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**IN THE
SUPREME COURT OF CALIFORNIA**

SUMMER J., a Minor, etc.,
Plaintiff and Appellant,

v.

UNITED STATES BASEBALL FEDERATION,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION SEVEN
CASE NO. B282414

PETITION FOR REVIEW

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	4
ISSUES PRESENTED	8
INTRODUCTION: WHY REVIEW SHOULD BE GRANTED	9
STATEMENT OF THE CASE	14
A. The trial court dismisses plaintiff's first amended complaint pursuant to the primary assumption of risk doctrine.....	14
B. The Court of Appeal reverses, declining to follow <i>Quinn</i> and other authorities recognizing the "baseball rule."	16
LEGAL ARGUMENT	19
I. Review should be granted to resolve an express conflict created by the Court of Appeal's decision about the continuing viability of the "baseball rule."	19
A. California courts have uniformly held that spectators seated outside screened areas assume the risk of injury from foul balls.	19
B. The great majority of other jurisdictions apply the same assumption of risk rule to baseball as California.....	24
C. The Court of Appeal's decision rejects the "baseball rule" and imposes a novel duty to protect baseball spectators from injuries by foul balls.....	27
II. Review should be granted to resolve a growing conflict regarding what duty is owed to participants by sponsors of sporting activities.....	32

A.	This Court’s opinions and one line of appellate decisions hold that a sponsor’s duty is limited to not increasing the inherent risks of a sport.	32
B.	The Court of Appeal’s opinion and another line of appellate decisions hold that a sponsor’s duty is to take measures that minimize inherent risks.	36
CONCLUSION.....		40
CERTIFICATE OF WORD COUNT.....		41

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Aaris v. Las Virgenes Unified School Dist.</i> (1998) 64 Cal.App.4th 1112.....	35
<i>Akins v. Glens Falls City School Dist.</i> (N.Y. 1981) 424 N.E.2d 531.....	26
<i>American Golf Corp. v. Superior Court</i> (2000) 79 Cal.App.4th 30.....	35
<i>Auto Equity Sales, Inc. v. Superior Court</i> (1962) 57 Cal.2d 450	18
<i>Avila v. Citrus Community College Dist.</i> (2006) 38 Cal.4th 148.....	8, 32, 33
<i>Balthazor v. Little League Baseball, Inc.</i> (1998) 62 Cal.App.4th 47.....	35
<i>Benejam v. Detroit Tigers, Inc.</i> (Mich.Ct.App. 2001) 635 N.W.2d 219	24, 25, 26
<i>Brown v. San Francisco Baseball Club</i> (1950) 99 Cal.App.2d 484	19, 21, 30
<i>Edward C. v. City of Albuquerque</i> (N.M. 2010) 241 P.3d 1086	24, 26
<i>Fortier v. Los Rios Community College Dist.</i> (1996) 45 Cal.App.4th 430.....	35
<i>Goade v. Benevolent etc. Order of Elks</i> (1963) 213 Cal.App.2d 189	20
<i>Grotheer v. Escape Adventures, Inc.</i> (2017) 14 Cal.App.5th 1283.....	37
<i>Gunther v. Charlotte Baseball, Inc.</i> (D.S.C. 1994) 854 F.Supp. 424	24

<i>Kahn v. East Side Union High School Dist.</i> (2003) 31 Cal.4th 990.....	32, 33, 35, 36, 37
<i>Knight v. Jewett</i> (1992) 3 Cal.4th 296.....	19, 20, 23, 36
<i>Lowe v. California League of Prof. Baseball</i> (1997) 56 Cal.App.4th 112.....	23, 28
<i>Maisonave v. Newark Bears</i> (N.J. 2005) 881 A.2d 700	25
<i>Martinez v. Houston McLane Co., LLC</i> (Tex.App. 2013) 414 S.W.3d 219	24
<i>Morgan v. Fuji Country USA, Inc.</i> (1995) 34 Cal.App.4th 127.....	38
<i>Nalwa v. Cedar Fair, L.P.</i> (2012) 55 Cal.4th 1148.....	8, 26, 29, 33, 34, 37
<i>Neinstein v. Los Angeles Dodgers, Inc.</i> (1986) 185 Cal.App.3d 176	22, 28, 30
<i>Nemarnik v. Los Angeles Kings Hockey Club</i> (2002) 103 Cal.App.4th 631.....	20
<i>Quinn v. Recreation Park Assn.</i> (1935) 3 Cal.2d 725	<i>passim</i>
<i>Ratcliff v. San Diego Baseball Club</i> (1938) 27 Cal.App.2d 733	20, 36
<i>Rodriguez v. Del Sol Shopping Ctr. Assocs., L.P.</i> (N.M. 2014) 326 P.3d 465	24
<i>Rosencrans v. Dover Images, Ltd.</i> (2011) 192 Cal.App.4th 1072.....	38
<i>Rountree v. Boise Baseball, LLC</i> (Idaho 2013) 296 P.3d 373	25
<i>Rudnick v. Golden West Broadcasters</i> (1984) 156 Cal.App.3d 793	21, 22, 31

<i>Saffro v. Elite Racing, Inc.</i> (2002) 98 Cal.App.4th 173	38
<i>Sciarrotta v. Global Spectrum</i> (N.J. 2007) 944 A.2d 630	25
<i>Shelly v. Stepp</i> (1998) 62 Cal.App.4th 1288	35
<i>Shin v. Ahn</i> (2007) 42 Cal.4th 482	33
<i>South Shore Baseball, LLC v. DeJesus</i> (Ind. 2014) 11 N.E.3d 903	25
<i>Souza v. Squaw Valley Ski Corp.</i> (2006) 138 Cal.App.4th 262	34
<i>Willhide-Michiulis v. Mammoth Mountain Ski Area, LLC</i> (2018) 25 Cal.App.5th 344	34

Statutes

Ariz.Rev.Stat.Ann. § 12-554	24
Colo.Rev.Stat.Ann. § 13-21-120	24
745 Ill.Comp.Stat.Ann. 38/10	24
N.J.Stat.Ann. §§ 2A:53A-43	24

Miscellaneous

<i>Action by Fan Hit by Foul Ball in Stadium Is Reinstated</i> (Feb. 20, 2020) Metropolitan News-Enterprise < https://bit.ly/2WErctk >	11
<i>Boysen, Calif. Court Says US Baseball Must Face Foul Ball Injury Suit</i> (Feb. 19, 2020) Law360 < https://bit.ly/3ae9Bft >	11

Lancaster, <i>Baseball Fan Can Sue Over Foul Ball to the Face, California Appeals Court Rules</i> (Feb. 19, 2020) The Recorder < https://bit.ly/2Jbtd8i >	11
“MLB Into the Stands” < https://www.youtube.com/watch?v=FWH8R2muvuw >	22
Rubenstein, <i>‘Baseball rule’ is in its 9th inning</i> , L.A. Daily J. (Feb. 28, 2020)	12
Shaikin, <i>A lawsuit could make baseball teams liable for foul balls that injure fans</i> (Feb. 20, 2020) L.A. Times < https://bit.ly/2xh6u80 >	11
Spedden, <i>California Appeals Court Overturns Dismissal of Foul Ball Lawsuit</i> (Feb. 22, 2020) Ballpark Digest < https://bit.ly/3aewiQQ >	12

ISSUES PRESENTED

This Court adopted the “baseball rule” in *Quinn v. Recreation Park Assn.* (1935) 3 Cal.2d 725 (*Quinn*). Under that rule, for more than a century, courts nationwide have applied the assumption of risk doctrine to hold that a sporting event’s sponsor is not required to protect spectators from the risk of being struck by batted or thrown balls, so long as screened seats are provided for those who may reasonably be expected to want them. Almost 80 years later, in *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148 (*Nalwa*), this Court affirmed the continuing viability of the primary assumption of risk doctrine, and its intended purpose to avoid chilling both vigorous participation in and sponsorship of sporting and other recreational activities. To avoid that chilling effect, this Court has held that sponsors owe only a duty “‘not to *increase* the risks inherent in the sport, not a duty to *decrease* the risks.’” (*Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 166 (*Avila*), emphasis added.)

The Court of Appeal’s decision here, which is in express conflict with these authorities, presents two issues for review:

1. Should California continue to follow the “baseball rule” adopted in *Quinn* and by the overwhelming majority of other jurisdictions, under which patrons seated along the first- and third-base lines assume the risk of injury from foul balls when they participate as spectators in the sport of baseball?

2. Where the primary assumption of risk doctrine applies, is the duty of a sponsor limited to not *increasing* the risks

inherent in the sporting activity (as this Court and one line of appellate decisions have held), or does the sponsor also have a duty to take measures to *minimize* all inherent risks so long as such measures would not alter the nature of the sport (as this Court of Appeal and other intermediate appellate courts have held)?

INTRODUCTION

WHY REVIEW SHOULD BE GRANTED

Ever since this Court's decision in *Quinn*, California's lower appellate courts have scrupulously followed the "baseball rule." As in other jurisdictions, those decisions have emphasized that baseball fans are active participants in the sport, and that the quality of that participation depends on fans' proximity to the field and the clarity of their view, which would be reduced if the game had to be watched through a protective screen.

Most fans prefer an unobstructed view of the game and are willing to expose themselves to the danger of foul balls in order to obtain that view and the intimate feeling of sitting close to the action without any intervening barrier. Indeed, courts have noted that spectator participation in baseball has traditionally involved active engagement in the game by trying to catch foul balls, as evidenced by the number of baseball gloves fans routinely take to games. Any stray ball caught is destined to be enshrined as a treasured memento. And for those fans who never catch a foul ball themselves, watching other fans vying to catch or scrambling to recover a loose ball hit into the stands is a fundamental aspect of the fun of attending a game.

Courts have also noted that requiring protective screening along the first- and third-base lines would change the nature of the game. Diving catches made by players leaping into the stands are thrilling moments, for both players and fans. The spectacular efforts of players to catch balls landing near or in the first row of seats are replayed in slow motion both to fans on jumbotron scoreboards and to those watching at home, and are captured for future viewing in highlight reels available on the internet. Protective netting would eliminate one of the most exciting aspects of the game.

Most significantly, imposing a duty to protect fans from injury by foul balls would chill vigorous participation in and sponsorship of the sport of baseball. In the absence of the “baseball rule,” stadium owners would face burgeoning litigation that would discourage sponsorship of the game, and participation in the game directly or as a spectator, depriving millions of the recreational benefits of “America’s pastime.” If netting were required along base lines up to the dugout, there would be no reasoned basis for not extending that requirement substantially beyond the dugouts and into the outfield, until all fans were protected from any risk of injury from errant balls. And because every baseball park is unique, the adequacy of any less extensive screening would be a factual question to be determined in every case of injury. Both the cost of screening and the specter of litigation—particularly for the operators of baseball fields at lower levels of the sport, all the way down to municipalities—would chill participation in the sport at all levels.

The Court of Appeal’s opinion in this case expressly acknowledges the *Quinn* decision and its adoption of the “baseball rule.” The opinion also acknowledges the subsequent decisions by lower courts holding that requiring protective netting in areas other than behind home plate would both fundamentally affect the nature of the game and the recreational activity of spectator participation. Nonetheless, citing news reports about 2020 plans to install extended netting in professional baseball stadiums, the Court of Appeal sweeps aside all precedent to conclude that the provision of additional netting “for field-level seating along the first- and third-base lines between home plate and the dugouts” would not alter “the nature of baseball as it is played today.” (Typed opn. 4.) The court’s decision characterizes this approach as replacing the “judicial view” with a “modern, practical view of the importance of protective netting.” (Typed opn. 3-4.) Under the Court of Appeal’s decision, claims of injury from foul balls by baseball spectators seated in those areas will no longer be barred by the primary assumption of risk doctrine.

In effect, by charting its own course, the Court of Appeal has placed the issue squarely before this Court.¹ This Court should

¹ The Court of Appeal’s decision has generated substantial media attention. (See, e.g., Boysen, *Calif. Court Says US Baseball Must Face Foul Ball Injury Suit* (Feb. 19, 2020) Law360 <<https://bit.ly/3ae9Bft>> [as of Mar. 23, 2020]; Lancaster, *Baseball Fan Can Sue Over Foul Ball to the Face, California Appeals Court Rules* (Feb. 19, 2020) The Recorder <<https://bit.ly/2Jbtd8i>> [as of Mar. 23, 2020]; Shaikin, *A lawsuit could make baseball teams liable for foul balls that injure fans* (Feb. 20, 2020) L.A. Times <<https://bit.ly/2xh6u80>> [as of Mar. 23, 2020]; *Action by Fan Hit*

grant review to resolve the express conflict in primary assumption of risk law as applied to baseball that has been created by the Court of Appeal's decision.

Granting review would also provide this Court with a needed opportunity to resolve a broader and deepening conflict among lower court decisions over what duty is owed by the sponsors of sporting and other recreational activities. This Court has repeatedly held that, to avoid chilling participation in and sponsorship of such activities, the duty owed is to not *enhance* or *increase* the inherent risk of the activity. To flesh out the scope of that duty, certain language in this Court's opinions has acknowledged that *removing* protections traditionally in place to minimize the inherent risks of a sport—for example, seatbelts and padding in bumper cars—*would* enhance the risks of the activity. But some courts have misinterpreted that language to require sponsors of recreational activities to take whatever measures are available to minimize risks inherent in those activities whenever those measures would not alter the nature of the activity.

This “minimize the risks” approach eviscerates the primary assumption of risk doctrine, because it invites litigation over not only the nature of any particular sport, but also whether any particular measure (usually envisioned with the benefit of

by Foul Ball in Stadium Is Reinstated (Feb. 20, 2020) Metropolitan News-Enterprise <<https://bit.ly/2WErctk>> [as of Mar. 23, 2020]; Spedden, *California Appeals Court Overturns Dismissal of Foul Ball Lawsuit* (Feb. 22, 2020) Ballpark Digest <<https://bit.ly/3aewiQQ>> [as of Mar. 23, 2020]; Rubenstein, *'Baseball rule' is in its 9th inning*, L.A. Daily J. (Feb. 28, 2020) p. 7.)

hindsight) would prevent or mitigate the particular injury at issue. A duty to minimize risks, unlike a duty only to avoid enhancing existing risks, has the very chilling effect on sponsorship of recreational activities that this Court has repeatedly avoided in its primary assumption of risk jurisprudence.

Here, the trial court got it right when it ruled that the “ ‘lack of netting is not an increase of inherent risks’ ” and that while “ ‘[p]lacing such netting might decrease the inherent risks of being hit by a foul ball . . . *that is not the inquiry.*’ ” (Typed opn. 14, emphasis added.) The Court of Appeal found instead that because protective netting would have minimized the risks to fans of injury while seated along the first- and third-base lines, there was a duty to install such netting if it would not alter the nature of the game. Relying exclusively on a voluntary effort by Major League Baseball teams to install such netting, the Court of Appeal concluded that additional netting would *not* alter the nature of the game—despite contrary precedent and even though the baseball commissioner’s announcement did not state that the voluntarily adopted measures would have no effect on how the game is played or watched by fans.

In sum, this Court should grant review to confirm the continuing viability of the “baseball rule.” It should also grant review to clarify whether the applicable duty by sponsors is to act so as to not *increase* the risk of injury inherent in a sporting activity, or whether, as the Court of Appeal and other courts have begun to hold, there is a duty to *minimize* such inherent risks.

STATEMENT OF THE CASE

A. The trial court dismisses plaintiff's first amended complaint pursuant to the primary assumption of risk doctrine.

On August 17, 2013, Summer J. attended national team trials sponsored by the United States Baseball Federation (US Baseball) at Blair Field, located on the campus of California State University, Long Beach (CSULB). (Typed opn. 4-5; 3/9/2020 Order.) Summer was seated in the stadium's grandstand or spectator bleachers, an area not protected by a screen or netting. (Typed opn. 5.) While Summer was momentarily distracted from the field of play, a line drive foul ball struck her in the face, causing serious injury to her eye. (*Ibid.*)

Summer sued the City of Long Beach, CSULB, and US Baseball, asserting claims for negligence and premises liability. (Typed opn. 5.) She alleged that US Baseball was responsible for her injuries under negligence and premises liability theories because it sponsored the game and controlled the stadium on the day it was played. (*Ibid.*)

Summer further alleged that Blair Field had inadequate netting to protect spectators “‘in the perceived zone of danger behind home plate.’” (Typed opn. 5.) However, she also alleged that she was struck by a line drive foul ball while sitting in the “‘bleachers,’” rather than in the seats behind home plate. (*Ibid.*) During discovery, Summer clarified that she was seated by the

third base line, as did her counsel during oral argument. (PFRH 6 & fn. 1.)

US Baseball demurred to Summer's first amended complaint on the ground her claims were barred by the primary assumption of risk doctrine. (Typed opn. 5.) Summer moved to file a second amended complaint while the demurrer was pending. (Typed opn. 6.) She argued she could allege there was inadequate protective netting along the first- and third-base lines between home plate and the dugouts. (Typed opn. 6, 13.) Summer further argued she could allege that the risk to spectators from foul balls was increased by the addition of box seats along the first- and third-base lines. (Typed opn. 6, 13-14.) But Summer had previously alleged she was seated in the park spectator *bleachers*, and she did not argue or allege that she was seated in the box seats or that their configuration was causally related to her injury. (See Motion for Leave to File Second Amended Complaint.)

The trial court sustained US Baseball's demurrer without leave to amend, on the ground that the primary assumption of risk doctrine barred Summer's claims. (Typed opn. 6.) The court further ruled that her proposed amendments would not cure her complaint's defects because being hit by a foul ball is an inherent risk to spectators attending baseball games. (Typed opn. 6, 14.)

B. The Court of Appeal reverses, declining to follow *Quinn* and other authorities recognizing the “baseball rule.”

Summer appealed the trial court’s ruling and dismissal of her case. Her opening brief challenged the demurrer ruling within the parameters set by this Court’s *Quinn* decision, asserting she was sitting “in the area behind home plate” and that there were issues concerning “whether protective screening at the stadium was wide enough to cover the entire danger zone behind home plate.” (AOB 11-12; see AOB 37-39.) US Baseball’s respondent’s brief and an accompanying motion argued that Summer could not prevail under existing law because she was seated in the bleachers along the third base line, not behind home plate. (See, e.g., RB 11-12.) In her reply, Summer shifted to arguing that US Baseball had a duty to minimize the risk of injury to spectators and could have done so with additional netting, citing a news report that Major League Baseball intended to extend screens at its stadiums “to the far end of each dugout.” (ARB 25 & fn. 4.) Summer argued that “protecting the most spectators in [that] zone of danger would [not] materially alter the game or the viewing experience.” (*Ibid.*)

In its published decision, the Court of Appeal adopted Summer’s argument. The decision acknowledged the trial court’s ruling that the duty of a recreational activity’s sponsor is not to “‘increase’” the “‘inherent risks’” of the activity, and that US Baseball similarly asserted on appeal that the “‘Supreme Court has determined, as a matter of policy, that in the context of risks inherent in a sporting event, the duty to be imposed on sponsors is

limited to a duty *not to increase* those risks.’” (Typed opn. 15-16, emphasis added.) But the Court of Appeal described these as “cramped descriptions” that “fundamentally misperceive the nature of US Baseball’s duty to fans.” (Typed opn. 15.)

Instead, held the Court of Appeal, a sponsor of a sport or other recreational activity has a duty to “increase safety and minimize the risk of injury” so long as that can be done “without altering the nature of [the activity].” (Typed opn. 4.) The court noted that prior appellate decisions had expressly found that installing protective netting down the first- and third-base lines *would* alter the nature of the game. (Typed opn. 3, 16.) The Court of Appeal declined, however, to follow those decisions, reasoning that Major League Baseball “Commissioner Rob Manfred” and “30 major league baseball teams and many minor league baseball teams *disagree*” that additional netting would alter the nature of the game. (Typed opn. 17, emphasis added.)

But the court cited no evidence the Commissioner had concluded that additional netting along the baselines would not alter the nature of baseball spectator participation or the way baseball is played, or that anyone had “disagree[d]” with prior appellate court decisions that it *would* have that effect. (See typed opn. 3-4, 17.) Nor did it explain why the Commissioner’s actions should necessarily apply to all fields on which baseball is played, given that fields have different configurations and uses, and that the speed at which the ball is in play and the resources available to sponsors also differs at various levels of the sport.

The Court of Appeal also failed to explain why its analysis was not foreclosed by *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455. Its opinion acknowledged that the “‘Baseball Rule’” has been “the state of the law throughout the country,” and that the rule was adopted by this Court in *Quinn, supra*, 3 Cal.2d 725. (Typed opn. 2.) The Court of Appeal even quoted *Quinn*’s holding that “ ‘one of the natural risks assumed by spectators attending professional games is that of being struck by batted or thrown balls; that the management is not required, nor does it undertake to insure patrons against injury from such source.’ ” (Typed opn. 2-3.) The court could have included its entire discussion in dicta urging this Court to reconsider *Quinn*, thus allowing this Court to decide if it wished to reconsider that holding.

Nonetheless, the Court of Appeal reversed the trial court’s ruling sustaining US Baseball’s demurrer, holding that providing protective netting “along the first- and third-base lines between home plate and the dugouts” would “increase safety and minimize the risk of injury to spectators without altering the nature of baseball as it is played today in professional and college ballparks.” (Typed opn. 4, 20.)

On US Baseball’s petition for rehearing, the court corrected the alleged date of the accident (from 2014 to 2013), but rejected US Baseball’s request to clarify that plaintiff was not seated in the original or newly added box seats referenced in her proposed amended complaint. (3/9/2020 Order.) The court’s order on the rehearing petition left its holdings and judgment intact. (*Ibid.*)

LEGAL ARGUMENT

I. Review should be granted to resolve an express conflict created by the Court of Appeal's decision about the continuing viability of the "baseball rule."

A. California courts have uniformly held that spectators seated outside screened areas assume the risk of injury from foul balls.

In *Quinn, supra*, 3 Cal.2d at p. 729, this Court adopted the "baseball rule," the legal doctrine under which courts for more than a century have concluded that " 'one of the natural risks assumed by spectators attending professional games is that of being struck by batted or thrown balls.' " Under that rule, " 'the management is not required, nor does it undertake to insure patrons against injury from such source.' " (*Ibid.*) This Court reasoned that " 'many patrons prefer to sit where their view is not obscured by a screen' " and that " 'spectators occupying positions which may be reached by such balls assume the risk of injury therefrom.' " (*Id.* at pp. 729-730.) Any duty management may have is fulfilled by providing screened seats " 'for as many as may be reasonably expected to call for them on any ordinary occasion.' " (*Id.* at p. 729.)

When affirming that the primary assumption of risk doctrine survived California's adoption of comparative fault principles, this Court cited *Quinn* with approval in *Knight v. Jewett* (1992) 3 Cal.4th 296, 304, 318 (*Knight*). In support of its reasoning, the Court in *Knight* also cited *Brown v. San Francisco Baseball Club* (1950) 99 Cal.App.2d 484, 488-492 (*Brown*), which

it described as holding that a “baseball spectator’s alleged ignorance of the game did not warrant imposing liability on [the] stadium owner for injury caused by a carelessly thrown ball.” (*Knight*, at p. 316.)

Both before and after *Knight*, and until the Court of Appeal’s decision here, *Quinn* and its adoption of the “baseball rule” have been rigorously followed by California’s intermediate appellate courts. (*Nemarnik v. Los Angeles Kings Hockey Club* (2002) 103 Cal.App.4th 631, 637 [“California courts have long held that the risk to spectators of being hit by . . . a foul ball is an inherent risk of baseball that is assumed by the spectator”].)

Shortly after *Quinn*, for example, in *Ratcliff v. San Diego Baseball Club* (1938) 27 Cal.App.2d 733, 736 (*Ratcliff*), the court acknowledged that when management has “provided a protected area sufficiently large to accommodate as many as may be reasonably expected to call for such protection,” it “is well settled that one who voluntarily occupies a seat outside of the area thus protected assumes the natural and well known risk of being struck by thrown or batted balls.”²

² The court ultimately held that the assumption of risk doctrine did not apply because the plaintiff was injured by a bat that had slipped from the hands of a player, rather than by a ball, and was not seated but was instead in a passageway “on her way to a seat in the section protected by [a wire] screen.” (*Ratcliffe, supra*, 27 Cal.App.2d at p. 734; see *Goade v. Benevolent etc. Order of Elks* (1963) 213 Cal.App.2d 189, 194 [acknowledging that a baseball spectator “as a matter of law assumes the risk of being hit by a fly ball” because “fly balls are a common, frequent, and expected occurrence in this well-known sport,” whereas “flying baseball bats” are not “common, frequent, or expected”].)

When applying the “baseball rule” in *Brown, supra*, 99 Cal.App.2d at page 487, the court emphasized that a patron at a baseball game is an active participant in the sport: “In baseball, . . . the patron participates in the sport as a spectator and in so doing subjects himself to certain risks necessarily and usually incident to and inherent in the game [B]y voluntarily entering into the sport as a spectator he knowingly accepts the reasonable risks and hazards inherent in and incident to the game.” Therefore the plaintiff, who was sitting “in an unscreened portion of the stadium near the first-base line” when struck by a baseball, was not “outside the application of the rule announced in the Quinn case” and “assumed the risk of injury in respect to which she complains.” (*Id.* at pp. 485, 492.)

The viability of the “baseball rule” was considered again in *Rudnick v. Golden West Broadcasters* (1984) 156 Cal.App.3d 793, 802 (*Rudnick*), in which the court held that “[d]espite the enormous changes in California tort law over the last 50 years, there is no reason to doubt the continuing vitality of the duty analysis of the *Quinn* line of cases.” The court also addressed whether changing that rule would alter the nature of baseball, and concluded that it would:

Whether baseball fans are viewed as participants in the game itself [citation] or merely passive spectators, one thing is certain: the chance to apprehend a misdirected baseball is as much a part of the game as the seventh inning stretch or peanuts and Cracker Jack.

(*Ibid.*)

Whether modification of the “baseball rule” would alter the nature of baseball was again addressed in *Neinstein v. Los Angeles Dodgers, Inc.* (1986) 185 Cal.App.3d 176 (*Neinstein*). The court first observed that the “quality of a spectator’s experience in witnessing a baseball game depends on his or her proximity to the field of play and the clarity of the view.” (*Id.* at p. 181.) The court then concluded that eliminating the “baseball rule” would “effect a wholesale remodeling of a revered American institution.” (*Ibid.*) The court explained:

As we see it, to permit plaintiff to recover under the circumstances here would force baseball stadium owners to . . . place all spectator areas behind a protective screen thereby reducing the quality of everyone’s view, and *since players are often able to reach into the spectator area to catch foul balls, [would] chang[e] the very nature of the game itself.*

(*Ibid.*, emphasis added.)³ The court also rejected the argument that California’s adoption of comparative fault abrogated this Court’s decision in *Quinn*, and noted that “[o]ther jurisdictions, after the adoption of comparative fault, have continued to follow the *Quinn* rationale.” (*Neinstein*, at p. 184.)

³ Highlight reels available on the internet depict spectacular catches by players flying into the stands to catch foul balls. (See, e.g., “MLB | Into the Stands” <<https://www.youtube.com/watch?v=FWH8R2muvuw>> [as of Mar. 23, 2020].) Such catches would be impossible if netting provided a barrier between the field and the stands, and one of the most exciting aspects of the game would be eliminated.

Finally, in *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 123 (*Lowe*), the court again affirmed that while “foul balls hit into the spectators’ area clearly create a risk of injury[,] . . . it would be impossible to play the game” if they were eliminated. Because “foul balls represent an inherent risk to spectators attending baseball games,” under *Knight* “such risk is assumed.” (*Ibid.*)⁴

In sum, until the Court of Appeal’s decision, this Court’s decision in *Quinn* has been controlling law in California. California courts have held without exception that so long as screened seats (e.g., behind home plate) are provided for as many patrons as may reasonably be expected to want them, the primary assumption of risk doctrine bars claims by baseball spectators who are struck by foul balls while seated in unscreened areas.

⁴ By contrast, the antics of a mascot in the row behind the plaintiff, whose tail bumped the plaintiff’s shoulder and distracted him just before a batted ball struck him in the face, were “not an essential or integral part of the playing of a baseball game,” which “can be played in the absence of such antics.” (*Lowe, supra*, 56 Cal.App.4th at p. 123.) Therefore, the court held that “whether such antics increased the inherent risk to plaintiff [was] an issue of fact to be resolved at trial.” (*Ibid.*)

B. The great majority of other jurisdictions apply the same assumption of risk rule to baseball as California.

In following the “baseball rule,” California is aligned with the overwhelming majority of courts in other states. (See *Gunther v. Charlotte Baseball, Inc.* (D.S.C. 1994) 854 F.Supp. 424, 428 [“the vast majority of jurisdictions recognize [the] hazard [of being hit by a foul ball] to be a risk that is assumed by the spectators”]; *Benejam v. Detroit Tigers, Inc.* (Mich.Ct.App. 2001) 635 N.W.2d 219, 221 (*Benejam*) [“Our review of precedents from other jurisdictions finds overwhelming, if not universal, support for the limited duty that defendant advocates” (footnote omitted)]; *Edward C. v. City of Albuquerque* (N.M. 2010) 241 P.3d 1086, 1092 (*Edward C.*) [“Courts almost universally adopted some form of what is known as the ‘baseball rule,’ creating on the part of ball park owners and occupants only a limited duty of care toward spectators”], overruled on another ground in *Rodriguez v. Del Sol Shopping Ctr. Assocs., L.P.* (N.M. 2014) 326 P.3d 465, 468; *Martinez v. Houston McLane Co., LLC* (Tex.App. 2013) 414 S.W.3d 219, 231 [affirming adherence “to established Texas law adopting the baseball rule”].)⁵

⁵ Four jurisdictions—Arizona, Colorado, Illinois, and New Jersey—have actually codified the baseball rule by statute. (See Ariz.Rev.Stat.Ann. § 12-554; Colo. Baseball Spectator Safety Act of 1993, Colo.Rev.Stat.Ann. § 13-21-120; Baseball Facility Liability Act, 745 Ill.Comp.Stat.Ann. 38/10; N.J. Baseball Safety Act of 2006, N.J.Stat.Ann. §§ 2A:53A-43.)

Only a small minority of courts have rejected the rule. (See *Rountree v. Boise Baseball, LLC* (Idaho 2013) 296 P.3d 373, 376-380 [holding that primary implied assumption of risk is not a valid defense in Idaho, and declining to adopt the “Baseball Rule”]; *South Shore Baseball, LLC v. DeJesus* (Ind. 2014) 11 N.E.3d 903, 909 [concluding the decision to adopt the “Baseball Rule” should be made legislatively rather than judicially].)

As in California, courts in other jurisdictions have concluded that baseball involves active spectator participation, and that the fundamental nature of that participation would be altered if management were required to install fencing or netting protecting patrons from foul balls in areas other than behind home plate. (See, e.g., *Benejam, supra*, 635 N.W.2d at p. 222-223 [“there is inherent value in having most seats unprotected by a screen because baseball patrons generally want to be involved with the game in an intimate way and are even hoping that they will come in contact with some projectile from the field (in the form of a souvenir baseball)”]; “most spectators . . . prefer to be as ‘close to the play’ as possible, without an insulating and obstructive screen between them and the action”]; *Maisonave v. Newark Bears* (N.J. 2005) 881 A.2d 700, 706-707 [“ ‘most spectators prefer to sit where they can have an unobstructed view of the game and are willing to expose themselves to the risk posed by flying balls . . . to obtain that view’ ”]; “because fans actively engage in the game by trying to catch foul balls . . . [¶] the potential danger of fly balls is an inherent, expected, and even desired part of the baseball fan’s experience”], superseded by statute as stated in *Sciarrotta v.*

Global Spectrum (N.J. 2007) 944 A.2d 630, 632; *Edward C.*, *supra*, 241 P.3d at pp. 1088, 1092 [“the sport of baseball[] involves spectator participation and a desire to catch balls that leave the field of play,” and “‘many field-level fans do not want screens or other protective devices in these areas because they feel their views will be degraded, foul ball catching opportunities will be decreased, or the intimate feeling derived from sitting close to the action will be reduced’”]; *Akins v. Glens Falls City School Dist.* (N.Y. 1981) 424 N.E.2d 531, 533 (*Akins*) [“many spectators . . . desire to watch the contest taking place on the playing field without having their view obstructed or obscured by a fence or a protective net”].)

Finally, just as this Court has held that the primary assumption of risk doctrine is necessary “to avoid chilling vigorous participation in or sponsorship of recreational activities” (*Nalwa, supra*, 55 Cal.4th at p. 1156), courts in other jurisdictions have held that if the doctrine did not apply to fans injured by foul balls, stadium owners would face “burgeoning litigation that might signal the demise or substantial alteration of the game of baseball as a spectator sport” (*Benejam, supra*, 635 N.W.2d at p. 223). “[E]very spectator injured by a foul ball, no matter where he is seated or standing in the ball park, would have an absolute right to go to the jury on every claim of negligence.” (*Akins, supra*, 424 N.E.2d at p. 534.)⁶

⁶ Because every baseball park is unique, the adequacy of increased screening would have to be repeatedly litigated based on the particular circumstances of a particular game in light of that

C. The Court of Appeal’s decision rejects the “baseball rule” and imposes a novel duty to protect baseball spectators from injuries by foul balls.

The Court of Appeal’s decision is candid about its departure from existing law. The opinion opens with a summary of the historic origins of the “‘Baseball Rule,’” and acknowledges its consistency “with the state of the law throughout the country.” (Typed opn. 2.) The opinion then quotes this Court’s holding in *Quinn*, and further acknowledges that, “[m]ore than 60 years later,” California’s intermediate appellate courts continue to follow that decision. (Typed opn. 2-3.)

The opinion then pivots to an announcement by Major League Baseball Commissioner Rob Manfred that major league teams will be expanding the protective netting in their stadiums, and concludes that the Commissioner’s announcement warrants wholesale reconsideration of existing law. (Typed opn. 3-4.) Rejecting the “judicial view” in favor of the Commissioner’s “modern, practical view of the importance of protective netting,” the opinion concludes that installing such netting “for field-level seating along the first- and third-base lines between home plate

park’s configuration. Both the cost of screening and the cost of litigation—particularly for the operators of minor league or amateur baseball fields who, unlike well-heeled major league teams, operate in a more precarious financial position—would chill participation in the sport at all levels, and impact the recreational and entertainment opportunities for millions.

and the dugouts” would “increase safety and minimize the risk of injury to spectators without altering the nature of baseball.”⁷ (Typed opn. 3-4.) Accordingly, the opinion holds that the primary assumption of risk doctrine does not bar the plaintiff’s claims based on injuries from “a line drive foul ball while watching a baseball game,” and reverses the judgment in favor of US Baseball. (Typed opn. 4, 20.)

Not only is the Court of Appeal’s conclusion in direct conflict with *Quinn*’s unambiguous holding, its reasoning conflicts with the reasoning of subsequent Court of Appeal decisions that have applied *Quinn* in various factual contexts. The opinion asks rhetorically, “[i]nstalling protective netting down the first- and third-base lines at least to the dugouts would certainly increase safety and minimize risk to fans sitting in those areas. Would it alter the nature of the game?” (Typed opn. 16.) The opinion then forthrightly cites the conclusion in *Lowe* that it *would* alter the nature of baseball: “According to the [*Lowe*] court, if foul balls hit into the stands were eliminated, ‘it would be impossible to play the game.’” (*Ibid.*) The opinion further concedes that “[o]ther courts in past generations have agreed,” citing the conclusion in *Neinstein*

⁷ The Court of Appeal’s decision indicates a duty to provide netting “at least from home plate *to* the dugouts,” while relying on major league baseball’s plans to “expand protective netting . . . substantially *beyond* the end of the dugouts.” (Typed opn. 17, emphasis added.) No rationale is given for imposing a lesser duty than that required by Major League Baseball, revealing both the ad hoc nature of the court’s analysis and its unlimited application in future litigation over how much netting should be required in particular contexts.?

that “protective screens would interfere with the players’ ability to reach into the spectator area to catch foul balls, ‘changing the very nature of the game itself.’ ” (*Ibid.*)

Yet the opinion concludes that Commissioner Manfred’s statement about plans to install protective netting overrides all past precedent: “Allegations incorporating the views of experienced baseball professionals that extending protective netting along the first-and third-base lines will minimize the inherent risk of being injured by a foul ball without fundamentally changing the game adequately identify an enforceable duty, at least for pleading purposes.” (Typed opn. 17.)

But the Commissioner’s cited statement actually says nothing about whether expanded protective netting will or will not “fundamentally chang[e] the game.” (Typed opn. 17.) Furthermore, Major League Baseball can voluntarily change the way the game is played at the professional level, but that has little or no bearing on whether those changes can be made without altering the fundamental nature of the game, particularly at other levels of baseball.⁸ (See *Nalwa, supra*, 55 Cal.4th at pp. 1156, 1163 [“voluntary efforts at minimizing risk do not demonstrate

⁸ The Court of Appeal’s analysis imports Major League Baseball policies to the determination of whether the provision of additional netting is required at a college stadium by an entity that did not own the stadium and over whose physical configuration it had no control. That analysis invites a general finding of a duty to provide netting down the baselines at all levels of baseball, including youth levels. The wholesale importation of Court of Appeal’s analysis into every game of baseball would place an enormous burden on the sport at all levels.

defendant bore a legal duty to do so; not every rule imposed by an organizer or agreed to by participants in a recreational activity reflects a legal duty enforceable in tort”].)

But even if the Commissioner *had* publicly stated that the installation of netting could be made without “fundamentally changing the game,” his opinion would be contrary to California law. While acknowledging the conflict with decisions finding that protective screens would prevent players from reaching into spectator areas to catch foul balls, the Court of Appeal ignores a more fundamental conflict—that protective screens interfere with the recreational activity of *spectator participation* in baseball games.

As discussed above, spectator participation is itself a recreational activity, one which California courts have held would be fundamentally altered by netting or other barriers between fans and the field of play. (See *Neinstein, supra*, 185 Cal.App.3d at p. 181 [the “quality of a spectator’s experience in witnessing a baseball game depends on his or her proximity to the field of play and the clarity of the view,” and placing “spectator areas behind a protective screen” would “reduc[e] the quality of everyone’s view”]; *Brown, supra*, 99 Cal.App.2d at p. 487 [“In baseball, . . . the patron participates in the sport as a spectator”].) The *Quinn* decision observes that those who wish to sit in protected seating behind home plate may do so, while permitting those who wish to see the game without looking through netting to do so as well. The Court of Appeal’s departure from the “baseball rule” deprives all fans

who want to sit along the first- and third-base lines of having an unobstructed view of the game.

Furthermore, baseball is a sport in which spectators not only hope but expect to catch and keep balls hit into the stands. An integral part of fan participation is bringing a glove with the anticipation of catching a foul ball and acquiring the bragging rights that go with it, as well as the fun of watching others compete for balls hit into the stands. (See *Rudnick, supra*, 156 Cal.App.3d at p. 802 [“the chance to apprehend a misdirected baseball is as much a part of the game as the seventh inning stretch or peanuts and Cracker Jack”].) Because the inevitable end of the Court of Appeal’s rationale is a duty to provide netting to protect all fans from batted balls or else face litigation over what extent of netting is required in any particular location, this fundamental aspect of spectator participation will be lost.⁹

Finally, the Court of Appeal’s decision not to follow existing law is especially problematic beyond its choice to reject decades of precedent. The court imports without reservation or modification a proposal for changes in major league baseball facilities into amateur sport. It also uses an announcement about providing expanded netting made during the 2020 Major League Baseball season as a basis for finding that a duty existed at a state college

⁹ Under the Court of Appeal’s two-part analysis, more netting will always increase safety, and the court has declared that netting does not change the nature of baseball. The requirement of full stadium netting thus becomes logically inescapable, so that the decision’s reasoning effectively shifts the governing doctrine from primary assumption of risk to its opposite, strict liability.

facility back in 2013 to take similar measures. The retroactive application of a new policy only just announced to create a duty in conflict with decades of established law is inherently unfair.

In sum, the Court of Appeal’s conclusions are in conflict with almost a century of California case law and the vast majority of decisions in other jurisdictions, and its analysis is supported only by the thinnest of reeds—an extrajudicial statement found on the internet. (See typed opn. 8 [defending use of “published materials” in deciding “the issue of inherent risk for purposes of the primary assumption of risk doctrine”].) By expressly declining to follow this Court’s *Quinn* decision and its progeny, the Court of Appeal is inviting this Court to grant review to resolve the conflict its own decision has created. The Court should accept that invitation.

II. Review should be granted to resolve a growing conflict regarding what duty is owed to participants by sponsors of sporting activities.

A. This Court’s opinions and one line of appellate decisions hold that a sponsor’s duty is limited to not increasing the inherent risks of a sport.

This Court has held that sponsors of sporting activities do not have a duty to *minimize* the inherent risks of a sport. Rather, sponsors owe “‘a duty *not to increase* the risks inherent in the sport, *not a duty to decrease the risks.*’” (*Avila, supra*, 38 Cal.4th at p. 166, emphasis added; accord, *Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1004 (*Kahn*) [no duty “to

eliminate risk from the sport,” but only “not to increase the risk of harm beyond what is inherent in the sport”].)

This aspect of the primary assumption of risk doctrine “helps ensure that the threat of litigation and liability does not cause [inherently risky] recreational activities to be abandoned or fundamentally altered in an effort to eliminate or minimize inherent risks of injury.” (*Nalwa, supra*, 55 Cal.4th at p. 1162; accord, *Khan, supra*, 31 Cal.4th at p. 1011 [“the object to be served by the doctrine of assumption of risk in the sports setting is to avoid recognizing a duty of care when to do so would tend to alter the nature of an active sport or chill vigorous participation in the activity”].)

In *Avila*, for example, a batter who was intentionally hit by a pitch during an intercollegiate baseball game sued the college district. (*Avila, supra*, 38 Cal.4th at pp. 152-153.) The plaintiff argued that the district increased the risks inherent in the game by, among other things, failing to provide umpires, which would have made the game safer. (*Id.* at p. 166.) This Court rejected the argument, explaining that it “overlooks a key point. The District owed ‘a duty not to increase the risks inherent in the sport, *not a duty to decrease the risks.*’” (*Ibid.*, emphasis added.) Even if providing umpires might have reduced the risk that the plaintiff would be hit by a pitch, the plaintiff had “alleged no facts supporting imposition of a duty on the District *to reduce that risk.*” (*Ibid.*, emphasis added; see *Shin v. Ahn* (2007) 42 Cal.4th 482, 486 [“those involved in a sporting activity do not have a duty to reduce the risk of harm that is inherent in the sport itself”].)

Similarly, in *Nalwa*, where the plaintiff fractured her wrist when bracing herself while riding in a bumper car, this Court rejected any duty to “have reduced the ride’s risks by configuring it to minimize head-on collisions,” reaffirming that “[w]here the doctrine applies to a recreational activity, operators, instructors and participants in the activity owe other participants only the duty not to act so as to *increase* the risk of injury over that inherent in the activity.” (*Nalwa, supra*, 55 Cal.4th at pp. 1153, 1154.) Responding to the argument that the operator could have discouraged head-on bumping as it did at its four other bumper car operations (*id.* at p. 1153), the Court held that “voluntary efforts at minimizing risk do not demonstrate defendant bore a legal duty to do so,” and that it did not “violate its ‘duty to use due care not to increase the risks to a participant over and above those inherent’ in the activity . . . by failing to restrict the angle of bumping” (*id.* at p. 1163).

Consistent with this Court’s guidance, many lower court appellate decisions have held that the primary assumption of risk doctrine bars liability even where a defendant could have acted differently to minimize the risk of injury. (See, e.g., *Willhide-Michiulis v. Mammoth Mountain Ski Area, LLC* (2018) 25 Cal.App.5th 344, 362 [ski resort not liable for injuries caused by collision with snow-grooming equipment because the use of such equipment during business hours “is inherent to the sport of snowboarding” and “does not unreasonably increase the risks associated with the sport”]; *Souza v. Squaw Valley Ski Corp.* (2006) 138 Cal.App.4th 262, 267 [ski resort not liable for inadequately

padding snowmaking equipment in the middle of a ski run]; *Aaris v. Las Virgenes Unified School Dist.* (1998) 64 Cal.App.4th 1112, 1115 [falling during stunt inherent in cheerleading; no liability for failing to instruct cheerleading team to use a safer technique]; *Shelly v. Stepp* (1998) 62 Cal.App.4th 1288, 1294-1295 [no liability for defendant's failure to use second horse and rider to control unruly horse]; *Balthazor v. Little League Baseball, Inc.* (1998) 62 Cal.App.4th 47, 52 [risk that player may be hit with carelessly thrown ball is inherent in baseball; no liability for failure to provide helmets with faceguards].)

Thus, “[i]f a risk is inherent in a sport, the fact that a defendant had a feasible means to remedy the danger does not impose a duty to do so.” (*American Golf Corp. v. Superior Court* (2000) 79 Cal.App.4th 30, 37.) Imposing a duty to take a particular safety measure in an inherently risky sport “would have enormous social and economic consequences” such that “[t]he opportunities to participate in [the sport] would be significantly diminished.” (*Fortier v. Los Rios Community College Dist.* (1996) 45 Cal.App.4th 430, 439; see *Kahn, supra*, 31 Cal.4th at p. 1004 [“it would not be appropriate to recognize a duty of care when to do so would require that an integral part of the sport be abandoned, or would discourage vigorous participation in sporting events”].)

B. The Court of Appeal’s opinion and another line of appellate decisions hold that a sponsor’s duty is to take measures that minimize inherent risks.

This Court’s decision in *Kahn* emphasized that “[i]mposing a duty to mitigate [a sporting activity’s] inherent dangers could alter the nature of the activity or inhibit participation,” and therefore the defendant’s duty is only to “avoid increasing the risk of harm inherent in a sporting activity.” (*Kahn, supra*, 31 Cal.4th at pp. 1003, 1005.)

In the course of *Kahn*’s analysis, however, this Court observed that when a stadium owner endeavors “to take reasonable measures to protect spectators from carelessly thrown bats,” those “reasonable steps *may* minimize the risk without altering the nature of the sport.” (*Kahn, supra*, 31 Cal.4th at p. 1004, emphasis added.)¹⁰ Of course, a carelessly thrown bat has been held *not* to be a risk that a baseball spectator assumes. (*Ratcliff, supra*, 27 Cal.App.2d at p. 734.) Regardless, the observation that certain measures *may* minimize risks without altering the nature of a sport has been interpreted by some appellate courts as defining a *duty* to take any and all measures that minimize the risks inherent in a sport, so long as those

¹⁰ In *Knight, supra*, 3 Cal.4th at page 317, this Court used similar language when noting that some prior cases had defined “the risks inherent in the sport not only by virtue of the nature of the sport itself, but also by reference to the steps the sponsoring business entity reasonably should be obligated to take in order to minimize the risks without altering the nature of the sport.”

measures would not alter the nature of the sport. Indeed, it is precisely this language from *Khan* that was quoted and relied upon by the Court of Appeal here. (Typed opn. 11.)

The Court of Appeal also relied on language in this Court’s *Nalwa* decision that observed a bumper car operator “‘might violate its “duty to use due care *not to increase* the risks to a participant over and above those inherent” in the activity [citation] by failing to provide routine safety measures such as seat belts, functioning bumpers and appropriate speed control.’” (Typed opn. 11, emphasis added.) Obviously, a sponsor of an activity can increase inherent risks by removing safety equipment that is *already* a standard part of the sport—e.g., such as if a football coach required his players to play without helmets or shoulder pads, equipment that has long been standard at all levels of the sport. But the Court of Appeal here interpreted the cited language as suggesting a sponsor must *minimize* risks by providing all *new* protections, so long as they do not alter the nature of the sport. (See *ibid.*)

The Court of Appeal’s decision represents the culmination of a line of decisions holding that a claim is not barred by the primary assumption of risk doctrine whenever there is a safety precaution that the sponsor of an activity *might* have taken to minimize the risk of injury, so long as that precaution would not have altered the nature of the sport. (See, e.g., *Grotheer v. Escape Adventures, Inc.* (2017) 14 Cal.App.5th 1283, 1300 [“As a general rule, where an operator *can* take a measure that would increase safety and minimize the risks of the activity *without also altering the nature*

of the activity, the operator is *required* to do so” (first and third emphasis added)]; *Rosencrans v. Dover Images, Ltd.* (2011) 192 Cal.App.4th 1072, 1084 [“In the sport of motocross, an owner/operator of a track has a duty to minimize the risk of a coparticipant crashing into a second coparticipant who has fallen on the track”]; *Saffro v. Elite Racing, Inc.* (2002) 98 Cal.App.4th 173, 179 [a marathon race organizer has a duty to “ ‘minimize the risks without altering the nature of the sport,’ ” which “includes the obligation to minimize the risks of dehydration and hyponatremia by providing adequate water and electrolyte fluids along the 26-mile course”]; *Morgan v. Fuji Country USA, Inc.* (1995) 34 Cal.App.4th 127, 134 [“the owner of a golf course has an obligation to design a golf course to minimize the risk that players will be hit by golf balls”].)

This line of lower court decisions is in direct conflict with the previously cited decisions holding that a sponsor’s duty is to avoid increasing the risks inherent in the sport, rather than an affirmative duty to take all steps necessary to minimize inherent risks. Because hindsight can always find a feasible means that could have been implemented to minimize the risks of a particular sports injury, it would effectively emasculate the primary assumption of risk doctrine to change the critical inquiry to whether a defendant had a feasible means to do so.

Further, as the Court of Appeal recognized, outside the context of primary assumption of risk, the ordinary negligence standard requires only “a duty of care not to cause an unreasonable risk of harm to others.” (Typed opn. 9.) Requiring sponsors of

recreational activities to take all steps that would *minimize* risks without altering the nature of the activity would impose a *greater* duty of care than the ordinary negligence standard applicable to other activities. Thus, the Court of Appeal's approach, and the approach in the line of opinions it followed, turns the primary assumption of risk doctrine on its head. Rather than encouraging the promotion of sporting and other recreational activities, it has precisely the chilling effect the primary assumption of risk doctrine was intended to avoid.

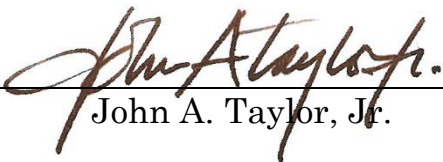
This Court should grant review to resolve the conflict between these two conflicting lines of decisions, and clarify that in the primary assumption of risk context, its prior decisions do not create a duty to minimize the risks inherent in an activity, but only a duty not to enhance those risks.

CONCLUSION

For the reasons explained above, this Court should grant US Baseball's petition for review.

March 27, 2020

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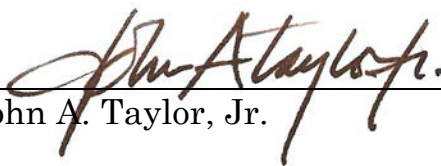
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**UNITED STATES BASEBALL
FEDERATION (erroneously sued
and served as USA BASEBALL 18U)**

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.504(d)(1).)

The text of this petition consists of 8,397 words as counted by the Microsoft Word version 2016 word processing program used to generate the petition.

Dated: March 27, 2020



John A. Taylor, Jr.

**ORDER MODIFYING AND DENYING
PETITION FOR REHEARING; NO
CHANGE IN APPELLATE
JUDGMENT (Filed 03/09/2020)**

**COURT OF APPEAL OPINION
(Filed 02/18/2020)**

Filed 3/9/20 (unmodified opn. attached)

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

SUMMER J., a minor, etc.,

Plaintiff and Appellant,

v.

UNITED STATES BASEBALL
FEDERATION,

Defendant and Respondent.

B282414 and B285029

(Los Angeles County
Super. Ct. No. BC554468)

**ORDER MODIFYING AND
DENYING PETITION FOR
REHEARING; NO CHANGE IN
APPELLATE JUDGMENT**

THE COURT:

The opinion filed on February 18, 2020, certified for publication, is modified as follows:

On pages 4, 15 and 17, the date “August 17, 2014” should read “August 17, 2013.”

Respondent’s Petition for Rehearing filed on March 4, 2020 is denied.

ORDERED that the opinion be corrected in the Official Reports.

This order does not change the appellate judgment.

PERLUSS, P. J.,

SEGAL, J.,

FEUER, J.

Filed 2/18/20 (unmodified version)

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

SUMMER J., a Minor, etc.,

Plaintiff and Appellant,

v.

UNITED STATES BASEBALL
FEDERATION,

Defendant and Respondent.

B282414 and B285029

(Los Angeles County
Super. Ct. No. BC554468)

APPEALS from a judgment and postjudgment order of the
Superior Court of Los Angeles County, Ross M. Klein, Judge.
Reversed and remanded with directions.

Steven B. Stevens, Professional Law Corp., Steven B.
Stevens; The Law Offices of Thomas M. Dempsey, Thomas M.
Dempsey; Selarz Law Corp. and Daniel E. Selarz for Plaintiff and
Appellant.

Manning & Kass, Ellrod, Ramirez, Trester, Sevan Gobel
and Ladell Hulet Muhlestein for Defendant and Respondent
United States Baseball Federation.

Writing for the New York Court of Appeals to reverse a judgment in favor of a young man injured while riding an attraction at the Coney Island amusement park, then-Chief Judge Benjamin Cardozo applied the common law doctrine *volenti non fit injuria* (“to a willing person, injury is not done”) and explained, “One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball.” (*Murphy v. Steeplechase Amusement Co.* (1929) 250 N.Y. 479, 482-483 [166 N.E. 173].)¹ Chief Judge Cardozo’s embrace of a baseball fan’s fundamental responsibility to protect himself or herself from injury from a foul ball—often referred to as the “Baseball Rule”²—was consistent with the state of the law throughout the country. The California Supreme Court in *Quinn v. Recreation Park Assn.* (1935) 3 Cal.2d 725, although holding a stadium operator had a limited duty to provide a screened area at the ballpark, nonetheless observed, “[I]t has been generally held

¹ Chief Judge Cardozo famously went on to advise, “The timorous may stay at home.” (*Murphy v. Steeplechase Amusement Co.*, *supra*, 250 N.Y. at p. 483; see Kaufman, *Cardozo at 100* (2012) 13 J. App.Prac. & Process 183, 187.)

² See, e.g., Grow & Flagel, *The Faulty Law and Economics of the “Baseball Rule”* (2018) 60 Wm. & Mary L.Rev. 59, 63-64 (“[u]nder what has commonly become known as the ‘Baseball Rule,’ courts for over a century have consistently held that professional baseball teams are not liable for injuries sustained by fans by bats or balls leaving the field of play, so long as the teams have taken minimal precautions to protect their spectators from harm”).

that one of the natural risks assumed by spectators attending professional games is that of being struck by batted or thrown balls; that the management is not required, nor does it undertake to insure patrons against injury from such source.” (*Id.* at p. 729.) More than 60 years later, the court of appeal in *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 123 noted, “[F]oul balls hit into the spectators’ area clearly create a risk of injury. If such foul balls were to be eliminated, it would be impossible to play the game. Thus, foul balls represent an inherent risk to spectators attending baseball games. . . . [S]uch risk is assumed.”³ (See generally *Neinstein v. Los Angeles Dodgers, Inc.* (1986) 185 Cal.App.3d 176, 181 [“it is not the role of the courts to effect a wholesale remodeling of a revered American institution through application of the tort law”].)

In sharp contrast to this judicial view of fans’ accountability for their own protection from balls hit into the stands, at Major League Baseball’s 2019 winter meetings Commissioner Rob Manfred announced that all 30 major league teams will expand the protective netting in their stadiums “substantially beyond the end of the dugout” for the 2020 season and that seven or eight stadiums will run netting all the way to the foul poles. (Young & Cosgrove, *Baseball commissioner says all 30 MLB teams will expand protective netting for 2020 season*

³ The issue in *Lowe* was whether the distraction caused by a minor league team’s mascot increased the inherent risk of a spectator being hit by a foul ball. Reversing the trial court’s order granting summary judgment in favor of defendants, the court of appeal held that was “an issue of fact to be resolved at trial.” (*Lowe v. California League of Prof. Baseball, supra*, 56 Cal.App.4th at p. 123.)

(Dec. 11, 2019) <<https://www.cnbc.com/2019/12/11/baseball-commissioner-says-all-30-mlb-teams-to-expand-protective-netting.html>> [as of Feb. 18, 2020], archived at <perma.cc/66dg-72DB>.) Extended netting is also being installed in many minor league ballparks. (Reichard, *All MLB Ballparks Will Feature Extended Netting in 2020*, Ballpark Digest (Dec. 11, 2019) <<https://ballparkdigest.com/2019/12/11/all-mlb-ballparks-will-feature-extended-netting-in-2020/>> [as of Feb. 18, 2020], archived at <perma.cc/MJQ7-9HPT>.)

To what extent should this modern, practical view of the importance of protective netting shape the legal system's understanding of the risks inherent in attending a baseball game and the responsibility of stadium owners to minimize spectator injuries from foul balls? Phrased more specifically in terms of California tort law and the doctrine of primary assumption of risk, would the provision of adequate protective netting in a perceived zone of danger behind home plate (or for field-level seating along the first- and third-base lines between home plate and the dugouts) increase safety and minimize the risk of injury to spectators without altering the nature of baseball as it is played today in professional and college ballparks? We conclude it would and, accordingly, reverse the judgment entered in favor of the United States Baseball Federation (US Baseball) after the trial court sustained without leave to amend US Baseball's demurrer to the first amended complaint of 12-year-old Summer J., who was seriously injured by a line drive foul ball while watching a baseball game sponsored by US Baseball.

FACTUAL AND PROCEDURAL BACKGROUND

Summer attended US Baseball's national team trials on August 17, 2014 at Blair Field, located on the campus of

California State University, Long Beach (CSULB), a stadium jointly owned and maintained by the City of Long Beach and CSULB. Summer was seated in the grandstand or “spectator bleachers,” an area of the stadium without a protective screen or netting. When she was “momentarily distracted from the field of play,” Summer was struck in the face by a line drive foul ball, which caused serious injury, including damage to her optic nerve.

Through her guardian ad litem, Lee J., Summer sued the City of Long Beach, CSULB and US Baseball, asserting in her original and first amended complaints causes of action for negligence and premises liability.⁴ As to US Baseball, Summer alleged it sponsored the game at which she was injured and controlled the stadium on that day. She further alleged inadequate protective netting was provided for spectators at Blair Field “in the perceived zone of danger behind home plate.” The presence of some limited netting at the stadium gave Summer a false sense of security that watching the game in a seat beyond this protected area would be safe. Summer further alleged US Baseball and the other defendants were aware of the inadequate nature of the netting, yet failed to provide any warnings regarding the danger of being struck by a batted ball.

US Baseball demurred to the first amended complaint, contending the lawsuit was barred under the primary assumption of risk doctrine. US Baseball also argued the alleged dangerous condition at the stadium was open and obvious, relieving it of any duty to warn or correct the condition it might otherwise have.

⁴ The City of Long Beach and CSULB are not parties to this appeal.

While the demurrer was pending, Summer moved for leave to file a second amended complaint.⁵ She argued she could provide further factual allegations regarding dangers at Blair Field from hard-hit foul balls that were not inherent risks in the sport of baseball, including the failure to install protective netting for field-level seating along the first- and third-base lines between the batter's box and the dugouts and the configuration of seating that brought spectators in the front rows closer to the field of play than 70 feet as recommended for college stadiums, as well as the provision of enhanced Wi-Fi to encourage use of mobile devices and brightly colored advertising on the outfield fences that distracted fans from the activity on the field.

After briefing and oral argument the court sustained US Baseball's demurrer without leave to amend, ruling Summer's claims were barred under the primary assumption of risk doctrine and the proposed amendments would not cure the defects in the pleading.

Judgment, including an award of costs in an amount to be determined, was entered in favor of US Baseball on February 28, 2017. US Baseball filed its memorandum of costs on March 9, 2017, requesting a total of \$4,902.24. Summer moved to tax costs. The trial court denied the motion on June 30, 2017. Summer filed timely notices of appeal from the judgment on May 1, 2017 (B282414) and from the postjudgment order denying her motion to tax costs on August 28, 2017 (B285029).

⁵ The additional allegations in the initial iteration of the proposed second amended complaint were primarily directed to the City of Long Beach and CSULB. In a revised version filed shortly after she had filed her opposition to US Baseball's demurrer, Summer focused on US Baseball.

DISCUSSION

1. *Standard of Review*

“In reviewing an order sustaining a demurrer, we examine the operative complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory.” (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 162.) “In making this determination, we must accept the facts pleaded as true and give the complaint a reasonable interpretation.” (*Mathews v. Becerra* (2019) 8 Cal.5th 756, 762.) “If the demurrer was sustained without leave to amend, we consider whether there is a ‘reasonable possibility’ that the defect in the complaint could be cured by amendment.” (*King v. CompPartners, Inc.* (2018) 5 Cal.5th 1039, 1050.) The burden is on the plaintiff to prove that amendment could cure the defect. (*Ibid.*)

Application of the primary assumption of risk doctrine is also a question of law subject to de novo review. (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003-1004 (*Kahn*); *Hass v. RhodyCo Productions* (2018) 26 Cal.App.5th 11, 23; see *Rosencrans v. Dover Images, Ltd.* (2011) 192 Cal.App.4th 1072, 1083 [“the legal question of duty, and specifically the question of whether a particular risk is an inherent part of a sport, ‘is necessarily reached from the common knowledge of judges, and not the opinions of experts’”]; *Staten v. Superior Court* (1996) 45 Cal.App.4th 1628, 1635 [“[t]he determinant of duty, ‘inherent risk,’ is to be decided solely as a question of law and based on the general characteristics of the sport activity and the parties’ relationship to it”]; see generally *Vasilenko v. Grace Family Church* (2017) 3 Cal.5th 1077, 1083 [“[t]he existence of a duty is a question of law, which we review de novo”].) In deciding

the issue of inherent risk for purposes of the primary assumption of risk doctrine, judges and justices “may consider not only their own or common experience with the recreational activity involved but may also consult case law, other published materials, and documentary evidence introduced by the parties on a motion for summary judgment.” (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1158 (*Nalwa*); see *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 775-776, fn. 5 [court may consider published material on legal questions “as an aid to the court’s work of interpreting, explaining and forming the law” without formally taking judicial notice of it].)

2. *Knight v. Jewett and Its Progeny: The Principles Governing the Primary Assumption of Risk Doctrine*

In *Knight v. Jewett* (1992) 3 Cal.4th 296 (*Knight*), in a plurality decision written by Chief Justice George and subsequently accepted by other members of the Court except Justice Kennard (see, e.g., *Shin v. Ahn* (2007) 42 Cal.4th 482, 491; *id.* at pp. 500-501 (conc. & dis. opn. of Kennard, J.)), the Supreme Court reformulated California’s assumption of risk doctrine and held, applying “primary assumption of risk” in a sports setting, the plaintiff is said to have assumed the particular risks inherent in a sport by choosing to participate and the defendant generally owes no duty to protect the plaintiff from those risks. “[A] court need not ask what risks a particular plaintiff subjectively knew of and chose to encounter, but instead must evaluate the fundamental nature of the sport and the defendant’s role in or relationship to that sport in order to determine whether the defendant owes a duty to protect a

plaintiff from the particular risk of harm.” (*Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 161 (*Avila*).)⁶

Although individuals generally owe a duty of care not to cause an unreasonable risk of harm to others (Civ. Code, § 1714, subd. (a)), when the primary assumption of risk doctrine applies, “operators, instructors and participants in the activity owe other participants only the duty not to act so as to *increase* the risk of injury over that inherent in the activity.” (*Nalwa, supra*, 55 Cal.4th at p. 1154.)⁷ “The primary assumption of risk doctrine rests on a straightforward policy foundation: the need to avoid chilling vigorous participation in or sponsorship of recreational

⁶ “Secondary assumption of risk,” in contrast, “arises when the defendant still owes a duty of care, but the plaintiff knowingly encounters the risks attendant on the defendant’s breach of duty.” (*Avila, supra*, 38 Cal.4th at p. 161, fn. 6; see *Knight, supra*, 3 Cal.4th at p. 308; see also *Gregory v. Cott* (2014) 59 Cal.4th 996, 1001 [“Since its reformulation in *Knight* . . . , California’s assumption of risk doctrine has taken two quite different forms. Primary assumption of risk is a complete bar to recovery. It applies when, as a matter of law, the defendant owes no duty to guard against a particular risk of harm. Secondary assumption of risk applies when the defendant does owe a duty, but the plaintiff has knowingly encountered a risk of injury caused by the defendant’s breach. Liability in such cases is adjudicated under the rules of comparative negligence”].)

⁷ The *Nalwa* Court held the primary assumption of risk doctrine is not limited to activities classified as sports, but applies to any physical recreational activity that involves an inherent risk of injury, including, in the case then before it, bumper car rides at an amusement park. (*Nalwa, supra*, 55 Cal.4th at pp. 1156-1157.)

activities by imposing a tort duty to eliminate or reduce the risks of harm inherent in those activities. It operates on the premise that imposing such a legal duty ‘would work a basic alteration—or cause abandonment’ of the activity.” (*Id.* at p. 1156.)

As applied to the potential liability of sports participants themselves, careless conduct alone is not enough; a participant owes no duty to protect a coparticipant from particular harms arising from ordinary or simple negligence. (*Avila, supra*, 38 Cal.4th at p. 161; *Knight, supra*, 3 Cal.4th at pp. 308-309.) Rather, “coparticipants’ limited duty of care is to refrain from intentionally injuring one another or engaging in conduct that is ‘so reckless as to be totally outside the range of the ordinary activity involved in the sport.’” (*Shin v. Ahn, supra*, 42 Cal.4th at pp. 489-490.)

The Supreme Court, however, has repeatedly emphasized the question of duty in the recreational context depends not only on the nature of the activity but also on the “role of the defendant whose conduct is at issue in a given case.” (*Kahn, supra*, 31 Cal.4th at p. 1004, quoting *Knight, supra*, 3 Cal.4th at p. 318.) “Duties with respect to the same risk may vary according to the *role* played by particular defendants involved in the sport.” (*Kahn*, at p. 1004; accord, *Nalwa, supra*, 55 Cal.4th at p. 1161 [“[t]he scope of the duty owed to participants in active recreation . . . depends not only on the nature of the activity but also on the role of the defendant whose conduct is at issue”]; see *Avila, supra*, 38 Cal.4th at p. 162 [“we have also noted in dicta that those responsible for maintaining athletic facilities have a similar duty not to increase the inherent risks, albeit in the context of businesses selling recreational opportunities”].) Demonstrating this distinction, the Court, first in *Knight* and then again in

Kahn, explained a batter in baseball has no duty to avoid carelessly throwing a bat after hitting the ball—such conduct being an inherent risk of the sport—but “a stadium owner, because of his or her different relationship to the sport, may have a duty to take reasonable measures to protect spectators from carelessly thrown bats. For the stadium owner, reasonable steps may minimize the risk without altering the nature of the sport.” (*Kahn*, at p. 1004; see *Knight*, at p. 317.) Similarly, in *Nalwa*, although the Supreme Court held the operator of a bumper car ride had no duty to eliminate or minimize head-on bumping, a risk inherent in the activity, it also recognized the operator “might violate its ‘duty to use due care not to increase the risks to a participant over and above those inherent’ in the activity [citation] by failing to provide routine safety measures such as seat belts, functioning bumpers and appropriate speed control” (*Nalwa*, at p. 1163; see *Hass v. RhodyCo Productions*, *supra*, 26 Cal.App.5th at p. 38 [as both *Knight* and *Nalwa* teach, “[w]hile the operator or organizer of a recreational activity has no duty to decrease risks *inherent* to the sport, it does have a duty to reasonably minimize *extrinsic* risks so as not to unreasonably expose participants to an increased risk of harm”].)

The significance of the defendant’s role as the operator or organizer of the activity in defining the scope of its duty to an injured participant or bystander has been illustrated in a number of court of appeal decisions applying the primary assumption of risk doctrine. Thus, the inherent risk in baseball that a pitcher will be hit by a line drive does not preclude a determination that the design and use of a particular type of aluminum bat unreasonably increased the inherent risk of injury to the pitcher (see *Sanchez v. Hillerich & Bradsby Co.* (2002) 104 Cal.App.4th

703, 715); the inherent risk in long-distance running of dehydration and hyponatremia does not mean the organizer of a marathon race had no duty to participants to arrange and conduct a reasonably safe event by providing sufficient water and electrolyte replacement drinks, which “minimize[d] the risks without altering the nature of the sport” (*Saffro v. Elite Racing, Inc.* (2002) 98 Cal.App.4th 173, 175, 179; see *Hass v. RhodyCo Productions, supra*, 26 Cal.App.5th at pp. 38, 40 [inherent risk of cardiac arrest in long-distance running does not preclude finding race organizer had duty to provide emergency medical services]); and the inherent risk of being hit by a misguided golf shot does not prevent a finding the owner of a golf course unreasonably exposed golfers to that risk by its poor design of the course (see *Morgan v. Fuji Country USA, Inc.* (1995) 34 Cal.App.4th 127, 134-135;⁸ see also *Rosencrans v. Dover Images, Ltd., supra*, 192 Cal.App.4th at p. 1084 [owner of motocross track has duty to provide a system for signaling when riders have fallen to minimize risk of collisions].)

In *Grotheer v. Escape Adventures, Inc.* (2017) 14 Cal.App.5th 1283 the court held, under the primary

⁸ The court in *Morgan v. Fuji Country USA, Inc., supra*, 34 Cal.App.4th at page 134 explained, “[I]f the relationship between the parties was one of coparticipants, i.e., if the defendant here were the golfer who hit the errant ball . . . the defendant would have no liability towards Morgan because there is an inherent risk that the defendant would hit an errant ball. Morgan, however, is not suing the other player; he is suing the owner and operator of the golf course. [¶] Fuji, as owner and operator of the Castle Creek golf course owes a different duty to Morgan and other golfers.”

assumption of risk doctrine, a hot air balloon company had no duty to protect its customers from crash landings caused by its pilot's failure to safely manage the balloon's descent (*id.* at p. 1298), but did have a duty to provide passengers instructions on safe landing procedures (*id.* at p. 1302). As our colleagues in Division Two of the Fourth District explained, "Safety is important, but so is the freedom to engage in recreation and challenge one's limits. The primary assumption of risk doctrine balances these competing concerns by absolving operators of activities with inherent risks from an obligation to protect their customers from those risks. [¶] What the primary assumption of risk doctrine does not do, however, is absolve operators of *any obligation* to protect the safety of their customers. [Citation.] As a general rule, where an operator can take a measure that would increase safety and minimize the risk of the activity *without also altering the nature of the activity*, the operator is required to do so." (*Id.* at pp. 1299-1300; see *id.* at p. 1301 ["the primary assumption of risk doctrine has never relieved an operator of its duty to take reasonable steps to minimize inherent risks without altering the nature of the activity"].)

3. *Summer's Proposed Second Amended Complaint States Causes of Action for Negligence and Premises Liability Against US Baseball*

a. *Summer has adequately alleged duty and breach*

Summer alleged in her first amended complaint and proposed to allege in a second amended complaint that Blair Field had inadequate protective netting in the perceived zone of danger behind home plate (first amended complaint) or for field-level seating along the first- and third-base lines between home plate and the dugouts (proposed second amended complaint).

She also proposed to allege the danger to spectators of being hit by hard-hit foul balls in the high-risk, unscreened area at Blair Field had been increased by addition of box seats on the field level along the first- and third-base lines that were closer to the field of play than the distance recommended for college baseball stadiums by the National Collegiate Athletic Association (NCAA) and creation of unnecessary distractions at the ball park including large, colorful advertising on the outfield wall and Wi-Fi ready access to encourage spectators to use their mobile devices during ballgames.

The trial court ruled these allegations were insufficient to state a cause of action for either negligence or premises liability because being hit by a foul ball is an inherent risk to spectators attending baseball games.⁹ The court reasoned, “The lack of netting is not an increase of inherent risks. Placing such netting

⁹ “The elements of a negligence claim and a premises liability claim are the same: a legal duty of care, breach of that duty, and proximate cause resulting in injury. [Citations.] Premises liability “is grounded in the possession of the premises and the attendant right to control and manage the premises”; accordingly, “mere possession with its attendant right to control conditions on the premises is a sufficient basis for the imposition of an affirmative duty to act.” [Citation.] But the duty arising from possession and control of property is adherence to the same standard of care that applies in negligence cases.” (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1158; see *Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1156 [“[t]he proper test to be applied to the liability of the possessor of land . . . is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others”].)

might decrease the inherent risks of being hit by a foul ball, but that is not the inquiry.”

On appeal US Baseball defends the ruling sustaining the demurrer without leave to amend with a similar argument, insisting in the opening paragraph of its brief, “[T]here is no legal duty to eliminate the inherent risk of being hit by a ball while watching a baseball game or to otherwise protect a spectator from being hit by a ball.” US Baseball reiterates this position later in its brief, arguing, “The Supreme Court has determined, as a matter of policy, that in the context of risks inherent in a sporting event, the duty to be imposed on sponsors is limited to a duty not to increase those risks. Primary assumption of risk precludes any other duty relative to the inherent risks of the sport.”

These cramped descriptions by the trial court and US Baseball fundamentally misperceive the nature of US Baseball’s duty to fans attending the August 17, 2014 national team trials.¹⁰ To be sure, foul balls are part of baseball. But as the entity responsible for operating Blair Field on that date,¹¹ US Baseball had a duty not only to use due care not to

¹⁰ That a stadium operator has no duty of any sort to protect spectators from foul balls, as argued by US Baseball, has never been the law in California. The Supreme Court in *Quinn v. Recreation Park Assn.*, *supra*, 3 Cal.2d 725, more than 50 years before *Knight*, held stadium management had a duty of ordinary care that was satisfied by providing screened seats for as many spectators as may be reasonably expected to ask for those seats on any ordinary occasion. (*Id.* at p. 729.)

¹¹ In her first amended complaint Summer alleged US Baseball, as the sponsor of the baseball game and lessee of Blair Field, was responsible for maintaining spectator safety at

increase the risks to spectators inherent in the game but also to take reasonable measures that would increase safety and minimize those risks without altering the nature of the game. (See *Kahn, supra*, 31 Cal.4th at p. 1004 [“[f]or the stadium owner, reasonable steps may minimize the risk without altering the nature of the sport”]; *Knight, supra*, 3 Cal.4th at p. 317 [same]; *Hass v. RhodyCo Productions, supra*, 26 Cal.App.5th at pp. 38, 40; *Grotheer v. Escape Adventures, Inc., supra*, 14 Cal.App.5th at pp. 1299-1301.)

Installing protective netting down the first- and third-base lines at least to the dugouts would certainly increase safety and minimize risk to fans sitting in those areas. Would it alter the nature of the game? The court in *Lowe v. California League of Prof. Baseball, supra*, 56 Cal.App.4th 112, using language quoted by the trial court in its ruling, surmised it would: According to the court, if foul balls hit into the stands were eliminated, “it would be impossible to play the game.” (*Id.* at p. 123.) Other courts in past generations have agreed. (See, e.g., *Neinstein v. Los Angeles Dodgers, Inc., supra*, 185 Cal.App.3d at p. 181

the stadium on the day she was injured. In her proposed second amended complaint Summer alleges US Baseball not only sponsored and organized the game at which she was injured but also controlled Blair Field on the day of the game. Whether she can provide evidence to support those allegations is not now at issue. (See *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 47 [“[I]t is not the ordinary function of a demurrer to test the truth of the plaintiff’s allegations or the accuracy with which [s]he describes the defendant’s conduct ‘[T]he question of plaintiff’s ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court.’”].)

[protective screens would interfere with the players' ability to reach into the spectator area to catch foul balls, "changing the very nature of the game itself"].) As discussed, however, Commissioner Rob Manfred, the 30 major league baseball teams and many minor league teams disagree, all of them planning to expand protective netting in their stadiums substantially beyond the end of the dugouts for the upcoming 2020 season. (See generally Grow & Flagel, *The Faulty Law and Economics of the "Baseball Rule"* (2018) 60 Wm. & Mary L.Rev. 59, 85-98 [discussing developments during the past 25 years that have increased the risk of being injured by foul balls at professional baseball games, including changes in stadium construction that bring spectators closer to the playing field, elevated velocity of pitched balls and increased distractions such as free Wi-Fi].) Allegations incorporating the views of experienced baseball professionals that extending protective netting along the first- and third-base lines will minimize the inherent risk of being injured by a foul ball without fundamentally changing the game adequately identify an enforceable duty, at least for pleading purposes. (Cf. *Nalwa, supra*, 55 Cal.4th at p. 1163.) Accordingly, Summer should be permitted to file an amended pleading alleging US Baseball had a duty to ensure there was adequate protective netting at Blair Field on August 17, 2014 and acted unreasonably, breaching that duty of care, by failing to provide netting on the field level along the first- and third-base lines at least from home plate to the dugouts. Whether the evidence will support those allegations, which will require an evaluation of the extent of the stadium's existing netting, the proximity of unprotected seats to the playing field and the history of previous injuries in the seating area at issue, is not now before us. (See

Mathews v. Becerra, supra, 8 Cal.5th at p. 762 [“surviving demurrer is no assurance of success on the merits once evidence is developed and considered. But we see no basis to prejudge what the evidence will show”].)

b. *Any issue of “open and obvious danger” cannot be resolved on demurrer*

As an alternate basis for holding US Baseball liable for her injuries, Summer alleged US Baseball was aware of the inadequate nature of the netting at Blair Field, yet failed to warn her of the danger of being struck by a foul ball where she was seated. In its demurrer US Baseball contended that danger was so obvious it had no duty to warn Summer of the risk. (See, e.g., *Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal.App.5th 438, 447 [“Generally, if a danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning, and the landowner is under no further duty to remedy or warn of the condition.” [Citation.] In that situation, owners and possessors of land are entitled to assume others will ‘perceive the obvious’ and take action to avoid the dangerous condition”]; see also *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 673.)

In response to US Baseball’s open-and-obvious defense, Summer argues (and, presumably, can allege in an amended pleading) (1) the presence of some protective netting misled her (as well as other reasonably prudent spectators) into believing the unprotected seats were outside the perceived zone of danger with a high risk of injury from foul balls (in effect, an argument that the nature of the risk of injury had been concealed); and (2) because the protective netting behind home plate was unusually narrow and the spectator seats atypically close to the

field of play, the dangers in the unprotected seating at Blair Field “are noticeable only if the spectator has expertise in mathematics, physics, human factors, or stadium design.” In light of these proposed allegations, whether the danger of injury from foul balls in unprotected seating was sufficiently obvious to relieve US Baseball of its duty to warn Summer of its existence is, at most, a question of fact that cannot be resolved on demurrer.¹² (See *Chance v. Lawry’s, Inc.* (1962) 58 Cal.2d 368, 374 [whether the danger created by an open planter box in a narrow foyer of a busy restaurant was sufficiently obvious to eliminate the owner’s duty to warn “was peculiarly a question of fact to be determined by the jury”]; *Henderson v. McGill* (1963) 222 Cal.App.2d 256, 260 [“[i]t is ordinarily a question of fact whether in particular circumstances the duty of care owed to invitees was complied with, . . . whether the particular danger was obvious”]; see also *Donohue v. San Francisco Housing Authority* (1993) 16 Cal.App.4th 658, 665 [“[T]he ‘obvious danger’ exception to a landowner’s ordinary duty of care is in reality a recharacterization of the former *assumption of the risk* doctrine, i.e., where the condition is so apparent that the plaintiff must have realized the danger involved, he assumes the risk of injury

¹² As the court of appeal noted in *Morgan v. Fuji Country USA, Inc.*, *supra*, 34 Cal.App.4th at page 135, footnote 3, in response to the open-and-obvious argument of the golf course owner and operator, “Under *Knight*, the obviousness of a risk may, however, support a duty to provide protection, e.g., as in the case of a baseball stadium where the stadium operator may be obligated to provide protection for spectators in an area where the danger and risk of being hit by a thrown bat or errant ball is particularly obvious.”

even if the defendant was negligent. [Citation.] . . . [T]his type of assumption of the risk has now been merged into comparative negligence”].)¹³

DISPOSITION

The judgment and postjudgment order denying Summer’s motion to tax costs and awarding costs to US Baseball are reversed. The matter is remanded with directions to the trial court to vacate its order sustaining US Baseball’s demurrer without leave to amend and to enter a new order sustaining the demurrer and granting Summer leave to file a second amended complaint. Summer is to recover her costs on appeal.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.

¹³ Our reversal of the judgment in favor of US Baseball necessarily compels reversal of the award of costs to it as the prevailing party pursuant to Code of Civil Procedure section 1032, the subject of Summer’s appeal in B285029. (*Ducoing Management, Inc. v. Superior Court* (2015) 234 Cal.App.4th 306, 314; *Allen v. Smith* (2002) 94 Cal.App.4th 1270, 1284.)

PROOF OF SERVICE

Summer J., a Minor, etc. v. United States Baseball Federation

Case No. S _____

Court of Appeal Case No. B282414

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

On March 27, 2020, I served true copies of the following document(s) described as **PETITION FOR REVIEW** on the interested parties in this action as follows:

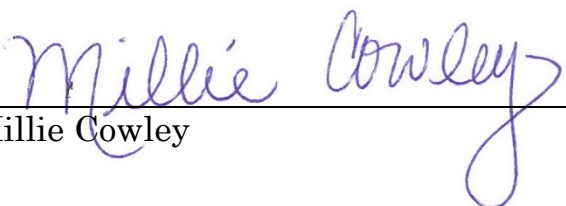
SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list.

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 27, 2020, at Burbank, California.



Millie Cowley

SERVICE LIST
Summer J., a Minor, etc. v. United States Baseball Federation
Case No. S _____
Court of Appeal Case No. B282414

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