No. 09-215

In the

SUPREME COURT OF THE

UNITED STATES OF AMERICA

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 APPEALS FOR THE FOURTHEENTH CIRCUIT

Anonymous Number: 4

QUESTION PRESENTED

1. Under *Miller v. California*, for a work to be obscene it must: (a) appeal to the prurient interest according to a contemporary community standard; (b) depict sexual conduct in a patently offensive way according to state law; *and* (c) completely lacks serious political, artistic, or other value as a whole. In choosing the siren as it's mascot, Tulania aimed to rebrand itself in today's progressive society by displaying an empowering female figure. Is the Tulania Siren mascot obscene?

2. An injured party recovers in a negligence claim when their injuries arise from an ongoing negligent activity rather than a premise defect, and the other party fails to perform its duty of care. Wyatt's injuries arose from a premise defect that Tulania warned players about prior to the game. Should Ben Wyatt be able to recover in a negligence claim when his injuries arose from a premise defect and Tulania warns players?

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This case originated in the United States District Court for the District of Tulania. For efficiency, the District Court combined these two cases brought by Ben Wyatt and the People Against Sexualization of Women's Bodies ("Respondents"). First, the District Court held that the Siren mascot was not obscene under the First Amendment, despite Petitioner's arguments otherwise. The District Court also held that the Tulania Sirens football team could not be held liable for Ben Wyatt's injuries during the Thanksgiving Day game. On appeal, the United States Court of Appeals for the Fourteenth Circuit reversed the lower court's decision on both counts. Petitioner now appeals the Fourteenth Circuit's ruling on both issues.

STATEMENT OF THE FACTS

Ben Wyatt and the Center for People Against Sexualization of Women's Bodies ("PASWB"), respondents, brought charges against the Tulania Sirens Football Team, petitioner. (R. at 1.). The suit arose from upset feeling and a tumble during the fourth quarter of the Thanksgiving Day game. *Id.* at 12, 17.

First, Wyatt's wife, Leslie Knope and her friend's in PASWB, became upset regarding Tulania's rebranding efforts. *Id.*at 12. In an effort to rebrand, Tulania changed its mascot to a Siren: a topless mythical aquatic creature. *Id.* Tulania also mailed flyers to members of the Tulania community seeking their support. *Id.* The flyer displayed the mythical creature and provided information about the Thanksgiving Day game against the Green Wave. *Id.* The flyer also offered fans a chance to "show your support for our new mascot! Purchase sirens gear in stores and online today!" *Id.*

But a small portion of the Tulania community became offended by the rebranding efforts and expressed their feelings to the city with Leslie Knope and PASWB leading the charge. *Id.* As a result of the group's loud voice, the city changed it law. *Id.* The new law provides that sexual conduct is "[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, intent to distribute or to exhibit or offer 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); (R. at 7.).

When Ben Wyatt entered the field for the Thanksgiving Day game against the Tulania Sirens, he was shocked to see the topless mascot displayed throughout the stadium. (R. at 7.). Later in that same game, Wyatt fell while catching a touchdown pass during the fourth quarter

after tripping over a bright orange cone outside the playing field. (R. at 17.). Wyatt is a seasoned professional football and the team's star wide receiver. *Id.* In fact, the Green Wave credits Wyatt's fast hands and agile feet with many of the team's caught passes, scored touchdowns, and won games. *Id.* The Green Wave knew Wyatt provided their best chance to beat the Sirens in the Thanksgiving Day rivalry game at Yulman Stadium in Tulania, Tulania. *Id.* Yet Wyatt still fell over the cone. *Id.*

During pregame warmups, a Tulania player fell ten feet behind the endzone tearing up a piece of turf. *Id.* The missing piece of turf slightly exposed a cement strip, however, Tulania's field crew acted almost immediately to warn players of the condition. *Id.* The field crew placed a bright orange cone over the piece of missing turf. *Id.* The cone was placed before the teams took the field to start the game. *Id.*

During the game, as expected, Wyatt provided a critical piece of the Green Wave's offense. *Id.* In fact, Wyatt spent more time of the field than off during the offensive drives of the game. *Id.* And, during the fourth quarter, Wyatt made a touchdown catch inside the endzone. *Id.* But his force propelled him from the field toward the orange cone, however, Wyatt ran into the cone injuring his knee. *Id.*

SUMMARY OF THE ARGUMENT

I. First Amendment

This Court should find that the Tulania Siren mascot is not obscene because in today's society it is not patently offensive, Tulania's statute itself is unconstitutionally overbroad, and there is immense political value in the mascot itself. To be considered obscene, the mascot must: (a) appeal to the prurient interest under contemporary community standards; (b) depict sexual conduct under the applicable state law; *and* (c) have no political, artistic, scientific, or other value to society. As none of these three prongs have been met, the Siren mascot is not obscene and Tulania is therefore protected in displaying the image under the First Amendment.

First, the mascot does not appeal to the prurient interest under contemporary community standards. Courts have long struggled with whether to apply a local or national standard. This case clearly demonstrates that the appropriate standard to apply is a national one. With the rise of the internet. there is virtually no work today that can be confined to one town, state, or even country. To make persons and businesses restrict their speech so as to not offend the most delicate communities across our nation infringes on the constitutional right to free speech guaranteed by the First Amendment. The Siren mascot is not only restricted to Tulania and therefore the community that determines whether or not it is patently offensive should not be only Tulania. The mascot may represent Tulania, but its wide reach in a national football league clearly argues in favor of looking to today's progressive national community as the standard.

Looking to the national standard, the mascot does not appeal to the prurient interest. It is not so offensive as to cause shock or awe. The purpose of the mascot is to display a powerful female form. It is a symbol of strength and power. The mascot is not so shocking as to appeal to

lewd thoughts or actions. It is a celebration of the female form meant to empower fans and players alike.

Second, the because the Tulania Penal Code does not narrowly define the conduct it wishes to prohibit as obscene, it is unconstitutionally overbroad. The only guidance the statute gives as to what sexual conduct is distributing "obscene" material. This circular definition could allow for broad application and restriction of First Amendment freedom. Without greater definition as to what conduct the statute wishes to prohibit, it prevents those who wish to work, live, or visit Tulania from adequately determining what behavior will be considered criminal. Therefore, this prong cannot be met because there is no definition of sexual conduct within the statute.

Finally, because this work has significant political value, the final prong of the test cannot be met. By choosing to display a strong female mascot in a sport where there are currently no female team members is a strong political statement on a nationwide stage. To have political value, a work need not be inherently political. A reasonable person just needs to be able to determine that there is some political value for this prong of the test to be met. Here, although some might argue that there is no political value in a mascot for the National Football League, a reasonable person could clearly find at least some political value in the unprecedented mascot. Not only does the Siren empower women by displaying the female form as a strong figure, but it also encourages female involvement in a male-dominated sport.

While only one of these prongs need not be met to find a work is not obscene, all three have not been met here. Therefore, this Court should hold that Tulania, and any other team playing at a national level, has the right to display a mascot like the Siren.

II. Negligence

This Court should deny Wyatt's negligence claim against Tulania because Wyatt's injuries arose from a premise defect, Tulania makes the turf as safe as it appears to be, and Wyatt assumes the risk of falling when he attempts to catch the touchdown pass. Courts reject pleadings stating an improper cause of action when the claims are not interchangeable. While premise liability is a form of negligence, the claims are not interchangeable because the claims present separate and distinct theories of recovery that rely on different, although similar, elements.

Negligence and premise liability present different theories of recovery. Negligence claims arise when a party's injuries result from an ongoing, negligent activity on the property. The claim further requires the injured party to prove the other party failed its duty of care and that the failure proximately caused the injury. Premise liability claims arise when a party's injuries result from a defect in the property's condition. The claim further requires the property owner have notice of the condition, the condition pose a unreasonable risk of harm, the owner fail to exercise reasonable care, and the failure proximately causes the party's injuries.

Here, Wyatt's injures occur from a premise defect not an ongoing negligent activity. Wyatt fell in a hole which originated when a player fell during pregame warmups and tore a piece of turf up with his helmet. Wyatt's injuries did not occur from an ongoing negligent activity like removing and reattaching a guardrail. Thus, Wyatt's pleading states the wrong cause of action because Wyatt claims negligence rather than premise liability. Therefore, this Court should reject Wyatt's negligence claim because negligence and premise liability are separate and distinct theories of recovery that rely on different elements.

Additionally, Tulania's duty only requires making the field as safe as it appears to be, and Tulania performs its duty by warning players of the missing piece of turf. A duty of care requires

a party to act reasonable to protect the safety of another, and the level of care depends on whether a reasonable prudent person would anticipate danger and provide against it under the circumstances. Courts impose a higher duty of care if a special relationship exist because one party is particularly vulnerable and dependent on another party who has control over the party's welfare.

For instance, employer owe their employees a duty to provide a safe working environment, not to expose employees to unreasonable risk of harm, and to warn of the existence of danger which the employee could not reasonably be aware. Landowners owe invitees a duty to make the property as safe as it appears and to warn of known dangers. However, courts fail to extend a higher duty of care when a reasonable prudent person would determine the party is not vulnerable.

Here, Tulania owes Wyatt a duty to make the property as safe as it appears to be and to warn of known danger. Wyatt claims Tulania owes him the duties an employer owes an employee. But Wyatt works for the New Orleans Green Wave not the Tulania Sirens. Rather, Tulania owes Wyatt the duty of a landowner and invitee because Tulania invited the Green Wave to play in the Thanksgiving Day game. As a result, Wyatt must rely on Tulania to make the field as safe as it appears to be and to warn of known dangers.

Furthermore, Tulania's duty adequately protects Wyatt because a reasonable prudent person would not believe Wyatt needs more protection. Football players rarely exceed the playing field during a game, and the missing piece of turf is located outside the playing field. So, Wyatt does not need additional protection beyond the duty to make the field as safe as it appears to be and warning players of a possible danger.

Moreover, Tulania performs its duty of making the field as safe as it appears to be and warning players of a possible danger. Tulania warns players of the possible danger by placing a bright orange cone over the area. The warning occurs during pregame immediately after the missing turf is discovered. The turf is as safe as it appears to be because players can see the bright orange cone from locations around the field and players know the cone indicates possible danger. Thus, Tulania performs its duty.

Finally, Wyatt assumes the risk inherent to an activity even after Tulania warns players of the danger. A risk is inherent to the activity when the risk arises from the nature of the activity, the player consents to the risk, the risk is open and obvious, and the other party performs its duty. A risk arises from the nature of the activity when the risk occurs during the activity itself as part of participation in the activity. A player consents to the risk if the player continues to voluntarily play, and the player's knowledge and experience of the risk that day and as a professional athlete show he fully comprehended the risk. A risk is open and obvious if the player can see the risk.

Wyatt assumes the risk inherent to catching a touchdown pass. Wyatt fell after he attempted to catch a pass during the fourth quarter of the football game. Wyatt consents when he continued to voluntarily play the game coupled with his extensive knowledge of the field that day and as a professional athlete. No one forced Wyatt to play. In fact, Wyatt played almost every offense down of the game, and as a professional athlete, he knew the risk of falling while trying to catch a pass. The risk of falling is obvious because the bright orange cone is eye catching so players can see it from the field. As a result, Wyatt assumes the risk of falling while attempting to make a catch.

Altogether, Wyatt's negligence claim fails. Wyatt pleads an improper cause of action because his injuries arose from a premise defect rather than an ongoing negligent activity.

Additionally, under either theory, Tulania's duty only required making the field as safe as it appears to be, and Tulania performs its duty by warning players when they place a bright orange cone on the missing turf. Lastly, under either theory, Wyatt assumes the risk inherent to making a catch because falling is inherent to making a catch, the risk is obvious, and Wyatt consents to the risk. Therefore, this Court should reject Wyatt's negligence claim against Tulania.

ARGUMENT

I. The Siren mascot is not an obscene image because it does not meet any of the three requirements laid out by this Court in *Miller v. California*.

This Court created its test for obscenity under the First Amendment in 1973 in *Miller v. California*. 413 U.S. 15 (1973). In that case, the Court found that to be considered obscene, a work must meet three prongs:

> (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. We do not adopt as a constitutional standard the *utterly* without redeeming social value.

Id. at 24 (internal quotations omitted). As the topless Siren mascot does not mean any of these three prongs, this Court should hold that it is not obscene under the Tulania Penal Code.

A. Under the appropriate "contemporary community standard"—one of a national community—the Tulania Siren mascot does not appeal to the prurient interest.

The Siren mascot fails the first prong of the three-pronged test laid out in *Miller v. California*: "whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ." 413 U.S. 15, 16 (1972). Under a national community standard, the Siren mascot is clearly not obscene. Although the issue has never been directly addressed by this Court, many lower courts have found that a national community standard best unifies obscenity law in the modern technological age. This Court has never held that a community standard must be restricted to a certain geographical area. Rather this Court finds that a state may, in referring to *Miller*'s "contemporary community standards," include in its law a restriction to that specific community. *Jenkins v. Georgia*, 418 U.S. 513, 517 (1974). In the fractured decision in *Ashcroft v. ACLU*,

Justice O'Connor noted that in today's internet culture, requiring those who choose to market to a nationwide audience to adhere to differing local community standards may "suppress an inordinate amount of expression." 535 U.S. 564, 587 (2002) (O'Connor, J., concurring). In cases such as this where a mascot may represent a specific community, but will be viewed on a nationwide basis, a national community standard is appropriate so as to not inhibit First Amendment speech. In applying this standard, it is clear that the Tulania statute unconstitutionally restricts the Tulania Sirens' free speech.

Even as early as 1965, and prior to its ruling in *Miller*, the Court recognized that forcing local standards on businesses would prevent certain areas of the country from access to materials the community is open to. *See Jacobellis v. Ohio*, 378 U.S. 104 (1964). At that time, the Court recognized that political, artistic, scientific, and other works can easily impact members of different communities even if they are directed only at the smallest local community. *Id.* at 193–94. For example, books and films cannot be expected to stay within the borders of the small locality in which they are created or shown. *Id.* at 194. This is even more prevalent today as the internet and television have allowed for such works to extend well beyond the borders of the states at which they may be initially aimed or where they are created. Works like the mascot of a team in the *national* football league will inherently reach well beyond the city or state they may ultimately represent. All those who tune in to live televised games, watch game highlights via the internet, or see pictures of the mascot on the Tulania Sirens' website or other sources are part of the community that should be considered when determining whether or not a work is obscene. So, while Tulania itself may not be fully accepting of the Siren mascot, the reach of the mascot is well beyond just the local community. This Court should not decide today to apply a local standard to something that inherently impacts our national community.

Similarly, since this Court's decision in *Miller v. California*, lower courts have found that the national standard is the correct standard to protect First Amendment rights in the internet age. *See United States v. Kilbride*, 584 F.3d 1240 (9th Cir. 2009). In that case, the Ninth Circuit agreed with the argument that "persons utilizing email to distribute possibly obscene works cannot control which geographic community their works will enter . . . ." *Id.* at 1250. The Ninth Circuit agreed with both Justice O'Connor and Justice Breyer's opinions in *Ashcroft v. ACLU* that held the same. The Ninth Circuit found issue with the application of a local community standard in such a situation because, like Justice Breyer stated: " [t]o read the statute as adopting the community standards of every locality in the United States would provide the most puritan of communities with a heckler's Internet veto affecting the rest of the Nation." *Ashcroft*, 535 U.S. at 590 (Breyer, J., concurring).

This same reasoning should apply in this case. Although this is not strictly a work that will be shared over the internet, it will reach a similarly nationwide audience. While it is similar to previous cases this Court and others have decided involving works mailed directly to members of the community in question, the reach of a mascot in a national football league goes well beyond just direct mailing. *See, e.g.*, *United States v. Reidel*, 402 U.S. 351 (1971). While the team did send direct mailers to the fanbase it hopes will support it, the mascot will not just be seen by those who support the team it represents. Beyond that, it will be consumed by the nation as a whole. Thus, in this instance—and in nearly all instances in today's internet culture—a national standard is the only way to make sure that the most conservative communities cannot prevent persons from exercising their First Amendment rights. To require that persons conform their speech to the most conservative communities in our nation will stymie the growth that a promotion of free speech has consistently provided this country.

Looking to this national community standard, a topless mascot does not appeal to the prurient interest. A work does not appeal to the prurient interest unless it is erotic. *Ashcroft*, 535 U.S at 579. Determining what is prurient is a question of fact. *Miller*, 413 U.S. at 30. Nudity alone is not enough to consider a work obscene. *Jenkins*, 481 U.S. at 161. Whether a work appeals to the prurient interest is to be determined by how that work would impact the "average person." *Miller*, 413 U.S. at 33. The average person in the today's progressive national community would not find an empowering depiction of the female form to appeal to the prurient interest in this way.

The female figure in this sense is meant to empower females and depict the female form as a powerful symbol. Courts have found that a work appeals to the prurient interest if *taken as a whole*, the work inspires a "shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters." *United States v. Roth*, 354 U.S. 476, 487 n. 20 (1954). That is not the case with the Siren mascot. This mascot is meant to show the female body as a representation of strength and power. While some might not appreciate that the Siren is topless, that does not prevent the team from expressing its views of female empowerment this way. Under a national community standard, the average person could see this work as depicting the female figure in a non-sexual, empowering manner. Today's society has clearly trended toward celebrating and lifting up females. To find that the female form is so shameful as to be obscene would turn back the clock to a time when women were not celebrated as they are today.

This celebration of the female form still does not appeal to the prurient interest even if the Court chooses to apply a local—as opposed to a national—community standard. In *Miller*, this Court addressed that an idea does not have to gain universal support or approval to merit First

Amendment protection. 413 U.S. at 34. While it may be that the most vocal of Tulania's citizens have decried the Siren mascot, those citizens do not speak for Tulania as a whole. Just as they are free to express their dislike of the mascot, the Sirens are free to share the work despite these vocalizations. These groups do not represent Tulania as a whole, but rather specific persons and interests within Tulania. So even if this Court restricts the standard only to that of the narrowest local community that the Siren mascot is meant to represent, those who are so against the mascot do not represent Tulania's progressive community as a whole. Therefore, because all three prongs of the *Miller* test must be met, and under either contemporary community standard the Siren mascot does not appeal to the prurient interest, this Court should find that the Tulania Siren mascot is not obscene.

B. Tulania's definition of sexual conduct is unconstitutionally broad because it does not specifically define the type of conduct to be regulated.

Because it does not provide a specific definition of sexual conduct that the statute wishes to prohibit, Sec. 12 Tulania Penal Code (2019) is too broad and therefore restricts Tulania citizens' free speech unconstitutionally. Although enough that the first prong of the *Miller* test is not met, even if this Court finds that the mascot meets that criteria, it should not be prohibited by Tulania's overbroad obscenity statute. Under *Miller,* the second prong of the test states that a work is obscene if "the work describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law." 413 U.S. at 24. The Tulania Penal Code states that a person is guilty of a misdemeanor if she "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 . . . ." Because the statute itself provides a definition of sexual conduct that is too vague, this statute is too broad.

This Court provided examples of some statutes that would pass constitutional muster. For example, a statute stating material is obscene if it is "patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated." *Id.* at 25. Another example would be "patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Id.* This statute does neither. The Fourteenth Circuit's opinion argued that this was a specific enough definition of sexual conduct. (R. at 7.). But without a further description other than the vague "obscene material," the statute provides no guidance on what is or is not obscene—it is ultimately a circular definition. To allow this statute to define obscenity in this way would be to unconstitutionally restrict all types of speech and infringe on Tulania citizens' right to free speech.

Courts throughout the country have found similar statutes to be constitutionally overbroad. For example, in *ABC Interstate Theatres v. State*, the Mississippi Supreme Court found that a statute holding that viewing any "obscene, indecent, or immoral" film was a crime was overbroad and infringed under First Amendment rights under *Miller*. 325 So. 2d 123, 126 (Miss. 1976). *Miller* itself states that states wishing to regulate obscenity must specifically define what conduct is to be regulated. *See id.*; *Miller*, 413 U.S. at 23–24. The Mississippi statue clearly aimed to target more specific behavior: viewing and creating obscenity in films. Even with that specificity, the vague language that did not further define what was to be regulated unconstitutionally tread on First Amendment rights. As this statute is even less specific, it similarly infringes on those rights. Therefore, this statute should not be enforced against the Tulania Sirens.

C. Under a reasonable person standard, the Tulania Sirens' mascot has significant political value.

Finally, the Tulania Sirens' mascot has significant political and artistic value. Under *Miller*, to be obscene, a work must lack "serious literary, artistic, political, or scientific value." 413 U.S. at 15. To maintain First Amendment protection, neither "the government or a majority of the people [must] approve of the ideas the[] works represent. *Id.* at 34. This Court reviews this factor not through the lens of the "average person, applying contemporary community standards," but rather a "reasonable person in any given community. *Pope v. Illinois*, 481 U.S. 497, 500–02 (1987). Similarly, a work's value does not vary from one community to another "based on the degree of local acceptance it has won. *Id.* at 500. Through the eyes of a reasonable person in any community, the Tulania Sirens' mascot maintains significant political value.

As the siren mascot makes a strong statement in support of women in an almost exclusively male-dominated sport, a reasonable person would find it carries significant political value. In *Miller*, this Court broadly read the word "political" to include those ideas that are intended to "bring[] about . . . political and social changes desired by the people." 413 U.S. at 37. Unlike any other team in the National Football League, Tulania chose to represent the strength of its team through a female mascot. As the District Court noted, this mascot is both "progressive and empowering" in what has, to date, remained a near exclusively male-dominated sport. (R. at 16.). This mascot is an important step in an effort to include more women in these types of professional sports.

The Sirens' mascot is similar to the nudist colony depicted in *U.S. v. Various Articles of Merch.*, as the siren champions female participation in the National Football League. 230 F.3d 649, 658 (3d Cir. 2000). There, the Third Circuit found that magazines depicting life in a nudist

colony, including pictures of nude children, were not obscene because they championed a nudist lifestyle. *Id.* at 658–59. Even though it is an alternative lifestyle and the political value was not "immediately evident," the Third Circuit held that the magazine, although it contained images with little actual text, had the purpose of advocating unregulated nudism. *Id.* at 659. Similarly, while the political value of a topless mascot might not be immediately evident, it is an important step in active participation of women in the National Football League. Although it is not the norm in the United States, by portraying a woman's body as a powerful symbol of a team with only male players, the Sirens have made an important political and social statement about the power of women and their involvement in the National Football League.

While some might argue this mascot is only used for shock value and to sell merchandise, this Court has consistently found that not every person must agree about the value of a work. *Miller*, 413 U.S. at 34. Here, although some might argue that there is no value beyond that meant to shock the public or to use the female body to entice fans to buy merchandise and attend games, that does not deprive the mascot of its political value. Not every member of the community—or even a majority of a community—must agree. While not immediately evident to some, those who champion the women's movement and female involvement in male dominated fields could clearly find significant political value in the first female mascot in the National Football League.

Because none of the three prongs of the *Miller* test have been met, this Court should find that the Tulania mascot is not obscene.

II. This Court should reject Wyatt's negligence claim against Tulania because his injuries arise from a premise defect, Tulania makes the turf as safe as it appears to be, and Wyatt assumes the risk of falling when he attempts to catch the touchdown pass.

A. Wyatt pleas an improper cause of action because his injuries arise from a premise defect not ongoing negligent activity on the property.

Courts reject pleadings stating an improper cause of action when claims are not interchangeable. *United Scaffolding, Inc. v. Levine*, 537 S.W.3d 463, 471–72 (Tex. 2017). In injury cases, an injured party may sue for premise liability or negligence depending on the facts in the case. *Id*. at 471. While premise liability is a form of negligence, the claims are not interchangeable because the claims present separate and distinct theories of recovery that rely on different, although similar elements. *Id*. Thus, a court rejects the pleading when it asserts negligence, but the facts show premise liability. *Id*. at 471–72.

Negligence claims arise when the party's injuries result from an ongoing, negligent activity on the property. *Id*. at 471. Negligence claims require an injured party to prove that another party failed to perform a duty of care and that failure proximately caused the person's injuries. *Green v. Ariz. Cardinals Football Club LLC*, 21 F. Supp. 3d 1020, 1027 (E.D. Mo. 2014). Negligence claims require the injured party to establish the other party had a duty of care to protect the party from injury, that the other party breached its duty of care, and the party's injuries were proximately caused by the other party's failure to perform its duty. *L.A.C., ex rel. D.C. v. Ward Parkway Shopping Ctr. Co., L.P.*, 75 S.W.3d 247, 257 (Mo. banc 2002). An injury results from an ongoing, negligent activity on the property when the activity occurs overtime from the person's actions. *Levine*, 537 S.W.3d at 471. In *Smith*, a guardrail created an ongoing, negligent activity when people continually removed and reattached it using the same nail holes. *Smith v. Dewitt & Assocs.*, 279 S.W.3d 220, 224–25 (Mo. Ct. App. 2009). The guardrail became

loose and shaky overtime as a result of the ongoing, negligent activity of moving the guardrail. *Id*.

Premise liability claims arise when the party's injuries result from a defect in the property's condition. *Levine*, 537 S.W.3d at 471. Premise liability requires the property owner to have notice of the premise's condition and that the condition poses a reasonable risk of harm. *Id*. Additionally, premises liability requires the property owner to fail to exercise reasonable care to reduce the risk of harm and that the owner's failure proximately causes the party's injuries. *Id*. Premise liability further focuses on the property owner's control of the premise. *Id*. at 471–72. Premise liability also requires a property owner to warn of the dangerous condition or make the conditions reasonably safe. *Id*. In *Levine*, a hole presented a premise defect when a pipefitter slipped on a piece of plywood covering the hole, ultimately falling through the hole fifteen feet above the ground. *Id*. at 470–71.

Here, Wyatt alleges a negligence claim when the facts point to a premise defect as the cause of his injuries. Like the pipefitter in *Levine*, Wyatt's injuries occurred when he slipped and fell in a hole on the premises. Wyatt fell into a hole ten feet outside the endzone. The hole originated when a player ripped a portion of turf up with his helmet during pregame warmups. Wyatt's injuries did not in any way result from an ongoing negligent activity like removing and reattaching the guardrail in *Smith*. Rather, Wyatt's injuries can only be explained with consideration of the premise defect in the stadium. Therefore, premise liability proves Wyatt's cause of action. Thus, the Court should reject Wyatt's claim because premise liability and negligence claims are not interchangeable claims since the claims are separate and distinct theories of recovery and require an injured party to prove different, although similar, elements to secure a judgment in his favor.

B. Tulania's duty only requires making the turf as safe as it appears to be at the time of the injury, and the team performs its duty by warning players of the missing piece of turf.

Under both theories, a duty of care requires a party to act reasonably to protect the safety of another. *See Levine*, 537 S.W.3d at 471. The level of care depends on whether a reasonably prudent person would anticipate danger and provide for it under the circumstances. *Smith*, 279 S.W.3d at 224. The law imposes a higher duty of care when parties engage in a special relationship that leads a reasonable prudent person to believe a higher duty of care is owed. *See Carman v. Wieland*, 406 S.W.3d 70, 76–77 (Mo. Ct. App. 2013); *Regents Univ. of Cal. v. Superior Court*, 413 P.3d 656, 664–66 (Cal. 2018). A special relationship exists if one party is particularly vulnerable and dependent on another party who has control over the party's welfare. *Regents Univ. of Cal.*, 413 P.3d 656 at 665. The law requires a higher duty of care between employers and employees because employers must protect employees in the workplace. *Carman*, 406 S.W.3d at 76–77. The duty requires employers to provide their employees a safe working environment, not to expose employees to unreasonable risk of harm, and to warn of the existence of danger which the employee could not reasonably be aware. (Carman). *Id*.

Additionally, the law imposes a higher duty of care between landowners and invitees. *See Levine*, 537 S.W.3d at 471–72. A landowner owes a duty to invitees to warn of a potential danger or to make the condition as safe as it appears to be. *See Smith*, 279 S.W.3d at 224; *Turcotte v. Fell*, 68 N.Y.2d 432, 439 (N.Y. 1986). In *Smith*, the contractor's duty required warning others of the potential danger because the shaky, loose guardrail looked perfectly normal. *Smith*, 279 S.W.3d at 224. Yet, the contractor fails his duty by knowing about the guardrail and allowing it to remain without the existence of a warning. *Id*. Additionally, in *Turcotte*, a racetrack's duty of care only required making the track as safe as it appeared to be to

the jockeys. *Turcotte*, 68 N.Y.2d at 439. The racetrack was not required to perform additional maintenance when the jockey could see the track's condition before the start of the race. *Id*. at 443.

In both relationships, a reasonable prudent person would determine the duties protect the vulnerable party from harm under the circumstances because the vulnerable party relies on the other for protection. The employee must rely on the employer to ensure the workplace is safe. *See Carman*, 406 S.W.3d at 76–77. The invitee must rely on the landowner to make the property as safe as it appears and to warn of known dangers. *See Levine*, 537 S.W.3d at 471–72. Thus, courts find the duty's scope is adequate when a reasonable prudent person believes the duty reasonably protects the safety of another. *See Smith*, 279 S.W.3d at 224.

Here, Wyatt claims Tulania owes him the same duty an employer owes to an employee. Wyatt claims Tulania's duty requires it to maintain a safe working environment, not to expose employees to unreasonable risk of harm, and to warn employees about the existence of danger which the employee could not reasonably be aware. But Wyatt works for the New Orleans Green Wave not the Tulania Sirens. It seems unreasonable that a reasonable prudent person would expand the duty to protect employees to a sports team that does not employ the player. Rather, a reasonable prudent person would conclude Wyatt was an invitee of the Tulania Sirens when he was injured at Yulman Stadium. The special relationship exists because Tulania invited the New Orleans Green Wave to compete in in the game. As a result, Wyatt must rely on Tulania to make the field as safe as it appears to be and to warn against known dangers. Thus, Tulania's duty requires them to warn Wyatt of a potential danger and make the turf as safe as it appears to be.

Additionally, Tulania's duty adequately protects Wyatt because a reasonable prudent person would not believe Wyatt needs more protection. Football players primary work within the

field of play and rarely exceed the playing field. The NFL defines the field of play as the area bounded by the goal lines and sideline, and the playing field ends nine feet beyond the goal lines. *2019 Rule Changes*, NFL, https://operations.nfl.com/the-rules/2019-nfl-rulebook/ (last visited Jan. 21, 2020).

The missing turf is located a foot outside the playing field beyond the goal line. So, a reasonable prudent person would determine additional duties unreasonable because the players do not need additional protections outside the playing field where the missing turf is located.

Furthermore, Tulania performs its duty by warning players of a possible danger and by making the turf as safe as it appears to be. Unlike the contractor in *Smith*, Tulania warns players of the missing turf immediately after discovering the condition by placing a bright orange cone over the area. The warning occurs immediately after the condition arises because the condition arose during pregame and Tulania applied the warning before the game began. Additionally, Tulania's warning ensures players can see the condition because the bright orange cone is an eye-catching object. So, much like the racetrack in *Turcotte*, the turf as safe as it appeared to be because the players could see the bright orange cone Tulania used to warn of the missing turf. Thus, Tulania warns players and makes the turf as safe as it appears to be.

C. Wyatt assumes the risk even after Tulania performs its duty because falling arises from the nature of catching a pass, Wyatt's continual play and knowledge of the field show he consents, and the bright orange cone is an open and obvious risk.

Under both theories, claims fail when an injured party assumes a risk inherent to a particular activity because the injured party releases the other party from its legal duty. *Martin v. Buzan*, 857 S.W.2d 366, 369 (Mo. Ct. App. 1993). A risk is inherent to a particular activity when the risk arises from the nature of the activity itself. *See Morgan v. State*, 90 N.Y.2d 471, 486–87 (N.Y. 1997). An injured party assumes a risk inherent to a particular activity when the injured

party consents to the risk, the risk is open and obvious, and the other party performs its duty of care. *See Morgan*, 90 N.Y.2d at 484. As discussed above, Tulania performs its duty of care by warning players of the missing turf with a bright orange cone and making the turf as safe as it appears to be. Additionally, the risk arises from the nature of activity, Wyatt consents to the risk, and the risk is open and obvious.

A risk arises from the nature of the activity when the risk occurs during the activity itself as part of participation in the activity. *See Morgan*, 90 N.Y.2d at 486–87. In *Morgan*, a bobsledder's assumed risk flows from the nature of the activity. *Id*. The bobsledder lost control of his sled during a run which caused his sled to run onto an exit ramp where it ran through a 20-foot opening in the wall and crashed into a cement brace off the run's normal course. *Id*. The risk arose from the nature of the activity because the bobsledder lost control of his sled while completing a run on a bobsled course. *Id*. The court found running off a course flowed from the nature of the activity because bobsledders assume the risk of losing control of their sleds every time they begin a run. *Id*.

Here, Wyatt assumes a risk arising from the nature of the activity. Wyatt fell after attempting to catch a touchdown pass during the fourth quarter of the Thanksgiving Day game. Like the bobsledder in *Morgan*, Wyatt assumes the risk of falling when he begins to catch the touchdown pass because every player assumes the risk of falling when trying to catch a pass.

Additionally, an injured party consents to a risk when the party voluntarily participates in the activity. *Turcotte*, 68 N.Y.2d at 439. Continual voluntarily participation allows courts to imply consent because it shows the player fully comprehended the assumed risk. *Id*. Parties voluntarily consent to participating in an activity when they chose to be a part of the activity because they have the ability to remove themselves. *Id*. at 440. Professional athletes are no

different even though they participate for a payment. *See Turcotte*, 68 N.Y.2d at 440. In fact, professional athletes are more likely to remove themselves from a risky situation because of their knowledge and experience in evaluating potential risks. *Id*.

In *Turcotte*, a jockey alleged track's condition caused his injury, however, the jockey fully comprehended the track's conditions when he chose to race because he raced in three prior races that day. *Id*. at 443. The court found the jockey fully comprehended the risk because his experience and knowledge of the track that day and as a professional athlete coupled with his continued participation showed he full comprehended the risk. *Id*. at 443–44. Thus, a professional athlete voluntarily consents to accepting a risk if they continue to participate and their knowledge and experience shows they fully comprehended the risk.

Here, Wyatt's consents to the risk because Wyatt's knowledge and experience coupled with his continual voluntarily participation shows he fully comprehended the risk. Wyatt chose to catch the touchdown pass during the fourth quarter of the Thanksgiving Day game, and Wyatt chose to play almost every offense down prior to that catch. In fact, Wyatt spent more time on the field than off during the offensive drives in the Thanksgiving Day game. No one forced him to play, and as a professional athlete, Wyatt is more likely to remove himself especially with his knowledge of the field that day. But Wyatt did not remove himself from the game even though the bright orange cone was clearly visible ten feet beyond the end zone. Like the court in *Turcotte*, this Court will find Wyatt consents to the risk because his continued play coupled with his knowledge and experience of the field that day show he fully comprehended the risk.

A risk must be open or obvious to the player. *Martin*, 857 S.W.2d at 369. A risk is open and obvious when the risk is clearly visible to a player. *Brown v. City of New York*, 69 A.D.3d 893 (N.Y. App. Div. 2010). In *Brown*, a cement strip presents an open and obvious risk when the

strip was located five feet from the sideline. *Id*. The court found the strip was an open and obvious risk because the players testified that the strip was present to hold down the artificial turf and the strip was visible. *Id*. Here, the bright orange cone presents an open and obvious risk to the players. Like the cement strip in *Brown*, the bright orange cone allows the piece of missing turf to be visible to players and the players know the bright orange cone indicates a problem. So, the bright orange cone is open and obvious because players can see the cone.

Altogether, Wyatt assumes the risk of falling while catching the touchdown pass after Tulania performs its duty. Wyatt continually plays the game knowing the condition of the field and seeing the bright orange cone outside the endzone. Therefore, Wyatt releases Tulania from liability because he assumed the risk of his injuries.

CONCLUSION

This Court should reverse the Fourteenth Circuit's findings both that the Tulania mascot is obscene and finding Tulania liable Ben Wyatt's injuries.

APPENDIX

Sec. 12 Tulania Penal Code (2019).

"Sexual conduct" is "[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, intent to distribute or to exhibit or offer 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."