No. 09-215

IN THE
SUPREME COURT OF THE UNITED STATES

Tulania Sirens Football Team,

Petitioner,

v.

Ben Wyatt, and
the Center for People Against Sexualization of Women's Bodies,

Respondents.

On Writ of Certiorari
to the Fourteenth Circuit

BRIEF OF RESPONDENTS

Team 20

January 21, 2020

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 exposed concrete on the football field?

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STATEMENT OF THE CASE

A. Factual Background

1. Ben Wyatt was a wide receiver for the New Orleans Green Wave, a professional football team. On Thanksgiving Day, the Green Wave faced off against its division rival, the Tulania Sirens. The holiday rivalry game is an important event for the New Orleans community. Many of its members—including many families and children—look forward to the game and either watch it at home or attend it in person.

The Thanksgiving Day game took place at the Sirens' Yulman Stadium. When Wyatt ran onto the field at the beginning of the game, he was immediately confronted by images of the Sirens' new mascot: a topless mermaid. He saw the image everywhere: on Sirens gear, on pamphlets distributed as fans entered the stadium, and as a giant figure installed in the center of the field. Each image depicted the mermaid's exposed breasts.

The topless mermaid's omnipresence was the result of a Siren promotional campaign. Before the game, the Sirens sent a promotional pamphlet, unsolicited, to the citizens of Tulania, including Wyatt. The pamphlets encouraged Sirens fans to spread images of the topless mermaids at the Thanksgiving Day game, urging them to "SHOW YOUR SUPPORT FOR OUR NEW MASCOT! PURCHASE SIRENS GEAR IN STORES AND ONLINE TODAY!" The Sirens also distributed copies of the flyer to every community member who passed by the team's stadium. Thus, the image of the topless mermaid was ubiquitous in Yulman Stadium.

Wyatt, already flushed with nerves, was horrified by the half-naked mermaid. He knew that his wife, Leslie Knope, and young children were present at the game and were being exposed to the topless image—as were thousands of other families.

2. During pregame warmups at Yulman Stadium, a Sirens player dove for a catch in the left-hand side of the endzone. As the player slid across the field, his face mask was shoved into the ground, displacing a large amount of turf and exposing the cement beneath. The Sirens did not replace the turf, nor did they warn the Green Wave about the patch of cement on the field. Rather, the only measure the Sirens staff took to address the exposed cement was to place an orange cone over some of the affected area.

3. Once the game was underway, Wyatt, the Green Wave's star receiver, was on the field more often than not. Wyatt is a key part of the Green Wave's offensive scheme, and the team relies on him to score touchdowns and ultimately win games. So in the fourth quarter, Wyatt found himself running into the back-left corner of endzone to catch a well-placed pass. As Wyatt leapt for the ball, however, he saw an orange cone in the endzone. Wyatt was moving too quickly to come to a complete stop, so he tried to circumvent the cone by making a sharp move to the right. But Wyatt could not avoid making contact with the ground below the cone—which, he was surprised to learn, was not turf but exposed cement. The unexpectedly hard ground caused Wyatt to slip, fall, and injure his knee. The severity of the knee injury ended Wyatt's career.

4. Many members of the Tulania community were upset about the Sirens' topless mascot. Several organizations—including Center for People Against Sexualization of Women's Bodies (PASWB), an advocacy group of which Leslie Knope is a member—expressed concerns about the prurient nature of the image. As a result, 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 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). The city

passed the new law after the Sirens mailed the promotional pamphlets; the law was in effect during the Thanksgiving Day game.

B. Procedural History

Wyatt and PASWB brought suit against the Tulania Sirens Football Team. Claiming the team's promotion of the topless mermaid was obscene, Wyatt and PASWB sought seeking to enjoin the team's use and promotion of the mascot. Wyatt also brought suit against the Sirens for negligence in the upkeep of Yulman Stadium.

The U.S. District Court for the Southern District of Tulania dismissed Wyatt and PASWB's obscenity claim. The court found that the Sirens' use and promotion of the mascot is protected by the First Amendment. Applying *Miller v. California*, 413 U.S. 15, 18 (1973), the court determined that, under Tulania's community standards, a topless mermaid does not appeal to prurient standards. The court also suggested that Section 12 of Tulania's penal code is overbroad and that the Sirens' mascot has artistic or political value. However, the court's holding rested solely on its interpretation of Tulania's community standards.

The district court also found that the Sirens' negligence in maintaining Yulman Stadium was a proximate cause of Wyatt's knee injury. The court held that Wyatt could recover damages from the Sirens for his hospital fees, attorney's fees, and lost wages.

The U.S. Court of Appeals for the Fourteenth Circuit affirmed the district court's decision as to Wyatt's negligence claim. The court found that Wyatt was working as an employee of a professional football team when his injury occurred and that his workplace—which, on Thanksgiving Day, was Yulman Stadium—should thus have been free of unreasonable risk of harm. The Sirens, the court concluded, had a duty to fill the hole in the turf.

But the court of appeals reversed the district court's decision on the obscenity claim. The Sirens' mascot, the court determined, was not a work of art but rather an attempt to shock viewers and fans. The court therefore found that the mascot was intended to be offensive to Tulania's community standards. The court also found that the Sirens' promotion of the mascot violated the Tulania's Penal Code's bar on the distribution of such obscene material.

SUMMARY OF ARGUMENT

I. The court of appeals correctly found that the Sirens' mascot is obscene material unprotected by the First Amendment. The topless mascot satisfies all three prongs of the *Miller v. California* test: an average person applying Tulania's community standards would find that the mascot appeals to prurient interests, the mascot depicts patently offensive sexual conduct, as defined by Tulania's Penal Code, and the mascot lacks serious literary, artistic, political, or scientific value. *See* 413 U.S. 15 (1973). Moreover, the topless mascot is commercial speech and therefore receives a lesser degree of constitutional protection. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980).

A. Obscenity is judged according to the average person in the community. Tulania has made its community standards clear: Tulania's city council passed a law criminalizing distribution of obscene matter specifically in response to the Sirens' topless mascot. Sec. 12 Tulania Penal Code (2019). The law's passage suggests that the majority of Tulanians, as represented by their democratically-elected officials, believe the mascot appeals to prurient interests.

Tulania's Penal Code also defines what sexual conduct that cannot be printed, exhibited, or distributed. That the city's penal code is not precise does not render it unconstitutional. Section 12 of the Penal Code provides ample warning as to what conduct is proscribed: the sale or distribution

of obscene material. And this Court has long protected states' legitimate interest in barring distribution of such material, especially when, as here, the mode of dissemination is likely to expose juveniles to obscene content. Displaying exposed breasts on apparel, billboards, and network television is widely understood to be obscene.

Only serious works of artistic or political expression are exempt from *Miller's* obscenity test. Otherwise, any image—no matter how obscene—would be beyond the reach of the law. But sex and nudity cannot be exploited without limits, especially if they are forced upon places of public accommodation and viewers of national television. *Miller*, 413 U.S. at 25-26. The Sirens can celebrate the female form without pushing a sex symbol on children and families without their consent.

B. The state is entitled to regulate commercial speech in order to ensure that it concerns lawful activity. Tulania has a substantial interest in limiting distribution of the topless mascot, both to ensure compliance with the city's penal code and to prevent the dissemination of lewd material to young children. The city has a compelling interest in protecting the physical and psychological well-being of minors.

II. A. The Tulania Sirens negligently caused the career-ending knee injury Wyatt sustained at Yulman Stadium. Because the Sirens controlled the stadium and invited the Green Wave onto it, the Sirens were required to exercise reasonable and ordinary care in making the field safe for all players. And because the Sirens were aware that a dangerous condition existed on the field—the exposed patch of cement—the Sirens had a duty to remedy the condition or warn the Sirens of the danger.

Even if the Sirens were not in control of the stadium, they still owed Ben Wyatt a duty of care. It was foreseeable that exposed cement on a football field would cause harm or injury to players

as they leap and dive for the ball. In fact, the Sirens recognized the danger posed by the cement: the team placed an orange cone over the patch. But the cone did not remove the danger posed by the exposed cement nor adequately warn players of its risk.

Wyatt did not assume the risk of injury as a result of the Sirens' poorly-maintained field. Though football is a fundamentally risky activity, injury by exposed cement is not inherent to the sport. And Wyatt is seeking damages only for the injuries he suffered because of the exposed cement. He did not understand the orange cone to warn of a significant risk of injury because similar props are commonly used on sidelines, including to demarcate the corners of endzones and to mark off yards.

Wyatt's negligence claim arises from the Sirens' common-law duties to maintain a safe playing field, not from contractual agreements with his employer. Negligence claims are only preempted by a contractual agreement if the claims are premised on the agreement and can only be resolved by interpreting the agreement's terms. *See Livadas v. Bradshaw*, 512 U.S. 107, 124 (1994). Wyatt's case is entirely independent of his collective bargaining agreement and can be resolved without determining what kind of medical care he is contractually entitled to receive.

B. The Sirens breached their duty of care to Wyatt because they anticipated the danger posed by the exposed cement but failed to guard against it. By placing an orange cone over the cement patch, the Sirens acknowledged the danger posed by the missing turf. But they did not repair the turf or warn Wyatt about the risk posed by the ground under the cone.

C. The Sirens' negligence was the but-for and proximate cause of Wyatt's career-ending injury. Had the Sirens repaired the turf, Wyatt would not have slipped and so severely injured his knee. The chain of events is clear: the Sirens failed to repair the turf; Wyatt landed on ground he

did not expect to be cement; and Wyatt slipped and fell, severely injuring his knee. Indeed, football fields are covered with turf precisely to prevent the kind of injury Wyatt suffered.

ARGUMENT

I. The Sirens' mascot is unprotected by the First Amendment because it is obscene material and commercial speech.

A. The Sirens' mascot constitutes "obscene material" under the *Miller* test.

Historically, obscenity has never received the same stringent protections as normal speech. "The First Amendment was not intended to protect every utterance … implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." *Roth v. United States*, 354 U.S. 476, 483-84 (1957). "It has well been observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942).

This Court has created a test to determine whether a work is unprotected by the First Amendment because it is "obscene." *See Miller*, 413 U.S. at 15. In evaluating obscenity the relevant guidelines are:

> (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.

Id. One of the animating values behind the First Amendment is the free flow of information and marketplace of ideas, but obscenity is mere visual stimulation and lacks any expression of ideas. Obscenity encourages anti-social conduct, influences public culture detrimentally, and is

corruptive towards minors. Thus, the Tulania Sirens should be prohibited from displaying their topless mascot as such a lewd depiction is unprotected by the First Amendment.

1. The average person applying Tulania's contemporary community standards would find that the Sirens' topless mascot appeals to prurient interests.

Contemporary community standards is determined by local standards where the material is distributed rather than a national scale. *See Pope v. Illinois*, 481 U.S. 497, 500 (1987). "To require a State to structure obscenity proceedings around evidence of a national 'community standard' would be an exercise in futility. … It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." *Miller*, 413 U.S. at 30, 32. The Court has determined that "obscenity is to be judged according to the average person in the community, rather than the most prudish or the most *tolerant*." *Smith v. United States*, 431 U.S. 291, 304 (1977). The purpose of requiring a contemporary community standard is "to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person, or a totally insensitive one." *Miller*, 413 U.S. at 93.

The Tulania Sirens argue that the views of The Center for People Against Sexualization of Women's Bodies are not representative of Tulania at large. However, the District Court noted that *many* members of the community were offended by the Sirens' mascot. R. at 12. In analyzing contemporary community standards what is accepted in Hollywood may not be the same as what is accepted in the Bible Belt, so it's important to look at local community standards. While PASWA alone may not be emblematic of the will of the entire community, Tulania's

representatives, by definition, are. The council passed a statute on obscenity in direct response to the Sirens' first distribution of pamphlets with the topless mascot, which demonstrates that the majority of Tulania, by their councilpersons, does in fact believe the mascot appeals to the prurient interest. An image with "such a high potential to offend those who are still not comfortable with their own forced viewing of this image, or the forced viewing of this image by their family" should not be protected. R. at 7.

2. The Sirens' topless mascot depicts sexual conduct in a patently offensive way as defined by Tulania law.

The mascot falls under the definition of sexual conduct as articulated in Sec. 12 Tulania Penal Code (2019). This Court has declined to rule on what is appropriate state legislation on sexual conduct stating that it is "not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts." *Miller*, 413 U.S. at 25. Just this month, this Court declined to hear a "Free the Nipple" decision in New Hampshire that found a city ordinance prohibiting public nudity and exposure of female breasts did not affect a fundamental right of freedom of speech. *State v. Lilley*, 204 A.3d 198, 208 (N.H. 2019), *cert. denied*, No. 19-64, 2020 WL 129551 (U.S. Jan. 13, 2020). Moreover, this Court has noted that obscenity statutes are not always precise and "lack of precision is not itself offensive to the requirements of due process.' … The Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Hamling v. United States*, 418 U.S. 87, 111 (1974). Further, the Court has ruled that a "Statute proscribing the mailing of obscene material and written information as to where it may be obtained, applied according to the proper standard for judging obscenity,

does not offend constitutional safeguards against conviction based on protected material or fail to give adequate notice of what is prohibited." *Id.* at 99.

Tulania law 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). The Fourteenth Circuit having already determined that the work appealed to the prurient interest under the first prong, found that the distribution of the Sirens' material was enough to satisfy the second prong as the law lists very specific ways for "sexual conduct" to be displayed. R. at 7-8. It's hard to imagine the city not intending the Sirens' mascot to fall under the confines of Tulania law as the legislation was passed in direct response to the uproar the mascot created. R. at 12.

In *Jenkins v. Georgia*, the Court clarified that a state law banning "nudity alone does not render material obscene under Miller's standards." 418 U.S. 153, 153 (1974). However, *Jenkins* involved a film with nudity where the camera did not come into full focus on the private parts. *See id.* Here, the topless mascot is displayed clearly. Unlike a movie which viewers have discretion to see, the Sirens' topless mascot was prominently broadcast on live television and also publicly disseminated to every passerby who unwillingly received a pamphlet. In fact, the details of this case are almost identical to *Miller* where this Court found the distributed works were obscene:

> This case involves the application of a State's criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials. This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles.

Miller, 413 at 18-19.

Here, the unsolicited works were sent to Wyatt's home and the pamphlets were distributed to every community member that walked past the stadium. The mascot was displayed everywhere in and outside the stadium, despite the Thanksgiving Day game being a community event that children attend. Even more, the game was broadcast on television furthering the number of children that could potentially view the topless mascot, reminiscent of the 2004 Janet Jackson Super Bowl scandal. The Sirens argue that the statute does not give sufficient notice of criminal acts. Yet, a statute can fail to define "sexual conduct" and still satisfy *Miller* through authoritative judicial construction, so Tulania's statute which gives a clear definition of "sexual conduct" should likewise pass muster. *E.g., United States v. Kirkpatrick*, 662 F. App'x 237, 238 (5th Cir. 2016) (rejecting an argument that a statute is unconstitutional simply because it fails to define the terms "obscene" and "sexual conduct").

In addition, there are significant federalism concerns in finding the Tulania statute invalid on its face. In *Ferber*, this Court refused to apply the overbreadth doctrine in a First Amendment case. *See New York v. Ferber*, 458 U.S. 747, 780–81 (1982). As Stevens explained in his concurrence:

> My reasons for avoiding overbreadth analysis in this case are more qualitative than quantitative. When we follow our traditional practice of adjudicating difficult and novel constitutional questions only in concrete factual situations, the adjudications tend to be crafted with greater wisdom. Hypothetical rulings are inherently treacherous and prone to lead us into unforeseen errors; they are qualitatively less reliable than the products of case-by-case adjudication.

Id. The Court should avoid interfering with legitimate state regulations tailored to reflect community standards.

3. The Sirens' topless mascot lacks serious artistic or political value.

The third prong of the *Miller* test uses an objective reasonable person standard rather than looking to the community where the material is distributed. *See Pope*, 481 U.S. at 500-01. "Earmarks of an attempt at serious art...are not inevitably a guarantee against finding of obscenity." *Kois v. Wisconsin*, 408 U.S. 229, 231 (1972). Indeed "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. While real works of art should be protected, "there is no evidence, empirical or historical, that the stern 19th century American censorship of public distribution and display of material relating to sex … in any way limited or affected expression of serious literary, artistic, political, or scientific ideas." *Id.* at 35.

Art is subjective. A vandal may view his graffiti depictions of genitals on a billboard as art, but if anything could be considered artistic, then all obscene works would fall outside the confines of the law. *Miller* demands more. The *Miller* test requires the work to be a *serious* artistic or political expression in order to be protected speech. *See id.* at 15. True artwork requires skill and does not cover an advertisement, designed primarily to make money, that any individual could create on clipart. As the Fourteenth Circuit articulated, this 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. at 7. Surely, there are examples of topless artwork in museums, but the Sirens' mascot must be treated differently. People have a personal choice whether or not to take their children to a museum, whereas a stadium passerby has no choice whether a pamphlet depicting nudity was aggressively pushed upon their children.

The district court found the Sirens' mascot a form of political expression: "We find great value in the first ever depiction of a strong female mascot in the sport of football. Such an important stride forward serves as a catalyst for women's strength in a sport clouded by male dominance. Taken in today's political climate, we find such a progressive and empowering mascot necessary in that it is pivotal" to further social change. R. at 16. The District Court misconstrues the message the mascot employs. Ben Wyatt and The Center for People Against Sexualization of Women's Bodies do not belittle the importance of having a female mascot. On the contrary, the Sirens undermine femininity by serving as a catalyst for female sexualization. There is simply no reason why the Tulania Football Team could not maintain the female mascot and core design without the indecency by placing starfish over the breasts, for example. The Court should be wary to "set a dangerous precedent which protects the widespread dissemination of inappropriate images which only serve to shock and offend." R. at 6.

Thus, the Sirens' mascot is unprotected speech because it meets the standard for obscenity that: "'the average person, applying contemporary community standards' would find that the mascot, taken as a whole, appeals to the prurient interest"; the mascot "depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law"; and the mascot, "taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller*, 413 U.S. at 24.

B. The Sirens' topless mascot is entitled to a lesser protection because it is commercial speech.

"The Constitution accords a lesser protection to commercial speech than to other constitutionally protected expression." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 557 (1980). "The First Amendment's concern for commercial speech is

based on the informational function of advertising and, therefore, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity." *Id.* at 563. The Central Hudson analysis asks: (1) If the speech advertises illegal activities or constitutes false or deceptive advertising that is unprotected by the First Amendment? (2) If the restriction is justified by a substantial government interest? *See id.* at 566. If the answer to both questions is yes, the regulation must: (3) directly advance that government interest and (4) be no more extensive than necessary to achieve that interest. *See id.*

The Sirens' pamphlets predominantly propose a commercial transaction advertising in all caps, "SHOW YOUR SUPPORT FOR OUR NEW MASCOT! PURCHASE SIRENS GEAR IN STORES AND ONLINE TODAY!" R. at 12. The speech uses illegal advertising as prohibited by Sec. 12 Tulania Penal Code (2019). Further, the statute advances a government interest as this Court has consistently held "there is a compelling interest in protecting the physical and psychological well-being of minors." *Am. Civil Liberties Union v. Ashcroft*, 322 F.3d 240, 251 (3d Cir. 2003), *aff'd and remanded*, 542 U.S. 656, 124 (2004). Preventing the dissemination of lewd material directly advances the government interest in maintaining the psychological well-being of community members, particularly in this instance because the advertisements are not sought out solely by individuals interested in the material. The nature of the advertisements in handing out pamphlets to every person on the street and public broadcasting of the game on television risks that the images be viewed inadvertently. Furthermore, Tulania's regulation is no more extensive than necessary as it only proscribes the exposed breasts and does not prohibit the Sirens from maintaining the core mermaid design or keeping a female mascot.

II. The Tulania Sirens' negligently-maintained football field caused Ben Wyatt's career-ending knee injury.

The Tulania Sirens negligently caused the career-ending knee injury Wyatt sustained at Yulman Stadium. Under Tulania law, the Sirens are liable because 1) they had a duty to maintain their stadium in reasonably safe conditions, 2) they failed to perform that duty, and 3) that failure proximately caused Wyatt's injury. *See Green v. Ariz. Cardinals Football Club LLC*, 21 F. Supp. 3d 1020, 1027 (E.D. Mo. 2014); *L.A.C. ex rel. D.C. v. Ward Parkway Shopping Ctr. Co.,* 75 S.W.3d 247, 257 (Mo. 2002) (en banc).

A. The Sirens had a duty to protect Ben Wyatt from injury.

1. The Sirens had a duty to maintain their field in safe conditions under both a premises liability theory and a general negligence theory.

a) Premises liability

It was the duty of the Tulania Sirens to maintain Yulman Stadium in a reasonably condition for all players, including members of the opposing team. When one party has control over premises and invites another onto it, the party in control must exercise reasonable and ordinary care in making the premises safe. *See Smith v. Dewitt & Assocs*., 279 S.W.3d 220, 224 (Mo. Ct. App. 2009); *Rycraw v. White Castle Sys.*, 28 S.W.3d 495, 499 (Mo. Ct. App. 2000). If a dangerous condition exists on the premises, the custodian must use ordinary care in removing or warning of the danger. *See Dewitt & Assocs.*, 279 S.W.3d at 224.

Jurisdictions around the country have applied premises liability to sports facilities' operators. *See, e.g*., *Politz v. Recreation & Park Comm'n For Par. of E. Baton Rouge*, 619 So. 2d 1089, 1093 (La. Ct. App.), *writ denied*, 627 So. 2d 653 (La. 1993) (holding custodians of softball facility had duty to repair known unreasonable conditions on softball field or to warn players of existence of

condition); *Singerman v. Mun. Serv. Bureau,* 536 N.W.2d 547 (Mich. Ct. App. 1995), *aff'd in part*, 565 N.W.2d 383 (Mich. 1997) (holding defendants owed a duty to exercise reasonable care in the operation of a hockey arena); *Branco v. Kearny Moto Park,* 43 Cal. Rptr. 2d 392, 398 (Cal. Ct. App. 1995) (holding an operator of a sporting facility had a duty to use due care not to increase the risks to a participant over and above those inherent in the sport); *Lester v. City of New York*, 650 N.Y.S.2d 235, 236 (N.Y. App. Div. 1996) (holding hockey rink operators had the responsibility to ensure that the ice was as safe as it appeared to be).

Wyatt and the Green Wave were invitees at Yulman Stadium on the day of Wyatt's injury, and the stadium was under the control, care, and custody of the Sirens. Therefore, when the Sirens became aware of a dangerous condition on the field, they had a duty to act as a reasonable person would to remove or warn players of that danger.

b) General negligence

The Sirens also owed Wyatt a duty of care under traditional principles of negligence, regardless of their control of the premises. "A duty of care arises out of circumstances in which there is a foreseeable likelihood that particular acts or omissions will cause harm or injury." *L.A.C. ex rel. D.C. v. Ward Parkway Shopping Ctr. Co.,* 75 S.W.3d 247, 257 (Mo. 2002) (*citing Madden v. C & K Barbecue Carryout,* 758 S.W.2d 62 (Mo. 1988) (en banc)). The scope of the duty is fact-specific and is measured by whether a reasonably prudent person would have anticipated danger and provided against it. *Smith v. Dewitt & Assocs*., 279 S.W.3d 220, 224 (Mo. Ct. App. 2009).

In *L.A.C.*, a young girl was attacked in a shopping mall by a third party. Prior incident reports at the mall and testimony from the mall employees established that continued violent crime was foreseeable. While the shopping mall did not have a general duty to protect all patrons from the

criminal acts of third parties, the foreseeability of violent crime triggered the mall's duty to take reasonable measures to protect its patrons against it. 75 S.W.3d at 259.

In *Dewitt & Assocs.*, the plaintiff accused a siding contractor of loosening nails on a guardrail, creating a dangerous condition that caused his injury. Under a general negligence theory, the plaintiff only needed to prove that the contractor contributed to the dangerous condition, thereby rendering the risk of injury foreseeable. It was of no significance whether the contractor was in control of the premises at the time of the injury. 279 S.W.3d 224-225.

There is no question that the missing patch of turf at Yulman Stadium was a dangerous condition. The fact that the stadium employee thought to put an orange cone on it proves that at least one person recognized the risk of injury or harm. Indeed, it is foreseeable that professional football players will come in contact with exposed concrete that is merely ten feet outside the endzone of a professional football field. Receivers such as Wyatt are trained to catch the ball near the perimeter of the endzone, plant their feet within the boundaries, and then fall out of bounds. With the momentum of a player's weight, the ball's speed, and typically a jump associated with a catch, it is easy to understand that a receiver will often land ten feet behind and endzone after making or attempting a catch. Due to the foreseeability that leaving concrete exposed close to the endzone could cause a player serious injury, the Sirens owed Wyatt a duty of care to take reasonable measures to remove the dangerous condition or adequately warn of its risk.

2. Assumption of risk does not bar Ben Wyatt from recovery.

Ben Wyatt did not assume the risk of suffering a career-ending injury as a result of the Sirens' negligence in maintaining safe playing conditions. Assumption of risk is not a complete bar to recovery where the risk is not an inherent part of the sport, but rather the defendant created the risk

of injury through its negligence. *Sheppard by Wilson v. Midway R-1 Sch. Dist*., 904 S.W.2d 257, 260 (Mo. Ct. App. 1995) (holding that a long jumper did not assume the risk of a poorly maintained landing pit); *Branco v. Kearny Moto Park, Inc.*, 43 Cal. Rptr. 2d 392 (Cal. Ct. App. 1995) (holding that a BMX racer who was injured on a jump was not barred from recovery because jump was designed to create extreme risk of injury); *Wagner v. Thomas J. Obert Enterprises*, 396 N.W.2d 223, 226 (Minn. 1986) (holding that injured ice skater's assumption of risk did relieve the rink management of its duty to safely supervise skating activities or to maintain the premises in a safe condition).

In *Sheppard*, the long-jumper claimed that her knee injury was caused by her school's negligence in maintaining its landing pit. The school owed Sheppard a duty of care in maintaining safe jumping conditions and breached that duty when the condition of the pit was not reasonably safe. 904 S.W.2d at 264. While Sheppard assumed the risks inherent in long jumping, such as awkward landings, "she did not assume the risk of Midway's negligent provision of a dangerous facility," and therefore did not relieve the school of the duty to maintain a reasonably safe landing pit. *Id.* Similarly, Wyatt is not claiming that the Sirens are liable for an injury he sustained as a result of the inherent risks involved with playing football. Rather, Wyatt's injury occurred due to the Sirens' inadequate field maintenance, a risk he did not assume.

While it could be argued that Wyatt secondarily assumed the risk of unsafe field conditions because the cone served as a warning of danger, there is nothing in the record indicating he was intelligently aware of the exposed concrete or its associated risk. Secondary assumption of risk "occurs when the defendant owes a duty of care to the plaintiff but the plaintiff *knowingly* proceeds to encounter a *known* risk imposed by the defendant's breach of duty. In this type of case, the

question of the reasonableness of the plaintiff's assuming the risk becomes an issue." *Sheppard*, 904 S.W.2d at 262 (emphasis added).

Wyatt's decision to continue playing despite the presence of an orange cone would only be deemed unreasonable if he knew and appreciated that the cone signified risk of serious injury, and acquiesced anyway. *Sheppard*, 904 S.W.2d at 265 (quoting *Ross v. Clouser*, 637 S.W.2d 14 (Mo. 1982) (en banc)). However, a small orange cone on a football field is far from a clear indication that the field is in an unsafe condition to keep playing. Even if Wyatt understood the cone as a warning sign, he had no way of knowing why it was there or what lay beneath it; it could have been a small muddy spot, wet paint, or even nothing at all. But there is no evidence Wyatt even saw the cone or appreciated its warning before his fall. Many tools and props are used on the sidelines of a football field and many of them are orange. It is possible that Wyatt confused the cone for an orange pylon that is placed in each corner of the endzone. He also might have thought it was a yard marker, which is an orange sign propped up in a tent formation, bearing a resemblance to a cone. It is not reasonable to assume that a football player would see a small orange object on the field and intelligently appreciate that the field was in a condition that could cause a career-ending injury. Even if Wyatt did recognize the cone's warning of danger earlier in the game, professional football players are under enormous pressure to play despite injuries or harsh weather conditions. It would not be reasonable to expect a player to halt a game or sit out after seeing a cone on the field, especially if the condition underneath the cone was unknown to that player.

3. The Sirens had a duty to warn Ben Wyatt of dangerous conditions independently of any contractual obligations.

Ben Wyatt's claim that the Sirens had a duty to maintain safe playing conditions is based on the Sirens' common law duty of care and is not dependent on any contractual agreement Wyatt

has with his employer. A state law claim is only preempted by a contractual agreement if the claim is based on a provision of the agreement and requires interpretation of its terms. *See Livadas v. Bradshaw*, 512 U.S. 107, 124 (1994); *Green v. Arizona Cardinals Football Club LLC*, 21 F. Supp. 3d 1020, 1025-26 (E.D. Mo. 2014). Wyatt does not rely on any provision of his player contract or Collective Bargaining Agreement (CBA) to suggest the Sirens breached a contractual duty. Even if the CBA contains provisions that relate to teams' obligations to provide physical examinations and to inform players of inherent risks associated with playing football, "mere reference to CBA is not enough. The relevant inquiry is whether the resolution of the claim depends upon the meaning of the CBA." *Bush v. St. Louis Reg'l Convention*, No. 4:16CV250 JCH, 2016 WL 3125869, at *5 (E.D. Mo. June 3, 2016).

This case does not depend on an interpretation of the kind of medical care Wyatt's contract entitles him to. Wyatt is not claiming that he received inappropriate treatment or care after his injury. Rather, his claim is based on the Sirens' common law duty to provide safe playing conditions and to reduce foreseeable risks of injury. Nor does the Court need to interpret any provisions of the CBA concerning, for example, the education Wyatt received about the inherent risk of football. Wyatt is not claiming he failed to receive this education or that the risks were improperly explained. He admits that there are *some* inherent risks associated with playing football that he assumed. But he claims that his injury was caused not by these risks, but rather by the Sirens' negligence in maintaining a safe field. Thus, resolution of the claim is independent of the meaning of the CBA.

B. The Sirens failed to perform their duty to protect Ben Wyatt from injury.

The Sirens breached their duty of care to Wyatt when the field employee noticed the dangerous section of turf and merely placed a small orange cone over it. Under traditional principles of negligence, the duty of care is breached when a party anticipates danger and fails to provide against it. *See Daoukas v. City of St. Louis*, 228 S.W.3d 30, 35 (Mo. Ct. App. 2007) (electrician breached his duty to remove or warn employee of electric company of dangerous condition); *Murray v. Ramada Inns,* 521 So. 2d 1123, 1136 (La. 1988) (hotel breached its duty to protect pool users from injury by failing to post signs indicating shallow waters or have a lifeguard on duty); *Bauer By & Through Bauer v. Minidoka Sch. Dist. No. 331*, 778 P.2d 336, 340 (Idaho 1989) (school breaches its duty to students when it knows of a danger that exists on a field where students are playing and fails to protect them against injuries).

In *Daoukas*, the defendant electrician dismantled a safety system, which he knew could cause unreasonable risk of bodily harm to the plaintiff. 228 S.W.3d at 33. As a result of the defendant's actions, Plaintiff suffered a serious injury. The defendant testified that he placed the dismantled safety system in the plaintiff's view, and thus assumed the plaintiff would know what steps to take to stay safe. However, this assumption did nothing to shield him from liability. In fact, it further proved that he anticipated danger and failed to provide against it. Because the defendant's actions led to foreseeable risk of injury and he did nothing to reduce that risk, the defendant breached his duty of care toward the plaintiff.

The Sirens' action of placing a small orange cone over the dangerous patch of exposed concrete merely 10 feet from the endzone was a similar failure to provide against the risk of danger. As the Court of Appeals aptly noted, "Drawing a professional football player's attention to an area of the field (of which they have no way of knowing is unsafe or why it might be unsafe), and expecting

this to protect them from harm, is like putting a sticky note on a portion of the floor in an office building that could collapse at any moment, sending an employee plummeting through the floor into the basement." R. at 9.

Placing the cone over the exposed area indicates the Sirens anticipated the danger. However, if the Sirens wanted to ensure the dangerous section of turf would not cause injury, they should have created an actual barrier around it or filled it in. Because the Sirens did not effectively repair or create a boundary around the dangerous section of the turf, they breached their duty to protect Wyatt from injury.

C. The Sirens' negligence proximately caused Ben Wyatt's injury.

As both the Court of Appeals and the District Court noted, there is no doubt that that leaving the patch of turf exposed was the factual, or "but-for" cause of Ben Wyatt's injury. R. at 9, 19. Had that area been repaired, Wyatt's knee would not have turned in such an awkward fashion, causing his injury. The Sirens' failure to repair or create a boundary around the exposed concrete on the field was also the *proximate*, or legal, cause of Wyatt's injury, which renders them liable. The definition of proximate cause is "something that 'in natural or probable sequence, produce[d] the injury complained of." *CSX Transp. Inc. v. McBride*, 564 U.S. 685 (2011).

Determining proximate causation can be complicated when there are several intervening circumstances that result in an injury. *See Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928). It requires "hindsight to determine whether the precise manner of a particular injury was a natural and probable consequence of a negligent act." *Lopez v. Three Rivers Elec. Co-op., Inc.*, 26 S.W.3d 151, 156 (Mo. 2000); *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 865-66 (Mo. 1993) (en banc).

However, the chain of events in this case is not complicated. The Sirens negligently left a patch of exposed concrete on the field in an area where a player was likely to step or fall. When Wyatt did, in fact, step on this patch of exposed concrete, he slipped and fell, suffering a career-ending knee injury. It would be absurd for the Sirens to claim that Wyatt's injury was not the natural or probable result of leaving exposed concrete on the field. The whole point of covering football fields with shock-absorbent Astroturf or appropriately soft grass is to avoid this very type of injury. Indeed, Wyatt's injury resulted from the exact chain of events that is anticipated when practicing proper field maintenance. Therefore, the Sirens' negligent field maintenance was the proximate cause of Wyatt's injury.

CONCLUSION

For all the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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