

IN THE SUPREME COURT OF MISSOURI

SC93214

JOHN COOMER,
Appellant,

v.

KANSAS CITY ROYALS BASEBALL CORPORATION,
Respondent.

Appeal from the Circuit Court of Jackson County, Missouri at Kansas City
Cause No. 1016-CV4073
Honorable W. Brent Powell, Division 11

Transfer from the Court of Appeals for the Western District of Missouri
Appeal No. WD73984

SUBSTITUTE BRIEF OF
KANSAS CITY ROYALS BASEBALL CORPORATION

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STATEMENT OF FACTS

This appeal is from a jury verdict rendered in a personal injury action in the Circuit Court of Jackson County, Missouri that found the plaintiff, John Coomer, 100% at fault. (LF269, 270-272, 341-342). Mr. Coomer alleges he sustained an eye injury on September 8, 2009 when he was struck by a hotdog that was thrown during “The Hotdog Toss”, a well-known, customary inter-inning promotional event at a Kansas City Royals baseball game held at Kauffman Stadium. (LF11-12; TR. 119:10-17, 127:14-22, 136:23-25, 164:6-22, 229:9- 232:13). Mr. Coomer is admittedly a sports fan, and he knew prior to attending The Royals game that The Hotdog Toss was an activity he would encounter. (TR. 249:12-250:5, 275:1-277:20).

Sluggerrr, The Royals’ mascot, allegedly threw the hotdog that struck Mr. Coomer. (LF11-12). Mr. Coomer admitted there were fans standing behind him hollering for Sluggerrr to throw them a hotdog. (TR. 273:24-274:15). Despite seeing Sluggerrr begin to throw the accident hotdog behind his back and knowing that it could be coming in his direction, Mr. Coomer looked away at the last second and was struck by the accident hotdog. (TR. 285:19-286:15).

A. The Hotdog Toss’ Role in The Royals’ Game Day Experience

The Hotdog Toss is an integral part of The Royals game day entertainment experience. (TR. 123:2-21; 127:14 – 128:18; 167:1 – 168:6; 170:1 – 178:13; 211:18 – 214:20; 229:9 – 232:13; 275:21 – 278:8). The Hotdog Toss began in 2000. (TR. 127:14-22). It replaced the T-shirt Toss. (TR. 127:23-25). From its inception to the date of Mr. Coomer’s accident, The Hotdog Toss was performed at every one of The Royals’ 81

home games each season. (TR. 164:6-25). Fans love The Hotdog Toss. (TR. 119:10-14, 167:21-168:6; Ex. 114, 115, and 119).

At all relevant times, Byron Shores was responsible for wearing Sluggerrr's lion costume and portraying Sluggerrr at Royals games. (TR. 111:10-112:8; Trial Ex. 26). Mr. Shores began his role as Sluggerrr in 1996. (Id.). Before Sluggerrr, he portrayed Fredbird, the mascot of the St. Louis Cardinals and Truman the Tiger, the mascot for the University of Missouri's athletic teams. (TR. 116:4-12).

Most professional sports teams have a mascot. (TR. 170:1-18). Like other mascots, Sluggerrr's goal is to entertain the crowd. (TR. 172:22-173:17). Sluggerrr prepares skits that are played on the Jumbotron, performs silly antics, and poses for photographs with fans. (TR. 172:5-175:21; Ex. 107). Sluggerrr is not the only in-game entertainment that occurs "outside the lines" of a Royals game. Kauffman Stadium has an area called "the Little K", where children can play baseball on a miniature field while The Royals game is occurring. (TR. 175:22-176:14; Ex. 107). The stadium also has "the Outfield Experience", which includes a variety of diversions including a merry-go-round, a fastball speed throw, and a video game area. (Id.). The Royals also have the K Crew, which is a fan interaction team comprised of young females who are charged with engaging with the fans. (TR. 213:16-25).

The Hotdog Toss is similar to other game-day activities performed by other professional sports franchises. (TR. 230:2-231:3). When Mr. Shores portrayed Fredbird for the Cardinals, he frequently threw promotional items such as T-shirts and Koosh balls

to the crowd. (TR. 123:2-21, 171:8-20). As Truman the Tiger, Mr. Shores remembered throwing items to the crowd. (TR. 167:16-20).

Mr. Coomer acknowledged that throwing promotional items to the crowd was a common game day activity at professional sports venues. (TR. 276:1-278:8). In his experience, he had seen T-shirts, frisbees, foam footballs, foam baseballs and other similar items being thrown into the stands. (Id.) Mary Ann Coomer, Mr. Coomer's wife, had accompanied him to several baseball games. (TR. 342:6-7). On one occasion, she caught a T-shirt thrown into the stands. (Id.)

B. The Typical Manner in which Sluggerrr Tossed Hotdogs to Fans
During The Hotdog Toss

“You can't miss” the beginning of The Hotdog Toss. (TR. 282:13-25). In between innings, the event is announced by an audio and video lead-in on what was, until recently, the largest high definition Jumbotron in professional sports.¹ (Id.) Using a hotdog shaped air gun, Sluggerrr launches free **4 ½ ounce** hotdogs into the crowd. (TR. 119:22-120:14). Sluggerrr is frequently positioned on top of one of the dugouts during the event. (TR. 119:22 – 120:5). After each launched-hotdog, Sluggerrr's assistant reloads the air gun. (TR. 120:9-24). To keep the crowd entertained, Sluggerrr tosses and throws hotdogs to fans while the air gun is being reloaded. (Id.). The K Crew members wander through the crowd and also toss hotdogs to fans. (TR. 122:15-123:1).

¹ It has since been surpassed by the big screen built at Cowboys' Stadium in Dallas, Texas.

From its inception to the date of Mr. Coomer's incident, Sluggerrr literally tossed or threw thousands of hotdogs to fans as a part of The Hotdog Toss. (TR. 164:6-25). To keep the act fresh, Sluggerrr tossed or threw hotdogs using a variety of techniques. (TR. 180:8 -182:12). He threw hotdogs overhand, underhand, behind his back, and side-armed. (TR. 144:20-24, 145:6-23, 180:8 -182:12). Sometimes he tossed hotdogs to fans that were close to him, and other times he threw hotdogs to fans far away. (Id.). Of course, to throw a hotdog a greater distance required Sluggerrr to use more force. (Id.). Sluggerrr knew, however, he needed to be careful when throwing hotdogs. (TR. 131:7-132:2). He testified: "obviously, you don't want to – you don't want to drill anybody." (TR. 134:3-16).

Sluggerrr knew it was not a good idea to throw hotdogs *forcefully* in a straight line (i.e. without an arc) to fans in close proximity to him. (TR. 135:1-136:2, 141:9-18). Sluggerrr and his Supervisor, Don Costante, testified to many factors that, depending on the circumstances, affected the appropriate way to throw a hotdog, including: (a) the distance between Sluggerrr and the intended receiver, (b) the relative velocity with which the hotdog was thrown, (c) the arc with which the hotdog was thrown, and (d) whether the intended receiver was expecting the hotdog or had made eye contact with Sluggerrr. (TR. 131:7-132:2, 133:9-25, 139:17-23, 141:9-18, 145:6-17, 146:24-147:6, 181:3–182:2, 217:1-18, 218:19-220:5).

Sluggerrr believed throwing hotdogs was a common sense activity. (TR. 162:11-15). He testified that he was always cautious when throwing hotdogs. (TR. 131:7-17). Sluggerrr's practice was never to throw hotdogs with substantial velocity to the fans

because he did not want to hurt them. (TR. 145:21-146:23). Costante believed Sluggerrr always conducted himself with “utmost care”, and that he always performed The Hotdog Toss in a “careful manner”. (TR. 216:16-16:25). Costante believed Sluggerrr threw hotdogs with a safe velocity. (TR. 217:21-219:5). At trial, the jury viewed videotape of Sluggerrr throwing/tossing hotdogs during The Hotdog Toss on July 20, 21, 22, 2009, August 4, 5, and 6, 2009, September 8 (the date of the incident), 25, 26, and 27, 2009. (Trial Exs. 4-10, 114, 115, 119; TR. 150:10-11, 151:19-20, 154:13-21, 156:15-16, 187:13-188:4, 189:14, 190:14).

C. Mr. Coomer’s September 8, 2009 Incident

John Coomer is 50 years old and lives in Overland Park, Kansas. He is admittedly from a family of sports fans. (TR. 244:22-245:15). Mr. Coomer grew up playing baseball. (TR. 274:16-21). He estimated he had attended over 175 baseball games at Kauffman Stadium. (TR. 250:2-5).

A friend gave Mr. Coomer tickets to the September 8, 2009 Kansas City Royals versus Detroit Tigers game at Kauffman Stadium. (TR. 251:23-252:1). Upon arriving at Kauffman, Mr. Coomer and his father, Robert Coomer, chose not to sit in their ticketed seats. (TR. 253:6-16). Instead, they sat in two open seats approximately six rows behind the third base dugout. (Id.). Mr. Coomer liked to sit close to the action. (TR. 276:20-24).

The Hotdog Toss occurred between the 2nd and 3rd or 3rd and 4th innings. (TR. 257:2-13). There were three to five fans seated in a row in front of Mr. Coomer, and there were fans in rows behind Mr. Coomer. (TR. 257:22-258:6, 273:24-274:15). Mr.

Coomer admitted he heard and saw the audio and video lead-ins for The Hotdog Toss and he knew the event was starting. (TR. 282:13-25, 283:6-8).

Mr. Coomer saw Sluggerrr performing The Hotdog Toss on top of the 3rd base dugout, which was in front of him. (TR. 253:6-255:25, 258:7-259:21, 283:18-284:1; Trial Ex. 1). He saw Sluggerrr shooting hotdogs to the crowd and he also saw him softly tossing hotdogs to other fans. (TR. 258:7 – 259:24, 289:3-19). When Sluggerrr reached what appeared to be his last hotdog, he began waving his arms around to get the crowd excited. (Id.). Mr. Coomer then saw Sluggerrr begin to throw the last hotdog (“the accident hotdog”) with a behind the back motion. (Id.).² At the time, there were fans seated behind Mr. Coomer “yelling and screaming” for Sluggerrr to throw them a hotdog. (TR. 284:2-18). Mr. Coomer knew the last hotdog could be coming in his direction. (TR. 285:19-286:15). Nevertheless, Mr. Coomer turned his attention away from Sluggerrr and claims he was allegedly struck by the accident hotdog. (TR. 284:19-286:15). At the time Mr. Coomer was struck by the accident hotdog, he was standing within 15 feet of Sluggerrr. (TR. 352:21-24).

Mr. Coomer did not testify with certainty that he was struck by a hotdog. His testimony left open the possibility that he was actually struck in the face by some of the yelling and hollering fans that were standing behind him as they tried to catch the hotdog coming in their direction. Mr. Coomer did not see the accident hotdog leave Sluggerrr’s

² As a matter of everyday experience, a “behind-the-back throw” is necessarily an underhand throw.

hand. (TR. 284:25-285:11). Mr. Coomer never saw the accident hotdog as it travelled from Sluggerrr's hand to its point of rest. (TR. 285:5-22). When describing the incident, he said after he glanced away, "a split second later...something hit me in the face." (TR. 258:7 -259:21).

In the moments after being struck, Mr. Coomer testified that he told his father: "I said I don't know, but I think it's that hotdog that Sluggerrr threw." (285:19-22).

Although The Hotdog Toss is recorded, there are multiple cameras filming at the same time, and only the segments on the active camera are recorded. The video from September 8, 2009 did not capture Sluggerrr's throw that allegedly struck Mr. Coomer. (TR. 149:4-14).

Mr. Coomer stayed for the remainder of the game. (TR. 281:16-17). Despite knowing he could report the incident to Royals personnel if he was injured, Mr. Coomer made no report that he was struck by a hotdog on the night of the incident. (TR. 280:10-282:1). The first time he reported anything to The Royals was eight days later on September 16, 2009. (TR. 282:2-6).

Sluggerrr (Byron Shores) first learned about Mr. Coomer's alleged injuries at the end of September or the first part of October 2009. (TR. 117:23-118:6). Sluggerrr did not remember throwing the hotdog that allegedly struck Mr. Coomer. (TR. 117:7-9). However, Sluggerrr conducted The Hotdog Toss in a similar manner at every game, and he believed he threw hotdogs on September 8, 2009 like he had at every other game. (TR. 117:1-13).

Chris DeRuyscher, Game Operations Director for The Royals, was responsible for monitoring Sluggerrr's throws during The Hotdog Toss. (TR. 223:16-224:23). If he observed a throw that had too much velocity, he was supposed to report the throw to Sluggerrr's Supervisor, Mr. Costante. (Id.) Mr. Costante never received a report from Mr. DeRuyscher that Sluggerrr threw any hotdogs in an inappropriate manner on September 8, 2009. (TR. 228:10-19). Although Mr. Coomer saw Sluggerrr throw hotdogs on September 8, 2009, he never saw Sluggerrr throw a hotdog hard or with velocity. (TR. 290:9-12).

After the jury's verdict finding the Royals 0% at fault and finding Mr. Coomer 100% at fault, Mr. Coomer filed a motion for judgment notwithstanding the verdict and for a new trial. (LF273-275). That motion was denied and the instant appeal followed. (LF341).

RESPONSE TO APPELLANT'S POINTS RELIED ON

I. THE TRIAL COURT WAS CORRECT IN INSTRUCTING THE JURY ON IMPLIED PRIMARY ASSUMPTION OF RISK AND IN DENYING PLAINTIFF'S MOTION FOR A DIRECTED VERDICT BECAUSE THERE WAS SUBSTANTIAL EVIDENCE THAT THE RISK OF BEING STRUCK BY A THROWN HOTDOG IS AN INHERENT RISK OF THE HOTDOG TOSS, AND MR. COOMER KNOWINGLY AND INTELLIGENTLY CONSENTED TO THE RISK OF THE HOTDOG TOSS IN THAT HE CHOSE TO ATTEND THE ROYALS GAME KNOWING THE HOTDOG TOSS WAS AN INEXTRICABLE PART OF THE ROYALS GAME DAY EXPERIENCE, AND THE RISK OF THE HOTDOG TOSS WAS OBVIOUS.

Primary authorities relied on:

- *Sheppard v. Midway R-1 School Dt.*, 904 S.W.2d 257 (Mo.App.W.D. 1995)
- *Cohen v. Sterling Mets, L.P.*, 17 Misc.3d 218, 840 N.Y.S.2d 527 (N.Y. 2007)
- *Crane v. Kansas City Baseball an Exhibition Co.*, 153 S.W. 1076, 1078 (Mo.Ct.App. 1913)
- *Loughran v. The Phillies*, 888 A.2d 872 (Pa. 2005)

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Primary authorities relied on:

- *Sheppard v. Midway R-1 School Dt.*, 904 S.W.2d 257 (Mo.App.W.D. 1995)
- *Martin v. Buzan*, 857 S.W.2d 366 (Mo.App.E.D. 1993)
- *Schnieder v. Snow Creek, Inc.*, 2011 Mo.App.Lexis 413 (Mo.App.W.D. March 29, 2011), *transfer denied*, June 28, 2011.
- *Bennett v. Hidden Valley Golf and Ski, Inc.*, 318 F.3d 868 (8th Cir. 2003)

III. THE TRIAL COURT WAS CORRECT 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 THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE INSTRUCTION IN THAT MR. COOMER KNEW THE HOTDOG TOSS WAS OCCURRING, HE SAW SLUGGERRR THROWING HOTDOGS TO FANS IN HIS VICINITY, HE KNEW FANS BEHIND HIM WERE BEGGING SLUGGERRR TO THROW A HOTDOG IN THEIR DIRECTION, HE

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Primary authorities relied on:

- *Wilson v. Shanks*, 785 S.W.2d 282 (Mo. 1990);
- *Lee v. Mirbaha*, 722 S.W.2d 80, 83 (Mo. banc 1986)

IV. THE TRIAL COURT WAS CORRECT IN REFUSING TO ALLOW MR. COOMER TO SUBMIT CLAIMS OF NEGLIGENT SUPERVISION AND NEGLIGENT TRAINING BECAUSE THE ROYALS ADMITTED AGENCY AND, THEREFORE, UNDER *MCHAFFIE V. BUNCH*, SUBMISSION UNDER ANY THEORY OF NEGLIGENCE IN ADDITION TO *RESPONDEAT SUPERIOR* WOULD HAVE BEEN DUPLICATIVE, AND WOULD HAVE ONLY SERVED TO CONFUSE THE JURY.

Primary authorities relied on:

- *McHaffie v. Bunch*, 891 S.W.2d 822, 826 (Mo. banc 1995)
- *Kwiatkowski v. Teton Transportation Inc.*, 2012 U.S.Dist.Lexis 56478, at p. 4 (W.D.Mo. April 23, 2012)
- *Beavis v. Campbell Co. Mem'l Hosp.*, 20 P.3d 508 (Wyo. 2001)

STANDARD OF REVIEW

Despite Mr. Coomer's suggestion to the contrary with respect to Point I, all four of Mr. Coomer's points on appeal allege error in denying him a directed verdict or error in submitting jury instructions. Thus, the applicable standards of review are as follows:

Denial of Motion for Directed Verdict: The standard of review for denial of a motion for a directed verdict is essentially the same as review of a denial of JNOV. *Dhyne v. State Farm Fire & Cas. Co.*, 188 S.W.3d 454, 456-457 (Mo. banc 2006). A case may only be submitted on substantial evidence. *Id.* In determining the sufficiency of the evidence, "the evidence is viewed in the light most favorable to the result reached by the jury," giving the appellee the benefit of all reasonable inferences and disregarding evidence and inferences that conflict with that verdict. *Id.* The verdict will only be reversed for insufficient evidence when there is "...a complete absence of probative facts to support the jury's conclusion." *Id.* This standard is applicable to Points I and III.

Error in Submitting Instructions: To reverse on grounds of instructional error, the party claiming error must establish the instruction at issue misdirected, misled or confused the jury. *Sorrell v. Norfolk Southern Ry. Co.*, 249 S.W.3d 207, 209 (Mo. banc 2008). Moreover, the party claiming error must show prejudice resulted from the instructional error. *Id.* The burden of proof rests with the party alleging the instructional error. *Van Volkenburgh v. McBride*, 2 S.W.3d 814, 821 (Mo.App. W.D. 1999). In determining whether the jury was properly instructed, all evidence and inferences should be considered in a light most favorable to the submission of the instruction, disregarding all contrary evidence and inferences. *Wright v. Barr*, 62 S.W.3d 509, 526 (Mo.App.W.D.

2001). Further, a party is entitled to an instruction upon any theory supported by the evidence. *Egelhoff v. Holt*, 875 S.W.2d 543, 548 (Mo.banc 1993). This standard is applicable to Points I, II, III, and IV.

With Respect to Point No. I: Mr. Coomer claims because implied primary assumption of risk (“IPAR”) raises an issue of duty, the trial court’s decision to instruct the jury on that affirmative defense is subject to de novo review.³ However, in *Sheppard v. Midway R-1 School Dt.*, 904 S.W.2d 257 (Mo.App.W.D. 1995), this Court held if there is substantial evidence supporting a finding that a plaintiff’s injury is the product of an inherent risk of the activity, the jury must be instructed on IPAR so that it may determine whether: (a) the injury was a product of an assumed risk, or (b) the injury was a product of the parties’ negligence. *Id.* at 264. Thus, the rules with respect to review of instructional error as set forth above, including the requirement that the Court review the evidence in the light most favorable to giving the instruction, applies. *Wright*, 62 S.W.3d at 526.

³ Appellant’s Brief, pp. 18-19.

ARGUMENT

I. THE TRIAL COURT WAS CORRECT IN INSTRUCTING THE JURY ON IMPLIED PRIMARY ASSUMPTION OF RISK AND IN DENYING PLAINTIFF'S MOTION FOR A DIRECTED VERDICT BECAUSE THERE WAS SUBSTANTIAL EVIDENCE THAT THE RISK OF BEING STRUCK BY A THROWN HOTDOG IS AN INHERENT RISK OF THE HOTDOG TOSS, AND MR. COOMER KNOWINGLY AND INTELLIGENTLY CONSENTED TO THE RISK OF THE HOTDOG TOSS IN THAT HE CHOSE TO ATTEND THE ROYALS GAME KNOWING THE HOTDOG TOSS WAS AN INEXTRICABLE PART OF THE ROYALS GAME DAY EXPERIENCE, AND THE RISK OF THE HOTDOG TOSS WAS OBVIOUS.

Implied primary assumption of risk ("IPAR") applies because even if we assume Mr. Coomer was struck with a 4 ½ ounce hotdog, there was substantial evidence showing his injury was a result of an inherent risk of an activity that is an integral part of The Royals game day experience - The Hotdog Toss. The Hotdog Toss has achieved that status through its longevity, and the consistency with which it has been a part of the game day experience. It had literally occurred at every one of The Royals' approximately 800 home games that preceded Mr. Coomer's incident. (TR. 127:14-25, TR. 164:6-25 – stating The Hotdog Toss occurred at every one of The Royals' 81 home games beginning in 2000). Royals fans have grown to love and expect The Hotdog Toss. (TR. 111:10 – 112:8; 230:8 – 231:3; Trial Ex. 26).

Activities similar to The Hotdog Toss are a common part of the professional game day experience in general. Witnesses testified to observing a wide array of items being thrown into the crowd as a part of promotional events at a variety of sports venues. Mr. Coomer, a big sports fan, admitted to personally seeing T-shirts, frisbees, foam footballs, foam baseballs and other similar items being thrown into the stands. (TR. 276:1-278:8).

Mr. Coomer does not dispute the venerated status of The Hotdog Toss. At trial, he admitted that before he arrived at the stadium on September 8, 2009, he knew The Hotdog Toss was an activity he would encounter, and that it involved Sluggerrr throwing hotdogs for fans to catch. (TR. 249:12-250:5, 275:1-278:4). Given his estimate that he had attended over 175 Royals games over the years, Mr. Coomer had undoubtedly seen The Hotdog Toss dozens of times prior to September 8, 2009. (TR. 250:2-5). Armed with that knowledge, Mr. Coomer decided to attend the game and sit six rows behind the 3rd base dugout because he liked being “close to the action.” (TR. 253:3-16, 276:20-24).

When the doctrine of IPAR applies, the defendant has no duty to protect the plaintiff from the risk of harm at issue. *Sheppard v. Midway R-1 School Dt.*, 904 S.W.2d 257, 261 (Mo. App. W.D. 1995). However, as is discussed in subsequent sections, there are limitations on IPAR, and it does not allow a defendant to act with disregard for the plaintiff, as Mr. Coomer has attempted to suggest. *Id.* at 263; *Frank v. Matthews*, 136 S.W.3d 196, 204 (Mo.App.W.D. 2004). IPAR applies “...where the parties have voluntarily entered into a relationship in which the plaintiff assumes well-known incidental risks.” *Lewis v. Snow Creek*, 6 S.W.3d 388, 393 (Mo.App.W.D. 1999). Thus, IPAR is premised on plaintiff’s consent to accept the risk. *Id.* “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.*

IPAR has frequently applied in instances where a spectator at a baseball game is struck by a foul ball, a wild throw, or a broken bat. *See, e.g., Blakely v. White Star Line*, 118 N.W. 482, 483 (Mich. 1908); *Crane v. Kansas City Baseball an Exhibition Co.*, 153 S.W. 1076, 1078 (Mo.Ct.App. 1913); *Benejam v. Detroit Tigers, Inc.*, 635 N.W.2d 219 (Mich. 2001). Such cases are so ubiquitous that they are often referenced in shorthand as “baseball rule” cases. *Benejam*, 635 N.W.2d at 223. The rationale for applying IPAR to baseball rule cases is that anyone with even a casual understanding of the game realizes balls and bats frequently leave the field of play, and there is an associated risk of being struck by such projectiles. *Crane*, 153 S.W. at 1077, *Benejam*, 635 N.W.2d at 223. Thus, spectators at baseball games are deemed to have comprehended the actual risk, and voluntarily consented to the risk posed by balls and bats that leave the field of play. *Crane*, 153 S.W. at 1078. The spectators consent is manifested by virtue of their decision to sit in an unprotected area of the stadium because the risk of being struck by a ball or bat is perfectly obvious. *Crane*, 153 S.W. at 1077-1078; *Hudson v. Kansas City Baseball Club*, 164 S.W.2d 318, 321-322 (Mo. 1942).

Strictly speaking, this is not a baseball rule case. Nevertheless, the rationale for applying IPAR to this case is the same. Sluggerrr testified The Hotdog Toss was a “common sense” activity. (TR. 162:11-15). Any reasonable person with even a casual understanding of the event can appreciate when hotdogs are thrown into the crowd, there is a risk of injury if one fails to catch the hotdog. Appreciation of that risk should be

particularly acute when one has substantial previous experience with The Hotdog Toss, as the evidence proves Mr. Coomer had. By choosing to attend a Royals game which Mr. Coomer knew included The Hotdog Toss, Mr. Coomer is deemed to have comprehended the actual risk of being struck by a thrown hotdog, and voluntarily and intelligently accepted that risk. *Crane*, 153 S.W. at 1077-1078; *Hudson*, 164 S.W.2d at 321-322.

A. The Risks Assumed are Not Limited to Those Risks Created by The Play of the Game

Mr. Coomer argues the risk of being struck by a hotdog is not a risk inherent in the play of a baseball game and, therefore, IPAR does not apply. However, his reliance on *Sheppard by Wilson v. Midway R-1 Sch. Dist.*, 904 S.W.2d 257, 262 (Mo.App.W.D. 1995), and *Lewis v. Snow Creek, Inc.*, 6 S.W.3d 388 (Mo.App.W.D. 1999) for the proposition that the only risks he assumed were those “...that in[here] in the nature of the sport itself” is misguided. *Sheppard* and *Lewis* involved **participants** in a sport. It is true that a **participant** only assumes the risks inherent in participating in the sport. However, Mr. Coomer was not a **participant** in the sport, he was a **spectator**.

Equating Mr. Coomer’s activity or situation as a spectator with the activity or situation of a participant in the sport is incongruous. A risk of being bowled over at home plate was not inherent in Mr. Coomer’s activity or situation as a spectator, but it was an inherent risk to the Catcher’s activity as a player of the game. On the other hand, the risk of being hit by a thrown hotdog was not inherent in the activity or situation of the Catcher, but it was an inherent risk to Mr. Coomer’s situation or activity as a spectator at a Royals game. Ultimately, nothing in *Sheppard*, *Lewis*, or earlier baseball rule cases

support the proposition that a **spectator**, who attends a multi-act or multi-faceted entertainment experience, only assumes the risks of one the acts or facets.

Mr. Coomer was equally a spectator to the Hotdog Toss as he was a spectator to the game being played on the field. When he made the decision to attend the game, and further made the decision to sit where he knew the Hotdog Toss was likely to occur as opposed to his ticketed seat, he assumed the risks inherent in all of the well-known “acts” or “elements” of the show.

In other baseball spectator cases, Courts have refused to limit the scope of risks assumed to only those risks posed by the actual play of the game. For example, there have been instances where spectators were injured when players threw balls to the crowd as souvenirs between innings or after pre-game warm-ups. In those cases, the plaintiffs argued that a player intentionally throwing a ball into the crowd between innings was not a risk of the game itself and, therefore, it was not a risk they assumed by attending a game. The plaintiff in *Loughran v. The Phillies*, 888 A.2d 872 (Pa. 2005) made such a claim against the Philadelphia Phillies and its Centerfielder, Marlon Byrd. The Court granted the defendants summary judgment under Pennsylvania’s “no-duty” rule. *Id.* at 876. It stated the scope of the no-duty rule “...was not limited by the rigid standards of the Major League Baseball Rule book...” and that it “...must consider the actual everyday goings on that occur both on and off the baseball diamond.” *Id.* Whether the “no duty” rule applied hinged upon whether the risk at issue was a “customary” part of the activity. *Id.* The Court concluded that for purposes of the “no-duty” rule, “customary” was not limited to those risks associated with the activities sanctioned by

baseball authorities, but also included the risks of activities that were “an integral part of attending a game.” *Id.*

Similarly, in *Pira v. Sterling Equities, Inc.*, 16 A.D.3d 396, 790 N.Y.S.2d 551 (2005), the Court granted the New York Mets summary judgment based on implied primary assumption of risk when a fan was struck by a ball intentionally thrown into the crowd by Pitcher Dennis Cook after completing his pre-game warm-ups.

In *Elie v. The City of New York*, 2009 N.Y.Misc.Lexis 2256, the plaintiff was injured during pre-game activities. A New Jersey Cardinals player was “horsing around”, doing nothing related to his preparation for the game when he lost control of his bat and struck the plaintiff, who was approximately 10 feet from the player. Plaintiff alleged her injuries did not arise out of the inherent activities of baseball, but the Court ruled that was not a controlling factor and granted the defendant summary judgment. *Id.* at p. 9. *See also, Dalton v. Jones*, 581 S.E.2d 360 (Ga.App. 2003)(granting Atlanta Braves Centerfielder Andruw Jones summary judgment after an errant warm-up throw between innings struck a fan).

No meaningful distinction exists between the risk of being struck by a baseball intentionally thrown into the crowd as a souvenir, and the risk of being struck by a free 4 ½ ounce hotdog thrown by Sluggerrr as a part of a longstanding inter-inning promotional event. Neither activity is an essential and unavoidable part of the game according to the Major League Baseball Rule Book. Nevertheless, both are well-known, “customary” activities that are a part of the game day experience and, therefore, one who attends a Royals game is deemed to have voluntarily accepted the risk of such events.

Mindful of the substantial evidence supporting the fact that The Hotdog Toss is an integral part of attending a Royals game, and that Mr. Coomer's injuries allegedly occurred as a result of the risks inherent in that activity, the trial court correctly instructed the jury on IPAR as follows:

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.

(LF267, Appx. 2).

Cohen v. Sterling Mets, L.P., 17 Misc.3d 218, 840 N.Y.S.2d 527 (N.Y. 2007), demonstrates the correctness of the trial court's instruction. In *Cohen*, a concession vendor was injured when a fan dove for a T-shirt that was launched into the stands during an inter-inning promotional activity. The plaintiff in *Cohen* claimed that IPAR only applied to the events of the game. The Court rejected that argument and granted the Mets judgment as a matter of law, stating:

This argument is without merit. ***The T-shirt launch, while not a part of the official game, is a part of the experience of attending a sporting event.***

The fact that it was a T-shirt rather than a baseball or a bat that was being chased after when the accident occurred does not warrant a denial of the motion. It is not disputed that launching of T-shirts into the stands is a regular and customary part of many sporting events. The T-shirt launch is comparable to the tossing of a ball to the fans between innings, while not necessary to the playing of the ball game, *it is a customary part of the experience of attending a sporting event*. When a ball is tossed into the stands by a player, many spectators rush toward the ball in hopes of getting a souvenir, just as what allegedly occurred here during the T-shirt launch. Similarly, fans often arrive prior to the start of the baseball game to attend batting practice, partly in hope of retrieving a baseball.

Id. at 528-529 (internal citation omitted)(emphasis added).

B. An IPAR Instruction was Appropriate Regardless of The Fact that Mr. Coomer Alleged an Enhanced Risk

In Mr. Coomer's Motion for Judgment Notwithstanding the Verdict, he acknowledged that an IPAR instruction is warranted when there is a dispute as to whether the plaintiff's injuries were: (a) caused by an inherent risk of the activity, or (b) the defendant's negligence:

Missouri Courts have authorized Implied Primary Risk instructions in certain circumstances. For example, where there is an issue of causation, an Implied Primary Risk instruction may be appropriate.

LF292, *citing Sheppard*, 904 S.W.2d at 264.

Now, it appears Mr. Coomer is attempting to say something entirely different. In arguing to this Court, he claims whenever a plaintiff asserts his injuries were caused by an “enhanced risk” (i.e. the negligence of the defendant), regardless of whether defendant disputes that contention, it is error to give an IPAR instruction.⁴ Mr. Coomer had it right the first time.

In *Sheppard v. Midway R-1 School Dt.*, 904 S.W.2d 257 (Mo.App.W.D. 1995), there was a dispute as to whether a long jumper’s knee injury was caused by the inherent risk of an athlete’s failure to land correctly, or if the injury was caused by the defendant’s negligence in failing to properly prepare the long jump pit. Because there was evidence to support both theories of the cause of plaintiff’s injury, the trial court gave ***both*** an IPAR instruction and an implied secondary assumption of risk instruction (i.e. comparative fault). *Id.* at 264. Although the trial court was reversed on appeal, it was reversed *because of the **manner*** in which the trial court instructed the jury on IPAR. *Id.* at 263-265. As to the trial court’s decision to give an IPAR instruction in the first place, the Western District stated:

By the same token, however, Midway presented substantial evidence to support a finding that Sheppard’s injury resulted exclusively from an awkward or bad landing, an inherent risk of participating in the long jump.

Thus, contrary to Sheppard’s contention, Midway was entitled to an

⁴ See Appellant’s Brief, pp. 28-31.

instruction on the affirmative defense of implied primary assumption of risk.

Id.

Thus, it is clear when there is evidence of two potential causes of the plaintiff's injury, i.e. whether: (a) the plaintiff's injury was caused by a risk that is incident to or inherent in the undertaken activity, or (b) whether plaintiff's injury was caused by the defendant's negligence, an IPAR instruction "[is] appropriate so that the jury [can] determine the cause of the injury." *Sheppard v. Midway R-1 School Dt.*, 904 S.W.2d 257, 264 (Mo.App.W.D. 1995). In this case, the jury was presented with exactly that scenario. It had to answer the questions: What caused the plaintiff's injury? If Mr. Coomer was struck by a hotdog, why did that happen? Did an alleged failure to throw the hotdog in a reasonably safe manner cause the injury, or was it simply a matter of the obvious possibility that when someone throws an object in a reasonably safe manner there is always a risk that the person to whom the object is thrown might not catch it? The latter risk is always present, and is incident to or inherent in throwing 4 ½ ounce hotdogs, baseballs, or any other object. Anyone with a casual understanding of thrown objects knows of the existence of such a risk. Because there was a dispute as to how, why, and what struck Mr. Coomer, the jury had to decide the issue. Thus, the Court was clearly correct to instruct the jury on IPAR.

C. Mr. Coomer’s Argument that Applying IPAR to The Hotdog Toss Would Allow Sluggerrr to Throw Hotdogs with Impunity is in Direct Contradiction of His Own Argument that IPAR Cannot Apply to a Defendant’s Negligence

Mr. Coomer’s suggestion that applying IPAR to The Hotdog Toss is bad public policy because it gives Sluggerrr “absolute immunity from any damages caused by [his] activities” is simply untrue.⁵ By plaintiff’s own admission, IPAR does not apply to those instances in which a plaintiff’s injury is caused by an “enhanced risk” created by the manner in which the activity is performed (i.e. negligence), as opposed to a risk inherent in the activity. *Sheppard*, 904 S.W.2d at 261; *Frank*, 136 S.W.3d at 205 (holding that while the plaintiff assumed the risks inherent in the activity of horseback riding, “she did not, however, assume any enhanced exposure to those risks that may have been caused by the Instructor’s negligent supervision.”). By applying IPAR to The Hotdog Toss, this Court will not be giving Sluggerrr license to throw “Nolan Ryan-like fastballs” at sleeping babies from point blank range. In such a case, IPAR would not apply.

In this case, the jury received substantial evidence about how The Hotdog Toss was performed, and direct and circumstantial evidence of how it was performed on September 8, 2009. Based on that, it reached the conclusion that the throw that struck Mr. Coomer was not a negligent throw, or a throw that otherwise enhanced the risk inherent in the Hotdog Toss. Therefore, it assessed no fault to The Royals. By its

⁵ Appellant’s Brief, p. 27-28.

verdict, the jury clearly did not believe Mr. Coomer's allegation that his injury was caused by an "enhanced risk" created by the way Sluggerrr threw the accident hotdog. The jury was the sole judge of credibility of the witnesses and its decision to disbelieve any or all of the plaintiff's testimony cannot be disturbed. *Keveny v. Missouri Military Acad.*, 304 S.W.3d 98, 105 (Mo. 2010); *State v. Pond*, 131 S.W.3d 792, 794 (Mo. 2004).⁶

Mr. Coomer wants to argue about what inferences and conclusions he believes the jury should have drawn from the evidence. Such arguments are inappropriate when asserting instructional error and challenging the denial of a directed verdict because they violate the rule that evidence and inferences should be considered in a light most

⁶ Despite plaintiff's attempt to argue *Lowe v. California League of Professional Baseball*, 56 Cal.App.4th 112, 123 (1997) stands for the proposition that the activities of a mascot can never be a part of the inherent risks assumed by spectators, review of that case reveals it is merely a classic enhanced risk case like *Sheppard* and *Frank*. The Court was clear in denying the baseball team's motion for summary judgment that there was an issue of fact as to whether the mascot's antics *during the play of the game* distracted the spectator from seeing the foul ball coming in his direction.

favorable to the submission of the instruction, and in the light most favorable to the verdict, disregarding all contrary evidence and inferences. *Wright v. Barr*, 62 S.W.3d 509, 526 (Mo.App.W.D. 2001); *Amador v. Lea's Auto Sales & Leasing, Inc.*, 916 S.W.2d 845 (Mo.App.S.D. 1996).

II. THE TRIAL COURT WAS CORRECT IN SUBMITTING INSTRUCTION NOS. 9 AND 11 BECAUSE THEY WERE CONSISTENT WITH IMPLIED PRIMARY ASSUMPTION OF RISK INSTRUCTIONS WHICH HAVE BEEN APPROVED BY MISSOURI COURTS IN THAT THEY DID NOT ALLOW FOR A COMPLETE DEFENSE VERDICT IN THE EVENT THE JURY FOUND THE DEFENDANT NEGLIGENT, AS IN *SHEPPARD V. MIDWAY R-1*.

The manner in which the Court instructed the jury on IPAR is consistent with controlling Missouri precedent and, therefore, is not subject to attack. Specifically, the language of Instruction Nos. 9 and 11 (Appx. 1 and 2) track the principles enunciated in the following decisions:

- *Martin v. Buzan*, 857 S.W.2d 366 (Mo.App.E.D. 1993);
- *Sheppard v. Midway R-1 School Dt.*, 904 S.W.2d 257 (Mo.App.W.D. 1995); and
- *Bennett v. Hidden Valley Golf and Ski, Inc.*, 318 F.3d 868 (8th Cir. 2003).
- *Schnieder v. Snow Creek, Inc.*, 2011 Mo.App.Lexis 413 (Mo.App.W.D. March 29, 2011)

The table found in Appendix 5 provides an illustration of the fact that the trial court's instructions are in harmony with Missouri precedent. In every case, the verdict director essentially followed MAI 17.01 and 37.01. In every case, the Court used the "unless you believe" tail about which the plaintiff complains.

Moreover, a close examination of *Sheppard v. Midway R-1 School Dt.*, 904 S.W.2d 257 (Mo.App.W.D.1995) shows that the instructional error in that case resided in the IPAR affirmative defense instruction, and the Court found nothing wrong with the verdict director or its "unless you believe" tail. With respect to the verdict director, the Court concluded: "Thus, Instruction 8, Sheppard's verdict director...properly presented the issue[] for determination by the jury." *Id.* at 262.

The errors in the *Sheppard* IPAR instruction were absent from the instruction in this case. The Western District identified two problems with the *Sheppard* IPAR instruction: (1) it was "overly broad in that it required the jury to find for Midway even if it found Midway negligently prepared the pit", and (2) it "...failed to properly instruct the jury that Sheppard must have had knowledge of and appreciated the risk." *Id.* at 264-265. As to the latter *Sheppard* error, that obviously was not a problem in the present case because the trial court's IPAR instruction required The Royals to prove: "Second, plaintiff comprehended the actual risk, and Third, plaintiff intelligently accepted such risk." LF267 and Appx. 2 (Instruction No. 11). In this regard, the Court's instruction followed the guidance of *Martin v. Buzan*, 857 S.W.2d 366, 367 (Mo.App.E.D 1993).

As to the former *Sheppard* error (i.e. the *Sheppard* instruction required the jury to find for the defendant even if it was negligent), the reason the *Sheppard* instruction was “overly broad” is because it used the wrong standard for IPAR. The instruction was fatally flawed because it combined primary assumption of risk and secondary assumption of risk. *Sheppard*, 904 S.W.2d at 264. The plaintiff was effectively barred from recovery if the risk of injury was a “reasonably foreseeable” risk of participating in the long-jump competition. *Id.* In other words, the *Sheppard* instruction did not use the “inherent risk” standard. Instead of requiring proof that the plaintiff assumed those risks that were “incident to or inherent in” the long jump, the *Sheppard* instruction only required proof that the plaintiff assumed a risk that was “...a reasonably foreseeable risk of participating in the long jump...” *Id.* at 260. The risk that the pit was not properly groomed was included in the “reasonably foreseeable” risks to *Sheppard* because she had an opportunity to inspect the pit and had made several jumps before her accident occurred. *Id.* at 259. Thus, the erroneous *Sheppard* affirmative defense instruction allowed the jury to find both *Sheppard* and the School District negligent, but that *Sheppard* was nevertheless barred from recovering. *Id.*

In contrast, the instruction in the instant case did precisely what the *Sheppard* IPAR instruction failed to do. To find against the plaintiff in this case, the jury had to believe being struck by a hotdog in the manner in which Sluggerrr threw the hotdog on September 8, 2009, was an “*inherent risk* of attending a game at Royals Stadium.” (LF267).

The purported inconsistency between Jury Instruction Nos. 9 and 11 does not exist. (Appx. 1 and 2). That is why on at least two other occasions Missouri Appellate Courts, including this Court, have affirmed other Courts' use of precisely the same language as used by the trial court in the instant matter. *Bennett v. Hidden Valley Golf & Ski, Inc.*, 318 F.3d 868, 878 (8th Cir. 2003); *Schneider v. Snow Creek, Inc.*, 2011 Mo. App. Lexis 413 (Mo.App.W.D. March 29, 2011).

Moreover, because “**Inherent risk**” and **defendant’s negligence** are mutually exclusive concepts, the plaintiff is simply wrong when he argues the Coomer instruction allowed for the possibility that the jury could find both The Royals and Coomer negligent, but that Coomer’s claim was barred under IPAR. For that same reason, any error in instructing the jury on IPAR in the instant matter would have been harmless.

Instruction No. 11 provided in pertinent part:

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.

Instruction No. 11 (emphasis added).

Under the above instruction, the jury was only instructed not to assess a percentage of fault to the Royals if it found the hotdog was thrown non-negligently (or in a manner that did not enhance the risk inherent in the Hotdog Toss). That is because the instruction only applied if the jury believed the risk of being hit by a hotdog “thrown in the manner in which Sluggerrr threw the hotdog . . . was a risk **inherent in** attending a game.” Earlier appellate decisions indicate that by definition, “inherent risk” does not include a defendant’s negligence. *Martin v. Buzan*, 857 S.W.2d 366, 369 (Mo.App.E.D. 1993); *Ivey v. Nicholson-McBride*, 336 S.W.3d 155, 158 (Mo.App.W.D. 2011). Thus, the jury had to have ruled out the conclusion that Sluggerrr threw the hotdog negligently if it also concluded the hotdog was thrown in a manner that posed no risk beyond the risk inherent in attending the game.

The result would have been the same if the IPAR instruction had not been submitted. The IPAR instruction could not have caused the jury to find for the Royals unless it also concluded the Royals was free of fault. Therefore, if the instruction had not been submitted, the jury still would have assessed the Royals 0% of the fault.

Because the result would have been the same even had the IPAR instruction not been given, the IPAR instruction did not cause an erroneous verdict. An error in instruction is only a ground for reversal if it can be demonstrated that the error contributed to an erroneous verdict. *See e.g. State v. McIlvoy*, 629 S.W.2d 333 (Mo. banc 1982)(holding an error in a second degree murder and manslaughter instruction was not prejudicial because the jury found the defendant guilty of capital murder).

III. THE TRIAL COURT WAS CORRECT 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 THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE INSTRUCTION IN THAT MR. COOMER KNEW THE HOTDOG TOSS WAS OCCURRING, HE SAW SLUGGERRR THROWING HOTDOGS TO FANS IN HIS VICINITY, HE KNEW FANS BEHIND HIM WERE BEGGING SLUGGERRR TO THROW A HOTDOG IN THEIR DIRECTION, HE SAW SLUGGERRR BEGIN TO THROW THE ACCIDENT HOTDOG IN HIS DIRECTION, AND INSTEAD OF ATTEMPTING TO CATCH THE ACCIDENT HOTDOG, HE LOOKED AWAY FROM SLUGGERRR BEFORE SLUGGERRR LET GO OF THE HOTDOG AND, MOREOVER, MR. COOMER SUFFERED NO PREJUDICE FROM THE TRIAL COURT'S INSTRUCTION IN THAT THE JURY ASSESSED THE ROYALS 0% OF THE FAULT.

The jury's finding that Mr. Coomer was 100% at fault was supported by substantial evidence. Mr. Coomer knew how The Hotdog Toss was performed. He had seen it on several occasions before at Royals Stadium. (TR. 249:12 – 250:5; 275:1 – 277:20). When he arrived at the stadium, he did not sit in his assigned seat. (TR. 255:6-16). Instead, he moved to an open seat six rows behind the third-base dugout, which was an area he knew was where The Hotdog Toss took place. (Id.)

Mr. Coomer saw and heard the audio and video board lead-in indicating The Hotdog Toss was about to begin. (TR. 282:13-25; 283:6-8). Mr. Coomer admitted seeing Sluggerrr standing on top of the dugout. (TR. 53:6 – 255:25; 258:7 – 259:21; 283:18 – 284:1; Trial Ex. 1). Mr. Coomer saw Sluggerrr throwing hotdogs immediately in front of him. Mr. Coomer knew there were several people immediately behind him yelling for Sluggerrr to throw a hotdog in his direction. (TR. 284:2-18). And, Mr. Coomer saw the throwing motion Sluggerrr used to throw the alleged accident hotdog (under-handed behind his back). (TR. 258:1 – 259:24; 289:3-19).

Despite all of that knowledge, Mr. Coomer chose to remain in his seat and in an area that a reasonable person would have appreciated a hotdog might be thrown. Despite seeing Sluggerrr begin to throw the hotdog, Mr. Coomer chose to look away. Is it any surprise Mr. Coomer did not catch the accident hotdog thrown in his direction? He had every reason to pay attention to Sluggerrr, but by his action in looking away, he clearly demonstrated that he “unreasonably failed to appreciate the risks” of The Hotdog Toss. *Sheppard*, 904 S.W.2d at 261.

Mr. Coomer is wrong when he claims the reason defendant sought a comparative fault (implied secondary assumption of risk) instruction was based “simply” on the fact that Mr. Coomer “remain[ed] in his seat.”⁷ The fact that Mr. Coomer chose to attend The Royals game knowing The Hotdog Toss would occur, and that he remained in his seat are important facts to this case because they demonstrate his voluntary consent to participate

⁷ Appellant’s Brief, pp.39-40.

in The Hotdog Toss. *Crane*, 153 S.W. at 1077-1078. Those facts are not, however, the bases for The Royals' position and the jury's conclusion that Mr. Coomer's actions were negligent.

Mr. Coomer looked away from Sluggerrr at the last second when it was perfectly obvious a hotdog was or could be coming in his direction. As such, it is clear there was substantial evidence to support the Court's instruction on comparative fault. By looking away at the last second, Mr. Coomer demonstrated a failure to reasonably appreciate the risks of The Hotdog Toss.

Regardless of the above, Mr. Coomer was not prejudiced by the trial court's instruction on comparative fault because the jury assessed 0% of the fault to The Royals.⁸ Missouri Courts have consistently held when a jury assesses a defendant 0% of the fault, any error in giving a comparative fault instruction is harmless, provided assessment of fault in the verdict director "was not dependent upon or made no reference to" the comparative fault instruction. *Lee v. Mirbaha*, 722 S.W.2d 80, 83 (Mo. banc 1986); *Barnes v. Tool & Machinery Builders, Inc.*, 715 S.W.2d 518, 522 (Mo. banc 1986); *Wilson v. Shanks*, 785 S.W.2d 282 (Mo. 1990); *Berry v. St. Andrews Mgmt. Services, Inc.*, 263 S.W.3d 434, 446 (Mo.App.E.D. 2008); *Skinner v. Leggett & Platt, Inc.*, 325 S.W.3d 520 (Mo.App.S.D. 2010). For example, in *Wilson, supra*, a pedestrian sustained

⁸ The jury's rationale for assessing The Royals 0% of the fault may also be because of the substantial evidence circumstantially suggesting Mr. Coomer was struck by one of the fans attempting to catch the hotdog thrown in his direction.

injuries while trying to flag down a passing motorist after he had driven his vehicle into a ditch. The jury in *Wilson* was instructed:

[Instruction No. 10 – Comparative Fault]

In your verdict on the claim of plaintiff Ivan Wilson, you must assess a percentage of fault to plaintiff Ivan Wilson, whether or not defendant was partly at fault, if you believe:

FIRST, either;

- a. Plaintiff Ivan Wilson’s vehicle was on the wrong side of the road, or
- b. Plaintiff Ivan Wilson stopped his vehicle in a lane reserved for moving traffic, and

SECOND, Plaintiff Ivan Wilson was thereby negligent, and

THIRD, such negligence of the Plaintiff Ivan Wilson directly caused or contributed to the cause of any damage Plaintiff Ivan Wilson may have sustained.

...

[Instruction No. 8 – Verdict Director]

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

FIRST, Defendant either:

Failed to keep a careful lookout, or drove at an excessive speed, or knew by the use of the highest degree of care would have known that there was a reasonable likelihood of collision in time thereafter to have swerved or slackened his speed but Defendant failed to do so, and

SECOND, Defendant's conduct, in any one or more of the respects submitted in paragraph First was negligent, and

THIRD, as a direct result of such negligence, Plaintiff Ivan Wilson sustained damage.

Wilson, 782 S.W.2d at 284.

Affirming the trial court's judgment consistent with the jury's verdict, the Court in *Wilson* relied upon *Lee, supra*, and *Barnes, supra*, in concluding that "...the jury verdict assessing no fault to the defendant negated any claim of prejudice to plaintiff in the giving of an erroneous contributory fault instruction." *Id.* It reasoned that Instruction No. 8 (the verdict director) required some assessment of fault to the defendant if the jury found the facts hypothesized to be true. Furthermore, that assessment of fault was not "dependent upon and made no reference to" Instruction No. 10 (the comparative fault instruction). *Id.* Therefore, it concluded:

The jury necessarily must have concluded that one of the essential propositions [of the verdict director] was not established when it failed to assess any fault to defendant. Absent some assessment of fault to

defendant, there was no prejudice in giving the contributory fault instruction.

Id.

The instant matter is on all fours with *Wilson* and the many other Missouri decisions on this issue. Like *Wilson*, the jury's verdict assessed no fault to the defendant, The Royals.⁹ Also like *Wilson*, assessment of fault in the verdict director "was not dependent upon and made no reference to" the comparative fault instruction.¹⁰ *Id.* Therefore, the jury "...necessarily concluded one of the essential propositions [of the verdict director] was not established..." and Mr. Coomer was not prejudiced by the trial court's giving of the comparative fault instruction. *Wilson*, 785 S.W.2d at 285.

⁹ LF267.

¹⁰ The Verdict Director (LF265) only references the IPAR instruction, Instruction No. 11 (LF267, Appx. 2), not the comparative fault instruction, Instruction No. 12 (LF268, Appx. 3).

IV. THE TRIAL COURT WAS CORRECT IN REFUSING TO ALLOW MR. COOMER TO SUBMIT CLAIMS OF NEGLIGENT SUPERVISION AND NEGLIGENT TRAINING BECAUSE THE ROYALS ADMITTED AGENCY AND, THEREFORE, UNDER *MCHAFFIE V. BUNCH*, SUBMISSION UNDER ANY THEORY OF NEGLIGENCE IN ADDITION TO *RESPONDEAT SUPERIOR* WOULD HAVE BEEN DUPLICATIVE, AND WOULD HAVE ONLY SERVED TO CONFUSE THE JURY.

If an employer admits an agency relationship existed between it and a co-defendant employee, a plaintiff is precluded from submitting a claim for negligent hiring, entrustment, retention, training, or supervision. *McHaffie v. Bunch*, 891 S.W.2d 822, 826 (Mo. banc 1995); *Kwiatkowski v. Teton Transportation Inc.*, 2012 U.S. Dist. Lexis 56478, at p. 4 (W.D. Mo. April 23, 2012); *Rebstock v. Evans Production Engineering Co., Inc.*, 2009 U.S. Dist. Lexis 96884 at p. 40-41 (E.D. Mo.); and *Young v. Dunlap*, 223 F.R.D. 520, 522 (E.D. Mo. 2004). Missouri is among the majority of jurisdictions to reach that conclusion. Examples from other jurisdictions include:

- *Rossetti v. Board of Ed. of Schalmont Central School Dt.*, 716 N.Y.S.2d 460 (3rd Div. 2000) (affirming trial court's dismissal of negligent hiring and retention claims arising out of injuries plaintiff sustained while a teacher's aide was changing plaintiff's diaper);
- *Gant v. L.U. Transport, Inc.*, 770 N.E.2d 1155 (Ill.App. 2002)(relying on *McHaffie* and holding once *respondeat superior*

liability is admitted, allowing plaintiff to proceed under both negligent entrustment and ordinary negligence theories is unnecessary and duplicative);

- *Beavis v. Campbell Co. Mem'l Hosp.*, 20 P.3d 508 (Wyo. 2001)(affirming dismissal of negligent training and supervision claims against a doctor in connection with a nurse's alleged negligence in administering an injection);
- *David v. City of Los Angeles*, 173 Cal.App.3d 944 (2nd App. Dt. 1985)(holding negligent hiring and supervision evidence which included evidence of a police officer's propensities for violence was properly excluded because the City admitted it was vicariously liable for the officer's conduct and such evidence supported no contested issue of fact); and
- *Hackett v. Washington Metro Area Transit Authority*, 736 F.Supp. 8 (D.D.C. 1990)(dismissing negligent entrustment, retention and supervision claims because they did not add any new avenue for liability).

Missouri first adopted the majority view in *McHaffie v. Bunch*, 891 S.W.2d 822 (Mo. banc 1995). The *McHaffie* plaintiff brought suit against a trucking company and its driver for injuries sustained in a motor vehicle accident and alleged claims against the trucking company for vicarious liability and negligent hiring. *Id.* at 824. At trial, both claims were submitted to the jury. On appeal, the defendants argued the trial court erred

in submitting both the *respondeat superior* and negligent hiring theories. *Id.* at 825. In reversing the trial court, the Missouri Supreme Court held that once an employer admits *respondeat superior* for the acts of its employee, it is improper to allow a plaintiff to proceed against the employer on any other theory of imputed liability unless a punitive damage claim is asserted. *Id.* at 826.

The Court explained: “[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 serves no real purpose.” *Id.*

The *McHaffie* Court’s conclusion is clearly based on the recognition that under these circumstances, the liability of the employer is “fixed by the amount of liability of the employee.” *Id.* at 826. Unless plaintiff proves the employee’s misconduct, no recovery may be had because “...even assuming [the employer] was negligent in [training or supervising the employee]..., it is clear such negligence could not be the proximate cause of the [plaintiff’s] injuries.” *Beavis v. Campbell Co. Mem’l Hosp.*, 20 P.3d at 515. Thus, upon a defendant’s admission of agency, allowing the plaintiff to submit on theories such as negligent hiring, training, or supervision does not change the plaintiff’s burden of proof. Plaintiff must still prove that the employee’s misconduct caused its injury. Therefore, the evidence that supports the imputed theories “...is irrelevant to any contested issue in the case” and only serves to antagonize the jury against the defendant. *McHaffie*, 891 S.W.2d at 826-827.

Turning to the present case, the *McHaffie* Rule was properly applied. Plaintiff alleged a claim for vicarious liability against The Royals for Sluggerrr's alleged negligence in the manner he tossed the accident hotdog, and also asserted claims for negligent supervision and training. (LF13). Plaintiff's theory was that The Royals' failure to properly train Sluggerrr and supervise the way in which he threw hotdogs ***contributed to cause*** Sluggerrr to throw the accident hotdog negligently. (Id. at ¶¶16 (b),(c), and 17). Thus, Mr. Coomer would have had the same burden of proof, even if the negligent training and supervision claims were submitted. To establish proximate cause on the negligent training and supervision theories, he still would have had to prove the accident hotdog was thrown negligently.

Plaintiff tries to avoid the *McHaffie* Rule by arguing negligent training and supervision are not actually "imputed theories" of liability. That argument is obviously wrong because the *McHaffie* Rule was applied to negligent training and supervision claims in *Rebstock v. Evans Production Eng. Co., Inc.*, 2009 U.S. Dist. Lexis 96884, at pp. 38-42 (E.D.Mo.). Similarly, other jurisdictions have recognized negligent training and supervision as theories of "imputed liability" and applied their version of the *McHaffie* Rule to such claims. *Beavis v. Campbell Co. Mem'l Hosp.*, 20 P.3d 508 (Wyo. 2001); *David v. City of Los Angeles*, 173 Cal.App.3d 944 (2nd App. Dt. 1985).

Mr. Coomer cites cases that set forth the elements of negligent supervision *as it relates to supervision of a minor* and notes that nowhere in the listed elements is

negligence of the employee specifically mentioned.¹¹ Obviously, reliance on cases involving negligent supervision of a minor is misplaced. *See e.g. O.L. v. R.L.*, 62 S.W.3d 469, 474 (Mo.App.W.D. 2001)(noting “the negligent supervision of a minor is the exact opposite of the doctrine of negligent supervision of an adult, which emphasizes the supervisor’s (whether employer, entrustor, etc.) right and ability to control the activity of the wrongdoer rather than to control the injured victim.”)

Even if we use the cases cited by Mr. Coomer for purposes of discussion, proximate cause is *always* an element of a negligence claim, regardless of the particular theory of negligence. As a matter of common sense, an employer’s failure to train or supervise can only be the proximate cause of a third-party’s injury if the employer’s failure to train or supervise causes the employee to be negligent and injure the plaintiff. *Beavis*, 20 P.3d at 515.

In *Kwiatkowski v. Teton Transportation, Inc.*, 2012 U.S.Dist.Lexis 56478 (W.D.Mo April 23, 2012), a Federal District Court rejected precisely the argument Mr. Coomer is making, that *McHaffie* only applies to negligent entrustment and hiring, and

¹¹ Plaintiff cites the following: *G.E.T. ex rel T.T. v. Barron*, 4 S.W.3d 622, 624 (Mo.App. 1999)(negligent supervision of a minor who was a victim of sexual abuse); *O.L. v. R.L.*, 62 S.W.3d 469, 474 (Mo.App. 2001)(negligent supervision of a minor who was a victim of sexual abuse), and *Cook v. Smith*, 33 S.W.3d 548, 553 (Mo.App. 2000)(negligent supervision of a minor injured in an ATV accident).

not to negligent training and supervision because the latter claims are allegedly not theories of imputed liability. *Id.* at p. 3. In rejecting that argument it stated:

Kwiatkowski highlights that *McHaffie* did not involve claims of negligent supervision and negligent training. Kwiatkowski argues he can establish liability for these claims “regardless of any conduct by the employee.” But every negligence action requires actual causation to be shown. Kwiatkowski cannot establish actual causation under Count III [negligent training and supervision] without Huff’s [the employee] alleged misconduct. Kwiatkowski has not shown his claims under Count III are materially different from the claims in *McHaffie*.

Id. at p. 4 (internal citations omitted).

Moreover, a party asserting instructional error must be able to establish prejudice caused by the alleged instructional error. *Sorrell*, 249 S.W.3d at 209. By its verdict assessing 0% of the fault to The Royals, the jury clearly concluded Sluggerrr was not negligent in the manner in which he threw the accident hotdog. Therefore, Mr. Coomer obviously was not prejudiced by any purported error in failing to instruct the jury on negligent training or supervision because we know as a matter of logic it could not have found that The Royals’ conduct was the proximate cause of Mr. Coomer’s injury. *See Beavis*, 20 P.3d at 515; *Kwiatkowski*, 2012 U.S.Dist.Lexis 56478, at p. 4.

Ultimately, plaintiff’s negligent supervision and training theories would not have relieved him of the duty to prove Sluggerrr’s underlying negligence. As such, the negligent training and supervision claims were duplicative of the claim for vicarious

liability, and allowing the plaintiff to submit under duplicative theories would have only served to confuse the jury.

CONCLUSION

The jury assessed 0% of the fault to The Royals and 100% of the fault to Mr. Coomer. Reviewing the Judgment in the light most favorable to the instructions and the verdict, there is substantial evidence to support the instructions submitted and the verdict rendered. The Royals respectfully requests that this Court affirm the Judgment of the trial court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the foregoing Brief fully complies with the provisions of Rule 55.03; that it contains 10,205 words / 880 lines and complies with the word/line limitations contained in Rule 84.06(b); that on June 10, 2013, the foregoing was filed electronically with the Missouri Supreme Court, which will send notice of electronic filing to the following:

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