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IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

MAY 3 2013

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WD 73984

JOHN COOMER
Appellant - Respondent

v.

KANSAS CITY ROYALS BASEBALL CORPORATION
Respondent - Appellant

APPEAL FROM THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
THE HONORABLE BRENT POWELL
CASE NO. 1016-CV4073

BRIEF OF APPELLANT - RESPONDENT,
JOHN COOMER

D

Robert W. Tormohlen #40024
Jason C. Bache #58377
M. Cory Nelson #63357
Lewis, Rice & Fingersh, L.C.
1010 Walnut Street - Suite 500
Kansas City, Missouri 64106
P.O. Box 16421-2500
P.O. Box 16472-2500
Attorneys for Appellant-Respondent

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Date: April 16, 2012

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JURISDICTIONAL STATEMENT

This action involves a claim for personal injury that arose after Defendant's employee threw a promotional item that struck Plaintiff in the face. This appeal involves mixed questions of fact and law. After a three day trial, the trial court submitted the case to the jury, which rendered its verdict on all claims. After post-trial motions, the trial court entered its final judgment on June 3, 2011. (LF 34.) All parties timely appealed the judgment of the trial court. (LF 343, 351.)

None of the questions presented in this appeal fall within the exclusive jurisdiction of the Missouri Supreme Court. Missouri Constitution Art. V. §3. This appeal, therefore, falls within the general jurisdiction of the Missouri Court of Appeals.

STATEMENT OF FACTS

In his Petition, Plaintiff alleged that on September 8, 2009, he attended a Royals' baseball game at Kauffman Stadium and suffered an eye injury, including a detached retina, after Defendant's mascot, "Sluggerrr," threw a hotdog that struck Plaintiff in his left eye. (Legal File "LF", LF 12.) Plaintiff alleged that Defendant's employee who portrayed Sluggerrr failed to exercise ordinary care in throwing the hotdog that struck Plaintiff. (LF 13.) Plaintiff also alleged that Defendant was negligent because it failed to adequately train and supervise its employee who portrayed Sluggerrr. (LF 13.)

In response to Plaintiff's Petition, Defendant admitted that its employee who portrayed Sluggerrr was its agent acting in the scope and course of his employment. (LF 202, wherein Defendant admitted paragraphs 8 and 9 of Plaintiff's Petition, LF 12.) Defendant, however, denied that it was negligent and alleged that Plaintiff's claims were barred because of Plaintiff's comparative fault and based upon the defense of assumption of risk, both implied primary assumption of risk and implied secondary assumption of risk. (LF 203 – 208.)

Before trial, Defendant filed a motion for summary judgment, arguing that the risk of Sluggerrr throwing a hotdog that would strike a patron in the face was an inherent risk of attending a Royals' baseball game, and therefore, Plaintiff's negligence claims were barred by the defense of implied primary assumption of risk. (LF 15, 16, 36 – 43.) Defendant argued that implied primary assumption of risk is an absolute defense to a negligence claim, in that, if this doctrine is applicable, Defendant owed no duty to

Plaintiff. (LF 37.) The trial court denied Defendant's motion on Plaintiff's negligence claim, ruling in part that:

In a claim alleging negligence, Plaintiff must establish that Defendant owed Plaintiff a duty of care. *O.L. v. R.L.*, 62 S.W.3d 469, 475 (Mo. Ct. App. 2001). Defendant argues Plaintiff assumed the risk of his injuries and thus, is barred from recovery. "Assumption of risk is generally categorized as express, implied primary, and implied secondary (reasonable and unreasonable)." *Lewis v. Snow Creek, Inc.*, 6 S.W.3d 388, 393 (Mo. Ct. App. 1999). Here, Defendant relies on implied primary assumption of the risk contending that this doctrine acts as a complete bar to Plaintiff's negligence action.

"Implied primary assumption of risk involves the question of whether the defendant had a duty to protect the plaintiff from the risk of harm. It applies where the parties have voluntarily entered a relationship in which the plaintiff assumes well-known incidental risks. The plaintiff's consent is implied from the act of electing to participate in the activity." *Id.* at 395. "The basis of implied primary assumption of risk is the plaintiff's consent to accept the risk. 'If the risks of the

activity are perfectly obvious or fully comprehended, plaintiff has consented to them and defendant has performed his or her duty.” *Id.* at 395-96 (citing *Martin v. Buzan*, 857 S.W.2d 366, 369 (Mo. Ct. App. 1993)).

Implied primary assumption of risk, however, does not relieve a defendant of liability for negligence. *Parker v. Roszell*, 617 S.W.2d 597, 600 (Mo. Ct. App. 1981). While Plaintiff may have assumed the risk inherent and common to a baseball game, he did not assume the risk created by Defendant’s negligence. *See e.g., Frank v. Mathews*, 136 S.W.3d 196, 202 (Mo. Ct. App. 2004); *Maldonado v. Gateway Hotel Holdings, L.L.C.*, 154 S.W.3d 303, 309 (Mo. Ct. App. 2003); *Lewis*, 6 S.W.3d at 395; *Sheppard v. Midway R-I School Dist.*, 904 S.W.2d 257, 261 (Mo. Ct. App. 1995); and *Hudson v. Kansas City Baseball Club*, 164 S.W.2d 318, 232 (Mo. 1942).

Plaintiff claims that Defendant, by and through its employee Sluggerrr, failed to exercise ordinary care in throwing hotdogs in the stadium seats. Specifically, Plaintiff alleges in his Petition that Sluggerrr “[i]nstead of throwing the hotdog at

an arch high into the stands, Slug[gerrr] lost control of his throw, or was reckless with his throw, and threw the hotdog directly into Plaintiff, who was sitting a few feet away.” Plaintiff also claims that Defendant failed to adequately train and supervise Sluggerrr on the proper method to throw a hotdog into the stands. While Plaintiff may have assumed the risk inherent and common to a baseball game, including the Hotdog Toss, Plaintiff did not assume the risk created by these alleged acts of negligence committed by Defendant and its employee. Certainly, Defendant denies these allegations of negligence, but a dispute exists. Therefore, summary judgment is denied on this issue.

(LF 198, 199.)

After the trial court denied Defendant’s motion for summary judgment, the case proceeded to a jury trial beginning March 7, 2011, where the evidence showed the following:

On Tuesday, September 8, 2009, Plaintiff John Coomer, a 50 year old man, attended a Royals’ baseball game at Kauffman Stadium with his 77 year old father. (Transcript “TR”, TR 245, 250, 251.) It had been raining earlier that day and the attendance at the game was sparse. (TR 250, 252, 253.) Plaintiff and his father sat in the sixth row behind the third base dugout. (TR 253.) During a break in the innings, the Royals’ mascot, Sluggerrr (a big lion), performed the Farmland hotdog launch which is a

promotional activity where Sluggerrr shoots hotdogs from an air gun and also hand throws hotdogs into the stands. (TR 258, 259, Trial Exhibit 4, video of the hotdog launch from September 8, 2009, which shows Sluggerrr conducting a portion of the hotdog launch but does not show Sluggerrr's throw that struck Plaintiff.) The hotdogs shot out of the air gun are wrapped in bubble wrap, and the hotdogs thrown by Sluggerrr are wrapped in foil. (TR 120, 121, Trial Exhibit 104, Appendix "A", A 1, photo of foil wrapped hotdog.) The individual portraying Sluggerrr on September 8, 2009, was Byron Shores, who was Defendant's employee. (TR 111 - 113, 116.) Defendant admitted that Mr. Shores was acting in the scope and course of his employment during this incident. (TR 355.)

As Sluggerrr was finishing the hotdog launch on September 8, 2009, he stopped shooting the hotdogs with the air gun and began softly tossing hotdogs into the stands. (TR 258, 289.) At the time, Plaintiff was about 15 – 20 feet away from Sluggerrr (TR 352.) When Sluggerrr reached the last hotdog, Sluggerrr threw the hotdog by means of a no-look, behind his back throw, and it struck Plaintiff in his face. (TR 258, 259.) Sluggerrr did not throw the hotdog in an arc but in a straight line. (TR 258 – 261, 284 – 286, 290, A 2 - 5.) Plaintiff was looking at the scoreboard and talking with his father, when Plaintiff saw out of the corner of his eye that Sluggerrr was throwing the last hotdog behind his back, and in a split second, the hotdog struck Plaintiff in the face with such force that Plaintiff's hat flew off his head. (TR 258 – 261, 284 – 286, 290, A 2 – 5.) Plaintiff's first reaction was to grab his face because he was concerned that his contacts had been knocked out of his eyes. (TR 260, A 3.) Although Plaintiff had been

to many Royals' baseball games and previously seen Sluggerrr conduct the hotdog launch, Plaintiff had never seen Sluggerrr throw hotdogs forcefully in a straight line. (TR 249, 250, 290, A 5.)

When Sluggerrr struck Plaintiff with the hotdog, Plaintiff did not know that he had been injured. (TR 262.) Two days later, he developed black spots in the vision of his left eye. (TR 262, 263.) Approximately a week later, Plaintiff went to his eye doctor and was diagnosed with a detached retina which required an immediate surgical repair. (TR 263 – 267.) Approximately one month later, Plaintiff developed a traumatic cataract in his left eye which was caused by being struck by the hotdog. (TR 269, 270, LF 236, 237.) In December 2009, Plaintiff underwent a surgery to remove the traumatic cataract from his left eye. (TR 270, 271.)

At trial, Bryon Shores, who portrayed Sluggerrr, testified that the Royals started the hotdog launch in approximately 2000. (TR 127.) Mr. Shores was 39 years old, 6 feet 3 inches tall and weighed 220 pounds. (TR 127). Mr. Shores was aware that in throwing hotdogs to nearby patrons, the proper method was to make eye contact with the intended recipient and then toss the hotdog in an arc. (TR 135, 136, 139, 144, A 6 - 8.) Mr. Shores was aware that between innings there were many things for patrons to do, including going to the concessions, talking to other patrons, looking at the scoreboard to see the scores of other games, or watching the players on the field. (TR 137 – 139, A 6, 7.) Mr. Shores was aware that not everybody watches Sluggerrr during the hotdog launch. (TR 139, A 7.) Mr. Shores knew he would be throwing hotdogs to patrons who were not looking at him but at something else in the stands. (TR 139, 199, A 7.) For

that reason, Mr. Shores knew it was important to not throw a hotdog in a straight line forcefully into the stands. (TR 139, A 7.) Mr. Shores further knew it was foreseeable that someone could get hurt if he was not careful with his throws. (TR 135, 136, A 6.) Despite this knowledge, Mr. Shores threw hotdogs to nearby patrons by engaging in behind the back throws and “no look” throws. (TR 144, A 8.) Trial Exhibit 4 shows Sluggerrr conducting a portion of the hotdog launch on September 8, 2009, but does not show Sluggerrr throwing the hotdog that hit Plaintiff. (TR 149, 156, 157.) Trial Exhibits 5 – 8 are videos of the hotdog launch on dates other than September 8, 2009, and are an accurate representation of how Mr. Shores and other Royals’ employees would conduct the hotdog launch. (TR 154, 155.) Mr. Shores acknowledged that the other Royals’ employees would typically throw hotdogs “quite a bit softer” than him. (TR 155.)

Donald Paul Costante testified he was the direct supervisor of Byron Shores and had instructed Mr. Shores before Plaintiff’s incident that in throwing hotdogs to nearby patrons, it was important to make eye contact with the intended recipient, and then throw the hotdog at an arc, and not throw it forcefully in a straight line. (TR 211 – 213, 215 – 230.) Before September 8, 2009, Mr. Costante had observed Sluggerrr on a couple of occasions throw hotdogs in a straight line and these throws concerned Mr. Costante. (TR 217, 218.) Mr. Costante acknowledged that it would not be proper for Sluggerrr to throw hotdogs to someone nearby, if Sluggerrr had not made eye contact with the person. (TR 219.) Mr. Costante also knew that if Sluggerrr did not throw the hotdogs at an arc, somebody could get hurt. (TR 220.) Mr. Costante had instructed the Royals’ employees working with Sluggerrr to observe Sluggerrr’s throwing the hotdogs to see if Sluggerrr

was throwing them in a forceful manner. (TR 223, 224.) If these employees observed Sluggerrr forcefully throwing hotdogs, Mr. Costante had instructed them to notify him so he could meet with Sluggerrr and talk about the throws and to reiterate the importance of throwing the hotdogs at an arc. (TR 223 – 226.)

Mr. David Allen testified that he attended a Royals' baseball game in August 2008 (before Plaintiff's incident), where Sluggerrr forcefully threw a hotdog that struck him in the face. Mr. Allen testified that:

after [Sluggerrr] finished shooting with the air gun, he started tossing hotdogs to the crowd. And he pointed one at several people, kind of in the playful way he did, and pointed one at me, and so I had my hands ready to go. And when I had my hands up, he threw it really hard, and it hit me right in the face. And when it hit me, it hit me so hard that I didn't realize what happened. And I put my hands down in my head and came up, and my glasses were broken.

(TR 310.) Mr. Allen was about 20 feet away from Sluggerrr and didn't catch the hotdog because it was thrown so hard. (TR 311.) Mr. Allen did not expect Sluggerrr to throw the hotdog in such a forceful manner “[b]ecause I’ve seen the way he has kind of tossed them in the air, kind of in an arch fashion in the past, and so I didn’t really expect it was going to come at me with that much force.” (TR 312.) As a result of Sluggerrr’s throw, Mr. Allen suffered a black eye and a scratch under his eye. (TR 311.) Defendant’s

employees were aware of this incident, took a report and walked Mr. Allen to a medical unit in the stadium. (TR 312.) Mr. Shores was also aware he had injured Mr. Allen. *Id.*

Before trial, Defendant filed a motion to strike and/or dismiss Plaintiff's allegations of negligent training and negligent supervision on the grounds that "[o]nce a defendant employer admits it is vicariously liable for the alleged negligent conduct of its employee, it is error to allow a plaintiff to proceed against the employer on any other theory of imputed liability, such as negligent hiring, entrustment, training, or supervision." (LF 211.) The trial court did not grant Defendant's motion, but held that it would not allow Plaintiff to submit a verdict director on both a respondent superior theory and a negligent supervision/ training theory. (TR 17 – 22, 30, 66.) The trial court held that Plaintiff could only submit one of the theories to the jury. *Id.* Plaintiff objected to this ruling and tendered a verdict director on all three theories, but given the trial court's ruling, Plaintiff elected to submit on a respondent superior theory. (TR 30, 382, Supplemental Legal File "SL", SL 1, A 9.)¹

At the close of the evidence, Plaintiff moved for a directed verdict on Defendant's affirmative defenses of assumption of risk and comparative fault. (LF 258 – 262.)

¹ In his motion for judgment notwithstanding the verdict and for new trial, Plaintiff argued that the trial court erred in refusing to allow Plaintiff to submit all of his negligence theories to the jury. (LF 273, 274, 301 - 303.) The trial court denied Plaintiff's motion and this issue is part of the present appeal. (LF 341.)

Plaintiff argued that implied primary assumption of risk was inapplicable because the risk that Sluggerrr would negligently throw a hotdog in a non-arc manner is not a risk inherent to a baseball game but instead is a risk created by Defendant's negligence. (LF 258, 261, 262.) Plaintiff further argued that Defendant had not made a submissible case to support a jury instruction on Defendant's affirmative defense of implied secondary assumption of risk, which is a form of comparative fault. (LF 258 – 261.) Plaintiff argued that there was no evidence that Plaintiff had acted unreasonably to cause his own injuries, and therefore, a comparative fault instruction was not supported by the evidence, which merely showed that Plaintiff was sitting in his seat talking to his father and watching the video screen when Sluggerrr struck him in the face with a hotdog. *Id.* The trial court denied Defendant's motion for directed verdict and over Plaintiff's objections, instructed the jury on Defendant's affirmative defenses of implied primary assumption of risk and comparative fault (implied secondary assumption of risk). (TR 369, 372, 377, 378, 379, 380, LF 265, A 10 (Instruction No. 9), LF 267, A 11 (Instruction No. 11), LF 208, A 12 (Instruction No. 12)).²

² In his motion for judgment notwithstanding the verdict and for new trial, Plaintiff argued that it was improper to submit these defenses and instructions to the jury. (LF 273 – 275, 297 - 301.) The trial court denied this motion and these issues are part of the present appeal. (LF 341.)

Plaintiff further objected to the tail instruction included within Instruction No. 9, which was the Verdict Director on Plaintiff's negligence claim. (TR 377, 378.)

Instruction No. 9 provided that:

In your verdict you must assess a percentage of fault to defendant if you believe:

First, defendant's employee threw a hotdog that hit plaintiff; and

Second, defendant's employee was thereby negligent, and

Third, as a direct result of such negligence plaintiff sustained damage,

unless you believe plaintiff is not entitled to recover by reason of Instruction No. 11.

(LF 265, A 10.) Instruction No. 11, in turn, provided that:

In your verdict you must not assess a percentage of fault to defendant if you believe:

First, the risk of suffering an injury by being struck by a hotdog thrown in a manner in which Sluggerrr threw the hotdog that plaintiff alleges struck him was a risk inherent in attending a game at Royals' stadium, and

Second, plaintiff comprehended the actual risk, and

Third, plaintiff intelligently accepted such risk.

(LF 267, A 11.) Plaintiff objected to the tail instruction in Instruction No. 9, because when coupled with Instruction No. 11, Instruction No. 9 made Defendant's assumption of risk defense a complete bar to Plaintiff's negligence claim, even if the jury found Defendant negligent. (TR 377.) Plaintiff also objected to Instruction No. 11, on the grounds that the defense of implied primary assumption of risk was not applicable in this

case. (TR 378.) The court overruled Plaintiff's objections as to Instruction No. 9 and 11 and refused to submit Plaintiff's proposed Verdict Director which did not contain the tail of Instruction No. 9 and refused to submit the verdict form tendered by Plaintiff that did not contain a comparative fault instruction. (LF 264, SL 2, 3, A 13, 14, TR 382.)³ After the trial court provided the instructions to the jury, it returned a verdict in favor of Defendant finding that Plaintiff was 100% at fault for his own injuries. (LF 269.) The court thereafter entered its judgment in favor of Defendant and against Plaintiff. (LF 270.) The present appeal followed. (LF 343.)

³ In his motion for judgment notwithstanding the verdict and for new trial, Plaintiff argued it was improper to submit Instruction Nos. 9 and 11 to the jury. (LF 273 – 275, 297 – 300.) The trial court denied this motion, and these issues are part of the present appeal. (LF 341.)

APPELLANT'S POINTS RELIED ON

POINT I

THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR DIRECTED VERDICT ON DEFENDANT'S DEFENSE OF PRIMARY IMPLIED ASSUMPTION OF RISK AND ERRED IN SUBMITTING INSTRUCTION NO. 11, WHICH SET FORTH THE ELEMENTS OF THIS DEFENSE, BECAUSE IMPLIED PRIMARY ASSUMPTION OF RISK HAS NO APPLICATION IN THIS CASE IN THAT THE RISK THAT SLUGGERRR WOULD NEGLIGENTLY THROW A HOTDOG THAT WOULD STRIKE A BUSINESS INVITEE IS NOT A RISK INHERENT TO THE GAME OF BASEBALL, AND EVEN IF IT WAS, IMPLIED PRIMARY ASSUMPTION OF RISK DOES NOT APPLY IF A PLAINTIFF ALLEGES HE WAS INJURED BY THE DEFENDANT'S NEGLIGENCE.

Ivey v. Nicholson-McBride, 336 S.W.3d 155 (Mo. App. 2011)

Lewis v. Snow Creek, Inc., 6 S.W.3d 388 (Mo. App. 1999)

Sheppard v. Midway R-1 School Dist., 904 S.W.2d 257 (Mo. App. 1995)

Frank v. Mathews, 136 S.W. 3d 196 (Mo. App. 2004)

POINT II

THE TRIAL COURT ERRED IN SUBMITTING INSTRUCTION NO. 9 BECAUSE EVEN IF THE DEFENSE OF IMPLIED PRIMARY ASSUMPTION WAS POTENTIALLY AVAILABLE TO DEFENDANT, INSTRUCTION NO. 9 WAS NOT PROPER IN THAT INSTRUCTION NO. 9, WHEN COUPLED WITH INSTRUCTION NO. 11, MADE DEFENDANT'S ASSUMPTION OF RISK DEFENSE A COMPLETE BAR TO PLAINTIFF'S CLAIM EVEN IF THE JURY FOUND THAT DEFENDANT WAS NEGLIGENT, WHICH IS AN INCORRECT STATEMENT OF THE LAW.

Sheppard v. Midway R-1 School Dist., 904 S.W.2d 257 (Mo. App. 1995)

Ivey v. Nicholson-McBride, 336 S.W.3d 155 (Mo. App. 2011)

Maldonado v. Gateway Hotel Holdings, LLC, 154 S.W.3d 303 (Mo. App. 2003)

POINT III

THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR DIRECTED VERDICT ON DEFENDANT'S DEFENSE OF COMPARATIVE FAULT (IMPLIED SECONDARY ASSUMPTION OF RISK) AND SUBMITTING INSTRUCTION NO. 12, BECAUSE DEFENDANT FAILED TO MAKE A SUBMISSIBLE CASE THAT PLAINTIFF WAS COMPARATIVELY AT FAULT IN THAT THERE WAS NO COMPETENT EVIDENCE THAT PLAINTIFF ACTED UNREASONABLY WHEN SLUGGERRR STRUCK HIM WITH THE HOTDOG.

Ivey v. Nicholson-McBride, 336 S.W.3d 155 (Mo. App. 2011)

Sheppard v. Midway R-1 School Dist., 904 S.W.2d 257 (Mo. App. 1995)

Holt v. Myers, 494 S.W.2d 430 (Mo. App. 1973)

POINT IV

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON PLAINTIFF'S CLAIMS FOR NEGLIGENT SUPERVISION AND TRAINING BECAUSE IT MISAPPLIED MCHAFFIE V. BUNCH, 891 S.W.2d 822 (MO. BANC 1995) IN THAT PLAINTIFF'S CLAIMS FOR NEGLIGENCE SUPERVISION AND TRAINING ARE NOT THEORIES OF IMPUTED LIABILITY LIKE CLAIMS FOR NEGLIGENT ENTRUSTMENT AND NEGLIGENT HIRING.

McHaffie v. Bunch, 891 S.W.2d 822 (Mo. banc 1995)

G.E.T. ex rel. T.T. v. Barron, 4 S.W.3d 622 (Mo. App. 1999)

ARGUMENT OF APPELLANT

POINT I

THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR DIRECTED VERDICT ON DEFENDANT'S DEFENSE OF PRIMARY IMPLIED ASSUMPTION OF RISK AND ERRED IN SUBMITTING INSTRUCTION NO. 11, WHICH SET FORTH THE ELEMENTS OF THIS DEFENSE, BECAUSE IMPLIED PRIMARY ASSUMPTION OF RISK HAS NO APPLICATION IN THIS CASE IN THAT THE RISK THAT SLUGGERRR WOULD NEGLIGENTLY THROW A HOTDOG THAT WOULD STRIKE A BUSINESS INVITEE IS NOT A RISK INHERENT TO THE GAME OF BASEBALL, AND EVEN IF IT WAS, IMPLIED PRIMARY ASSUMPTION OF RISK DOES NOT APPLY IF A PLAINTIFF ALLEGES HE WAS INJURED BY THE DEFENDANT'S NEGLIGENCE.

STANDARD OF REVIEW

The determination of whether implied primary assumption of risk is applicable involves the question of whether Defendant had a duty to protect Plaintiff from a risk of harm. *Lewis v. Snow Creek, Inc.*, 6 S.W.3d 388, 393 (Mo. App. 1999), citing *Sheppard v. Midway R-1 School Dist.*, 904 S.W.2d 257, 261 (Mo. App. 1995.) "Whether a legal duty exists is a matter of law for the court to decide." *Zubres Radiology v. Providers Ins. Consultants*, 276 S.W.3d 335, 340, 341 (Mo. App. 2009); *Hoffman v. Union Elec. Co.*, 176 S.W.3d 706, 708 (Mo. banc 2005) ("Whether a duty exists is purely a question of law."); *Burrell ex rel. Schatz v. O'Reilly Automotive, Inc.*, 175 S.W.3d 642, 656 (Mo.

App. 2005) (“The duty element stands separate from other elements of negligence because the existence of a duty is a question of law to be decided by the court.”). “The judicial determination of the existence of duty rests on sound public policy.” *Hoffman*, 176 S.W.3d at 708, quoting *Hoover’s Dairy, Inc. v. Mid-America Dairymen, Inc.*, 700 S.W.2d 426, 431 (Mo. banc 1985).

Questions of law, in turn, are subject to *de novo* review. *Building Owners & Managers Ass’n of Greater Kansas City v. City of Kansas City*, 231 S.W.3d 208, 211 (Mo. App. 2007). *See also Jones v. GST Steel Co.*, 272 S.W.3d 511, 515 (Mo. App. 2009) (“Issues of law fall within the court’s province of independent review and correction is appropriate where the decision is erroneous”); *In re G.F.*, 276 S.W.3d 327, 329 (Mo. App. 2009) (“We review questions of law independently, and reach our own conclusions on the issue presented, without deference to the trial court’s conclusions.”)

ARGUMENT

Throughout this case, Defendant has argued that the defense of implied primary assumption of risk is applicable and acts as a complete bar to Plaintiff’s negligence claim because the risk that its employees would throw promotional items that would strike and injure business invitees is similar to the risk that its business invitees could be struck by foul balls or broken bats. Defendant argues that all these risks are unavoidable and inherent to the game of baseball, and therefore, Defendant owed no duty to Plaintiff.

Plaintiff, on the other hand, maintains the defense of implied primary assumption of risk is inapplicable for two separate reasons and that Defendant did owe Plaintiff a duty to exercise ordinary care in throwing promotional items. First, the defense of

implied primary assumption of risk is limited under Missouri law to the unavoidable risks associated with participating in a sporting event or a game itself, or, in other words, risks that arise from the nature of the activity itself. *Ivey v. Nicholson-McBride*, 336 S.W.3d 155, 158 (Mo. App. 2011). No Missouri case has ever expanded the defense of implied primary assumption of risk to the activities of a team mascot who is intentionally throwing promotional items directly at business invitees. The expansion of this defense to the activities of a team mascot is unwarranted and bad public policy because it would bar injured persons from seeking compensation for injuries caused by the negligent or reckless conduct of team mascots. Expansion of the defense to team mascots is further unwarranted because the risk created by a mascot is not related to the inherent risks arising from a baseball game. The risks created by a mascot throwing promotional items could be avoided if a mascot did not throw the items or if he did so in a careful manner. In either event, the game of baseball could still be played, but the risk created by the mascot would be avoided. Because the risks created by a mascot throwing promotional items do not arise from the inherent nature of a baseball game, the defense of implied primary assumption of risk is not applicable.

Furthermore, even if being struck in the face with hotdogs is an inherent risk of a baseball game, Missouri case law establishes a second reason why implied primary assumption of risk has no application in this case. Missouri case law recognizes that this defense is not available where a plaintiff, as is true in the present case, alleges a defendant's negligence caused his injuries. *Ivey*, 336 S.W.3d at 158. In such cases, the implied primary assumption of risk has no application and cannot serve as a complete bar

to a negligence claim. *Id.* Rather, implied secondary assumption of risk is applicable, which is a form of comparative fault and allows the jury to compare the fault of the parties, provided that there is evidence that the plaintiff acted unreasonably when faced with the risk at issue. *Sheppard*, 904 S.W.2d at 262.

Despite Plaintiff's arguments and objections, the trial court accepted Defendant's analysis on the issue of implied primary assumption of risk and instructed the jury on this defense, which was embodied by the tail on Instruction No. 9, along with Instruction No. 11. (LF 265, 267, A 10, 11.) Because implied primary assumption of risk is a "no duty" defense, its application presents a question of law, which this Court decides on a *de novo* review. *Zubres Radiology*, 276 S.W.3d at 340, 341.

In *Ivey*, 336 S.W.3d at 157, this Court recently reiterated that under Missouri law, there are three types of assumptions of risk and they are categorized as either express, implied primary, or implied secondary, citing *Snow Creek Inc.*, 6 S.W.3d at 393. "Express assumption of risk occurs when the plaintiff expressly agrees in advance that the defendant owes him no duty." *Snow Creek, Inc.*, 6 S.W. 3d at 393, citing *Sheppard*, 904 S.W.2d at 261, 262. When an express assumption of risk occurs, which typically arises when a plaintiff signs a written release, a plaintiff's "[r]ecovery is completely barred since there is no duty in the first place." *Snow Creek*, 6 S.W.3d at 393. In the present case, Defendant did not raise the defense of an express assumption of risk and this category of assumption of risk has no bearing on the present appeal.

With respect to the two categories of implied assumption of risk, *Snow Creek, Inc.*, 6 S.W.3d at 395, explained the difference as follows:

Implied assumption of risk includes two sub-categories, implied primary and implied secondary. Implied primary assumption of risk involves the question of whether the defendant had a duty to protect the plaintiff from the risk of harm. *Sheppard*, 904 S.W.2d at 261. It applies where the parties have voluntarily entered a relationship in which the plaintiff assumes well-known incidental risks. *Id.* The plaintiff's consent is implied from the act of electing to participate in the activity. *Id.* Implied primary assumption of the risk is also a complete bar to recovery. *Id.* at 262. On the other hand, implied secondary assumption of the 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. *Id.* In implied secondary assumption of the risk cases, the question is whether the plaintiff's action is reasonable or unreasonable. *Id.* If the plaintiff's action is reasonable, he is not barred from recovery. *Id.* If the plaintiff's conduct in encountering a known risk is unreasonable, it is to be considered by the jury as one element of fault. *Id.*

In *Ivey*, 336 S.W.3d at 157, 158, this Court explained the doctrine of implied primary assumption of risk as follows:

[i]mplied primary assumption of risk involves the question whether the defendant had a duty to protect the plaintiff from the risk of

harm. Under this type of assumption of risk, the defendant is relieved from the duty to protect the plaintiff from well-known incidental risks of the parties' voluntary relationship because the parties' participation in the activity acts as consent to relieve the defendant of this duty. If the plaintiff sustains an injury from such a risk while in the relationship, the defendant, having no duty, cannot be found negligent. Thus, a finding of primary implied assumption of risk, similar to that of an express assumption of risk, completely bars the plaintiff's recovery under negligence.

(Internal citations and quotation marks omitted.) In *Sheppard*, 904 S.W.2d at 261, the court similarly explained the doctrine of implied primary assumption of risk as follows:

It only applies where the parties have voluntarily entered a relationship in which the plaintiff assumes well-known incidental risk. As to those risks, the defendant has no duty to protect the plaintiff and if the plaintiff's injury arises from an incidental risk, the defendant is not negligent. Implied primary assumption of risk, like express assumption of risk, is based on consent by the plaintiff, but does not possess the additional ceremonial and evidentiary weight of an express agreement. The plaintiff's consent is implied from the act of electing to participate in the activity. In such situations, assumption of risk is not actually an absolute defense, but a measure of a defendant's duty of care; . . .

(Internal citations and quotation marks omitted.)

Under Missouri law, a critical component of implied primary assumption of risk is that the risk assumed is an unavoidable and inherent risk of participating in the game or activity itself. As recognized in *Ivey*, 336 S.W.3d at 158, “[a]ssumed risks, however, arise from the nature of the activity itself rather than from a defendant’s negligence”, citing *Martin v. Buzan*, 857 S.W.2d 366, 369 (Mo. App. 1993) (“The assumed risks in such activities are not those created by a defendant’s negligence but rather by the nature of the activity itself. . . . Certain risks or dangers are inherent in the athletic competition”). See also *Snow Creek, Inc.*, 6 S.W.3d at 395 (“Generally, assumption of risk in the sports context involves primary assumption of risk because the plaintiff has assumed certain risks inherent to the sport or activity.”)

As explained by *Sheppard*, 904 S.W.2d at 262, 263:

The nature of the activity creates the risk. For example, the risk of being hit by a baseball is a risk inherent to the game of baseball, and everyone who participates in or attends a baseball game assumes the risk of being hit by a ball. However, the assumed risks in such activities that fall within the primary assumption of risk category are not those created by a defendant’s negligence ***but rather by the nature of the activity itself.***

(Internal quotation marks and brackets omitted) (emphasis added). *Grimes v. American League Baseball Co.*, 78 S.W.2d 520 (Mo. App. 1935) provided a more thorough

explanation for the rationale of assumption of risk as applied to the risk of injury from a batted ball to an attendee at a baseball game:

With the results of play so much dependent on chance, and especially so as regards the course to be taken by batted balls, the game of baseball could hardly be played without some small element of risk of injury to spectators. Almost every one attending a game desires to witness it from a vantage point as near the diamond as his good fortune and purse will permit, and yet the nearer one is to the diamond the greater is the risk of injury from balls coming into the stands. . . . So far as regards the danger to a spectator of being struck and injured by a ball batted into the stands, a circumstance which is commonly incident to the inherent nature of the game, the club is held to have discharged its full duty when it has provided adequately screened seats in the stands in which the patron may sit if he so desires; . . .

Id. at 523.

Because implied primary assumption of risk applies to unavoidable and inherent risks of participating in a sport or an activity, the Missouri courts have recognized that the doctrine is potentially applicable to numerous types of sporting activities, such as skiing, track meets, co-ed softball games, horseback riding and spectators hit by baseballs. *See Snow Creek, Inc.*, 6 S.W.3d at 388; *Sheppard*, 904 S.W.2d at 257; *Martin*, 857 S.W.2d at

366; *Frank v. Mathews*, 136 S.W. 3d 196 (Mo. App. 2004); *Maldonado v. Gateway Hotel Holdings, LLC*, 154 S.W.3d 303 (Mo. App. 2003); and *Hudson v. Kansas City Baseball Club*, 164 S.W.2d 318, 323 (Mo. 1942).

Although the Missouri courts have applied the defense of implied primary assumption of risk to a broad range of sporting activities, no Missouri case has ever extended the defense to the activities of a team mascot who is intentionally throwing promotional items directly at business invitees. The rationale for not extending the defense to such activities is both legally sound and good public policy.

The rationale is legally sound because implied primary assumption of risk only applies to the unavoidable and inherent risks of the game or activity itself. The activity of a mascot throwing hotdogs directly at business invitees is not an inherent or unavoidable risk of the game of baseball. The risk created by a mascot throwing promotional items could be avoided if the mascot chose not to throw the items or did so in a careful, non-negligent manner. In either scenario, the game of baseball could still be played without the risk created by the mascot. *See Lowe v. California League of Professional Baseball*, 56 Cal.App.4th 112, 123 (1997) (holding that primary assumption of risk doctrine did not apply to a spectator hit by foul ball while distracted by team mascot because “the antics of the mascot are not an essential or integral part of the playing of a baseball game” and “defendants had a duty *not to increase* the risk to which spectators at professional baseball games are regularly exposed and which they assume”) (emphasis in original).

It would be both legally unsound and bad public policy to expand the defense of implied primary assumption of risk to the activities of a team mascot. Applying implied primary assumption of risk to the activities of team mascots would give mascots absolute immunity from any damages caused by their activities. Business invitees who are injured by a mascot's reckless or negligent throws would be barred from recovering damages for injuries caused by careless mascots. The law, however, should create an incentive for the mascots to use reasonable, ordinary care when throwing items directly into the face of business invitees. Should the peanut vendor be immune from liability if the vendor throws a bag of peanuts forcefully by means of a no-look, behind the back throw, into the face of a business invitee who is not looking at him? The law and public policy should not condone such conduct but rather should impose a duty upon the mascot or vendor to exercise ordinary care.

In the present case, Bryon Shores, who portrayed Sluggerrr, testified that he knew the proper method to throw a promotional item was to make eye contact with the intended recipient and then throw the item softly at an arc. (TR 135, 136, 139, 144, A 6 - 8.) Mr. Shores knew if he did not follow this protocol, his throws could be dangerous and he could potentially hurt someone looking at the many other activities that occur between the innings. (TR 135 - 139, A 6, 7.) In the present case, the only reason Plaintiff suffered a serious eye injury, including a detached retina and the development of a traumatic cataract, was because Mr. Shores failed to follow his own protocol and negligently and unsafely threw a hotdog. The evidence in this case showed that the risk that Defendant's employee would negligently throw a hotdog is not similar to the

unavoidable or inherent risk that a spectator could be struck with a foul ball or a broken bat. For this reason, the defense of implied assumption of risk has no application in this case and the trial court committed a reversible error by denying Plaintiff's motion for directed verdict on this issue and submitting Instruction Nos. 9 and 11 to the jury.

Moreover, even if the risk of being struck by hotdogs is an inherent risk to the game of baseball (which it is not), the defense of implied primary assumption of risk is not applicable in this case for a second reason. Missouri law recognizes that this defense is not applicable where a plaintiff alleges his injuries were caused by a defendant's negligence. In *Ivey*, 336 S.W.3d at 158, this Court held that implied primary assumption of risk has no application where the law imposes a duty upon the defendant and the plaintiff alleges a breach of such duty.

In *Ivey*, the trial court granted a summary judgment against the plaintiff, a driver's license examiner, who alleged she was injured after the defendant applicant "slammed on the brakes" during the applicant's driving skills test. *Id.* at 156. In granting the summary judgment, the trial court reasoned that the plaintiff's negligence claim was barred by implied primary assumption of risk because the plaintiff's injuries resulted from a risk inherent to her position as a driver's license examiner. *Id.* On appeal, this Court reversed the summary judgment and found that assumption of risk had no application to the case. *Id.* at 158. *Ivey* recognized that the law imposes a duty on all drivers to operate their vehicles with the highest degree of care and that the plaintiff "had every right to expect [the defendant] to exercise the highest degree of care in demonstrating her driving skills." *Id.* *Ivey* reasoned that:

Assumed risks [under implied primary assumption of risk], however, arise from the “nature of the activity itself” rather than from a defendant’s negligence. *Martin v. Buzan*, 857 S.W.2d 366, 369 (Mo. App. E.D. 1993). Primary implied assumption of the risk is thus inapplicable when a plaintiff’s injuries are caused by a defendant’s breach of a duty of care in administering or regulating the activity. *See Sheppard*, 904 S.W.2d at 262-63. This is so because duty is predicated upon foreseeability. *See Hallquist v. Midden*, 196 S.W.3d 601, 604-05 (Mo. App. E.D. 2006); *Bostic ex rel. Bostic v. Bill Dillard Shows, Inc.*, 828 S.W. 2d 922, 926-27 (Mo. App. W.D. 1992). For example, in the sports context, a player generally consents to “injuries which are reasonably foreseeable consequences of participating in the competition.” *Martin*, 857 S.W.2d at 369. However, a player does not consent to injuries resulting from negligent conditions because it is not reasonably foreseeable that the standards of care in regulating and administering the game will be breached. *See Sheppard*, 904 S.W.3d at 262-63.

Id. (Brackets added.)

In addition to *Ivey*, numerous other Missouri cases have recognized that implied primary assumption of risk has no application where a plaintiff alleges he was injured by a defendant’s negligence. In *Frank*, 136 S.W.3d at 196, the plaintiff brought suit against a horse-riding instructor and stable owner after the plaintiff fell off a horse during a

riding lesson. The plaintiff, who was an inexperienced rider, was thrown off the horse after the instructor had told her to tap the horse's neck with a riding crop, and the horse immediately jolted forward. *Id.* at 198. The trial court entered summary judgment in favor of the defendants on the ground that being thrown from a horse is an inherent risk of horseback riding, and that plaintiff had assumed that risk. *Id.* at 203. On appeal, *Frank* reversed and recognized that “[c]ommon law negligence principles imposed a duty upon [defendants] to exercise due care for [the plaintiff’s] safety.” *Id.* at 205. *Frank* further held that while the plaintiff assumed the risks inherent in the activity of horseback riding, “[s]he did not, however, assume any enhanced exposure to those risks that may have been caused by the Instructor’s negligent supervision.” *Id.* at 205.

In *Sheppard*, 904 S.W.2d at 257, a long jump competitor injured in a school track meet brought suit against the school district, alleging that the long jump pit had been negligently prepared by the school district’s employees. *Id.* at 259. *Sheppard* held that while “[t]here can be no question that Sheppard assumed the risks inherent in the sport of long jumping” – which included the inherent risk of a bad or awkward landing – “she did not assume the risk of [the school district’s] negligent provision of a dangerous facility.” *Id.* at 264. *See also Maldonado*, 154 S.W.3d at 309 (“[A]ssumed risks in sporting events do not include those created by a defendant’s negligence.”) *See also Hudson*, 164 S.W.2d at 323 (holding that spectator at baseball game assumes risks inherent to the game, but not the risk of “being injured by the proprietor’s negligence”).

In the present case, common law negligence principles establish that Defendant and its employees owed Plaintiff, a business invitee, a duty to exercise ordinary care in

conducting its promotional events. *See Lear v. Norfolk and W. Ry Co.*, 815 S.W.2d 12, 18 (Mo. App. 1991), (“A landowner does owe a duty to business invitees, once their presence is known, to exercise reasonable care as to the activities of the landowner on the premises,” citing *Scheibel v. Hillis*, 531 S.W.2d 285, 288 (Mo. banc 1976)).

Given that Defendant and its employees owed Plaintiff a duty of care, Plaintiff had every right to expect that Defendant’s employee would abide by his duty and not forcefully and recklessly throw a hotdog in his face while Plaintiff was watching the scoreboard and talking to his father. Given that Defendant owed a duty to Plaintiff and Plaintiff has alleged a breach of that duty, the defense of implied primary assumption of risk has no application in this case. The trial court committed a reversible error in submitting Instruction Nos. 9 and 11 to the jury.

POINT II

THE TRIAL COURT ERRED IN SUBMITTING INSTRUCTION NO. 9 BECAUSE EVEN IF THE DEFENSE OF IMPLIED PRIMARY ASSUMPTION WAS POTENTIALLY AVAILABLE TO DEFENDANT, INSTRUCTION NO. 9 WAS NOT PROPER IN THAT INSTRUCTION NO. 9, WHEN COUPLED WITH INSTRUCTION NO. 11, MADE DEFENDANT'S ASSUMPTION OF RISK DEFENSE A COMPLETE BAR TO PLAINTIFF'S CLAIM EVEN IF THE JURY FOUND THAT DEFENDANT WAS NEGLIGENT, WHICH IS AN INCORRECT STATEMENT OF THE LAW.

STANDARD OF REVIEW

“Whether a jury was instructed properly is a question of law that this Court reviews *de novo*.” *Klotz v. St. Anthony's Medical Ctr.*, 311 S.W.3d 752, 766 (Mo. banc 2010), citing *Bach v. Winfield-Foley Fire Protection Dist.*, 257 S.W.3d 605, 608 (Mo. banc 2008). “Review is conducted in the light most favorable to the submission of the instruction, and if the instruction is supportable by any theory, then its submission is proper.” *Id.* “Instructional errors are reversed only if the error resulted in prejudice that materially affects the merits of the action.” *Id.*

ARGUMENT

Even if the defense of implied primary assumption of risk was available to Defendant in this case, the trial court erred in instructing the jury on this defense. Instruction No. 9 was submitted to the jury over Plaintiff's objection and instructed the jury as follows:

In your verdict you must assess a percentage of fault to defendant if you believe:

First, defendant's employee threw a hotdog that hit plaintiff; and

Second, defendant's employee was thereby negligent, and

Third, as a direct result of such negligence plaintiff sustained damage,

unless you believe plaintiff is not entitled to recover by reason of Instruction No. 11.

(LF 265, A 10.)

Instruction No. 11, in turn, was also submitted to the jury over Plaintiff's objection and provided as follows:

In your verdict you must not assess a percentage of fault to defendant if you believe:

First, the risk of suffering an injury by being struck by a hotdog thrown in a manner in which Sluggerrr threw the hotdog that plaintiff alleges struck him was a risk inherent in attending a game at Royals' stadium, and

Second, plaintiff comprehended the actual risk, and

Third, plaintiff intelligently accepted such risk.

(LF 267, A 11.) Instruction No. 9 is flawed because when it is coupled with Instruction No. 11, Instruction No. 9 made Defendant's assumption of risk a complete bar to Plaintiff's recovery, even if the jury found that Defendant was negligent. This instruction, however, incorrectly states the law because implied primary assumption of risk is not a complete bar to a personal injury claim if a plaintiff's injuries were caused by a defendant's negligence. *See Ivey*, 336 S.W.3d at 158 ("a player does not consent to

injuries resulting from negligent conditions because it is not reasonably foreseeable that the standards of care in regulating and administering the game will be breached”); *Maldonado*, 154 S.W.3d at 309 (“[A]ssumed risks in sporting events do not include those created by a defendant’s negligence.”)

Sheppard, 904 S.W.2d at 264, 265, addressed jury instructions very similar to the instructions at issue in this appeal and *Sheppard* found that such instructions were improper and incorrectly stated the law. In *Sheppard*, the plaintiff alleged that she was injured because the long jump pit into which she jumped was negligently prepared. *Id.* at 264. The defendant school district, in turn, argued that the plaintiff was injured by a bad landing which was an inherent risk of the sport, and therefore, the plaintiff’s claims were barred by the defense of implied primary assumption of risk. *Id.* The *Sheppard* trial court, like the trial court in the present case, submitted a verdict directed on the plaintiff’s negligence claim that contained a tail provision identical to the tail contained in Instruction 9 submitted in the present case. *Id.* at 259, 260. The Court of Appeals in *Sheppard* recognized that under this instruction, the jury could not find in the plaintiff’s favor even if the jury believed the defendant was negligent. *Id.* at 260.

In other words, the tail on Instruction No. 8 (“unless you believe plaintiff Terra Sheppard is not entitled to recover by reason of Instruction No. 9”) coupled with Instruction No. 9, made Sheppard’s assumption of risk an affirmative defense completely barring recovery: if the jury found Sheppard’s injury was a reasonably foreseeable risk of participating in the long jump and that she

assumed that risk by participating, she could not recover from [the defendant], even if the jury also found [the defendant] was negligent in preparing the pit. In fact, under these instructions, the jury would have been required to find for [the defendant] even if the jury had found [the defendant] was totally at fault, so long as the injury was foreseeable and Sheppard assumed that risk.

Id. After recognizing that these instructions made the assumption of risk defense a complete bar to *Sheppard's* negligence claim, the court found that these instructions were fatally flawed and then remanded case for new trial. *Id.* at 264, 265. *Sheppard* recognized that if a plaintiff's injuries were caused by the defendant's negligence, the doctrine of implied primary assumption of risk cannot act as a complete bar to a plaintiff's claims. *Id.* at 262, 263. ("Consequently, if as *Sheppard* contends, her injury was caused not by a risk inherent in the sport of long jumping but rather by [defendant's] negligence in preparing the pit, secondary, rather than primary, assumption of risk applies and the question of her negligence in assuming that risk should merely be compared by the jury as an element of comparative negligence rather than a complete bar to her recovery.") The *Sheppard* court concluded that the instructions were "fatally flawed" because "it required the jury to find for [the defendant], even if it found [the defendant] negligently prepared the pit." *Id.* at 264.

In the present case, the tail instruction contained within Instruction No. 9 is identical to the instruction which *Sheppard* found incorrectly stated the law. Both instructions directed the juries to find completely in defendants' favor even if the jury

found that the defendants had acted negligently. As recognized by *Sheppard*, this is an incorrect statement of law. The implied primary assumption of risk does not protect a defendant from its negligent actions and the trial court in our case erred in submitting Instruction No. 9, which misstates the law. This case should be remanded for a new trial.

POINT III

THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR DIRECTED VERDICT ON DEFENDANT'S DEFENSE OF COMPARATIVE FAULT (IMPLIED SECONDARY ASSUMPTION OF RISK) AND SUBMITTING INSTRUCTION NO. 12, BECAUSE DEFENDANT FAILED TO MAKE A SUBMISSIBLE CASE THAT PLAINTIFF WAS COMPARATIVELY AT FAULT IN THAT THERE WAS NO COMPETENT EVIDENCE THAT PLAINTIFF ACTED UNREASONABLY WHEN SLUGGERRR STRUCK HIM WITH THE HOTDOG.

STANDARD OF REVIEW

“The standard of review of the trial court’s denial of a motion for JNOV and directed verdict is the same; the Court must determine whether the [non-moving] party makes a submissible case.” *Hodges v. City of City Louis*, 217 S.W. 3d 278, 279 (Mo. 2007).

A case should not be submitted to the jury unless each and every fact essential to liability is predicated upon legal and substantial evidence. In determining whether the plaintiff or counterclaimant has made a submissible case, this Court views the evidence in the light most favorable to the [non-moving party], giving the [non-moving party] the benefit of all reasonable inferences.... However, no fact essential to submissibility may be inferred in the absence of a

substantial evidentiary basis. This Court does not supply missing evidence and does not give a plaintiff or counterclaimant the benefit of speculative, unreasonable, or forced inferences. Liability cannot be based on conjecture, guesswork, or speculation beyond inferences reasonably to be drawn from the evidence.

The Hertz Corp. v. Raks Hospitality, Inc., 196 S.W.3d 536, 549 (Mo. App. 2006).

(Internal quotations and citations omitted.)

ARGUMENT

At the close of the evidence, the trial court denied Plaintiff's motion for directed verdict on Defendant's defense of implied secondary assumption of risk which is a form of comparative fault, and over Plaintiff's objection, submitted Instruction No. 12 which addressed Defendant's defense of comparative fault. (TR 369, LF 268, A 12.)

Under Missouri law, "[a] comparative fault instruction is not warranted in every negligence suit. Rather, the defendant bears the burden of producing evidence to support the instruction." *Wendt v. General Accident Ins. Co.*, 895 S.W.2d 210, 215 (Mo. App. 1995). "While the instruction may be based on any theory supported by the evidence as construed most favorably to defendant, it must be based on 'substantial evidence' and not merely a 'scintilla of evidence' or speculative deductions and conclusions." *Id.* Giving a jury instruction on comparative fault in the absence of substantial evidence supporting the instruction is reversible error. *See, e.g., Robinson v. Weinstein*, 856 S.W.2d 337, 338

(Mo. App. 1993) (holding that the trial court erred in giving a comparative fault instruction where there was no evidence to support finding of comparative fault); *American Family Mut. Ins. Co. v. Robbins*, 945 S.W.2d 52, 55, 56 (Mo. App. 1997) (holding that the trial court erred in a traffic accident case in finding that one of the drivers was 50 percent at fault because the evidence against the driver merely rose to the level of speculation).

As recognized in *Sheppard*, 904 S.W.2d at 262, Defendant's defense of implied secondary assumption of risk is a form of comparative fault and is applicable where 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." "If the plaintiff's action is reasonable, he is not barred from recovery, nor is the defendant entitled to a comparison of fault, because reasonable assumption of risk is not fault and should not have the effect of barring recovery." *Id.* "On the other hand, if the plaintiff's conduct in voluntarily encountering a known risk is itself unreasonable, it amounts to contributory negligence and is therefore subsumed as an element of fault to be compared by the jury." *Id.*

In this case, Defendant's theory for comparative fault and its theory for implied secondary assumption of risk are the same. Defendant argued that Plaintiff was at fault for his own injuries because he was sitting in his seat watching the scoreboard and talking to his father while knowing that the Hotdog Launch was being conducted. In other words, Defendant alleges that Plaintiff, by simply remaining in his seat, knowingly

proceeded to encounter a known risk imposed by the Defendant's breach of duty and in doing so was negligent and acted unreasonably.

Plaintiff, on the other hand, submits that the fact that he was simply sitting in his seat and talking to his father while watching the scoreboard during the hotdog launch is not sufficient evidence to support a comparative fault instruction. Plaintiff was essentially in the same position as the *Ivey* plaintiff who was the driver's instructor who was injured when the applicant slammed on her brakes during the driver's skill test. *Ivey*, 366 S.W. 3d at 155. In *Ivey*, this Court recognized that the defendant applicant owed a duty of care to the *Ivey* plaintiff and that the *Ivey* plaintiff had every right to expect the applicant to abide by that duty. *Id.* at 158. *Ivey* held it is not reasonably foreseeable in a negligence case that a defendant will breach the standards of care in regulating and administering the activity at issue. *Id.* *Ivey* therefore concluded that the assumption of risk had no application to its case. *Id.* Like *Ivey*, Defendant owed a duty of care to Plaintiff and Plaintiff had every right to expect Defendant to abide by its duty of care. As in *Ivey*, comparative fault and assumption of risk have no application under the facts of this case.

This conclusion is further supported because Defendant failed to present substantial evidence from which the jury could have found that Plaintiff knew he was encountering a known risk, or in other words, that Plaintiff knew Sluggerrr was negligently conducting the Hotdog Launch, which is the first element of implied secondary assumption of risk. *See Sheppard*, 904 S.W.2d at 262 (a plaintiff must voluntarily encounter a "known risk"). Though the evidence showed that Plaintiff knew

that the hotdog launch was going on, there was no evidence to suggest that Plaintiff actually was aware that Sluggerrr was conducting the Hotdog Launch *in a negligent manner*. Plaintiff had never seen Sluggerrr throw hotdogs forcefully in a straight line and had no reason to believe Mr. Shores would breach his duty of care. (TR 290, A 5.)

Basing a finding that Plaintiff was negligent on this evidence would have required “plaintiff[] to anticipate the negligence of the defendant[] and further to anticipate a danger which would not have existed except for the negligence of the defendant[]. This the law does not require.” *Holt v. Myers*, 494 S.W.2d 430, 442, 443 (Mo. App. 1973) (holding that it was reversible error for the trial court to submit a contributory negligence instruction when the plaintiffs had no reason to suspect the defendants’ negligence, and therefore had no duty to anticipate such negligence); *see also Taylor v. Dale-Freeman Corp.*, 389 S.W.2d 57, 61 (Mo. 1965) (“A person is not required to look for danger where he has no cause to anticipate it, or when the danger would not exist but for the negligence of another.”) (internal quotation marks omitted); *Ivey*, 336 S.W. 3d at 158 (“[I]t is not reasonably foreseeable that the standards of care in regulating and administering the game will be breached.”)

Further, even if there was evidence that Plaintiff knew Sluggerrr was negligently throwing hotdogs, there was no evidence that when confronted with this known risk, Plaintiff knowingly and voluntarily “proceed[ed] to encounter” that risk, which is the second element of implied secondary assumption of risk. *See Sheppard*, 904 S.W.2d at 262. The evidence merely showed that Plaintiff continued to sit in his seat between innings and did nothing to suggest participation in the promotional event. There was no

evidence that Plaintiff took any affirmative action to put himself in harm's way. If merely sitting in one's seat at a Royals' baseball game could be construed as "knowingly proceed[ing] to encounter [a] known risk" of Sluggerrr negligently throwing hotdogs in a non-arc manner, then a duty would be imposed upon every single attendee of a baseball game at Kauffman Stadium to leave his or her seat when Sluggerrr begins the Hotdog Launch during each game. That would create an even greater hazard than the promotional event itself.

There was no evidence, much less "substantial evidence," that Plaintiff voluntarily and knowingly proceeded to encounter a known risk imposed by Defendant's breach of duty and there was no evidence to support Defendant's affirmative defenses of comparative fault and implied secondary assumption of risk. The trial court committed reversible err in denying Plaintiff's motion for directed verdict on this issue and instructing the jury on comparative fault.

POINT IV

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON PLAINTIFF'S CLAIMS FOR NEGLIGENT SUPERVISION AND TRAINING BECAUSE IT MISAPPLIED *MCHAFFIE V. BUNCH*, 891 S.W.2D 822 (MO. BANC 1995) IN THAT PLAINTIFF'S CLAIMS FOR NEGLIGENCE SUPERVISION AND TRAINING ARE NOT THEORIES OF IMPUTED LIABILITY LIKE CLAIMS FOR NEGLIGENT ENTRUSTMENT AND NEGLIGENT HIRING.

STANDARD OF REVIEW

On appeal, the Court reviews the trial court's refusal to give a proffered jury instruction *de novo*, "evaluating whether the instructions were supported by the evidence and the law." *Marion v. Marcus*, 199 S.W.3d 887, 893, 894 (Mo. App. 2006). An instructional error will only result in reversal if the Court determines that the "error resulted in prejudice, . . . and the error materially affected the merits of the action." *Id.* (internal quotation marks and brackets omitted).

ARGUMENT

Before trial, Defendant moved to dismiss Plaintiff's negligent supervision and negligent training claims based on *McHaffie v. Bunch*, 891 S.W.2d 822 (Mo. banc 1995). *McHaffie* held that no more than one theory of imputed liability may be asserted at trial by a plaintiff, on the premise that "[i]f all of the theories for attaching liability to one person for the negligence of another were recognized and all pleaded in one case where the imputation of negligence is admitted, the evidence laboriously submitted to establish

other theories would serve no real purpose.” *Id.* at 826. The trial court did not grant Defendant’s motion to dismiss, but based upon *McHaffie*, held that it would not allow Plaintiff to submit a claim based upon respondeat superior and claims for negligence supervision or training. (TR 17 – 22, 30, 66.) Rather, the trial court required Plaintiff to choose one of these theories to submit to the jury. *Id.* Plaintiff objected to this ruling, but given the Court’s ruling, chose to submit on a respondeat superior theory. (TR 30, 382.)

The trial court, however, misconstrued *McHaffie* and committed reversible error in refusing to instruct the jury on all of Plaintiff’s theories. Plaintiff’s claims for negligent supervision and training are not theories of imputed liability like the claims addressed in *McHaffie* and plaintiff was entitled to submit them to the jury.

The specific claims at issue in *McHaffie* were claims of negligent entrustment and negligent hiring. *Id.* at 825. As set forth by the *McHaffie* court, the elements of those two claims are as follows:

- (i) Negligent entrustment – (1) the entrustee is incompetent, (2) the entrustor knew or had reason to know of the incompetence, (3) there was an entrustment of a chattel, and (4) ***the negligence of the entrustor concurred with the negligence of the entrustee*** to harm the plaintiff;
- (ii) Negligent hiring –there are facts from which the employer knew or should have known of a particular dangerous proclivity of an employee, followed by ***employee misconduct*** consistent with such dangerous proclivity by the employee.

Id. at 825 (emphasis added). The *McHaffie* court was careful to point out that all three theories – negligent entrustment, negligent hiring, and *respondeat superior* – were theories of imputed liability because they all required proof of some form of misconduct

by the employee that caused damages to the plaintiff. *Id.* at 826. In other words, under all three theories, the employer's duty was "dependent on and derivative of the employee's misconduct." *Id.*

Because all three theories require a finding that the employee was negligent, *McHaffie* held that once a party admits respondeat superior liability, the other theories become redundant. *Id.* at 826. Importantly, however, *McHaffie* recognized that "it may be possible that an employer or entrustor may be held liable on a theory of negligence that does not derive from and is not dependent on the negligence of an entrustee or employee." *Id.*

In the present case, Plaintiff did not assert claims of negligent entrustment or negligent hiring, but rather asserted claims for negligent supervision and negligent training. (LF 13.) These claims are not theories of imputed liability, and do not require proof that the employee was negligent. The elements of negligent supervision and negligent training claims are: "(1) a legal duty on the part of the defendant to use ordinary care to protect the plaintiff against unreasonable risks of harm; (2) a breach of that duty; (3) a proximate cause between the breach and the resulting injury; and (4) actual damages to the plaintiff's person or property." *G.E.T. ex rel. T.T. v. Barron*, 4 S.W.3d 622, 624 (Mo. App. 1999); *O.L. v. R.L.*, 62 S.W.3d 469, 474 (Mo. App. 2001); *Cook v. Smith*, 33 S.W.3d 548, 553 (Mo. App. 2000).

A negligent supervision claim is a "variant of the common law tort of negligence." *Barron*, 4 S.W.3d at 624; *O.L.*, 62 S.W.3d at 474. "In a negligent supervision case, the determination of whether the duty of ordinary care has been breached turns on whether a

reasonable person could have foreseen the injuries of the type suffered might occur under the circumstances.” *Barron*, 4 S.W.3d at 624. Because a negligent supervision claim focuses on the reasonableness of an employer’s actions, this claim is not a theory of imputed negligence based on what the employee did or failed to do, but rather is a theory of direct negligence against an employer for failing to protect a plaintiff from foreseeable injuries caused by failing to supervise its employees. Because it is not a theory of imputed negligence, the jury could have found that Sluggerrr himself was not negligent, but that Defendant was negligent by failing to properly train and supervise Sluggerrr.

For example, the jury could have concluded that a reasonable person in Sluggerrr’s position, based upon his prior experiences, might not foresee a risk of harm in the manner in which Sluggerrr was throwing hotdogs into the stands, and therefore find that Sluggerrr was not negligent. *See, e.g., Hoover’s Dairy*, 700 S.W.2d at 431-32 (“The foundation of liability for negligence is knowledge-or what is deemed in law to be the same thing: opportunity by the exercise of reasonable diligence to acquire knowledge-of the peril which subsequently results in injury,” quoting 57 Am.Jur.2d *Negligence* § 54 (1971)); *Alcorn v. Union Pac. RR. Co.*, 50 S.W.3d 226, 238 (Mo. banc 2001) (holding that negligence action requires showing that defendant “should have foreseen the risk of danger” and that Plaintiff was “within the class of persons to whom such harm might foreseeably occur”).

However, even if the jury found it was not foreseeable to Sluggerrr that his throws could injure someone, the jury could also have lent weight to evidence showing that the Royals had notice of previous similar incidents causing harm to spectators and had

knowledge that Sluggerrr had a history of throwing hotdogs in a forceful manner. Based on this evidence, the jury could find that the harm caused by failing to supervise Sluggerrr was a foreseeable risk to Plaintiff. In such a case, Defendant's liability would be predicated not on an imputation of Sluggerrr's negligence, but on its own breach of duty that it independently owed to Plaintiff.

Accordingly, *McHaffie* does not apply to Plaintiff's negligent supervision and training claims against Defendant. Those claims are not theories of imputed negligence, and thus the rationale for *McHaffie* does not apply. The trial court committed reversible error in refusing to instruct the jury on Plaintiff's claim for negligent supervision and training.

CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that the Court remand the case to the trial court for a new trial to be tried consistent with this Court's opinion.

Respectfully submitted,

LEWIS, RICE & FINGERSH, L.C.

By: _____

Robert W. Tormohlen #40024

Jason C. Bache #58377

M. Cory Nelson #63357

1010 Walnut Street - Suite 500

Kansas City, Missouri 64106

PHONE: (816) 421-2500

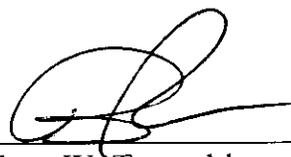
FAX: (816) 472-2500

**ATTORNEYS FOR APPELLANTS-
RESPONDENTS**

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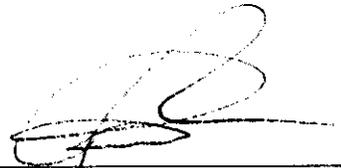
Scott D. Hofer, Esq.
Kyle N. Roehler, Esq.
Foland, Wickens, Eisfelder, Roper &
Hofer, P.C.
3000 Commerce Tower
911 Main Street
Kansas City, Missouri 64105-2009
Telephone: 816-472-7474
Facsimile: 816-472-6262
**ATTORNEY FOR RESPONDENT-
APPELLANT**



Robert W. Formohlen

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the limitations contained in Rule 84.06(b) and contains 12,131 words. In preparing this certificate, the undersigned has relied on the word count of the word-processing system used to prepare this brief.

A handwritten signature in black ink, appearing to read 'Robert W. Tormohlen', written over a horizontal line.

Robert W. Tormohlen

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A handwritten signature in black ink, appearing to read 'Robert W. Tormohlen', written over a horizontal line.

Robert W. Tormohlen

**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

WD 73984

**JOHN COOMER
Appellant - Respondent**

v.

**KANSAS CITY ROYALS BASEBALL CORPORATION
Respondent - Appellant**

**APPEAL FROM THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
THE HONORABLE BRENT POWELL
CASE NO. 1016-CV4073**

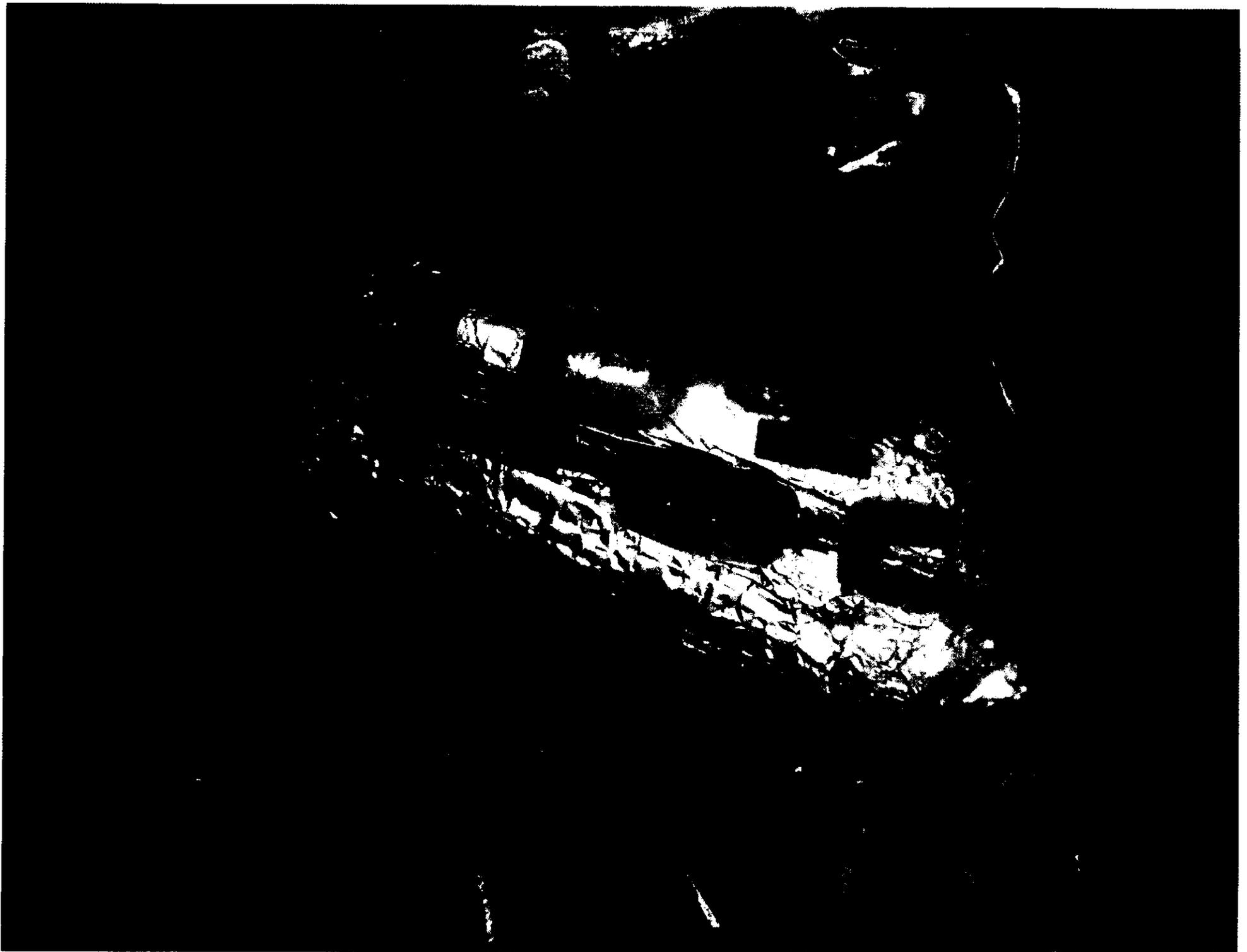
**APPENDIX TO
BRIEF OF APPELLANT – RESPONDENT,
JOHN COOMER**

Robert W. Tormohlen #40024
Jason C. Bache #58377
M. Cory Nelson #63357
Lewis, Rice & Fingersh, L.C.
1010 Walnut Street - Suite 500
Kansas City, Missouri 64106
PHONE: (816) 421-2500
FAX: (816) 472-2500
Attorneys for Appellant-Respondent

Date: April 16, 2012

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1 It's not been admitted yet.
 2 **MR. TORMOHLEN:** Your Honor, I'd move for the
 3 admission of Exhibit -- Plaintiff's Exhibit 1.
 4 **THE COURT:** Any objection?
 5 **MR. HOFER:** No.
 6 **THE COURT:** Plaintiff's 1 will be admitted into
 7 evidence.
 8 **MR. HOFER:** Do you want to tell me what you're
 9 going to use, and I'll stipulate to it.
 10 **MR. TORMOHLEN:** Okay.
 11 Q. (By Mr. Tormohlen) All right. Now,
 12 Mr. Coomer, do you recognize that photo we've marked
 13 as Plaintiff's Exhibit 1?
 14 A. Uh-huh, I do.
 15 Q. Tell the jury what that is, please.
 16 A. Well, it's the section where I was sitting
 17 that night.
 18 Q. Do you have a laser pointer? I think -- you
 19 may not know how to use it, but can you kind of show
 20 us where you were sitting at?
 21 A. This must be it here. I'd say we were -- I
 22 remember kind of -- I was sitting to the left of my
 23 dad, but I'd say roughly there (indicating), because I
 24 was fairly close to the aisle on this side rather than
 25 the aisle on that side.

1 yes.
 2 Q. Now, do you recall Sluggerr and the hot dog
 3 launch?
 4 A. I do.
 5 Q. Okay. Do you recall what inning it
 6 occurred?
 7 A. I'm sorry?
 8 Q. I'm sorry, do you recall what inning it
 9 occurred in-between?
 10 A. I remember it was fairly early because -- I
 11 want to say between the second and the third or the
 12 third and the fourth because it was still kind of dusk
 13 out. Not night yet.
 14 Q. How many -- how would you describe the crowd
 15 around you?
 16 A. There were a couple guys right behind us
 17 because I would -- one of them I was kind of carrying
 18 on a little conversation with back and forth, talking
 19 about different players and what have you. Beyond
 20 that, really, I mean, other than a few people up
 21 towards the dugout maybe --
 22 Q. Was there anybody in the row immediately in
 23 front of you?
 24 A. There was not, no.
 25 Q. How about the second row in front of you?

1 Q. Okay. And, again, what was the crowd like?
 2 A. Sparse. I think I remember the announcement
 3 being maybe 12,000.
 4 Q. I think the defendants have already
 5 introduced it, but let's take a look at Plaintiff's
 6 Exhibit 3, which is the diagram.
 7 **MR. TORMOHLEN:** Have you introduced it as an
 8 exhibit?
 9 **MR. HOFER:** We introduced it as 105, I think.
 10 **MR. TORMOHLEN:** Your Honor, I would move to
 11 introduce Plaintiff's Exhibit 3.
 12 **MR. HOFER:** No objection.
 13 **THE COURT:** Plaintiff's Exhibit 3 will be
 14 admitted into evidence.
 15 Q. (By Mr. Tormohlen) Now, Mr. Coomer, that
 16 appears to be kind of a diagram. Can you tell the
 17 different sections?
 18 A. No. I'm kind of blended together with
 19 colors now.
 20 Q. I can't read that either.
 21 **MR. TORMOHLEN:** So I think where I'm pointing
 22 right here, can you blow that up?
 23 Q. (By Mr. Tormohlen) Do you remember -- do
 24 you remember sitting in Section 120?
 25 A. I think -- I believe that's where I sat,

1 A. Second row, no, not -- people, I think, were
 2 sitting in maybe the second or third row, something
 3 like that.
 4 Q. Okay.
 5 A. Three, four, five people. I can't recall
 6 exactly how many.
 7 Q. Why don't you tell the jury, turn to them
 8 and tell them what you remember about the hot dog
 9 launch that day.
 10 A. Well, I remember Sluggerr coming out onto
 11 the -- onto the dugout itself with a gun, and he was
 12 firing, firing the gun, you know, up. I wasn't even
 13 looking to see where he was shooting them.
 14 And then when he finished with that, then
 15 there were a few that -- I think while he was shooting
 16 it he had a couple of people within the neighborhood
 17 he tossed it to. And when he finished with that, he
 18 had a few, and he would just kind of softly toss to
 19 people, too.
 20 And then what I recall was that he had the
 21 last one that he had, he had it -- he was waving his
 22 arms up, trying to get, you know, the crowd -- the
 23 last throw, trying to get the crowd up on their feet.
 24 And I could hear people behind me cheering, you know,
 25 (demonstrating) as he was right in the dugout in front

of us. He was cheering, and I remember an action of him kind of doing this (demonstrating) and then kind of going behind his back.

I had -- you know, so saw that and I was -- I was seeing this, and I was kind of looking at the scoreboard because between innings the Tigers were in the process of blowing the lead that year. At that time they were leading the division, so I wanted to see what were the Twins doing, what were the White Sox doing.

So I saw this going along, so I was kind of just seeing what was going on. I was sitting there talking to my dad, making some small-talk, glancing at the scoreboard to see if the scores were up or not. They weren't always up.

But if I remember the last action of like something like that (demonstrating), he was just behind his back. And then I just -- I glanced away, and then it was a split second later that, you know, something hit me in the face, but it hit me in the face.

Q. Now, are you absolutely sure that you saw Sluggerrr make a movement behind his back?

A. Yes, I did.

Q. How much time expired between when he mad

this move (demonstrating) and you felt the impact?

A. It was a split second.

Q. And you were six rows back?

A. Six rows back, yeah.

Q. Now, are you sure -- I mean, I want you to tell this jury, are you sure that you were hit by a hot dog?

A. I mean, based on seeing, you know, what was going on in front of me and, you know, glancing at the scoreboard, and I mean, I wasn't staring at Sluggerrr 24/7. I was aware he was there. I was looking at the scoreboard, and I saw this action (demonstrating). And like I said, I was kind of, you know, seeing him, sitting down, making small-talk with my dad, looking at the scoreboard, that kind of back-and-forth, saw that action, and, you know, a split second later and I just remember grabbing my face.

Q. How would you describe the force of the impact?

A. It was pretty forceful. I mean, almost as if somebody maybe popped you in the face or something. My first reaction was to kind of grab my face because I was concerned. I mean, it was so sudden, and I was stunned. I wear contacts, and I was concerned that it popped my contacts out. So I was kind of blinking

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around and was trying to look at the scoreboard for perspective to see if I could see if my lenses were still in my eyes.

Q. Were you wearing hat?

A. I was wearing a hat.

Q. What kind of hat were you wearing?

A. Tigers baseball cap.

Q. Okay.

A. And that was -- based on the force, it was knocked off, knocked off into the row behind me.

Q. Okay. Did you pick up -- who picked up your hat?

A. I think my dad retrieved my hat, yeah.

Q. Do you believe that the hot dog had struck you was tossed?

A. Tossed? No, it wasn't tossed.

Q. And what do you base that upon?

A. Well, I mean, as I said, I mean, I remember Sluggerrr, you know, the last hot dog, getting the people on their feet and seeing the behind-the-back motion, and as I glanced away, then a split second later it came into my face.

Q. Did you stay for the rest of the game?

A. We stayed for the rest of the game, yeah.

Q. And did you go to the game the next day?

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A. I did.

Q. Now, when did you first have any issues with your vision?

A. I can recall the following -- the Thursday, so it was Tuesday night when I got hit. Thursday morning, Thursday morning when I woke up, I knew something wasn't right. I wasn't sensing something right. I couldn't, you know, feel anything, but I was seeing, seeing differently.

Q. Okay, describe that, please.

A. Well, I mean, I think when I first kind of -- when I first really thought about it was when I got in my car to go to the office, and I just remember getting in, thinking who -- who sprayed something inside my car? I was trying to touch my dashboard, the inside of the -- the inside of the windshield as I was leaving, and it didn't feel anything out of the ordinary. And it was -- from what I remember, as I was looking, just as you would look through a screen door for that morning.

Q. And, Mr. Coomer, that occurred two days later; is that correct?

A. It was -- yeah, it was Thursday.

Q. It would have been Thursday? Did you mention anything to your wife?

Q. You watched everything that we've shown on the September 8, 2009, video that the jury has now had a chance to see. You sat and watched all of that from your seat that night, correct?

A. I did.

Q. You were aware that the hot dog launch was starting?

A. I did.

Q. Correct?

A. Uh-huh.

Q. You had experienced it before on several occasions, correct?

A. I'd seen it before.

Q. Okay. You remember seeing Sluggerrr standing on the dugout as we've seen in these blowups, correct?

A. That's right.

Q. The video clip, I'm not going to go -- try not to play it again, but you saw him throwing the hot dog the way that the jury now has seen them throw those in that video, correct?

A. In terms of? What -- I mean, yes, I saw some that he was soft tossing.

Q. So what the jury has now seen you saw that night?

A. That's correct.

Q. Okay. And you also saw Sluggerrr start with what you described as a behind-the-back motion?

A. That's right.

Q. And at the time that you saw Sluggerrr with the hot dog you knew it was his last hot dog, and you knew he was going to throw it in the stands, right?

A. Presumably so, yes.

Q. Presumably so. You saw him with the motion of starting to throw it, correct?

A. Correct.

Q. You knew there were people behind you yelling and screaming for him to throw the hot dog hopefully to them?

A. Yes.

Q. And you assumed he was going to throw it somewhere into the stands, correct?

A. Yes.

Q. So this behind-the-back motion or throw that Sluggerrr made, that's the throw that you're complaining of in this case that was inappropriate, right?

A. Well, I was -- it was the one that caught me in the face, yes.

Q. But is that throw you're complaining of,

that's the one that you're telling the jury you saw that night, right?

A. I saw the motion with his arm behind his back.

Q. Did you see the hot dog leave his hand?

A. No. Like I said, I glanced away at the scoreboard.

Q. Okay. Is it fair to say that from -- that you never saw the hot dog from when it left his hand, and you never saw it after that?

A. That's fair.

Q. Okay. Did you say anything to your father after you were hit?

A. No. I mean, I, you know, put my hands in my face. I recall him saying something to me.

Q. What did he say to you?

A. He said something to the effect that, are you okay? What was that?

Q. And when he said what was that, did you say to him that's the hot dog that Sluggerrr threw?

A. I said I don't know, but I think it's that hot dog that Sluggerrr threw.

Q. So is it fair to say that if you saw the motion behind his back and then immediately after you were hit you assumed that it was the hot dog that he

threw, you at least had an awareness of sitting there that Sluggerrr was throwing that hot dog your direction?

A. Well, not necessarily my direction, but he was going to throw a hot dog, yes.

Q. But at least right after it hit you, you made a statement to your father that that was the hot dog that Sluggerrr was throwing?

A. Yes.

Q. So you can at least agree with me that you knew when you saw the behind-the-back motion that you knew it could have come your direction because you said to your father right away, that's the hot dog that Sluggerrr threw?

A. Yes.

Q. Fair enough?

A. Uh-huh.

Q. With respect to the injury, you didn't have any pain or any unusual sensation, I think, until you were in the car a day or two days later, and that's what you explained was about the --

A. Right.

Q. -- vision looked funny?

A. Correct.

Q. Your first vision correction was when you

1 were in high school for being nearsighted; is that
2 correct?

3 A. That's right.

4 Q. After -- to kind of put this in perspective,
5 after you went to your first appointment, which was
6 September 16?

7 A. Yes, the first one I --

8 Q. The procedure, and then you had the issue
9 with the pain, the pressure that night, that was
10 alleviated on the 17th; is that right?

11 A. Well, Dr. Swan as the 16th. She referred me
12 for retina surgery, which was I think Thursday, the
13 17th, and then the 18th was the --

14 Q. So I may be off a day or two?

15 A. Right.

16 Q. But there was a day where you had the
17 pressure build up?

18 A. Right.

19 Q. And I understand that can be very
20 uncomfortable.

21 A. It was.

22 Q. I'm sure that it was. After that point when
23 you had the pressure released in your eye, is it fair
24 to say that it wasn't a pain issue after that; it was
25 just a pain in the butt dealing with the ointment in

1 the eye, and it was a vision issue after that?

2 A. Once the pressure was alleviated, yeah,
3 the -- yeah, putting drops in.

4 Q. All right, and for every medical checkup or
5 eye checkup that you've had since the incident or
6 since you had the repair, you've been 20/20; fair
7 enough?

8 A. 20/20? Well, depending upon -- I mean they
9 measure you different eyes.

10 Q. 20/20 in your left eye?

11 A. 20/20 in my left eye from a distance vision.
12 I don't know how they measure the 20/20 but --

13 Q. I'm not going to act like that an expert
14 either. The doctor testified about it. We'll leave
15 that alone.

16 MR. HOFER: That's all the questions I have.
17 Appreciate it.

18 THE COURT: Redirect?

19 MR. TORMOHLEN: Yes, Your Honor. Thank you.

20 **REDIRECT EXAMINATION BY MR. TORMOHLEN:**

21 Q. Mr. Coomer, in response to defense counsel's
22 question about not reporting it on September 8th,
23 2009, or September 9th when you went back the
24 following day, how come you didn't make a complaint to
25 the Royals?

A. I didn't know I was injured. I didn't know
I was hurt.

Q. Okay. Now, was -- I'm trying to get the
scene. Was Sluggerrr the only person in the area
throwing hot dogs?

A. Initially when the hot dogs -- when the
whole production started there were some K Crew
people.

Q. Okay.

A. And then after he had finished, you knew
with the gun, they -- I think the -- from what I
remember, they had left or went to the other side of
the, you knew, dugout, the far side of the dugout, and
it was just Sluggerrr soft tossing a few and then
throwing his last one.

Q. Okay. I think you testified in response to
defense counsel that you saw Sluggerrr doing a soft
toss that evening?

A. I did.

Q. Explain to the jury what you mean by that.
How did you see Sluggerrr throwing the hot dogs?

A. There were some people -- I mean, some of
the people that were in the first couple of rows.
Maybe they were to the left or the right, and he would
just, you know, toss them, just kind of overhand and

1 just, you know, so they could catch them.

2 Q. Would it be fair to say it was in an arc?

3 A. It was, yeah.

4 Q. Had you ever seen Sluggerrr throw hot dogs
5 at other games?

6 A. I have, yes.

7 Q. Have you ever seen him do arcs before or --

8 A. From some of the videos and things, yes.

9 Q. Okay, but what I'm trying to get at, on
10 September 8th, 2009, before you got hit, had you seen
11 him throw it hard or in a straight line at all?

12 A. No, not -- not that day, no.

13 Q. And you were six rows up?

14 A. Right.

15 Q. And you saw this motion?

16 A. Yes.

17 Q. And how much time expired?

18 A. I would say it was a split second.

19 Q. And there's no -- are you convinced that it
20 was a straight-line throw?

21 A. It was a split second, so it had to have
22 been a straight-line throw.

23 Q. You think you're responsible for your own
24 injuries?

25 A. I mean, I've played a lot of baseball. I

1 Q. Were you aware -- well, let me ask you this.
 2 You don't think it was proper to throw hot dogs in a
 3 straight line at people in the stands, do you?
 4 A. Define "in the stands." We're talking --
 5 Q. Well, how about --
 6 A. -- thousands of seats.
 7 Q. What about close to the dugout? I mean, we
 8 saw your testimony that the folks sitting close to the
 9 dugout you would make eye contact and try to toss it.
 10 That's how you testified?
 11 A. Right, right. You said "in the stands."
 12 So --
 13 Q. Okay.
 14 A. -- you know, that's what why I wanted to
 15 define "stands" a little bit more, so I know what kind
 16 of area you were talking about, yes.
 17 Q. And you believe that to be true, right, that
 18 folks sitting close to the dugout, it's a good
 19 practice to make eye contact and toss it?
 20 A. Yes.
 21 Q. And what I'm asking you is you would agree
 22 that it's not a good idea to throw hot dogs at people
 23 close by you (demonstrating)?
 24 A. Correct, yes, sir.
 25 Q. And you were aware if you did that, somebody

could get hurt, could they not?
 1 A. They could, sure, yes, sir.
 2 Q. And that would include facial injuries?
 3 A. If it hit them in the face, I guess it could
 4 include facial injuries, yes, sir.
 5 Q. And if you hit them in the eye, it could
 6 include eye injuries?
 7 A. Potentially it could, yes, sir.
 8 Q. And it could include causing someone to get
 9 a detached retina?
 10 A. I'm not an eye doctor. I don't know.
 11 Q. Well, do you know what a detached retina is?
 12 A. I've heard of it. I don't know exactly what
 13 it is though. I've heard of a detached retina, yes.
 14 Q. Do you view that as a serious eye injury?
 15 MR. HOFER: Your Honor, I object.
 16 MR. TORMOHLEN: I'll withdraw the question.
 17 A. I don't know.
 18 Q. (By Mr. Tormohien) But you would agree it's
 19 foreseeable that if a mascot is not careful, someone
 20 could get hurt?
 21 A. Yes, sir.
 22 Q. Now, Mr. Shores, the hot dog launch always
 23 occurs between innings?
 24 A. Yes, sir.

1 Q. Right?
 2 A. Yes, sir.
 3 Q. And you did that for 14 years, right?
 4 A. Not hot dogs, but --
 5 Q. But is it fair to say that there are a lot
 6 of things going on in the stands between the Innings?
 7 A. A lot of things from --
 8 Q. Well, like people go to the concessions?
 9 A. Yes, sir. That's fair to say, yes, sir.
 10 Q. All right. People going to the restroom?
 11 A. Yes.
 12 Q. And you've got people walking away from you.
 13 I'm assuming as you're jumping up and down on the
 14 dugout, you can see people walking to go to the
 15 concessions?
 16 A. Yes.
 17 Q. You can see them walking at an angle, right?
 18 A. I guess, yes, sir. I could see them going
 19 at an angle if that's where they're headed.
 20 Q. And I'm assuming that during the innings
 21 people are talking to their fathers or mothers or
 22 children or talking to each other?
 23 A. They could be talking, yes, sir. I don't
 24 know to who, but yeah.
 25 Q. That's not a rare occurrence when you throw

hot dogs and you see people talking to each other?
 1 A. Right. They could be talking, yes, sir.
 2 Q. And that's quite frequent?
 3 A. Yeah, I imagine they're talking if they're
 4 sitting there. I --
 5 Q. And there's a huge video scoreboard, right?
 6 A. Yes, sir, JumboTron up there.
 7 Q. All right. And then on the Innings or in
 8 between Innings, what is typically shown on this
 9 video, huge video JumboTron?
 10 A. Typically, they would run things that
 11 were -- if it was any break that had -- like for the
 12 hot dog launch, we would start it off with an intro to
 13 it, and in the course of the hot dog launch going on,
 14 they would show different camera shots. If it's not
 15 the hot dog launch, they would do different contests,
 16 whatnot. Sometimes they'd just show highlights,
 17 trying to sell tickets from it, whatever.
 18 Q. And there were scoreboards, too, right? I
 19 mean, at Royals Stadium was there a scoreboard where
 20 you could see the games -- scores of other games?
 21 A. I believe that was down along the outfield
 22 fence perhaps.
 23 Q. Okay, but it would be common for people
 24 between Innings perhaps to check the scores of other
 25

1 games?
 2 A. They could, sure.
 3 Q. And, actually, during the innings some of
 4 the players are still on the ball field warming up?
 5 A. Correct.
 6 Q. And it would be maybe common for folks to
 7 watch the players warm up between the innings?
 8 A. They could, yes, sir, if they chose to.
 9 Q. So I mean, there's lots of things going on
 10 between the innings?
 11 A. Yes, sir.
 12 Q. And not everybody is watching you as
 13 Sluggerrr during the hot dog launch; is that fair to
 14 say?
 15 A. I would assume, no, but I don't know. But I
 16 would assume no.
 17 Q. Okay. I mean, that's another reason,
 18 wouldn't you agree with me, because of people being
 19 diverted, they're out there watching other things,
 20 that's another reason you wouldn't want to throw a hot
 21 dog in a straight line forcefully into the stands?
 22 Would you agree with me on that?
 23 A. Yes, sir.
 24 Q. And even if people are looking at you, I
 25 mean, don't you think Sluggerrr kind of tends itself

1 have very good reflexes?
 2 A. I would assume not, but I don't know. I'm
 3 not surprised.
 4 Q. And there might be people with bad eyesight
 5 at the games?
 6 A. I would assume. You're talking some nights
 7 30,000. I would probably say it's safe to say there
 8 was some poor eyesight in there as well, yes, sir.
 9 Q. Okay. And, now, that's another reason
 10 perhaps it's not a very good idea to throw hot dogs
 11 forcefully in a straight line into the crowd?
 12 A. Throw -- define "throw."
 13 Q. Well, I'm talking about a straight line,
 14 forceful throw.
 15 A. Forceful, yes, sir.
 16 Q. And we're going to talk about that in a
 17 little bit.
 18 A. Yes, sir.
 19 Q. Did the Royals ever inform you of other
 20 occasions where somebody claimed they were hurt by one
 21 of your throws?
 22 A. They did, yes, sir.
 23 Q. Okay. And when did they do that?
 24 A. I don't recall. It was something that I had
 25 actually forgotten about when we did our video

1 to have little kids looking at Sluggerrr?
 2 A. I would hope so, yes, sir. That was my
 3 main -- that was my number one goal. Yes, sir.
 4 Q. I mean, isn't that the purpose to kind of
 5 gen up the interest of the kids?
 6 A. That was always my goal number one, yes,
 7 sir.
 8 Q. All right. And so you've got children in
 9 the stands, right?
 10 A. Yes, sir.
 11 Q. And you've got babies; people go to the
 12 games with babies, right?
 13 A. They would, yes, sir.
 14 Q. And you've seen babies out there?
 15 A. Yes, sir.
 16 Q. And I'm assuming there might be folks that
 17 might be a little bit older than you --
 18 A. Yes, sir.
 19 Q. -- at the games?
 20 A. Yes.
 21 Q. And have you seen senior citizens at the
 22 games?
 23 A. I've seen about every age at the games, yes,
 24 sir.
 25 Q. Okay. And some of those folks might not

1 deposition.
 2 Q. Okay.
 3 A. And I was since reminded of it, yes, sir.
 4 Q. Okay. And we're going to go through this
 5 again with the video, but do you remember me asking
 6 you that specific question in the deposition?
 7 A. I believe you did, yes, sir.
 8 Q. And I asked -- all right, so didn't that --
 9 and, again, the setup in question is were you made
 10 aware of anybody else who claimed that they were hurt
 11 by one of your throws?
 12 MR. HOFER: Your Honor, I object. It's
 13 cumulative. He asked, he said yes to the one other
 14 incident ever, and it's cumulative for him to show on
 15 a video.
 16 THE COURT: Overruled.
 17 MR. TORMOHLEN: Let's do -- let me make sure I've
 18 got this right -- Number 6, please.
 19 [The following clip was played of the
 20 videotaped deposition of Byron Shores]:
 21 "Q. Okay. The Royals have produced records that
 22 indicated that somebody complained. I think it was on
 23 April 24th, 2008, that you hit them with a hot dog and
 24 broke their glasses. Did you hear that at the time?
 25 A. I cannot recall. I can't -- I can't recall

1 if I heard it at the time or not.
 2 Q. Are you aware of it now?
 3 A. If that's the incident that was shown to me
 4 this morning, then, yeah, I'm aware of it now.
 5 Q. What was shown to you this morning?
 6 A. An incident of someone saying that their
 7 glasses had been broken. That's what they claimed.
 8 Q. But the first time you ever heard that was
 9 today?
 10 MR. HOFER: Objection, misstates the prior
 11 testimony.
 12 Q. (By Mr. Tormohlen) Let me ask you, when was
 13 the first time you ever heard of that incident?
 14 A. That I can honestly recall was today.
 15 Q. During your employment at Royals Stadium,
 16 had you ever been made aware of any occasion where
 17 somebody claimed that they were hurt by a hot dog?
 18 A. No, sir."
 19 [The following proceedings returned to live
 20 testimony]:
 21 Q. (By Mr. Tormohlen) Now, Mr. Shores, that
 22 was three months ago, right?
 23 A. December, I believe, yes, sir.
 24 Q. Okay. And at that time you testified nobody
 25 had ever complained that you injured them with a hot

1 hot dogs in a straight-line, forceful manner?
 2 A. Routinely?
 3 Q. Into the crowd. Do you acknowledge that you
 4 routinely would throw it hard into the stands?
 5 A. Yes, sir. Again, "stands," we're talking --
 6 Q. Well, I'm talking about when you --
 7 A. Because I tried to include as many people as
 8 I could into it. So, yes, sir, if I was trying to get
 9 it to someone who was seated far away, then just
 10 because of the distance, I would have to throw it
 11 harder, yes, sir.
 12 Q. Okay. But how about folks closeby? Would
 13 you throw it hard? Let's say if they're within 15
 14 rows. Would you throw it hard at them?
 15 A. I would try to get it to them. I mean, I --
 16 "hard" is kind of a relative term. I didn't try to
 17 Nolan Ryan it or anything, but...
 18 MR. TORMOHLEN: Let's do Clip 8, please.
 19 [The following clip was played of the
 20 videotaped deposition of Byron Shores]:
 21 "Q. Was there ever an occasion when you would
 22 forcefully throw the hot dog into the stands?
 23 A. No, sir, not in the stands. No, sir."
 24 [The following proceedings returned to live
 25 testimony]:

1 dog, right?
 2 A. Right.
 3 Q. And we now know that's not true, right?
 4 A. Correct.
 5 Q. And, in fact, that gentleman's name was
 6 David Allen, right?
 7 A. I'm not sure what his name was, no, sir.
 8 Q. He's going to be coming in here and
 9 testifying to it, but he's going to testify that you
 10 actually talked to him about what happened.
 11 A. After the game, yes, sir.
 12 Q. And you didn't remember that when I was
 13 asking you that in your deposition?
 14 A. No, sir.
 15 Q. All right. Now, Mr. Shores, you've just
 16 testified with respect to folks in the dugout --
 17 located near the dugout, best practice, make eye
 18 contact, loss, right?
 19 A. Yes.
 20 Q. Now, despite that, you acknowledge that you
 21 would do no-look throws?
 22 A. Yes, sir.
 23 Q. You would do behind-the-back throws?
 24 A. Yes, sir.
 25 Q. Do you acknowledge that you routinely threw

1 Q. (By Mr. Tormohlen) Was that how you
 2 testified that day?
 3 A. Yes, sir.
 4 Q. All right. Now, sir, in your deposition you
 5 acknowledged that the only time you would forcefully
 6 throw a hot dog was at a cameraman who was located
 7 down in the camera bay. Do you remember that?
 8 A. He wasn't a cameraman, but he would be
 9 located in the camera bay, sir.
 10 Q. But he was a worker that was in charge of
 11 rotating the advertising behind home plate?
 12 A. Correct, yes, sir.
 13 Q. And do you remember testifying that the only
 14 time you would ever throw a hot dog hard was when you
 15 would throw it to him?
 16 A. Close like that, yes, sir.
 17 Q. Okay. And you think that you did that maybe
 18 eight or nine times a year?
 19 A. That would be safe to say, yes, sir.
 20 Q. Okay. Is it fair -- one of the reasons you
 21 wouldn't want to throw it hard in the stands, you
 22 wouldn't want to hurt somebody, right?
 23 A. Correct, yes, sir.
 24 Q. All right. In your deposition that we just
 25 saw and we played for the jury, you said that you

INSTRUCTION NO. 9A

Your verdict must be for plaintiff if you believe:

First, either:

defendant's employee threw a hotdog that hit plaintiff, or

defendant failed to properly train its employee on how to throw hotdogs into the stands, or

defendant failed to properly supervise its employee on how to throw hotdogs into the stands, and

Second, defendant, in any one or more of the aspects submitted in paragraph First, was thereby negligent, and

Third, as a direct result of such negligence, plaintiff sustained damage.

INSTRUCTION NO. 9

In your verdict you must assess a percentage of fault to defendant if you believe:

First, defendant's employee threw a hotdog that hit plaintiff, and

Second, defendant's employee was thereby negligent, and

Third, as a direct result of such negligence plaintiff sustained damage,

unless you believe plaintiff is not entitled to recover by reason of Instruction No. 11.

INSTRUCTION NO. 11

In your verdict you must not assess a percentage of fault to defendant if you believe:

First, the risk of suffering an injury by being struck by a hotdog thrown in a manner in which Sluggerrr threw the hotdog that plaintiff alleges struck him was a risk inherent in attending a game at Royals' stadium, and

Second, plaintiff comprehended the actual risk, and

Third, plaintiff intelligently accepted such risk.

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2
2
2

INSTRUCTION NO. 12

In your verdict you must assess a percentage of fault to plaintiff if you believe:

First, either:

plaintiff observed the manner in which the "Hotdog Launch" was being conducted on September 8, 2009, and with such knowledge, he stayed in the area where the "Hotdog Launch" was being conducted, or

plaintiff unreasonably failed to appreciate the risks associated with the manner in which the "Hotdog Launch" was being conducted on September 8, 2009, and

Second, plaintiff, in any one or more of the respects submitted in paragraph First, was thereby negligent, and

Third, such negligence of plaintiff directly caused or directly contributed to cause any damage plaintiff may have sustained.

INSTRUCTION NO. 9B

In your verdict you must assess a percentage of fault to defendant if you believe:

First, defendant's employee threw a hotdog that hit plaintiff; and

Second, defendant's employee was thereby negligent, and

Third, as a direct result of such negligence plaintiff sustained damage,

MAI 17.01
Submitted by Plaintiff

INSTRUCTION NO. A

VERDICT 1

Note:	Complete this form by writing in the name required by your verdict.
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On the claim of plaintiff, John Coomer, for personal injuries against defendant, Kansas City Royals Baseball Corporation, we, the undersigned jurors, find in favor of:

(Plaintiff John Coomer)	o	(Defendant Kansas City Royals Baseball Corporation)
	r	

Note:	Complete the following paragraph only if the above finding is in favor of plaintiff John Coomer.
-------	--

We, the undersigned jurors, assess the damages of plaintiff John Coomer at \$ _____.

Note:	All jurors who agree to the above findings must sign below.