Wyatt") is a wide receiver for the New Orleans Green Wave and resident of Tulania. (R. at 12) On Thanksgiving Day, Wyatt participated in a football game against the Tulania Sirens ("Sirens"). Due to the game being played on Thanksgiving Day, the event is greatly anticipated by the Tulania and New Orleans communities and is attended and watched on television by many families and children. (R. at 12). Recently, the Sirens recreated their mascot, depicting a topless bare breast mermaid, to promote the rebranding of the Sirens franchise. (R. at 12). To promote their rebranding the Sirens mailed unsolicited pamphlets to residents of Tulania featuring the new mascot with the location and time of the Thanksgiving Day game and a message in bold letters that read: "Show your support for our new mascot! Purchase Sirens gear in store and online today!" (R. at 12). Wyatt received one of the pamphlets in the mail at his Tulania home that he shares with his family. (R. at 12). Wyatt and many other members of the Tulania community were offended by the new mascot. (R. at 12). One of these groups, the Center for People Against the Sexualization of Women's Bodies ("PAWSB"), which Wyatt is a member of, stated that the new mascot appeals to the prurient interest and it is not indicative of how the city of Tulania would like to be portrayed. (R. at 12). Upon receiving additional public outcry related to the mascot the city of Tulania passed a law 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 has in their possession with intent to distribute, any obscene matter is guilty of a misdemeanor. Sec. 12 Tulania Penal ode (2019). (R. at 12).

On game day Wyatt enter Yulman Stadium, the home stadium of the Sirens, and saw the mascot displayed in the middle of the field. (R. at 12). Additionally, depictions of the mascot were featured throughout the stadium, as well as on fliers that were passed out to every member

of the community that passed by the stadium. (R. at 12). Wyatt and his wife, Leslie Knope ("Knope"), who is also a member of PAWSB, were extremely offended by the presence of the mascot. (R. at 12). Furthermore, their young children were in attendance and were exposed to the bare chest mermaid mascot. (R. at 12). There were also thousands of other children watching the game in the stadium and at home with their families. (R. at 12).

Negligence

The Thanksgiving Day Game between Tulania Sirens and New Orleans Green Wave is a widely anticipated division rivalry game. (R at 17). Plaintiff Ben Wyatt was a wide receiver for the New Orleans Green Wave in the Thanksgiving Day Game against the Tulania Sirens that was played at Yulman Stadium in Tulania. (R at 17). During pregame warmups, a player's face mask dug into the turf about 10 feet behind the endzone leaving behind a large exposed area of cement. (R at 17). A Tulania staff member addressed the situation by placing an orange cone over the exposed area. (R at 17).

During the fourth quarter of the game Wyatt caught a touchdown pass in the back of the endzone. (R at 17). During the catch Wyatt's momentum carried him towards the orange cone. (R at 17). Wyatt attempted to side step the cone and while doing so his left foot landed on an exposed area of cement that the cone did not cover. (R at 17). Wyatt slipped and fell injuring his left knee ending his season. (R at 17). Not only did Mr. Wyatt's knee injury end his season, it ended his career. (R at 5).

Standard of Review

This Court will review all matters de novo. (R. at 2).

Summary of Arguments

The Tulania Sirens Football Team exposed children to obscene material and players to hazardous playing conditions. The Tulania Court of Appeals held the Tulania Sirens Football Team's mascot was obscene and that they were liable for Ben Wyatt's career ending injury which was sustained by slipping on a divot in the turf. This Court should affirm on both counts.

Obscenity

The Fourteenth Circuit correctly ruled that Sirens Mascot constituted an obscene image because it appeals to the prurient interest, is patently offensive according to the applicable state statute and lacks the requisite artistic or political value to enjoy the protections of the First Amendment. Applying contemporary community standards, the average person would find that the Mascot violates appeals to the prurient interest. Because in an effort to sell tickets the Sirens sent unsolicited brochures featuring the Mascot to residents of Tulania. The depiction of the indecent Mascot in the stadium graduated from indecent to obscene because they were minors present in the stadium. The depiction of the Mascot violated the relevant state law because the Mascot was displayed in a patently offensive manner in the presence of minors. Viewed through the lens of the reasonable person standard the Mascot lacks the requisite political or artistic value to enjoy the protections of the First Amendment.

Negligence

The Tulania Court of Appeals correctly decided that the Tulania Sirens are liable for the opposing team's star Ben Wyatt's knee injury which he sustained during the Thanksgiving Day Game. Section 301 of the does not preempt Mr. Wyatt's knee injury. The duty not to expose employees to unreasonable risks of harm and to duty to warn about dangerous conditions are stand-alone common law state duties. Adjudicating any breach of these duties does not require interpretation of the Tulania Sirens' league collective bargaining agreement.

Thoughtful consideration of the aim of section 301 of the LMRA demonstrates why this claim should not be preempted. Petitioners argue that the uniformity of the federal labor common law would be disturbed if individual states were granted the ability to interpret labor contracts. Here, this issue is moot because the Court does not need to interpret a collective bargaining agreement. Allowing this negligence claim to be preempted would not only depart from Supreme Court precedent, it would compromise the state's ability to protect its citizens.

The Tulania Sirens did owe Mr. Wyatt a common law duty of care that sports teams owe their invitees. The Tulania Sirens owed Mr. Wyatt the duties to maintain a safe playing surface and surrounding areas in a reasonably safe condition, and to remove or warn of dangerous conditions. The Sirens breached all three duties. The duty to remove dangerous conditions was breached the moment the Thanksgiving Day Game started and the missing patch of turf was not fixed. The duty to warn was breached when the team insufficiently put merely one orange cone on top of the exposed cement which only partially covered the affected area. As a result of both duties to remove and warn of dangerous conditions were breached the duty to maintain reasonably safe playing conditions was also breached.

Argument

I. THE DEFENDANT'S MASCOT SATISFIES ALL THREE PRONGS OF THE OBSCENITY TEST BECAUSE THE OBSCENE IMAGERY BECAUSE APPLY CONTEMPORARY COMMUNITY STANDARDS THE AVERAGE PERSON WOULD FIND THE MASCOT APPEALS TO THE PRURIENT, THE MASCOT DEPICTS SEXUAL CONDUCT IN A PATENTLY OFFENSIVE WAY THAT SPECIFICALLY DEFINED BY THE TULANIA STATUTE AND THE MASCOT TAKEN AS WHOLE LACKS ARTISTIC OR POLITICAL VALUE.

The First Amendment of the Constitution provides that no law shall be passed that abridges one's freedom of speech. USCS Const. Amend. 1. However, the protection of the First Amendment does not extend to obscene materials. *Roth v. United States*, 354 U.S. 476, 492, 77 S. Ct. 1304, 1313, 1 L. Ed. 2d 1498 (1957). The federal obscenity statute, 18 U.S.C. §1461, provides in pertinent part: Every lewd, lascivious, filthy or vile article or device is considered obscene. 18 U.S.C. §1461. To limit what could be construed as the vague language of the statute, in *Miller*, the Court provides an interpretive lens to determine if material shall be classified as obscene: (1) Applying contemporary community standards would the average person find the material taken as whole appeals to the prurient interest; (2) Whether the material depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state statute and (3) whether the work taken as a whole, lacks serious artistic or political value. *Miller v. California*, 413 U.S. 15, 24, 93 S. Ct. 2607, 2615, 37 L. Ed. 2d 419 (1973).

The following argument will analyze the image of the bare chested Tulania Sirens mascot ("The Mascot") through the interpretative lens provided in Miller. We will analyze how the use of the image coupled with manner the petitioner chose to disseminate it effectively violated all the prongs of the obscenity test and how every vehicle the petitioner distributed the images through exposed minors to the Mascot. Effectively disarming parents of their rights to control or determine how minors are exposed to such obscene images.

A. Applying contemporary community standards, the average person would find the image in question appeals to the prurient interest.

Material is considered obscene when the average person applying the contemporary community standards to the material would find that the material as a whole appeals to the prurient interest. *Kois v. Wisconsin*, 408 U.S. 229, 230, 92 S. Ct. 2245, 2246, 33 L. Ed. 2d 312 (1972). Prurient is defined as the uneasy with desire or lascivious longings or lewd. (R. at 7). Every lewd, lascivious, filthy or vile article or device is considered obscene and is declared nonmailable. 18 U.S.C. §1461. The country is too large and diverse to establish a national standard for obscenity, therefore the standards of the communities where the material in question is disseminated governs if it is obscene or not. *Miller,* 413 U.S. at 2607.

States have a legitimate interest in prohibiting the dissemination or exhibition of obscene material especially when the mode of dissemination carries with it, danger of offending the sensibilities of unwilling recipients or minors. *Miller,* 413 U.S. at 2612. [N]udity may not be exhibited without limit by films or pictures exhibited or sold in places of public accommodation no more than nudity can be exhibited or sold without limit in public places. *Miller*, 413 U.S. at 2615-17. In summation if a business invites minors into its doors, they have a duty not to expose them to obscene materials. *Id*.

In *Kois*, the Court held that a picture of a naked man and woman embracing was not obscene, because they were coupled with an article that validated the display of the pictures in the manner that they were presented. *Kois,* U.S. at 2245-46. In *Miller* the Court ruled that pamphlets displaying sexual content was obscene because the recipients did not request the information. *Miller,* U.S. at 2611. The court also held, because the country is so large and diverse that there is no applicable national standard to determine obscenity. *Id*. The standards of the communities where the material is disseminated dictates if the material is considered obscene or not. *Id*.

1. *The pamphlet featuring the Mascot effectively violated the federal obscenity statute because it was not requested by its recipients.*

In the instant case, the Sirens mailed unsolicited pamphlets featuring the Mascot to the residents of Tulania. By utilizing the mail, the Sirens did not take into account who could be the initial recipient of the mailer. Since the Sirens actively market their games to families, it is reasonable to believe that any mailing list that the Sirens have would include the addresses of customers that have families, in particular minors.

Like *Miller*, the Sirens sent their pamphlets to people that did not request information from them, in an attempt to drive sales associated with their business. Just like *Miller* any party that received the pamphlet featuring the Mascot had a substantial probability of being offended. It is reasonable for parties that did not request information to take offense to receiving materials featuring a bare chest female Mascot. Especially when those parties in question have a high likelihood to have children that could be exposed to the Mascot, by merely performing a common chore that children are tasked with, checking the mail.

In the alternative the Sirens will contend that the Mascot does not constitute hard core pornographic materials and therefore is not obscene. However, the Sirens are not taking into

account the fact that they actively market their product to families and minors themselves. Because the Sirens actively seek the business of families and minors alike the Sirens owe a duty of care not only to not expose minors to hard core obscene images, but indecent images as well. Absent the presence of children there may be no issue with the Mascot in an environment exclusively for adults. When the Sirens sent unsolicited pamphlets out to customers that can reasonably be expected to have minors, they effectively deprived the parent of the minors from taking any affirmative steps to ensure that they were not exposed to the Mascot. Because the Sirens are actively seeking to involve minors in their business the Court should consider the pamphlets to be obscene.

2. *The depiction of the Mascot in the stadium should be considered obscene because the Sirens actively invite minors into their place of business.*

Here, the Sirens utilized the Mascot as part of their rebranding effort and prominently displayed the Mascot in the middle of field and throughout the stadium. As a direct result of the Sirens conduct Wyatt and his children that were in attendance were exposed to the Mascot. While the Sirens may try to claim that the public was aware of the rebranding, evidenced by the pamphlets they mailed out and the fact the Mascot was prominently displayed on the Sirens apparel, tickets and other advertising materials. The fact remains that the rebranding was recent. The Sirens have customers that have a casual relationship with watching football. It is reasonable to believe the casual fan that enjoys the Sirens with their families may not be aware of a rebranding until they show up to the game. By implementing the use of the Mascot, the Siren's deviated from years of expectations that they built with their customers to provide a family friendly environment in which to enjoy football.

Furthermore, the Sirens actively market to the public, specifically to customers that have minors. With every marketing material that the Sirens send, pass out to the community and disseminate via television and other media mediums, the Sirens effectively invite the public into their place of business. When a business invites the public into its place of business, they cannot display nudity within their walls, no more than they could display nudity in a public venue.

Because the Sirens invite minors into their place of business, they own them a duty of care to not expose them to indecent images. If the Sirens exclusively marketed their product to adults, did not let minors into the games and made their customers had to take affirmative steps to view their games, they would not owe a duty of care to minors.

However, this is not the case. The Sirens business model is predicated on marketing to customers with families. Over the course of the years they have developed goodwill with this segment of the market. By implementing the use of the Mascot, the Sirens effectively deviated from the goodwill that they accumulated throughout the life of their business. For these reasons the Court should find that the Sirens display, and exhibition of the Mascot qualifies as obscene because the team knowingly did so in an environment where minors are present.

B. The Mascot violates the applicable Tulania statute because it depicts sexual conduct in a patently offensive way in the presence of minors.

To protect the people from being stripped of the protections afforded to them by the First Amendment, state statutes designed to limit obscenity must be carefully limited. *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 690, 88 S. Ct. 1298, 1306, 20 L. Ed. 2d 225 (1968). The applicable Tulania state statute provides, "[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 has in their possession with the intent to distribute or exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor." §12 Tulania Penal Code (2019).

Indecent material that is broadcast may be deemed to be patently offensive when there is a substantial likelihood that minors will be in the audience. *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 726, 98 S. Ct. 3026, 3028, 57 L. Ed. 2d 1073 (1978). To enact a complete ban on indecent material that does not qualify as obscene for adults for the sake of minors, effectively violates the First Amendment protections provided to adults. *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 663, 124 S. Ct. 2783, 2790, 159 L. Ed. 2d 690 (2004). In other words, the presence of minors during times when they can reasonably expect to be in the audience may elevate indecent material to obscene material. *Id*.

In *Ashcroft* the court held that the Child Online Protection Act ("COPA") was not carefully limited in its construction. *Id.* COPA violated the First Amendment because it lacked precision because in order to limit minors' access to harmful speech, it effectively suppressed a large amount to speech that adults had the right to receive and address to each other. *Id.* In *F.C.C.* the court held that a monolog broadcast at two o'clock in the afternoon featuring offensive language became patently offensive because it was broadcast at a time that there was a high likelihood that minors were in the audience. *F.C.C.*, U.S. at 3031.

At first glance the Mascot may not be considered obscene in an establishment exclusively frequented by adults. However, the Sirens do not only invite minors into their place of business through ticket sales and activities that take place at the games. The Sirens also invite minors into their place of business through broadcasting the games on television. Similar to *F.C.C.* The Sirens played their game on Thanksgiving at a time of the day where people could watch the game with their families. The fact that the game could be viewed on television during the Thanksgiving holiday guaranteed that there were minors in the audience.

Because the game is broadcast on network television during Thanksgiving, there are limited steps that a parent can take to block their minor's access to the watching the game. It is not reasonable to expect a parent to place parental controls on channels that they depend on for information on a daily basis, such as the local news. For a minor to be exposed to the Mascot they merely need to turn on the television to be exposed to the bare breast in the middle of Thanksgiving Day.

The Mascot and the material like it are harmful to children and it is reasonable for a parent to expect a business operating in an ecosystem that promotes the presence minors to watch and participate in the very activity that they are selling to exercise a standard of care to not expose its minor customers to indecent material. Unlike, *Ashcroft* limiting the Sirens usage of the Mascot does constitute a complete ban of material that is not considered obscene amongst adults. Rather, it mandates the Mascot and other images be displayed in a time, place and manner where there is substantially less of a likelihood that there will be minors in the audience.

Because the Sirens know that their business model is predicated on the presence of minors, exposing minors to indecent images such as the Mascot effectively graduates the Mascot from indecent to obscene material. Considering these factors, the Court should find the Mascot constitutes an obscene image.

C. The image as a whole lacks the requisite artistic or political value to be protected by the Constitution, because it is lewd image that was created for commercial gain.

At minimum prurient or patently offensive material must have serious artistic or political value to be afforded the protections of the First Amendment. When determining the political or artistic value of the material in question it is viewed through the lens of if a reasonable person would find artistic or political value in the material, rather than the community standard that governs the first prong of this test. *Pope v. Illinois*, 481 U.S. 497, 107 S. Ct. 1918, 95 L. Ed. 2d

439 (1987). A quotation coupled with obscene images does not constitutionally redeem the publication of the images. The images must be relevant to the theme of the article to garner the protection of the First Amendment. *Kois*, 408 U.S. at 2246.

In *Kois*, the court found that an image depicting a naked man and woman embracing each other had the requisite artistic or political value to be protected by the First Amendment, because the image was in line with the theme of the article that it was accompanied by. *Id.* Put plainly the publication of an obscene or indecent image is protected by the First Amendment if it is accompanied with a credible work that provides the context of the requisite political or artistic value. *Id.*

In this instance, the facts show that the Sirens did not rebrand their team because they sought to construct a mascot that would empower women. The facts show no evidence that the Sirens were involved in the community or any causes for the betterment of women. However, the facts do show, the Sirens are in the business of making money. By featuring a controversial rebranded Mascot, during their Thanksgiving Day contest, the Sirens had a hot button issue that would not only draw fans to the game but increase television ratings as well.

Taking a look at this issue through the lens of the reasonable person standard, it is reasonable to believe that a professional football team with limited to no political involvement regarding the advancement of women has suddenly decided to champion their cause through the use and dissemination of a bare chest mascot with exposed areolas. Like *Kois*, the Sirens are trying to stick the quotation of women's rights on the exposed breasts of the Mascot to deem that it has artistic and political value. However, attaching a label to something without it actually serving that purpose is not enough to garner the protection of the First Amendment. The Sirens need to show the image plus involvement in the causes that they claim it champions for the image to apply in this manner. Considering these reasons, the court should find that the Mascot lacks the requisite artistic or political value to enjoy the protections of the First Amendment.

II. THE TULANIA DISTRICT COURT AND COURT OF APPEALS CORRECTLY HELD THAT THE TULANIA SIRENS WERE NEGLIGENT FOR BEN WYATT'S INJURY BECAUSE MR. WYATT'S BASIS OF HIS NEGLIGENCE CLAIM IS A STATE IMPOSED DUTY THAT IS INDEPENDENT FROM THE SIRENS' CBA.

The power granted to the states by the tenth amendment is the blooming freedom that makes the national system of dual sovereignty unique. The tenth amendment states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." USCS Const. Amend. 10. In sum, all of the unenumerated powers shall be given to the states. I will refer to this force as the pull for state's rights.

The power granted to the federal system by the supremacy clause is undoubtedly the integral framework that allows our idea of freedom to flourish in the national dual sovereignty system. The Supremacy Clause provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." USCS Const. Art. VI, Cl 2. In other words, federal law takes precedence over or pre-empts state laws. I will call this force the push for uniformity.

It is helpful to look at pre-emption in terms of a tripartite framework: express, field, and conflict. Express pre-emption is present when Congress intention to pre-empt state law is

explicitly written into the legislation. *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990). Field pre-emption occurs when Congress created such a pervasive scheme of federal legislation as to make reasonable inference that Congress precluded or left no room for enforcement of state laws on the same subject. *English*, 496 U.S. at 79. Conflict pre-emption is when state law is pre-empted by federal law to the extent in which the two are in conflict. *English*, 496 U.S. at 79. This happens when it is impossible for a private party to comply with both state and federal law or where state law frustrates the full purposes and objectives of Congress. *English*, 496 U.S. at 79. "Pre-emption fundamentally is a question of congressional intent," so one must look to the actual federal legislation to find what type of pre-emption exists. *English*, 496 U.S. at 78-79.

A. Section 301 of the Labor Management Relations Act Exclusively Preempt Claims Via Conflict Pre-emption.

The Labor Management Relations Act (LMRA), also known by the Taft-Hartley Act, was enacted in 1947 with the purpose to define and protect rights of employees and employers in regard to unions, provide uniform procedures for labor disputes, and to protect the rights of the public relating to labor disputes that would affect commerce. 29 U.S.C. §141(b). The LRMA establishes that no party has the right to engage in behavior that would risk "the public health, safety or interest." 29 U.S.C. §141(b).

Section 301 of the LMRA applies to, "suits for violations of contracts between an employer and a labor organization," or suits that allege breaches of collective bargaining agreements. 29 U.S.C. §141(a). The purpose of a collective bargaining agreement (CBA) is to provide contractual code for employment relations and to prevent interruptions of commerce. *Alaska Airlines Inc. v. Schurke*, 898 F.3d 904, 919 (9th Cir. 2018). Section 301 of the LMRA pre-empts state law claims that are "substantially dependent" on the interpretation of CBAs. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985). The policy reason behind section 301's pre-emption power is to preserve arbitration as the forum to resolve CBA disputes with federal law providing a uniform jurisprudence and avoid inconsistent or conflicting outcomes that state law adjudication may bring. *Alaska Airlines*, 898 F.3d at 919.

There is no express pre-emption present since there is no provision in the LMRA that explicitly pre-empts state law. Field pre-emption is also not present because Congress clearly left room for the enforcement of state law, by only pre-empting claims that are "substantially dependent" on the interpretations of the CBA's, which leaves room for state law claims that are independent of the CBA's. Section 301 of the LMRA is a conflict pre-emption provision since the provision only pre-empts claims that are in direct conflict with an interpretation of a CBA provision.

B. No Term of the Tulania Sirens' Collective Bargaining Agreement Has to be Interpreted.

Application of section 301 pre-emption is determined by a two-prong test in which the courts must start its examination with the claim itself. *Trs. of the Twin City Bricklayers Fringe Benefit Funds v. Superior Waterproofing, Inc.*, 450 F.3d 324, 331 (8th Cir. 2006). The courts apply a two-step approach to determine if the claim is "sufficiently independent" to withstand section 301pre-emption. *Bogan v. GMC*, 500 F.3d 828, 830 (8th Cir. 2007). First, a state law claim is pre-empted by section 301 if the right upon which the claim is built stems from a CBA provision. *Bogan*, 500 F.3d at 874. Second, a state law claim is pre-empted when the claim requires an interpretation of a CBA provision making the claim "inextricably intertwined" with the CBA. *Bogan*, 500 F.3d at 874. If the claim is based on a right that does not depend on the CBA and the CBA does not need to be interpreted to settle the claim, then the claim is sufficiently independent and would not be pre-empted by section 301 of the LRMA. *Lueck*, 471

U.S. at 203. Put more simply, if interpretation of a CBA is required, then the claim is pre-empted; if CBA analysis is not necessary, then the claim is not pre-empted. *Williams v. NFL,* 582 F.3d 863, 886 (8th Cir. 2009).

In *Stellar,* the plaintiff alleged that he developed mesothelioma as a result of being exposed to asbestos as a union worker employed by defendant Mack Trucks. Plaintiff brought several state claims against Mack Trucks and in response the defendant moved to have the state claims pre-empted by section 301. Mack Trucks pointed to workplace and safety clauses in the CBAs and asserts that complete pre-emption must apply to plaintiffs' negligence claim. *Stellar v. Allied Signal, Inc.,* 98 F. Supp. 3d 790, 803 (E.D. Pa. 2015). This argument failed since the court did not have to interpret any of the clauses in the CBA in order for Plaintiffs to establish the scope of the duty. *Stellar,* 98 F. Supp. 3d at 803. In sum, "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement is preempted by § 301 or other provisions of the federal labor law." *Lueck,* 471 U.S. at 211. The court explained that the Plaintiff's claims were not pre-empted because Pennsylvania recognizes the duty to provide a safe working environment as a matter of law and Mack Trucks were unable to prove that the court will have to interpret any terms of the CBA despite the fact there were numerous provisions in the CBA concerning workplace safety and hazardous conditions. *Stellar*, 98 F. Supp. 3d at 803.

C. There Is No Conflict Present Because Mr. Wyatt Alleged A Non-Delegable Common Law Duty to Maintain A Safe Working Environment Is Independent of the Tulania Sirens Collective Bargaining Agreement.

In *Woonsocket*, a special education school leased some classrooms from a local high school and the school nurse was tasked with administering medicine to the special education students. *Woonsocket Teachers' Guild, Local 951 v. Woonsocket Sch. Comm.*, 770 A.2d 834, 836 (R.I. 2001). The nurse then filed a grievance with her union claiming that the workload of administering medicine to the special education students was not part of the CBA and sought to have the dispute arbitrated pursuant to the CBA. *Woonsocket*, 770 A.2d at 836. The court articulated the hierarchy of authority by stating, "applicable state law trumps contrary contract provisions, contrary practices of the parties and contrary arbitration awards." *Woonsocket*, 770 A.2d at 838-39. "Because this duty is created by state law, it is non-delegable and cannot be bargained away in [a] CBA." *Woonsocket*, 770 A.2d at 838. A non-delegable duty is an obligation that cannot be outsourced by contract. *Non-Delegable Duty*, Black's Law Dictionary (2nd ed. 1910).

In the current case, the Tulania Sirens are alleging that Mr. Wyatt's claim is governed by the CBA. This simply cannot be for two reasons. First, applicable state law trumps contrary contract provisions. The CBA is a contract that governs private rights and the duty that is the basis of Mr. Wyatt's claim is a public right established in state law. Hence, the duty to maintain a safe working environment trumps any contrary CBA provisions that the Tulania Sirens may point to. Second, a non-delegable state law duty cannot be bargained away in a CBA. Essentially, the Tulania Sirens are arguing that their non-delegable duty was negotiated in their CBA which directly contradicts the definition of a non-delegable duty.

1. The Tulania Sirens Breached the Duty to Warn About Hazardous Conditions.

In *Ramirez,* an employee of PUMI an independent contractor sustained serious injuries when he was shocked by a live wire on a tower he was there to paint and the plaintiff's alleged that the Alabama Power Company (APCo) breached their duty to warn him of danger of the energized power lines. *Ramirez v. Ala. Power Co.,* 898 F. Supp. 1537, 1542 (M.D. Ala. 1995).

The court looked to two other Alabama Supreme Court cases for the applicable rules for the duty to warn. The rule that came out of *Duffner* was that, "If the defect or danger is hidden and known to the owner, and neither known to the contractor, nor such as he ought to know, it is the duty of the owner to warn the contractor and if he does not do this, of course, he is liable for resultant injury." *Crawford Johnson & Co. v. Duffner*, 279 Ala. 678, 189 So. 2d 474 (1966). The *Armstrong* rule stated that, "Once a third party discharges its duty by warning the employer, the duty of warning each of the employer's individual employees falls to the employer." *Armstrong v. Ga. Marble Co.*, 575 So. 2d 1051, 1053 (Ala. 1991). The *Ramirez* court established through excerpts of depositions that APCo warned the PUMI supervisor of the energized lines and that the PUMI supervisor in turn informed the employees about the energized lines, including the plaintiff. *Ramirez*, 898 F. Supp. at 1548. Not only did APCo warn PUMI orally but they also warned them by contract. The court found that APCo successfully discharged their duty to warn by informing the PUMI president of the energized lines. *Ramirez*, 898 F. Supp. at 1548.

In the case at bar, the facts are void of evidence that the Tulania Sirens gave actual notice to the New Orleans Green Wave. The Sirens will argue that they gave constructive notice by placing an orange cone on the area of exposed cement. (R at 17). This is clearly insufficient. In Ramirez, the defendant company made direct contact to warn of the dangerous conditions to the plaintiff company twice, once orally and once in writing via contract. Merely placing a cone on the affected area does not rise to the standard of actual notice that the duty to warn demands. The Tulania Sirens also had the opportunity to warn the team because they discovered the defect before the game commenced. (R at 17). If the Sirens had time to place a cone over the affected area before the start of the game, they also had time to orally warn the Green Wave of the dangerous condition before the game, the Sirens dropped the ball on their duty to warn.

2. Both Breaches of Duties Caused Mr. Wyatt's Knee Injury.

The Supreme Court describes proximate cause as any cause which, "in natural or probable sequence, produced the injury of which was complained." *CSX Transp., Inc. v. McBride*, 564 U.S. 685 (2011). After catching a touchdown pass Mr. Wyatt's momentum carried him towards the patch of exposed cement. (R at 17). While attempting to avoid the cone Mr. Wyatt's left foot landed on an exposed area of cement that the cone did not cover. (R at 17). Wyatt fell injuring his left knee effectively ending his season and his career. (R at 17). But for the Tulania Sirens failure to maintain a safe work environment and failure to warn of a dangerous condition Mr. Wyatt would not have sustained the injury to his left knee. The inability of the Tulania Sirens to properly address the missing piece of turf was the actual and proximate cause of Ben Wyatt's career ending injury.

3. A Field Defect Is Not an Inherent Risk of Sport.

In *Sheppard*, a high school long jumper injured her knee by landing in a long jump pit that was inadequately prepared and unsafe. *Sheppard v. Midway R-1 Sch. Dist.*, 904 S.W.2d 257, 264 (Mo. Ct. App. 1995). Under comparative fault if the plaintiff's injury is the result of an inherent risk in the sport, the defendant is relieved of liability on the grounds that the plaintiff assumed the risk by participating in the sport. *Sheppard*, 904 S.W.2d at 263-64. However, if the plaintiff's injury is a result of the defendant's negligence, then the reasonableness of the plaintiff's assumption of risk is to be compared to the defendant's negligence as elements of fault by the jury. *Sheppard*, 904 S.W.2d at 264. The court explained that although Ms. Sheppard assumed the risk of sport, the school's negligent provision of a dangerous facility is not part of that inherent risk. *Sheppard*, 904 S.W.2d at 264. Since Ms. Sheppard observed the pit and

continued to participate, she may have unreasonably assumed the risk of injury and could be held contributorily negligent. *Sheppard*, 904 S.W.2d at 264.

In the current controversy, the field defect stemmed from pregame warmups when a player's facemask ripped up a chunk of the turf from the field of play. (R. at 17). This left a large area of exposed cement ten yards behind an endzone. (R. at 17). There are no facts in the record that suggest that the New Orleans Green Wave was given proper notice of the field defect. The only action taken was that an orange cone was placed on a portion of the bare cement. The bare cement is not part of the inherent risk of sport from the Green Wave football players because this is clear negligent maintenance of a safe workplace by the Tulania Sirens. None of the members of the Green Wave would be partially liable by way of contributory negligence because since notice was never given, a player cannot assume a risk that they are unaware of.

D. Ben Wyatt's Personal Injury Negligence Claim Should Not Be Preempted Because It Does Not Conflict With The Goals Of Section 301 Of The Labor Management Relations Act And Prevents Private Parties From Contracting Around State Law.

The competing interests of the LMRA illuminates the balancing act that takes place during conflict pre-emption. On one hand there is the push for the establishment of a federal uniform standard to maintain consistent outcomes for a certain area of law and on the other hand there is a pull for states to have the police power to give more robust protections to their citizens than the federally created floor. This is evident by the *Williams* case, where the Eighth Circuit decided that two state law claims brought up by current NFL players were not pre-empted by section 301 of the LMRA. In *Williams*, Minnesota Vikings players Kevin and Pat Williams were suspended after testing positive for a banned substance and consequently sued the NFL in Minnesota state court for violations of the Minnesota Drug and Alcohol Testing in the Workplace Act (DATWA) and the Minnesota Consumable Products Act (CPA). *Williams v. NFL*, 582 F.3d 863, 873 (8th Cir. 2009). The court held that the plaintiff's DATWA and CPA claims were not pre-empted since no CBA interpretation was needed for claims that are entirely dependent on Minnesota law. *Williams*, 582 F.3d at 876. The court however did hold that the plaintiff's claim that the NFL owed a duty to its players to warn them of a banned substance in a particular supplement did call for interpretation of the CBA and was thus pre-empted. *Williams*, 582 F.3d at 880-81. The court skillfully and simultaneously maintained a federal uniform labor standard in which CBA interpretations have a consistent outcome nationwide, all while allowing Minnesota to exercise its police power and provide more robust protections for its citizens. There was a harmony reached between the push and pull.

One of the more recent cases to cover section 301 pre-emption was the *Ryans* case. In *Ryans*, DeMeco Ryans suffered a career ending injury at a visiting stadium and he claimed in state court that his injury was due to negligent upkeep of the turf. *Hous. NFL Holding L.P. v. Ryans*, 581 S.W.3d 900, 904 (Tex. App. 2019). The court reasoned that Ryans' claim was pre-empted by section 301 because the premises-liability claim involved the interpretation of the Playing Field Specifications which is part of the NFL rules which were integrated into the CBA. *Ryans*, 581 S.W.3d at 911. The court of appeals concluded that the trial court abused its discretion by denying the Texans' motion to compel arbitration and remanded the case with directions to order compelling arbitration. This is a case where there was simply too much push and not enough pull. The wrong result was reached.

In addition to blocking pre-emption of a state law claim, *Woonsocket* forced to vacate the arbitration award because the arbiter's decision produced an irrational result and the arbiter abused their power in reaching that result. *Woonsocket Teachers' Guild, Local 951 v.*

Woonsocket Sch. Comm., 770 A.2d 834, 839 (R.I. 2001). The arbiter decided that the public school could not force the Plaintiff, the school nurse, to serve students who were not under the exclusive direction and control of the Woonsocket education department which would allow the nurse not to provide services to special education students. *Woonsocket*, 770 A.2d at 839. This result was in direct contravention of the common goal of the CBA which was to provide public education to "all children" which clearly intended to include the special education students. *Woonsocket*, 770 A.2d at 839.

The *Ryans* Court erred in that they used the CBA as a sword and not as the shield that it is intended to be used as. Presumably, the common goal of the CBA in Ryans is to provide guidelines and a forum to fairly resolve contractual labor disputes. The court in its ruling converted a guideline into a mechanism for adjudication when they ordered the trial court to compel arbitration. This is contradictory to the common goal of the CBA because the court is applying a private contractual standard to a state law claim. Additionally, whatever award the arbiter would come up with would be both an irrational result and considered an abuse of the arbitrator's power.

Conclusion

For the foregoing reasons, the judgment of the Tulania Court of Appeals should be affirmed on both counts.

Respectfully submitted,

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