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

CLERK, SUPREME COURT

WD 73984

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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**

**RESPONDENT'S REPLY BRIEF OF
APPELLANT-RESPONDENT
JOHN COOMER**

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TABLE OF CONTENTS

Table of Authorities.....iii

Reply to the Royals’ Statement of Facts 1

Reply Argument in Support of Appellant’s Points Relied On..... 4

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. 4

ARGUMENT..... 4

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...16

ARGUMENT..... 16

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. 22

ARGUMENT 22

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 CLAIMS FOR NEGLIGENT SUPERVISION AND TRAINING ARE NOT THEORIES OF IMPUTED LIABILITY LIKE CLAIMS FOR NEGLIGENT ENTRUSTMENT AND NEGLIGENT HIRING. 25

ARGUMENT 25

Conclusion. 30

Certificate of Service 32

Certificate of Compliance. 33

Certificate of Virus Scan. 34

TABLE OF AUTHORITIES

Cases

<i>American Family Mut. Ins. Co. v. Robbins</i> , 945 S.W.2d 52 (Mo. App. 1997).....	23
<i>Barnes v. Tool & Machinery Builders, Inc.</i> , 715 S.W.2d 518 (Mo. banc 1986)	24
<i>Beavis v. Campbell County Mem’l Hosp.</i> , 20 P.3d 508 (Wyo. 2001).....	28, 29
<i>Bennett v. Hidden Valley Golf and Ski, Inc.</i> , 318 F.3d 868 (8 th Cir. 2003).....	19
<i>Cohen v. Sterling Mets, L.P.</i> , 17 Misc.3d 218, 840 N.Y.2d 527 (2007).....	10, 11
<i>Dalton v. Jones</i> , 581 S.E.2d 360 (Ga. App. 2003).....	10
<i>David v. City of Los Angeles</i> , 173 Cal. App. 3d 944 (1985).....	28
<i>Elie v. The City of New York</i> , 24 Misc.3d 1243(A), 901 N.Y.S.2d 899 (2009).....	10
<i>Gant v. L.U. Transport, Inc.</i> , 770 N.E.2d 1155 (Ill. App. 2002)	28
<i>G.E.T. ex rel. T.T. v. Barron</i> , 4 S.W.3d 622 (Mo. App. 1999)	29
<i>Hackett v. Washington Metro. Area Transit Auth.</i> , 736 F.Supp.8 (D.D.C. 1990).....	28
<i>Hoffman v. Union Elec. Co.</i> , 176 S.W.3d 706 (Mo. banc 2005)	13
<i>Ivey v. Nicholson-McBride</i> , 336 S.W.3d 155 (Mo. App. 2011).....	11, 12, 15, 22, 23
<i>Kwiatkowski v. Teton Transp., Inc.</i> , No. 11-1302-CV-W-ODS, 2012 WL 1413154 (W.D. Mo. Apr. 23, 2012).....	28
<i>Lear v. Norfolk and W. Ry. Co.</i> , 815 S.W.2d 12 (Mo. App. 1991).....	12
<i>Loughran v. The Phillies</i> , 888 A.2d 872 (Pa. Super. Ct. 2005)	8, 9
<i>Maldonado v. Gateway Hotel Holdings, LLC</i> , 154 S.W.3d 303 (Mo. App. 2003)	16
<i>Martin v. Buzan</i> , 857 S.W.2d 366 (Mo. App. 1993).....	5, 16
<i>McHaffie v. Bunch</i> , 891 S.W.2d 822 (Mo. banc 1995).....	25, 26, 27, 30

Pira v. Sterling Equities, Inc., 16 A.D.3d 396, 790 N.Y.S.2d 551 (2005) 10

Rebstock v. Evans Prod. Engineering Co., No. 4:08CV01348 ERW, 2009 WL 3401262 (E.D. Mo. Oct. 20, 2009)..... 28

Rossetti v. Board of Educ. of Schalmont Central Sch. Dist., 716 N.Y.S.2d 460 (N.Y. App. Div. 2000)..... 28

Schnieder v. Snow Creek, Inc., 340 S.W.3d 220 (Mo. App. 2011) 19

Sheppard v. Midway R-1 School Dist., 904 S.W.2d 257 (Mo. App. 1995)
..... 5, 12, 13, 14, 17, 18, 19

Stacy v. Truman Medical Center, 836 S.W.2d 911 (Mo. banc 1992)..... 26

Wilson v. Shanks, 785 S.W.2d 282 (Mo. banc 1990)..... 24

Young v. Dunlap, 223 F.R.D. 520 (E.D. Mo. 2004) 27

REPLY TO THE ROYALS' STATEMENT OF FACTS

Within its Statement of Facts, the Royals acknowledge that Sluggerrr knew "he needed to be careful when throwing hotdogs" and "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" because "obviously . . . you don't want to drill anybody [with a hotdog]." *See* p.4 of the Royals' Response, citing TR. 134:3-16 (emphasis in original). However, after acknowledging these common sense facts, the Royals misstate the trial record on a number of points.

First, the Royals state that Sluggerrr's supervisor, Don Costante, "believed Sluggerrr always conducted himself with 'utmost care,' and that he always performed the hotdog toss in a 'careful manner.'" *See* p.5 of the Royals' Response, citing TR. 216:16-25. Mr. Costante's actual testimony, however, does not support this statement. Rather, Mr. Costante testified that he thought that Sluggerrr "should" conduct the hotdog launch in a careful manner, but that he had seen Sluggerrr throw hotdogs in a straight line, non-safe manner. (TR. 216:16 – 219:5.)

The Royals also state that Mr. Coomer "knew the last hotdog could be coming in his direction," but "turned his attention away from Sluggerrr." *See* p.6 of the Royals' Response, citing TR. 285:19 - 286:15. The actual testimony cited by the Royals shows that Mr. Coomer testified as follows:

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 hotdog that he threw, you at

least had an awareness of sitting there that Sluggerrr was throwing the hotdog your direction?

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

(TR. 285:23 – 286:9.)

The Royals also state that Mr. Coomer never saw Sluggerrr throw a hotdog hard or with velocity on September 8, 2009. *See* p.8 of Royals' Response, citing TR. 290:9-12. This statement is misleading. Although it is true that Mr. Coomer had never seen Sluggerrr throw hotdogs forcefully before Sluggerrr struck him, Mr. Coomer did testify that Sluggerrr's throw that hit him was forceful and in a straight line. (TR. 258 – 261, 284 – 286, 290, A. 2-5.) In particular, Mr. Coomer testified:

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 I popped my contacts out. So I was kind of blinking 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.

(TR. 260:18 – 261:3, A. 3.)

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

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

Q. And you were six rows up?

A. Right.

Q. And you saw this motion?

A. Yes.

Q. And how much time expired?

A. I would say it was a split second.

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

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

(TR. 290:9-22, A. 5.)

REPLY ARGUMENT IN SUPPORT OF 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.

ARGUMENT

In its Response Brief, the Royals admit that (a) it is foreseeable that Sluggerrr could injure its business invitees if Sluggerrr is not careful in throwing hotdogs, and (b) the risk of being struck by a hotdog is not an inherent risk of a baseball game. These admissions are fatal to the Royals' position. To avoid liability, the Royals assert the unique argument—that the hotdog toss is an inherent risk of attending a baseball game at Kauffman Stadium and that the risk of being struck by a hotdog is an inherent risk of the hotdog toss itself. *See* p.14 of the Royals' Response.

This Court should reject the Royals' creative attempt to expand the defense of implied primary assumption of risk beyond the risks arising from the activity itself, namely, a baseball game. No Missouri case, nor any case in the country, has applied this defense to protect a team mascot who throws promotional items directly at business invitees. The rationale for not expanding this defense is sound. All of the Missouri cases addressing this issue have recognized that the defense of implied primary assumption of risk applies only to those activities where there is an inherent risk of being injured through the fault of no party, in that the risk arises from the nature of the activity itself. In other words, the risks are a necessary and unavoidable risk of engaging in the activity itself, and without such risks, the activity could not be conducted. *See Sheppard v. Midway R-1 School Dist.*, 904 S.W.2d 257, 262 (Mo. App. 1995) ("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."); *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 damages are inherent in athletic competition.")

With Sluggerrr, the risk that he would injure a business invitee with a hotdog is not an unavoidable and necessary risk of a baseball game. The risks created by a mascot throwing promotional items could easily be avoided if a mascot did not throw the items or if he threw the items in a non-negligent manner. In either event, the game of baseball could still be played, but the risk created by the mascot would be avoided.

In the present case, public policy dictates that the implied primary assumption of risk doctrine should not be applied to team mascots. If a business owner wants its employees to throw items at its business invitees, the employee should do so in a careful and reasonable manner. The Royals, though, reject this common sense approach and even argue that the immunity provided by the implied primary assumption risk doctrine should be extended to the following: employees at Lambert's Café who strike business invitees with rolls; anyone struck with fruit at a Gallagher show; and business invitees at a movie theater who are struck with rice while watching the 'Rocky Horror Picture Show.' *See* pp. 19 – 21 of the Royals' Response. The Royals' argument shows the danger of its position. This Court should not sanction or create public policy that allows employees to throw items directly into the face of its business invitees with immunity.

The Royals' argument is further flawed because the risk that Sluggerrr would injure business invitees with tossed hotdogs is not even an unavoidable and necessary risk of the hotdog toss. Rather, the risk only arises if the hotdog toss is conducted negligently, and therefore, implied primary assumption of risk has no application to this activity. The Royals, though, argue to the contrary, claiming that “[a]ny reasonable person with even a casual understanding of the event can appreciate when hotdogs are thrown into the crowd, if one fails to catch a thrown hotdog, there is a risk of injury.” *See* pp.16 and 17 of the Royals' Response.

The Royals' argument that being injured by hotdogs is an inherent risk of the hotdog toss is unsound and is not supported by either common sense or the evidence introduced at trial. Sluggerrr testified that he was aware that in throwing hotdogs, he

should first make eye contact with the intended recipient and then throw the hotdog softly in an arc. (TR. 135, 136, 139, 144, A. 6-8.) Sluggerrr testified he knew he had to be careful so as to not drill somebody with a hotdog. (TR. 134:5-11.) If the risk of being injured by a non-negligently thrown hotdog is an inherent risk of the hotdog toss itself, one would expect many business invitees to be injured by such throws. The evidence, however, showed that Sluggerrr has injured only two individuals with his throws, namely, Mr. Coomer and Mr. David Allen. Mr. Allen testified that he was standing 20 feet away from Sluggerrr and looking directly at him, but was injured when Sluggerrr threw a hotdog forcefully at his head. (TR. 310:6 – 311:2.) Mr. Allen failed to catch the hotdog even though he had anticipated it because Sluggerrr threw it so hard. (TR. 311:14-16.).

Given that Sluggerrr has only injured two business invitees with his throws, it is reasonable to conclude that the risk of being injured by a hotdog is not an inherent risk of Sluggerrr throwing hotdogs.¹ Rather, the only reason Mr. Coomer was injured was because Sluggerrr disregarded his own protocol and threw the hotdog at Mr. Coomer, who was only 15 feet away, without first making eye contact with Mr. Coomer and without throwing the hotdog softly and with an arc. Because any risk associated with Sluggerrr's throws arises only if he acts negligently, implied primary assumption of risk has no application to this activity.

¹ Under the Royals' reasoning, it would also be an inherent risk of a baseball game that a fan could be injured by a non-negligently thrown bag of peanuts. Mr. Coomer, however, has been unable to locate a single case where a fan was injured by a peanut vendor.

Despite the lack of Missouri authority supporting its position, the Royals claim that expanding the defense of implied primary assumption of risk to team mascots is supported by a number of non-Missouri cases. These cases, however, address the activities of baseball players and not team mascots. In *Loughran v. The Phillies*, 888 A.2d 872 (Pa. Super. Ct. 2005), the court affirmed a summary judgment against a fan who was injured after a baseball player threw a baseball into the stands after the last out of an inning. *Loughran* noted that the trial court had applied the “no duty” rule because the injured fan had failed to show that the baseball player “deviated from an established custom in the game of baseball in tossing a ball to the fans . . .” *Id.* at 875. *Loughran* concluded that “[o]nly when the plaintiff introduces adequate evidence that the amusement facility in which he was injured deviated in some relevant respect from established custom will it be proper for an inherent-risk case to go to the jury.” *Id.*

Loughran does not support the Royals’ position. *Loughran* involved the activity of a baseball player throwing a ball into the stands after the last out of an inning. This activity occurs in almost every inning of every major league baseball game, and is not the equivalent of Sluggerrr throwing hotdogs at business invitees. Furthermore, unlike *Loughran*, the evidence in the present case demonstrated that Sluggerrr deviated from the established custom in conducting the hotdog toss. Contrary to his normal procedure of making eye contact with the intended recipient and then softly tossing the hotdog at an arc, Sluggerrr threw the hotdog that struck Mr. Coomer by means of a no-look, straight line, forceful throw. (TR. 258 - 261, 284 - 286, 290, A. 2-5.)

Loughran, moreover, contained a very strong dissent wherein Judge Bender reasoned that the “no duty” rule should not be expanded to activities outside the game itself. Judge Bender reasoned that there is a distinction between a ball thrown during the game and one thrown for purely gratuitous purposes. *Id.* at 877. Judge Bender was “unwilling to accept the premise that simply because the custom is commonplace, the commonality of the custom provides blanket immunity for the way it was carried out.” *Id.* at 881. Judge Bender wrote that:

since the act of tossing a ball to fans as a souvenir is extraneous to the game and not necessary to the playing of the game, a spectator does not “assume the risk” of being struck by a ball entering the stands for this purpose, nor is there any valid reason in law or policy to extend the immunity of the “no duty” rule to this practice. Rather, if a baseball player wants to go beyond the confines of the game and provide a gratuitous souvenir to a fan, he should be charged with the obligation of doing it in a reasonably safe and prudent manner.

Id. at 882. Judge Bender further attempted to show the bizarre extent to which the majority’s rationale could be extended, by pointing out that it could even apply to a hotdog launch. Judge Bender recognized the fundamental flaw with this rationale because “[o]f course, this would mean that if one of those executing the hotdog launch imprudently aimed at spectators seated a couple of rows into the stands they would be

immune if a spectator lost an eye after getting hit nearly pointblank by a foil-wrapped hotdog.” *Id.*

Judge Bender’s rationale is sound and is consistent with Missouri case law and public policy. The defense of implied primary assumption of risk should not be extended to activities beyond the game itself and should not be extended to the activities of team mascots. The other cases cited by the Royals to support the expansion of the defense to team mascots are similarly distinguishable from the present case. *See Pira v. Sterling Equities, Inc.*, 16 A.D.3d 396, 790 N.Y.S.2d 551 (2005) (a one-page decision affirming the dismissal of a case filed by a fan injured after a baseball player threw a ball in the stands because the plaintiff had not introduced evidence that the defendants “unreasonably increased the inherent risks to spectators associated with the game of baseball”); *Elie v. The City of New York*, 24 Misc.3d 1243(A), 901 N.Y.S.2d 899 (2009) (a trial court decision granting summary judgment to an injured fan who was injured by a bat thrown during batting practice); *Dalton v. Jones*, 581 S.E.2d 360, 362 (Ga. App. 2003) (the court affirmed a summary judgment against a fan who was injured when she was hit in the face by a baseball, because the throw occurred “during a time which was necessary to the playing of the game, during which time the Plaintiff has assumed the risk of injury from bats, balls, and other missiles”).

The one case cited by the Royals that actually addressed the activities of a team mascot is also distinguishable. In *Cohen v. Sterling Mets, L.P.*, 17 Misc.3d 218, 840 N.Y.2d 527 (2007) (which is a trial court decision), the plaintiff was injured by a spectator who was running after a tee shirt that had been thrown into the stands. Rather

than suing the spectator who injured him, the plaintiff sued the baseball team. The trial court granted a summary judgment, reasoning that it was an inherent risk of a ballgame that when a ball or promotional item is tossed in the stands, spectators may rush towards the souvenir. 17 Misc.3d at 220. Not only is *Cohen* a trial court decision decided under non-Missouri law, *Cohen* does not address the present situation where Mr. Coomer was directly injured by the negligent throw of the Royals' employee as opposed to being injured by a fan chasing a hotdog. *Cohen* simply stands for the proposition that the injured fan could not sue a baseball team for the actions of another fan. *Cohen* would only be analogous if it had held that the injured plaintiff could not sue the spectator who negligently injured him while chasing the promotional item.

Not only have the Royals failed to provide any case law or sound public policy that justifies expanding implied primary assumption of risk to the activities of team mascots, the Royals have failed to address this Court's recent decision in *Ivey v. Nicholson-McBride*, 336 S.W.3d 155 (Mo. App. 2011). In *Ivey*, this Court found that assumption of risk has no application where the defendant owed a duty to the plaintiff and the plaintiff alleges a breach of such duty. *Id.* at 158. In *Ivey*, the plaintiff was a driver's license examiner who was injured while riding with a driver's license applicant. *Ivey* rejected the defense of implied primary assumption of risk and recognized that the law imposes a duty on all drivers to operate their vehicles with 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* concluded that "[p]rimary implied assumption

of risk is thus inapplicable when a plaintiff's injuries are caused by a defendant's breach of a duty of care in administering the activity." *Id.*

Ivey is directly applicable to the present case because Missouri common law establishes that the Royals owed a duty to Mr. Coomer to exercise reasonable care in conducting activities on the Royals' premises. *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"). Because the Royals owed a duty to Mr. Coomer and Mr. Coomer alleged a breach of that duty, *Ivey* dictates that the defense of implied primary assumption of risk has no application in this case.

The Royals do not directly address *Ivey*, but attempt to sidestep it by arguing that the trial court's instruction on implied primary assumption of risk was proper because there was a factual dispute as to whether Mr. Coomer's injuries were: a) caused by an inherent risk of the activity, i.e., the hotdog toss, or b) the defendant's negligence. *See* p.24 of the Royals' Response. In support of its argument, the Royals cite *Sheppard*, 904 S.W.2d at 264. In *Sheppard*, the plaintiff alleged that she was injured because the long jump pit into which she jumped was negligently prepared, whereas the defendant school district argued that plaintiff was injured by a bad landing, which was an inherent risk of the sport. *Id.*

Sheppard is actually one of the few Missouri cases where a jury was asked to, in effect, determine if the defendant owed a duty to the plaintiff. It is well recognized in Missouri that the initial determination of whether a duty exists is normally a question of

law for the court to decide. See cases cited on pp. 18-19 of Mr. Coomer's initial brief, including *Hoffman v. Union Elec. Co.*, 176 S.W.3d 706, 708 (Mo. banc 2005) ("Whether a duty exists is purely a question of law"). Despite this general rule, *Sheppard* submitted a primary implied assumption of risk instruction to the jury because there was a factual dispute as to what caused the plaintiff's injury. *Sheppard* found that there was evidence that the plaintiff was injured by a bad landing (which was an inherent risk of the long jump) as well as evidence that the plaintiff was injured by a negligently prepared long jump pit. *Sheppard*, 904 S.W.2d at 264. *Sheppard* reasoned that if the jury found that the plaintiff was injured due to a bad landing, then it would be proper to apply implied primary assumption of risk and find that the defendant never owed a duty to the plaintiff. *Id.* On the other hand, if the jury found the plaintiff was injured by a negligently prepared long jump pit, the defendant did owe a duty to the plaintiff, which the defendant breached. *Id.*

Sheppard is distinguishable from the present case. The *Sheppard* plaintiff was participating in an athletic event and there was no question that the doctrine of implied primary assumption of risk was potentially applicable if the jury found the plaintiff was injured due to a bad landing. *Sheppard* found "[t]here can be no question that Sheppard assumed the risks inherent in the sport of long jumping" *Id.* In the present case, Mr. Coomer was not injured while engaging in an athletic event, but was injured by the activities of a team mascot.

Thus, unlike *Sheppard*, there is a question in the present case as to whether the defense of implied primary assumption of risk is even applicable. As discussed

previously, no Missouri case nor any case in the country has expanded the doctrine of implied primary assumption of risk to the activities of a team mascot when throwing promotional items at business invitees. Therefore, the initial question this Court must answer is whether the implied primary assumption of risk defense even applies to Sluggerrr tossing hotdogs. Because the answer to this question determines whether the Royals owed Mr. Coomer a duty, this issue presents a question of law which is decided by this Court on a *de novo* review. See cases cited on pp. 18 and 19 of Mr. Coomer's initial brief.

In order for *Sheppard* to be applicable to the present case on this point, this Court would have to first find as a matter of law that the defense of implied primary assumption of risk potentially applies to the activities of a team mascot. If the Court expands the defense of assumption of risk in such way, then a jury could find that under some circumstances, team mascots would owe no duty to business invitees in connection with tossing promotional items to them.

This Court, however, should reject the expansion of this defense to the activities of team mascots. The risk of being injured by a tossed hotdog is neither an inherent risk of a baseball game nor even an inherent risk of the hotdog toss. The risk arising from tossed hotdogs only arises if the team mascot acts negligently and it is not a necessary and unavoidable risk of engaging in a baseball game or even an inherent risk of Sluggerrr tossing hotdogs. Additionally, such an expansion is directly contrary to Missouri common law, which recognizes that a landowner owes a duty of care to a business invitee. Because of this duty and because Mr. Coomer has alleged the breach of that

duty, the defense of implied primary assumption of risk has no application in this case, as was the case in *Ivey*, 336 S.W.3d at 155. The trial court, therefore, committed a reversible error in submitting Instruction Nos. 9 and 11 to the jury. (LF. 265, 267, A. 10, 11.)

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.

ARGUMENT

The parties agree that if this Court finds that the defense of implied primary assumption of risk is potentially applicable to Sluggerrr throwing hotdogs, it would be reversible error to submit instructions that instructed the jury to find completely in the Royals' favor, even if the jury found that the Royals had acted negligently. *See Maldonado v. Gateway Hotel Holdings, LLC*, 154 S.W.3d 303, 309 (Mo. App. 2003) ("assumed risks in sporting events do not include those created by a defendant's negligence"); *Martin*, 857 S.W.2d at 369 ("The assumed risks in such activities are not those created by a defendant's negligence but rather by the nature of the activity itself").

The Royals do not contest this principle, but argue that Instruction Nos. 9 and 11 do not result in this outcome.

Instruction No. 9 provided 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, 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 the game at Royals' Stadium, and

Second, plaintiff comprehended the actual risk, and

Third, plaintiff intelligently accepted risk.

(LF. 267, A. 11.) Contrary to the Royals' argument, these instructions, when read together, directed the jury to find completely in the Royals' favor, even if the jury found the Royals negligent. The Royals' position is also undermined by its misinterpretation of *Sheppard*. Instruction Nos. 9 and 11 in the present case contain the same flaws as did the jury instructions that were rejected by *Sheppard*, 904 S.W.2d at 257. The Royals, however, assert that *Sheppard* found nothing wrong with its Instruction No. 8, which was the verdict director on the plaintiff's negligence claim. See p.28 of the Royals' Response.

The Royals further argue that *Sheppard* rejected the jury instructions only because there were problems with the instruction setting forth the elements of implied primary assumption of risk. *Id.*

The Royals' assertions are not correct. While *Sheppard* did find that the plaintiff's verdict director properly stated the elements of the plaintiff's claim, it also found the tail instruction in the verdict director was improper. *Id.* at 264. The tail instruction in Instruction No. 9 in the present case is identical to the tail instruction which *Sheppard* rejected. *Sheppard* recognized that the tail instruction was flawed because it could allow the jury to find that implied primary assumption of risk completely barred plaintiff's claim, even if the jury found that the defendant had acted negligently. *Sheppard* recognized that:

[i]n other words, the tail on Instruction No. 8 ("unless you believe plaintiff Tara 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: . . . In fact, under these instructions, the jury would have been required to find for Midway even if the jury had found Midway was totally at fault, so long as the injury was foreseeable and Sheppard assumed the risk.

Id. at 260. In reversing the case, *Sheppard* recognized that the instructions (including the tail on Instruction No. 8) were flawed because they "required the jury to find for Midway

even if it found Midway negligently prepared the pit, and that the negligent condition of the pit contributed to cause the injury.” *Id.* at 264. In the present case, there is no difference between Instruction Nos. 9 and 11 and the instructions that *Sheppard* rejected.

The cases cited by the Royals to support Instruction Nos. 9 and 11 are distinguishable and do not overrule *Sheppard*. The Royals argue that *Schnieder v. Snow Creek, Inc.*, 340 S.W.3d 220 (Mo. App. 2011), approved instructions identical to Instruction Nos. 9 and 11. *Schnieder*, however, is an unreported decision and the court did not provide a written opinion.

Schnieder, moreover, is distinguishable because it was a premises liability case where the plaintiff alleged he was injured because of a dangerous condition on the property. The *Schnieder* verdict director and tail instruction addressed the issue of whether the condition of a ski slope presented an inherent risk of skiing. Mr. Coomer, however, did not proceed under a premises liability theory, but rather under an active negligence theory. In other words, Mr. Coomer did not allege that Royals’ Stadium was unreasonably dangerous, but rather that the Royals’ employee acted negligently in throwing hotdogs. Based upon these different legal theories, *Schnieder* is not analogous to the present case.

Similarly, the other case cited by the Royals, *Bennett v. Hidden Valley Golf and Ski, Inc.*, 318 F.3d 868 (8th Cir. 2003), is also distinguishable because it involved a premises liability claim and not a negligence claim. Furthermore, in *Bennett*, there is no discussion of whether the verdict director even included a tail instruction. In any event, *Sheppard* is controlling precedent on this issue and specifically provides that it is error to

submit a jury instruction that would allow the jury to find in favor of a defendant under the implied primary assumption of risk doctrine, even if the jury found that the defendant had acted negligently. That is the outcome presented by Instruction Nos. 9 and 11.

If this Court actually finds that the implied primary assumption of risk defense applies to the activities of Sluggerrr throwing hotdogs, the proper way to instruct the jury is to place the tail instruction on the affirmative defense instruction and not on the verdict director, such that the instructions read as follows:

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.

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 of attending a game at Royals' Stadium; and

Second, plaintiff comprehended the actual risk; and

Third, plaintiff intelligently accepted such risks,
unless you believe the plaintiff was negligent by reason of Instruction No. 9.

By virtue of these instructions, the jury would be instructed that it could find in the Royals' favor based upon the defense of implied primary assumption of risk, but that such defense is not applicable if the jury also finds the Royals acted negligently. Putting the tail instruction on the affirmative defense instruction accurately states Missouri law which provides that implied primary assumption of risk does not apply if the defendants' negligence caused a plaintiff's injury. Because Instruction Nos. 9 and 11 misstated 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.

ARGUMENT

The issue presented by Point III is straightforward. Is the fact that Mr. Coomer remained in his seat talking to his father, while knowing Sluggerrr was tossing hotdogs, sufficient evidence to prove that he acted unreasonably for his own safety so as to support a comparative fault instruction. Mr. Coomer submits that the answer is "no." It was the Royals that decided it was a good idea to have its employees throw hotdogs to its business invitees. After the Royals decided to engage in such conduct, it was obligated to use reasonable care in doing so.

Mr. Coomer is in the same position as the plaintiff in *Ivey*, 336 S.W.3d at 155. In *Ivey*, the court held that the doctrine of assumption of risk has no application where the defendant owed a duty to the plaintiff and the plaintiff alleged a breach of that duty. *Id.* at 158. As in *Ivey*, Mr. Coomer had every right to expect that Sluggerrr would abide by

the duty to exercise reasonable care in throwing hotdogs, and, as in *Ivey*, it was not reasonably foreseeable to Mr. Coomer that Sluggerrr would breach the standard of care in throwing hotdogs. *Id.* After all, during the entire history of the hotdog toss, Sluggerrr had only injured two business invitees and Mr. Coomer had never seen Sluggerrr engage in forceful, straight line throws before Sluggerrr injured him. (TR. 290, A. 5.) As in *Ivey*, the defenses of assumption of risk and comparative fault have no application in this case.

Even if simply sitting in one's seat could be deemed sufficient evidence to support a comparative fault instruction, the instruction in the present case was not warranted because the evidence against Mr. Coomer rises to the level of mere speculation. *See American Family Mut. Ins. Co. v. Robbins*, 945 S.W.2d 52, 55, 56 (Mo. App. 1997) (the trial court erred in a traffic accident case in finding that one of the drivers was 50% at fault because the evidence against the driver merely rose to the level of speculation).

The Royals' entire argument is based upon the assumption that if Mr. Coomer had been intently watching Sluggerrr, Mr. Coomer would have easily caught the hotdog that Sluggerrr threw at him. It is pure speculation, however, that Mr. Coomer would have caught the hotdog if he had been watching Sluggerrr. Mr. David Allen testified he was standing 20 feet away (further away than Mr. Coomer), and was waiting for the throw from Sluggerrr, but didn't catch the hotdog because Sluggerrr threw it so hard. (TR. 310.) If Mr. Allen couldn't catch Sluggerrr's throw, it is guesswork that Mr. Coomer could have caught Sluggerrr's behind the back throw. The Royals' argument and the purported evidence supporting it are based on pure speculation.

The Royals are also mistaken in relying upon *Barnes v. Tool & Machinery Builders, Inc.*, 715 S.W.2d 518 (Mo. banc 1986), and the other cases that cite *Barnes*. *Barnes* stands for the proposition that a comparative fault instruction is not prejudicial if there was a “full and complete” verdict director that commands the jury to return a verdict for the plaintiff if it finds the plaintiff has proven the elements of his claim. *Id.* at 521. *Barnes* held that in such cases, if a jury returns a verdict in the defendant’s favor, any error with the comparative fault instruction is harmless because the jury is deemed to have found that the plaintiff did not establish at least one of the elements of the verdict director. *Id.* *Barnes*, however, held that for this doctrine to apply, the verdict director must not contain a tail instruction. *Id.*

Similarly, in *Wilson v. Shanks*, 785 S.W.2d 282 (Mo. banc 1990), the court found a comparative fault instruction was harmless error because the jury was provided a verdict director without a tail and therefore the “jury necessarily must have concluded one of the essential propositions was not established . . .” *Id.* at 285. In the present case, the *Barnes*’ doctrine is not applicable because the verdict director, Instruction No. 9, did contain a tail instruction and there is no way to conclude that the jury necessarily found that Mr. Coomer failed to prove one of the elements of his claim. (LF. 265, A. 10.)

Because there was no competent evidence showing that Mr. Coomer acted unreasonably, the trial court erred in submitting Instruction No. 12 to the jury and the case should be remanded for a new trial. (LF. 268, A. 12.)

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.

ARGUMENT

The Royals' argument in response to Point IV—that “under *McHaffie v. Bunch*, submission under any theory of negligence in addition to *respondeat superior* would have been duplicative”—is directly contrary to the reasoning and holding of *McHaffie*. See p. 36 of the Royals' Response (underscore added). Rather than creating a broad prohibition of any direct negligence action against an employer when *respondeat superior* liability is also pleaded, *McHaffie* expressly stands for the more limited proposition that if more than one theory for imputing the liability of an employee to the employer is pleaded, a plaintiff may only submit one such theory to the jury. See *McHaffie*, 891 S.W.2d at 826. In *McHaffie*, the Supreme Court simply held that the two specific causes of action at issue in its case, negligent entrustment and negligent hiring, specifically required proof of the negligence on the part of the employee, and were means of imputing the employee's negligence to the employer. See *id.*

However, *McHaffie* was careful to note 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 trustee or employee.” *Id.* In that circumstance, the rationale for the rule against submitting multiple theories of vicarious liability is not implicated, and the plaintiff should be permitted to submit a direct theory of negligence against the employer in addition to the allegations of *respondeat superior* liability. *See id.*

Stacy v. Truman Medical Center, 836 S.W.2d 911 (Mo. banc 1992), *abrogated in part on other grounds by Southers v. City of Farmington*, 263 S.W.3d 603, 614 n.13 (Mo. banc 2008), is illustrative of this principle. In *Stacy*, two wrongful death claims were brought against a hospital and one of its nurses arising out of a fire at the hospital. *Stacy*, 836 S.W.2d at 914. The plaintiffs sought to hold the nurse liable on a negligence theory and the hospital liable on the basis of both *respondeat superior* and its own negligence, based in part on evidence that (a) the nurse was aware that the sister of one of the decedents had been smoking in a hospital room and not using a hospital-approved ash tray, (b) inadequate fire training of the hospital’s staff, and (c) a similar smoking incident that had happened on the same floor of the hospital just two weeks beforehand. *Id.* at 922-23, 926. At trial, the jury found in favor of the nurse, but against the hospital. *Id.*

On appeal, the hospital argued that the jury’s verdict in favor of the nurse mandated exoneration of the hospital because there was no underlying negligence upon which to base *respondeat superior* liability. *Id.* at 923. The Supreme Court rejected the argument, holding that even if the nurse had not breached a duty of care, the hospital

could be held directly liable for its own negligence in, *inter alia*, failing to properly train its employees in fire safety and failing to take preventive measures in light of a similar incident occurring on the same floor of the hospital just two weeks earlier. *Id.*

A similar set of facts is at issue in this case. As discussed in Mr. Coomer's initial brief, the additional causes of action alleged against the Royals in this case (*i.e.*, negligent supervision and training) do not require a finding of underlying negligence on the part of the Royals' employee, Sluggerrr. *See* pp. 45-47 of Mr. Coomer's initial brief. Rather, a properly instructed jury could have found both that: (1) a reasonable person in Sluggerrr's position may not have foreseen the risk of harm in the manner in which Sluggerrr was conducting the Hotdog Launch, and thus Sluggerrr did not breach a duty of care to Mr. Coomer (*i.e.*, Sluggerrr was not negligent, thus providing no basis for imposing *respondeat superior* liability); and (2) based on its superior knowledge of a previous similar incident causing harm to a spectator and Sluggerrr's history of throwing hotdogs in a forceful manner, the Royals should have foreseen the risk of harm in the manner in which Sluggerrr was conducting the Hotdog Launch, and thus the Royals did breach a duty of care to Plaintiff (*i.e.*, the Royals were negligent in training and supervising Sluggerrr).

The Royals cite federal district court and non-Missouri cases in support of its argument, several of which involved negligent entrustment, negligent hiring, or negligent retention claims that were directly addressed by the holding in *McHaffie*, and thus have no relevance to the issue of whether *McHaffie*'s holding applies to the negligent training and supervision claims in this case. *See Young v. Dunlap*, 223 F.R.D. 520 (E.D. Mo.

2004) (negligent entrustment and *respondeat superior* claims); *Gant v. L.U. Transport, Inc.*, 770 N.E.2d 1155 (Ill. App. 2002) (negligent hiring, negligent retention, and *respondeat superior* claims); *Rossetti v. Board of Educ. of Schalmont Central Sch. Dist.*, 716 N.Y.S.2d 460 (N.Y. App. Div. 2000) (negligent hiring, negligent retention, and *respondeat superior* claims); *Hackett v. Washington Metro. Area Transit Auth.*, 736 F.Supp.8 (D.D.C. 1990) (negligent entrustment and *respondeat superior* claims); *David v. City of Los Angeles*, 173 Cal. App. 3d 944 (1985) (negligent retention and *respondeat superior* claims).

The Royals' three remaining cases do address negligent training and supervision claims. See *Kwiatkowski v. Teton Transp., Inc.*, No. 11-1302-CV-W-ODS, 2012 WL 1413154 (W.D. Mo. Apr. 23, 2012); *Rebstock v. Evans Prod. Engineering Co.*, No. 4:08CV01348 ERW, 2009 WL 3401262 (E.D. Mo. Oct. 20, 2009); and *Beavis v. Campbell County Mem'l Hosp.*, 20 P.3d 508 (Wyo. 2001). However, the opinion in each of those cases makes the same analytical error. In each case, the court found that because the employer's liability for negligent training or supervision depended on the existence of an underlying negligent act of an employee causing harm, the employer's liability for such harm was purely derivative of the employee's and thus the claims at issue were subject to the same rule against presenting multiple theories of imputed liability to a jury. See *Kwiatkowski*, 2012 WL 1413154, at *2; *Rebstock*, 2009 WL 3401262, at *14; *Beavis*, 20 P.3d at 516.

The fundamental flaw in each of these three cases is that each opinion improperly equates a finding of the necessary harm-inducing predicate act with a finding of

negligence. *See, e.g., Beavis*, 20 P.3d at 516 (“[E]ven assuming Dr. Horan was negligent . . . *i.e.*, breached some duty in failing to supervise or train Hazlett, it is clear his negligence could not be the proximate cause of Pamela Beavis’ injuries unless the predicate negligence of Hazlett was found.”). All three opinions fail to consider the possibility that for the same underlying harm-inducing action, a reasonable jury could find that the employee did not breach a duty of care, while the employer did—*i.e.*: (a) an improperly trained employee may not reasonably foresee the risk of harm in his actions; (b) the employee’s actions caused harm to another person; (c) the employer, armed with superior knowledge gained through knowledge of prior incidents, knew or should have known of the risk of harm to third persons from the actions of the employee; and therefore (d) the employer, but not the employee, breached a duty of care to third persons injured by the employee’s actions.

Applied to this case, the Royals are simply wrong in stating that “[a]s 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.” *See* pp. 40-41 of the Royals’ Response. Rather, the Royals’ failure to properly train or supervise Sluggerrr can be the proximate cause of Mr. Coomer’s injuries if the failure to train or supervise caused Sluggerrr to injure Mr. Coomer, and such failure to train or supervise was a breach of the Royals’ duty of care to Mr. Coomer. *See, e.g., G.E.T. ex rel. T.T. v. Barron*, 4 S.W.3d 622, 624 (Mo. App. 1999) (setting forth elements of negligent supervision and training

claims). Whether a jury finds that Sluggerrr also breached a duty of care to Mr. Coomer is a separate issue.

McHaffie's holding simply does not apply when the theories of negligence at issue are not solely means of imputing an employee's negligence to his employer. Because a properly instructed jury could find the Royals solely liable for the harm caused by its negligent training and supervision of Sluggerrr, Mr. Coomer's additional theories of liability are not solely means of imputing negligence to the Royals. Accordingly, the trial court committed reversible error by refusing to instruct the jury on Mr. Coomer's claim of 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,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the limitations contained in Rule 84.06(b) and contains 8,481 words. In preparing this certificate, the undersigned has relied on the word count of the word-processing system used to prepare this brief.

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