3-8-2012

Rountree v. Boise Baseball, LLC Appellant's Brief Dckt. 38966

IN THE SUPREME COURT OF THE STATE OF IDAHO

BUD ROUNTREE,

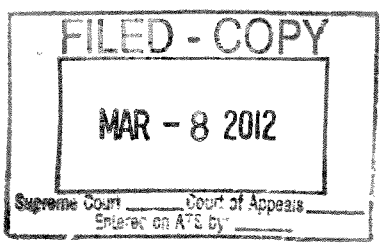
Plaintiff/Respondent,

vs.

BOISE BASEBALL, LLC, a Delaware Limited Liability Corporation d.b.a. Bosie Baseball, d.b.a. Boise Baseball Club d.b.a. Boise Hawks Baseball Club LLC, d.b.a. Boise Hawks, BOISE BASEBALL, LLC, an Idaho Limited Liability Corporation d.b.a Boise Baseball, d.b.a. Boise Baseball Club, d.b.a. Boise Hawks Baseball Club, LLC, d.b.a. Boise Hawks, BOISE HAWKS BASEBALL CLUB, LLC, an assumed business name of Boise Baseball, LLC, HOME PLATE FOOD SERVICES, LLC, an Idaho Limited Liability Corporation, MEMORIAL STADIUM, INC., WRIGHT BROTHERS, THE BUILDING COMPANY, an Idaho General Business Corporation, TRIPLE P, INC., an Idaho general business corporation, DIAMOND SPORTS, INC., a New York Corporation, DIAMOND SPORT CORP., an Idaho corporation, DIAMOND SPORTS MANAGEMENT AND DEVELOPMENT, LLC, an Idaho Limited Liability Corporation, CH2M HILL, INC., a Florida Corporation d.b.a. Ch2M Hill, CH2M HILL CONSTRUCTORS, INC. d.b.a. Ch2M Hill, CH2M HILL E&C, INC., d.b.a Ch2M Hill,

Docket No. 38966

APPELLANTS' BRIEF



CH2M HILL ENGINEERS, INC. d.b.a. Ch2M Hill, CH2M HILL INDUSTRIAL DESIGN AND CONSTRUCTION, an assumed business name of Ch2M Engineers, Inc., CH2M HILL, a foreign corporation doing business in Idaho under the name Ch2M Hill, WILLIAM CORD PEREIRA, ROBERT PEREIRA, and JOHN DOES I through X, whose true identities are unknown,

Defendants/Appellants.

APPELLANTS' BRIEF – BOISE BASEBALL, LLC, BOISE HAWKS BASEBALL CLUB, LLC AND HOME PLATE FOOD SERVICES, LLC

Appeal from the District Court of the Fourth Judicial District
of the State of Idaho, in and for the County of Ada
Honorable Darla Williamson, District Judge, Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case

On August 13, 2008, Bud Rountree was at a Boise Hawks baseball game in Memorial Stadium. While in the Executive Club, approximately 250 feet from home plate down the third-base line, Mr. Rountree had his back to the field during play. A player hit a foul ball down the third-base line and Mr. Rountree was hit in his right eye when he turned around.

Boise Baseball, LLC ("Boise Baseball"), Boise Hawks Baseball Club, LLC ("Boise Hawks"), Home Plate Food Services, LLC ("Home Plate") and Memorial Stadium, Inc. ("Memorial Inc.") moved for summary judgment on the basics that (1) they complied with their limited duty to minimize the risks to those within Memorial Stadium from being hit by foul balls; and (2) Mr. Rountree consented to the risk of being hit by a foul ball when he entered Memorial Stadium.

The district court declined to adopt the limited duty rule. The district court also declined to consider whether primary implied assumption of risk remains a viable defense in Idaho.

Both the district court and this Court granted Boise Baseball, Boise Hawks and Home Plate's permissive appeal pursuant to Idaho Appellate Rule 12.

Boise Baseball, Boise Hawks and Home Plate request this Court reverse the district court's denial of summary judgment, adopt the limited duty rule, and find that they complied

with this rule. Boise Baseball, Boise Hawks and Home Plate also request this Court find that primary implied assumption of risk remains a viable defense in Idaho.

B. Statement of the Facts

1. History of the Boise Hawks Baseball Club.

The Boise Hawks is a minor league baseball team and currently a farm team[1] for the Chicago Cubs. (Aff. of Todd Rahr in Supp. of Defs' Mot. for Summ. J. ("Rahr Aff."), ¶ 3, R. Vol. I, pp. 549-50.) The Boise Hawks were founded in 1987 as a member of the Northwest League, and they play their home games at Memorial Stadium in Garden City, Idaho. (*Id.*) Memorial Stadium opened in 1989 for the Boise Hawks' third season after being built by a private investment group. (*Id.*) The Boise Hawks is currently owned by Boise Baseball. (*Id.*)

Memorial Inc. entered into a lease agreement with Ada County for the construction, operation, and maintenance of Memorial Stadium in 1989. (*See* Aff. of Joshua Evett in Supp. of Defs' Mot. for Summ. J. ("Evett Aff."), Ex. E (Copy of relevant portions of the Ground Lease Agreement), R. Vol. I, pp. 499-502.) Memorial Inc. simultaneously entered into a sublease with Diamond Sports, Inc. (the original owner of the Boise Hawks) for the construction, operation, and maintenance of Memorial Stadium. (*See* Evett Aff., Ex. F (Copy of relevant portions of the

[1] "Farm team" is generally a team or club whose role is to provide experience and training for young players who can move to a higher level, i.e., Major League Baseball.

Sublease for the Construction, Maintenance and Operation of Memorial Stadium), R. Vol. I, pp. 503-06.)

Thereafter, there were a number of mergers, sales, and assignments between entities which owned the Boise Hawks over the years. (*See* Evett Aff., Ex. G (Copy of Assignment and Assumption of Sublease), R. Vol. I, pp. 507-09.) At the time of Mr. Rountree's accident, Memorial Inc. did not operate, maintain, and/or control Memorial Stadium. (Rahr Aff., ¶ 22, R. Vol. I, p. 553.) The Boise Hawks did. (*See* Evett Aff., Ex. G (Copy of Assignment and Assumption of Sublease), R. Vol. I, pp. 507-09.)

Home Plate has been a food and beverage concessionaire at Memorial Stadium since 2006. (Rahr Aff., ¶ 23, R. Vol. I, p. 553.) At the time of the subject accident, Home Plate did not operate, maintain, and/or control any area of Memorial Stadium. (*Id.*)

2. <u>Barrier Netting Configuration at Memorial Stadium</u>.

Memorial Stadium has barrier netting that is approximately 30 feet in height that extends approximately 250 feet down the first-base line and approximately 250 feet down the third-base line. (Rahr Aff., ¶ 5, R. Vol. I, p. 550.) Todd Rahr has been the President and General Manager of the Boise Hawks since 2004. (Rahr Aff., ¶ 1, R. Vol. I, p. 549.) Mr. Rahr does not know who or what entity designed and/or determined the barrier netting configuration at Memorial Stadium. (Rahr Aff., ¶ 6, R. Vol. I, p. 550.) However, the current barrier netting configuration at

Memorial Stadium is the same configuration that was in place when Mr. Rahr began his employment with the Boise Hawks in 2004. (Rahr Aff., ¶ 7, R. Vol. I, p. 550.)

Allsports Cages and Netting ("Allsports") is a netting company located in Seattle, Washington. (Aff. of Ron Anderson in Supp. of Defs' Mot. for Summ. J. ("Anderson Aff."), ¶ 2, R. Vol. I, p. 511.) Allsports sells different types of netting, including barrier netting, to entities in the United States and Canada. (Anderson Aff., ¶ 3, R. Vol. I, p. 511.) Allsports also installs barrier netting at different sporting stadiums/facilities in Washington and other surrounding states, including Idaho. (*Id.*)

According to Mr. Anderson, the barrier netting at Memorial Stadium has more extensive coverage than any other baseball stadium he has worked on or observed in his 43 years in the netting industry.[2] (Anderson Aff., ¶ 9, R. Vol. I, p. 512.) The other baseball stadiums Mr. Anderson has worked on and observed over his 43 years in the netting industry generally only place barrier netting around the home plate area and sometimes, in addition to the barrier netting around the home plate area, extend barrier netting out to the end of the team dugouts. (Anderson Aff., ¶¶ 10-11, R. Vol. I, p. 512; *See also* Anderson Aff., Ex. B (Photographs of the barrier netting configuration at various baseball stadiums), R. Vol. I, pp. 516-24.)

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[2] On or about June 2, 2008, the Boise Hawks hired Allsports to install replacement barrier netting at Memorial Stadium in Garden City, Idaho. (Anderson Aff., ¶ 5, R. Vol I, p. 512.) Allsports used existing barrier netting poles to complete the June 2008 installation at Memorial Stadium. (Anderson Aff., ¶¶ 6-7, R. Vol. I, p. 512; *See also* Anderson Aff., Ex. A (Diagram of Memorial Stadium used by Allsports), R. Vol. I, p. 515.) The work done by Allsports is not at issue.

In fact, Mr. Anderson is unaware of any baseball club, other than the Boise Hawks, that has chosen to exceed the industry standard by placing extra barrier netting almost all the way down the first-base and third-base lines of their baseball stadium – as the Boise Hawks have done at Memorial Stadium. (Anderson Aff., ¶¶ 12-13, R. Vol. I, p. 513; *See also* Anderson Aff., Ex. C (Photographs of the barrier netting at Memorial Stadium), R. Vol. I, pp. 525-43.)

3. Language On the Back of Boise Hawks Tickets.

A spectator, whether a season ticket holder or otherwise, cannot gain entrance into Memorial Stadium without a ticket. (Rahr Aff., ¶ 16, R. Vol. I, p. 552.) The Boise Hawks tickets contain the following language on the back of each ticket:

> THE HOLDER ASSUMES THE RISK AND DANGERS INCIDENTAL TO THE GAME OF BASEBALL INCLUDING SPECIFICALLY (BUT NOT EXCLUSIVELY) THE DANGER OF BEING INJURED BY THROWN OR BATTED BALLS. . .

(*Id.*; *See also* Rahr Aff., ¶ 17, Ex. C (Boise Hawks tickets), R. Vol. I, pp. 559-60.)

According to Mr. Rountree, he was a Boise Hawks season ticket holder for approximately 20 consecutive seasons/years – between 1989 and 2009. (*See* Evett Aff., Ex. A (Deposition of Bud Rountree), 34:13-21 and 43:18-25, R. Vol. I, pp. 433 and 435; and Rahr Aff., ¶ 3, R. Vol. I, pp. 549-50.) There are approximately 40 home games in each season. (Rahr Aff., ¶ 13, R. Vol. I, p. 551.) By Mr. Rountree's own account, he personally attended a minimum of 10 home games each of his 20 seasons/years as a season ticket holder. (*See* Evett Aff., Ex. A (Deposition

of Bud Rountree), 44:12-45:6, R. Vol. I, pp. 435-36.) Thus, Mr. Rountree has personally attended at least 200 Boise Hawks games. (*Id.*)

As a season ticket holder, at the beginning of each season Mr. Rountree would receive one Boise Hawks ticket for each home game for each season ticket seat he purchased. (Rahr Aff., ¶ 21, R. Vol. I, p. 553.) Thus, Mr. Rountree received somewhere between 80 (when he had two season ticket seats) and 160 (when he had four season ticket seats) Boise Hawks tickets each season. This means Mr. Rountree received somewhere between 1,600 and 3,200 Boise Hawks tickets during his 20 seasons/years as a season ticket holder. The aforementioned language was on the back of each Boise Hawks ticket Mr. Rountree received since becoming a season ticket holder in 1989. (*See* Rahr Aff., ¶ 18, R. Vol. I, p. 552.)

Despite the fact that this language has been on the back of approximately 1,600 to 3,200 Boise Hawks tickets handled by Mr. Rountree over a 20-year period, Mr. Rountree claims to have never read the language before the August 13, 2008, accident. (*See* Evett Aff., Ex. A (Deposition of Bud Rountree), 82:3-5, R. Vol. I, p. 445.)[3]

4. <u>Bud Rountree's Accident on August 13, 2008.</u>

On August 13, 2008, Mr. Rountree took his wife, Linda Ballard, and two of his grandchildren to a Boise Hawks game at Memorial Stadium in Garden City, Idaho. (*See* Evett

[3] Mr. Rountree's friend, Stan Tollinger, with whom he attended many of the Boise Hawks games, knew about the language on the back of the Boise Hawks tickets for years prior to the August 13, 2008, accident. (*See* Evett Aff., Ex. C (Deposition of Albert Stanton Tollinger), ¶ 21:18-22:22, R. Vol. I, p. 480.)

Aff., Ex. B (Deposition of Linda Ballard), 28:18-22, R. Vol. I, p. 460.) Mr. Rountree had four season ticket seats in the Viper section of Memorial Stadium – Row H, Seats 7-10. (Rahr Aff., ¶ 19, R. Vol. I, p. 552.) There is barrier netting between Mr. Rountree's seats, as well as all other seats in the Viper section of Memorial Stadium, and the field of play. (*Id.*; *See also* Evett Aff., Ex. A (Deposition of Bud Rountree), 52:14-24, R. Vol. I, p. 437.)

On August 13, 2008, however, Mr. Rountree chose not to sit in his season ticket seats. (*See* Evett Aff., Ex. B (Deposition of Linda Ballard), 30:17-32:5, R. Vol. I, p. 461.) Instead, Mr. Rountree reserved a table in the Hawks Nest to eat, drink, and watch the game. (*Id.*) The Hawks Nest is a full service eating and drinking area and is fully enclosed by barrier netting. (Rahr Aff., ¶ 10, R. Vol. I, p. 551.)

In or around the fifth inning of the game, Mr. Rountree, his wife, and his two grandchildren exited the fully-enclosed Hawks Nest and went to the Executive Club, located adjacent to the Hawks Nest, to watch the game. (*See* Evett Aff., Ex. A (Deposition of Bud Rountree), 80:13-25, R. Vol. I, p. 444.) The Executive Club is located at the end of the third-base line next to the outfield wall of Memorial Stadium. (Rahr Aff., ¶ 8, R. Vol. I, p. 551.) The Executive Club stops serving food and beverages before the beginning of each game and, at that point, acts only as an alternative location for people to watch the game without the obstruction of barrier netting. (Rahr Aff., ¶ 9, R. Vol. I, p. 551.)

When Mr. Rountree entered the Executive Club with his wife and grandchildren, he told his grandchildren that they could be hit by foul balls in this area if they did not watch out.[4] (*See* Evett Aff., Ex. B (Deposition of Linda Ballard), 34:16-35:9, R. Vol. I, p. 462.) During her November 2, 2010, deposition, Ms. Ballard testified as follows:

> Q: The evening of the accident, were you concerned at all that your step-grandkids needed to be warned about watching out for foul balls at the park?
>
> A: Well, we told them they needed to watch out. And where we were at, you know, I felt it was relatively safe because I thought there was adequate netting.
>
> Q: So before you got to the park, you told the boys, you need to watch out for foul balls?
>
> A: Yeah. And I know Bud told them when we were down there, he says, now, you guys, if you see a ball coming, make sure you watch for it, you know, don't get hit.
>
> Q: And when you say "when we were down there," Bud told them that, where is "down there"?
>
> A: Well, there's kind of a gazebo area that we walked down to after we got through eating, because he wanted to show them everything down there.
>
> Q: And so the area that you just mentioned, that's the area where Bud was hit, wasn't it?
>
> A: Yes.

[4] Mr. Rountree denied warning his grandchildren that they needed to watch out for foul balls. (*See* Evett Aff., Ex. A (Deposition of Bud Rountree), 100:6-12, R. Vol. p. 449.)

(*Id.* (emphasis added).)[5]

Approximately ten minutes after entering the Executive Club, while standing and talking with someone and facing away from the field of play, Mr. Rountree heard the "roar of the crowd" and turned towards the field of play and directly into an oncoming foul ball. (*See* Evett Aff., Ex. A (Deposition of Bud Rountree), 66:7-17; 74:8-16; 75:18-25; 101:3-14; and 111:1-4, R. Vol. I, pp. 441; 443; 450; and 452.) Mr. Rountree was not in the Executive Club sitting and eating or drinking. (*See* Evett Aff., Ex. A (Deposition of Bud Rountree), 66:7-17; 74:8-16; and 101:23-25, R. Vol. I, pp. 441; 443; and 450.) The foul ball hit Mr. Rountree in his right eye and, as a result, his right eye was surgically removed. (*See, e.g.,* Evett Aff., Ex. B (Deposition of Linda Ballard), 47:17-23 and 65:6-8, R. Vol. I, pp. 465 and 470.)

At his deposition, Mr. Rountree testified as follows:

> Q: And were you sitting at the time you were struck by the ball?
>
> A: No. I was standing at the time I was struck by the ball.
>
> * * *
>
> Q: And before you were hit, you weren't looking at the field; right?
>
> A: Before I was hit I was not looking at the field.
>
> Q: Because you were talking to someone?

---

[5] Based upon Ms. Ballard's testimony, she and Mr. Rountree warned the boys at least two different times on August 13, 2008, that they needed to watch out for foul balls – once before getting to Memorial Stadium and once in the Executive Club. (*Id.*)

A: Correct.

* * *

Q: And when you were down in the elevated portion [the Executive Club] – and you were there for about 10 minutes before you got hit; right?

A: When I was down in the elevated portion you said?

Q: Yeah. You were there about ten minutes; right?

A: Okay.

Q: That's what Exhibit C says; right?

A: Okay.

Q: You agree with that; correct?

A: Yes. I was confused when you said "down in the elevated section."

* * *

Q: And you would agree, wouldn't you, that right before you were hit you were not paying attention to the field of play?

A: Correct.

(Evett Aff., Ex. A (Deposition of Bud Rountree), 66:7-17; 74:8-16; 75:18-25; 101:3-14; and 111:1-4, R. Vol. I, pp. 441; 443; 450; and 452) (emphasis added).)

5. History Leading Up To Bud Rountree's Accident on August 13, 2008.

Mr. Rountree grew up watching and playing baseball and even helped coach his son's baseball team when his son was younger. (*See* Evett Aff., Ex. A (Deposition of Bud Rountree), 47:4-22 and 48:10-19, R. Vol. I, p. 436.) Mr. Rountree was a Boise Hawks season ticket holder

for approximately 20 consecutive seasons and attended a minimum of 10 home games each season (as discussed *supra*). (*See* Evett Aff., Ex. A (Deposition of Bud Rountree), 43:18-25 and 44:12-45:6, R. Vol. I, pp. 435-36.) In fact, in Mr. Rountree's own words, he is an "avid Hawks fan." (*See* Evett Aff., Ex. A (Deposition of Bud Rountree), 44:3-4, R. Vol. I, p. 435.)

As an "avid Hawks fan" who has attended at least 200 Boise Hawks games over a 20 season/year period, Mr. Rountree knows that foul balls are common to the game of baseball, Mr. Rountree knows that foul balls frequently enter the areas surrounding the field of play, and Mr. Rountree knows that, as a spectator, if you are not paying attention to the field of play, there is the possibility of getting hit by a foul ball. Mr. Rountree testified as follows:

> Q. Before the accident that you had back in 2008, did you ever see a spectator get hit with a foul ball at Hawks stadium?
>
> A. I know that foul balls have come up in the stands, and whether people were injured by them or not – you know, some people catch them.
>
> Q. So before the accident you had, you had seen spectators catch foul balls at Hawks stadium?
>
> A. Yes.
>
> Q. And do you have a memory of ever seeing a spectator at a Hawks game, before the accident, get hit with a foul ball?
>
> A. I don't think I can – define what you mean by "hit," because –
>
> Q. Well, hit in the body.
>
> A. Oh, not that I was sitting there. I mean, I – not near me anyway.

Q. But have you – excluding people sitting near you, did you ever see anybody, before your accident, at Hawks stadium get hit with a foul ball, regardless of where they were sitting?

A. I've seen foul balls come into the stands. And when you say "hit," I can't say if they were hit with them, or if they – the spectator caught them or dodged them or what.

* * *

Q. Have you ever had a ball come down near you at any time?

A. What's your definition of near?

Q. Within 20 feet?

A. Within 20 feet, yes.

(Evett Aff., Ex. A (Deposition of Bud Rountree), 50:16-51:15 and 53:6-10, R. Vol. I, pp. 437-38) (emphasis added).)

Mr. Rountree's testimony is supported by the testimony of Stan Tollinger, Mr. Rountree's friend, who is a fellow Boise Hawks fan and someone with whom Mr. Rountree would frequently watch Boise Hawks games.[6] (*See* Evett Aff., Ex. C (Deposition of Albert Stanton Tollinger), 8:1-9:19 and 10:10-16, R. Vol. I, pp. 476-77.) During his November 11, 2010, deposition, Mr. Tollinger testified as follows:

Q. At any of the games you ever went to, did you ever see a spectator get hit by a ball?

---

[6] Mr. Tollinger's seats are located one row back and directly behind Mr. Rountree's seats in Memorial Stadium – Row I, Seats 9-10. (*See* Evett Aff., Ex. C (Deposition of Albert Stanton Tollinger), 38:1-7, R. Vol. I, p. 484.)

A. Yes.

* * *

Q. But you did go to a lot of games. And, obviously, when you go to baseball games, foul balls get hit pretty frequently in a game, correct?

A. Correct.

Q. And at Hawks games you probably saw foul balls go out into the parking lot fairly often?

A. Yes.

Q. And probably saw cars get hit every once in a while?

A. Yes.

* * *

Q. But you probably saw people who had ball gloves at Hawks games to try to catch foul balls?

A. The kids.

Q. The kids mainly? Yes?

A. Yes.

Q. And every once in a while, you probably saw someone who did catch a foul ball with a glove at a Hawks game?

A. Yes, and the audience would cheer.

Q. Yeah. And in the little general area where you sat with your group of friends, did balls ever come and land around you all?

A. Yes.

Q. And they would either be caught by someone or they would hit a seat or the concrete and bounce off somewhere?

A. Correct.

Q. And that's just kind of part of a baseball game, isn't it, foul balls coming into the crowd that are either being caught or bouncing away?

A. Yes.

(Evett Aff., Ex. C (Deposition of Albert Stanton Tollinger), 32:5-34:21, R. Vol. I, pp. 482-83.)

According to Todd Rahr, he has personally seen thousands of foul balls hit into areas surrounding the field of play at Memorial Stadium in his seven seasons and approximately 280 home games with the Boise Hawks. (Rahr Aff., ¶ 14, R. Vol. I, pp. 551-52.) Foul balls are a common occurrence at Memorial Stadium, not unlike any other baseball stadium, and are part of the game of baseball. (*Id.*)

Mr. Rountree also testified during his deposition that he had "occasionally" been in the Executive Club prior to the August 13, 2008, accident. (*See* Evett Aff., Ex. A (Deposition of Bud Rountree), 68:22-24, R. Vol. I, p. 441.) This testimony is again supported by the testimony of Mr. Tollinger. According to Mr. Tollinger, he and Mr. Rountree would go to the Executive Club "perhaps every other game." (*See* Evett Aff., Ex. C (Deposition of Albert Stanton Tollinger), 17:12-18:5, R. Vol. I, p. 479.) Mr. Tollinger testified as follows:

Q. And was it obvious to you when you were in this area of the park [the Executive Club] that there wasn't any netting –

A. Yes.

Q. – facing the field?

A. Yes.

(Evett Aff., Ex. C (Deposition of Albert Stanton Tollinger), 18:6-10, R. Vol. I, p. 479) (emphasis added).)

Lisa Leek, who knows Ms. Ballard from their employment in the mortgage industry, was in the Executive Club at the time of the August 13, 2008, accident. (*See* Evett Aff., Ex. D (Deposition of Lisa Leek), 7:19-8:6 and 12:15-22, R. Vol. I, pp. 488-89.) Ms. Leek's testimony supports Mr. Tollinger's testimony that it was obvious there was no netting facing the field in the Executive Club. Ms. Leek testified as follows:

Q. And so my question is, simply the part of this area facing the field [in the Executive Club], did that have netting on it the night of the accident?

A. Are you talking about this part right here in front of the bench [looking at Plaintiff's Exhibit Nos. 5 and 6]?

Q. Yes.

A. No. There was no netting there.

Q. And the night of the accident, was it obvious to you there was no netting there?

A. Yes.

* * *

Q. So the night of the accident, that was the first time you were ever in this area [the Executive Club] that doesn't have netting facing the field?

A. Correct.

(Evett Aff., Ex. D (Deposition of Lisa Leek), 14:10-22 and 15:5-8, R. Vol. I, p. 490.) Ms. Leek reaffirmed her testimony when questioned later in her deposition by Mr. Rountree's counsel, in relevant part, stating:

> Q. When you walked into this area, can you recall whether or not you consciously recognized that there was no netting between the Executive Club area and the field?
>
> A. I was aware there was no netting.

(Evett Aff., Ex. D (Deposition of Lisa Leek), 34:19-23, R. Vol. I, p. 495.)

In fact, according to Ms. Leek's testimony, she and her husband went into the Executive Club because they knew there was no netting facing the field of play and wanted to watch the game without the obstruction of barrier netting. (*See* Evett Aff., Ex. D (Deposition of Lisa Leek) 15:9-15, R. Vol. I, p. 490.) Ms. Leek testified as follows:

> Q. And the night of the accident, do you remember, was there a particular reason you went into that part of the park [the Executive Club]?
>
> A. I just walked around there to stand right by this pole right here [looking at Plaintiff's Exhibit Nos. 5 and 6] to watch the game, <u>because it was a little easier to see than through the netting</u>.

(*Id.* (emphasis added).)

More importantly, Mr. Rountree's knowledge that foul balls could possibly enter the Executive Club area is demonstrated by Mr. Rountree telling his grandchildren that they could be hit by foul balls in this area if they did not watch out (as discussed *supra*). (*See* Evett Aff., Ex. B (Deposition of Linda Ballard), 34:16-35:9, R. Vol. I, p. 462.)

While foul balls are common and it is important for spectators at Memorial Stadium to watch the field of play, in Mr. Rahr's seven seasons and approximately 280 home games with the Boise Hawks, the August 13, 2008, accident is the only time a spectator has suffered a "major" injury because of a foul ball and, to his knowledge, the only time a foul ball has entered the Executive Club. (*See* Rahr Aff., ¶ 15, R. Vol. I, p. 552.)

C. Course of Proceedings

Mr. Rountree filed his Complaint and Demand for Jury Trial against various defendants on October 30, 2009. (Compl., R. Vol. I, pp. 10-21.) Mr. Rountree filed four subsequent amended complaints. (R. Vol. I, pp. 34-46 (Amended Complaint and Demand for Jury Trial filed on November 25, 2009); pp. 134-48 (Second Amended Complaint and Demand for Jury Trial filed on May 26, 2010); pp. 180-92 (Third Amended Complaint and Demand for Jury Trial filed on June 8, 2010); and pp. 257-70 (Fourth Amended Complaint and Demand for Jury Trial filed on June 23, 2010).) Boise Baseball, Boise Hawks, Home Plate and Memorial Inc. filed their Answer to Plaintiff's Fourth Amended Complaint and Demand for Jury Trial on July 6, 2010. (Fourth Answer, R. Vol. I, pp. 274-86.)

Boise Baseball, Boise Hawks, Home Plate and Memorial Inc. filed their Motion for Summary Judgment on March 2, 2011. (R. Vol. I, pp. 418-20 (Mot. For Summ. J.); pp. 563-93 (Mem. in Supp. of Mot. for Summ. J.).)

Mr. Rountree responded on May 9, 2011, with his Opposition to Defendants Boise Baseball, LLC, Boise Hawks Baseball Club, LLC, Home Plate Food Services, LLC and

Memorial Stadium, Inc.'s Motion for Summary Judgment. (Pl.'s Mem. in Opp'n to Defs' Mot. For Summ. J., R. Vol. I. pp. 712-37.) Thereafter, on May 13, 2011, a Reply Supporting Defendants Boise Baseball, LLC, Boise Hawks Baseball Club, LLC, Home Plate Food Services, LLC and Memorial Stadium, Inc.'s Motion for Summary Judgment was filed. (Reply Mem. in Supp. of Defs' Mot. for Summ. J., R. Vol. I, pp. 738-49.)

Defendants Boise Baseball, LLC, Boise Hawks Baseball Club, LLC, Home Plate Food Services, LLC and Memorial Stadium, Inc.'s Motion for Summary Judgment was heard on May 18, 2011. (Tr. on Defs' Mot. for Summ. J. Hr'g.)

At the hearing, the district court expressed doubt about whether it is permitted to apply the limited duty rule in this case due to the Court's holding in *Ruffing v. Ada County Paramedics*, 145 Idaho 943, 188 P.3d 885 (2008), so supplemental briefing was filed on this issue. (Tr. on Defs' Mot. for Summ. J. Hr'g, p. 19, ll. 4-22.)

A Supplemental Memorandum in Support of Defendants Boise Baseball, LLC, Boise Hawks Baseball Club, LLC, Home Plate Food Services, LLC and Memorial Stadium, Inc.'s Motion for Summary Judgment was filed on May 23, 2011. (Supp. Mem. in Supp. of Defs' Mot. for Summ. J., R. Vol. I, pp. 813-18.) That same day, the district court issued its Memorandum Decision on Defendants' Motion for Summary Judgment denying Boise Baseball, Boise Hawks, Home Plate and Memorial Inc.'s summary judgment motion. (Mem. Dec. on Defs' Mot. for Summ. J., R. Vol. I, pp. 804-12.)

On June 6, 2011, Home Plate and Memorial Inc. filed a Motion for Reconsideration and Memorandum in Support of their Motion for Reconsideration. (R. Vol. I, pp. 841-43 (Defs' Mot. for Rec.); and pp. 844-48 (Mem. in Supp. of Defs' Mot. for Rec.).) Boise Baseball, Boise Hawks, Home Plate and Memorial Inc. simultaneously filed a Motion for Permission to Appeal and Memorandum in Support of their Motion for Permission to Appeal. (R. Vol. I, pp. 849-51 (Defs' Mot. for Perm. to A.); and pp. 852-65 (Mem. in Supp. of Defs' Mot. for Perm. to A.).)

Mr. Rountree responded on June 17, 2011, with Plaintiff's Opposition to Motion for Reconsideration and Permission to Appeal. (Pl.'s Opp. to Mot. for Rec. and Perm. to A., R. Vol. I, pp. 869-81.) Thereafter, on June 20, 2011, a Reply Memorandum Supporting Defendants Boise Baseball, LLC, Boise Hawks Baseball Club, LLC, Home Plate Food Services, LLC and Memorial Stadium, Inc.'s Motion for Permission to Appeal and a Reply Memorandum Supporting Defendants Home Plate Food Services, LLC and Memorial Stadium, Inc.'s Motion for Reconsideration were filed. (R. Vol. I, pp. 901-07 (Reply Memo. Supp. Defs' Mot. for Perm. to A.); and pp. 908-12 (Reply Memo. Supp. Defs' Mot. for Rec.).)

Defendants Home Plate Food Services, LLC and Memorial Stadium, Inc.'s Motion for Reconsideration and Defendants Boise Baseball, LLC, Boise Hawks Baseball Club, LLC, Home Plate Food Services, LLC and Memorial Stadium, Inc.'s Motion for Permission to Appeal was heard on June 22, 2011. (Tr. on Defs' Mot. for Rec. and Perm. to A. Hr'g.)

The district court issued a Memorandum Decision on Defendants' Motion for Summary Judgment on June 24, 2011, in which it dismissed Memorial Inc. from this case. (Mem. D. on Defs' Mot. for Summ. J., R. Vol. I, pp. 913-17.)

On June 29, 2011, the district court entered an Order Granting Defendants' Motion for Reconsideration and Permission to Appeal. (Order Gr. Defs' Mot. for Rec. and Perm. to A., R. Vol. I, pp. 918-23.)

On July 12, 2011, the district court entered an Amended Order Granting Defendants' Motion for Permission to Appeal. (Amend. Order Gr. Defs' Mot. for Perm. to A., R. Vol. I, pp. 933-38.)

II. ISSUES PRESENTED ON APPEAL

A. Whether the district court erred in declining to adopt the limited duty rule, *i.e.,* the baseball rule, and finding that Appellants complied with it.

B. Whether the district court erred in finding that primary implied assumption of risk is not a viable defense in Idaho, and that only written or oral consent under *Salinas v. Vierstra*, 107 Idaho 984, 695 P.2d 369 (1985) is a viable assumption of risk defense.

III. ARGUMENT

A. Standard of Review

An order denying a motion for summary judgment is not an appealable order itself. *Grover v. Wadsworth*, 147 Idaho 60, 66, 205 P.3d 1196, 1202 (2009). Idaho Appellate Rule 12(a), however, provides that an interlocutory order by a district court or administrative agency may be immediately appealed where the issue(s) presented "involved a controlling

question of law as to which there is substantial grounds for difference of opinion and in which an immediate appeal from the order or decree may materially advance the orderly resolution of the litigation." *See Budell v. Todd*, 105 Idaho 2, 665 P.2d 701 (1983).

"The intent of Idaho Appellate Rule 12 is to provide an immediate appeal from an interlocutory order if substantial legal issues of great public interest or legal questions of first impression are involved." *Aardema v. U.S. Dairy Systems, Inc.*, 147 Idaho 785, 789, 215 P.3d 505, 509 (2009).

This appeal presents pure legal issues of significant public importance and legal questions of first impression for this Court to decide.

B. The District Court Erred in Declining to Adopt the Limited Duty Rule, *i.e.*, the Baseball Rule, and Finding That the Appellants Complied With It.

1. Overview of the Limited Duty Rule

In addressing the scope of a baseball club's duty in the common law negligence and/or premises liability setting, the "limited duty rule" (also known as the baseball rule) has gained widespread acceptance in the United States.

The rule places two important requirements on baseball stadium owners and operators: (1) they must screen the area of the field behind home plate where the danger of being struck by a ball is the greatest; and (2) such screening must be of sufficient extent to provide adequate

protection for as many spectators as may reasonably be expected to desire such seating in the course of an ordinary game.[7]

Although this duty has slight variations in different jurisdictions, there is essentially national consensus that stadium owners and operators are not liable for injuries to spectators caused by foul balls leaving the field of play at baseball games – at least if there is adequate safety screening to protect spectators behind home plate, where the danger is most pronounced. *See supra,* fn 7.

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[7] *See generally* James L. Rigelhaupt, Jr., *Liability to Spectator at Baseball Game Who Is Hit by Ball or Injured as Result of Other Hazards of Game*, 91 A.L.R.3d 24 (1979); *See also Turner v. Mandalay Sports Entertainment, LLC*, 180 P.3d 1172 (Nev. 2008); *Lawson ex rel. Lawson v. Salt Lake Trappers, Inc.*, 901 P.2d 1013 (Utah 1995); *Bellezzo v. State*, 174 Ariz. 548, 851 P.2d 847 (Ct. App. 1992); ARIZ. REV. STAT. ANN. § 12-554 (1999) (statutorily adopted limited duty rule); *Hunt v. Portland Baseball Club*, 207 Or. 337, 296 P.2d 495 (Or. 1956); *Akins v. Glens Falls City Sch. Dist.*, 441 N.Y.S.2d 644, 424 N.E.2d 531 (N.Y. 1981); *Sparks v. Sterling Doubleday Enterprises, LP*, 752 N.Y.S.2d 79 (N.Y.S. Ct. App. Div. 2002); COLO. REV. STAT. ANN. § 13-21-120 (1994) (statutorily adopted limited duty rule); *Sciarrotta v. Global Spectrum*, 194 N.J. 345, 944 A.2d 630 (2008); N.J. STAT. ANN. § 2A:53A-43 – 2A:53A-48 (2006) (statutorily adopted limited duty rule); *Arnold v. City of Cedar Rapids*, 443 N.W.2d 332 (Iowa 1989); *Lorino v. New Orleans Baseball & Amusement Co.*, 16 La.App. 95, 133 So. 408 (1931); 745 ILL. COMP. STAT. ANN. 38/1 (1992) (statutorily adopted limited duty rule); *Costa v. Boston Red Sox Baseball Club*, 61 Mass.App.Ct. 299, 809 N.E.2d 1090 (Mass. App. Ct. 2004); *Benejam v. Detroit Tigers, Inc.*, 246 Mich.App. 645, 635 N.W.2d 219 (2001); *Alwin v. St. Paul Saints Baseball Club, Inc.*, 672 N.W.2d 570 (Minn. Ct. App. 2003); *Anderson v. Kansas City Baseball Club*, 231 S.W.2d 170, 173 (Mo. 1950); *Erickson v. Lexington Baseball Club*, 233 N.C. 627, 65 S.E.2d 140 (1951); *Hobby v. City of Durham and Durham Bulls Baseball Club, Inc.*, 569 S.E.2d 1 (N.C. Ct. App. 2002); *Cincinnati Baseball Club Co. v. Eno*, 112 OhioSt. 175, 147 N.E. 86 (1925); *Pakett v. The Phillies, L.P.*, 871 A.2d 304 (Pa. Commw. Ct. 2005); *Friedman v. Houston Sports Ass'n*, 731 S.W.2d 572 (Tex. App. 1987); *Tite v. Omaha Coliseum Corp.*, 144 Neb. 22 (Neb. 1943); *Perry v. Seattle School Dist. No. 1*, 66 Wash.2d 800, 405 P.2d 589 (1965); *Moulas v. PBC Productions Inc.*, 217 Wis.2d 449, 576 N.W.2d 929 (1998).

The limited duty rule identifies the duty of baseball stadium owners and operators with greater specificity than the usual standard provides. *See, e.g., Turner v. Mandalay Sports Entertainment, LLC*, 180 P.3d 1172, 1175 (Nev. 2008); *Benejam v. Detroit Tigers, Inc.*, 246 Mich.App. 645, 649, 635 N.W.2d 219, 223 (2001) (quoting *McNiel v. Ft. Worth Baseball Club*, 268 S.W.2d 244, 246 (Tex. Civ. App. 1954)). In this sense, the limited duty rule does not eliminate the stadium owners' and operators' duty to keep the premises in a reasonably safe condition or to exercise ordinary care to prevent unreasonable, foreseeable risks of harm to protect spectators against injury; rather, it defines that duty in detail. *See, e.g., Turner*, 180 P.3d at 1175.

This rule insures that those spectators desiring protection from foul balls will be accommodated and that seats in the most dangerous area of the stadium will be safe. *See, e.g., Lawson ex rel. Lawson v. Salt Lake Trappers, Inc.*, 901 P.2d 1013, 1015 (Utah 1995). At the same time, this rule recognizes baseball tradition and spectator preference by not requiring owners to screen the entire stadium. *See id.* As the Michigan Court of Appeals stated in *Benejam v. Detroit Tigers, Inc.*, 246 Mich.App. 645, 635 N.W.2d 219 (2001):

> [T]here 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). In other words, spectators know about the risk of being in the stands and, in fact, welcome that risk to a certain extent. On the other hand, the area behind home plate is especially dangerous and spectators who want protected seats should be able to find them in this area. Balancing all of these concerns, courts generally have adopted the limited duty doctrine that prevents liability if there

> are a sufficient number of protected seats behind home plate to meet the ordinary demand for that kind of seating.

Id. at 651-52, 635 N.W.2d at 222-23.

Thus, the limited duty rule strikes a balance between safety and preserving the essential character (including the innate risks) of baseball. *See, e.g., Akins v. Glens Falls City Sch. Dist.*, 441 N.Y.S.2d 644, 424 N.E.2d 531 (N.Y. 1981).

2. *Ruffing v. Ada County Paramedics*, 145 Idaho 943, 188 P.3d 885 (2008), Does Not Prevent Idaho Courts From Developing Common Law Duty Rules.

In the district court's Memorandum Decision on Defendants' Motion for Summary Judgment entered on May 23, 2011, the district court ruled that only the Legislature can adopt the limited duty rule based upon its interpretation of the Court's decision in *Ruffing v. Ada County Paramedics*, 145 Idaho 943, 188 P.3d 885 (2008). (Mem. Dec. on Defs' Mot. for Summ. J., R. Vol. I, pp. 804-12.) Appellants disagree with the district court's interpretation of *Ruffing*.

Ruffing involved a situation where a firefighter sustained injuries as a result of a paramedic backing an ambulance into a parked car – pinning his leg between the ambulance and the parked car. The firefighter's injuries occurred on duty and following an emergency call in which firefighters and a paramedic team responded. As a result of his injuries, the firefighter filed a personal injury suit against the Ada County Paramedics. The Ada County Paramedics then filed a motion for summary judgment, claiming Idaho's fireman's rule barred the firefighter's suit. The district court granted the Ada County Paramedics' motion for summary judgment. The firefighter appealed.

On appeal, the Court held that the fireman's rule did not preclude the action, as the conduct causing injury was not the same conduct that required the firefighter's presence at the scene of the medical emergency. *Id.* at 943. In overruling the district court's decision to grant summary judgment, the Court did not state that Idaho courts cannot decide the question of whether a legal duty should apply.[8] Rather, the Court found that the district court impermissibly expanded the fireman's rule in its application – beyond the recognized parameters of the rule. *Id.* at 946.

As stated by the Court in *Ruffing*, the fireman's rule simply says that "neither a firefighter nor a police officer may recover in tort when his injuries are caused by the same conduct that required his official presence." *Id.* (citing *Winn v. Frasher*, 116 Idaho 500, 501, 777 P.2d 722, 723 (1989)).

Ultimately, while the Court did not disagree with the district court that an expansion of the fireman's rule to also immunize paramedics from liability caused by the same conduct that required his/her official presence was logical, it found that "[i]t is the Legislature's prerogative to expand the rule should it desire to do so." *Id.* at 946 (emphasis added).

In this case, Appellants did not ask the district court to expand the limited duty rule in its application – beyond the recognized parameters of the rule. For instance, they did not ask the

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[8] In fact, it was the Court, not the Legislature, that decided to originally apply the fireman's rule in *Winn v. Frasher*, 116 Idaho 500, 777 P.2d 722 (1989).

district court to find that the limited duty rule should be expanded to immunize some other third-party in the baseball setting. Nor did they ask the district court to find that the limited duty rule should be expanded to include injuries other than those caused by foul balls. Appellants only asked the district court to find that the limited duty rule applies in the baseball setting to immunize baseball stadium owners and operators from liability when a spectator is injured by a foul ball if, and only if, the recognized requirements of the limited duty rule have been complied with.

There is a critical distinction between expanding a rule, as the district court did in *Ruffing*, and adopting a rule, as Appellants requested the district court to do here. The district court had the authority to adopt the limited duty rule under a long line of cases. *See, e.g., Chavez v. Barrus*, 146 Idaho 212, 223, 192 P.3d 1036, 1047 (2008) ("Whether a duty exists is a question of law"); *Bramwell v. South Rigby Canal Co.*, 136 Idaho 648, 650, 39 P.3d 588, 590 (2001) ("In negligence actions, the determination of whether there is a duty is a question of law to be decided by the court"); *Turpen v. Granieri*, 133 Idaho 244, 247, 985 P.2d 669, 672 (1999) ("Existence of duty is a question of law "); *Freeman v. Juker*, 119 Idaho 555, 556, 808 P.2d 1300, 1301 (1991) ("The question of whether a legal duty in fact exists is a question of law for the court to decide").

In support of its interpretation of *Ruffing*, the district court stated that "[t]he Idaho Legislature has, by statute, limited the duty of particular businesses and persons. For example, Idaho Code § 6-1101, et. seq. limits the scope of the duty that ski area operators owe to skiers. Idaho Code § 6-1201, et. seq. limits the scope of the duty that outfitters and guides owe to

recreational participants. These statutes demonstrate that our Legislature knows how to define the scope of duties owed in the case of particular high risk businesses. The Legislature has so far declined to do so with regard to the duty owed by baseball stadium owners." (Mem. Dec. on Defs' Mot. for Summ. J., R. Vol. I, pp. 804-12.)

While it is true that the Legislature has and can insulate entities/individuals from liability, *see, e.g.,* Idaho Code §§ 6-1101 and 6-1201, this Court has not ruled that the Legislature's involvement in such issues prevents courts in Idaho from developing common law duty rules. In fact, both of these statutes were passed before the Court adopted the fireman's rule in *Winn v. Frasher*, 116 Idaho 500, 777 P.2d 722 (1989). If the Court believed that Idaho courts cannot decide the parameters of duty, it would have said that in *Winn.*

Winn is also an Idaho Appellate Rule 12 case. In *Winn*, the defendants asked the district court to adopt the fireman's rule. The district court declined to adopt the fireman's rule and denied defendants' motion for summary judgment. The Court then accepted those defendants' permissive appeal and adopted the fireman's rule. *See id.*

The Legislature's occasional forays into insulating some business owners from liability have not prevented this Court or district courts from adopting common law duty rules. If courts in Idaho are not permitted to adopt common law duty rules, as the district court suggests in its Memorandum Decision on Defendants' Motion for Summary Judgment entered on May 23, 2011, then it has effectively overruled a long line of cases, including *Turpen*, which

unequivocally establish that whether a legal duty exists is a question of law for courts to decide.

3. This Court Should Adopt the Limited Duty Rule.

The Appellants request this Court adopt the limited duty rule and find that owners and operators of baseball stadiums/fields in Idaho are not liable for injuries to spectators caused by foul balls at baseball games so long as (1) there is screening behind the home plate area; and (2) such screening is of a sufficient extent to provide adequate protection for as many spectators as may reasonably be expected to desire such seating in the course of an ordinary game.

The question of whether a legal duty exists is a question of law for the courts to decide. *See e.g., Chavez*, 146 Idaho at 223, 192 P.3d at 1047; *Bramwell*, 136 Idaho at 650, 39 P.3d at 590; *Turpen*, 133 Idaho at 247, 985 P.2d at 672; *Freeman*, 119 Idaho at 556, 808 P.2d at 1301. There is a general proposition in Idaho that every person, in the conduct of his business, has a duty to exercise ordinary care to prevent unreasonable, foreseeable risks of harm to others. *Turpen*, 133 Idaho at 247, 985 P.2d at 672.

"The duty not to be negligent is only a duty to take reasonable precautions against risk of undue harm." *Harrison v. Taylor*, 115 Idaho 588, 596, 768 P.2d 1321, 1329 (1989). Nonetheless, Idaho appellate courts have held that not every person or entity owes a tort duty to everyone else in all circumstances. *See, e.g., Turpen,* 133 Idaho at 247-48, 985 P.2d at 672-73 (No duty for a landlord to thoroughly screen tenants or refuse to rent to college students); *Winn*, 116 Idaho at 500, 777 P.2d at 722 (Neither a firefighter nor a police officer may recover in tort when his injuries are caused by the same conduct that required his official presence); *Coughlan v.*

Beta Theta Pi Fraternity, 133 Idaho 388, 987 P.2d 300 (1999) (No affirmative duty to aid or protect a third person absent a special relationship); *Boots ex rel. Boots v. Winters*, 145 Idaho 389, 393-94, 179 P.3d 352, 356-57 (Ct. App. 2008) (No duty for a landlord to protect third persons from a tenant's dog).

In determining whether a duty will arise in a particular context, the Court has identified several factors to consider. *Turpen*, 133 Idaho at 247, 985 P.2d at 672. The factors include the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for risk involved. *Id.*

Utilizing the *Turpen* factors to adopt the limited duty rule and clarify the duty stadium owners and operators owe to spectators in the baseball setting is unnecessary under these circumstances because the *Turpen* factors have typically been utilized in determining whether there is no duty in a particular situation – as opposed to a situation such as this where the Appellants are saying a different duty should apply, *i.e.*, a limited duty. Nonetheless, the *Turpen* factors support a determination that the limited duty rule should apply to situations where a spectator is injured by a foul ball at a baseball game.

Foul balls are an unavoidable part of baseball. (*See* Aff. of Rahr, ¶ 14, R. Vol. I, pp. 551-52.) Fans go to games specifically to catch foul balls and their access to foul balls is an undeniable part of the game. *See, e.g., Rudnick v. Golden West Broadcasters*, 156 Cal.App.3d 793, 802, 202 Cal.Rptr. 900, 909 (Cal. App. 1984) ("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"). Imposing a general duty of care on the Appellants, rather than the limited duty rule, would be tremendously burdensome and necessitate changing the nature of the game at Memorial Stadium at the expense of the community. *See, e.g., Benejam*, 246 Mich.App. at 654, 635 N.W.2d at 223 ("the rule prevents burgeoning litigation that might signal the demise or substantial alteration of the game of baseball as a spectator sport").

Foul balls are hit out of the field of play at Memorial Stadium all the time. (*See* Rahr Aff., ¶ 14, R. Vol. I, p. 551.) They fly into the parking lot area where they can strike cars. (*See* Evett Aff., Ex. A (Deposition of Bud Rountree), 50:16-19, R. Vol. I, p. 437; Ex. B (Deposition of Linda Ballard), 33:13-34:4, R. Vol. I, p. 462; and Ex. C (Deposition of Albert Stanton Tollinger), 33:10-22, R. Vol. I, p. 483.) Even though the Boise Hawks have netted the vast majority of the stadium, foul balls can still make it over the top of the netting and land around spectators and in the parking lot. (Evett Aff., Ex. A (Deposition of Bud Rountree), 50:15-51:15, R. Vol. I, p. 437 and Ex. C (Deposition of Albert Stanton Tollinger), 34:1-23, R. Vol. I, p. 483.)

There are only two ways for the Boise Hawks to protect everyone in the vicinity of Memorial Stadium from the possibility of being struck by a foul ball: (1) net every inch of the

stadium from foul post to behind home plate and erect netting several hundred feet high to prevent foul balls from leaving the park; or (2) shut down the baseball club. Neither approach is acceptable as neither approach is reasonable and would either alter the game beyond recognition or destroy it.

In addition to being overly burdensome and harmful to the community, imposing a general duty of care on the Boise Hawks does not comport with the *Turpen* test in other respects. Because foul balls are part of baseball, and being struck by a foul ball is an unavoidable risk, there is no "closeness or connection" between the Boise Hawks' conduct and Mr. Rountree's injury. *Turpen*, 133 Idaho at 247, 985 P.2d at 672. The mere act of putting a baseball game on presents a risk that spectators will be hit, even those behind home plate. Similarly, there is no moral blame attached to the Boise Hawks' conduct, because the risk of being struck by a foul ball is part of the game. *See id.*

The alternative approach advocated by Mr. Rountree is unworkable, as it would require a jury determination every time a spectator is hit by a ball at Memorial Stadium.

Illustrating that such an approach is unworkable, Mr. Rountree argued in his Opposition to Defendants Boise Baseball, LLC, Boise Hawks Baseball Club, LLC, Home Plate Food Services, LLC and Memorial Stadium, Inc.'s Motion for Summary Judgment that Memorial Stadium is not safe enough because spectators can be struck by foul balls. (*See* Pl.'s Mem. In Opp'n to Defs' Mot. For Summ. J., R. Vol. I. pp. 720-25.) Mr. Rountree simultaneously took the untenable position that Memorial Stadium is too safe (the stadium has more netting than any

ballpark in the country) and therefore spectators cannot perceive the risk of being struck by a foul ball. (*See id.*) Mr. Rountree's position demonstrates there is no connection between the harm and the conduct.

Mr. Rountree submitted an eighty-page affidavit from a human factors expert (Joellen Gill), who has no experience with barrier netting or sporting events to support his position. Mr. Rountree's position is paradoxical and demonstrates why every jurisdiction that has addressed a situation such as this has chosen to adopt the limited duty rule.

The alternative is that the baseball club cannot win, and doing more than the industry requires is actually cited as evidence that the stadium is unsafe. (*See* Gill Aff., ¶ 39 (arguing that more netting reduces the perceived risk of being hit), R. Vol. I, p. 638.)

In practical terms, if this Court applies a simple negligence standard applicable to land owners and invitees, the Boise Hawks will have to net every single inch of Memorial Stadium from foul post to behind home plate and erect netting several hundred feet high to prevent foul balls from going over the top of the netting and/or leaving the park. To the Boise Hawks' knowledge, Memorial Stadium would be the only baseball stadium in the country with such a netting configuration.

Being a spectator at a baseball game presents innate risks that cannot be eliminated. Foul balls at baseball games are random and unavoidable. There is no possible way for owners and operators of baseball stadiums and/or fields in Idaho to protect themselves from liability without a rule specifically defining the duty that is owed to these spectators. The limited duty rule

defines this duty in detail. Without such a rule, as the district court stated in its Memorandum Decision on Defendants' Motion for Summary Judgment and Appellants discuss *supra*, each case will have to be presented to a jury. Such a result will have consequences to the general public and the game of baseball in Idaho.[9]

The potential ramifications of not adopting such a rule in Idaho are much broader than the context of this lawsuit. There are hundreds, if not thousands, of public and private baseball and softball fields throughout Idaho. Most, if not all, of these fields have nothing more than a small chain link backstop around the home plate area. Every town in Idaho has a baseball and/or softball field (or several dozen) where spectators are at risk of being hit by a foul ball. Without the limited duty rule, there is no way for an owner (private or public) to insulate itself from liability without netting or fencing all spectator areas.

Foul balls and the risk of injury to baseball spectators are part of the game of baseball. The only way to preserve the nature of a game in Idaho is by adopting the limited duty rule.

4. Neighboring States Have Recently Adopted the Limited Duty Rule.

In a case remarkably similar to this one, the Nevada Supreme Court in *Turner v. Mandalay Sports Entertainment, LLC*, 180 P.3d 1172 (Nev. 2008) affirmed summary judgment

[9] "By providing greater specificity with regard to the duty imposed on stadium owners, the rule prevents burgeoning litigation that might signal the demise or substantial alteration of the game of baseball as a spectator sport." *Benejam*, 246 Mich.App. at 654, 635 N.W.2d at 223.

for a minor league baseball team where a spectator was injured when a foul ball struck her in the face as she sat in the baseball stadium's concession area.

In affirming the trial court's judgment, the court applied the limited duty rule and found that although a proprietor owes a general duty to use reasonable care to keep the premises in a reasonably safe condition for use, the risk of an occasional foul ball being hit into a concessions area – which was located in the upper concourse level above the stands, with no barrier netting surrounding it – does not amount to an unduly high risk of injury. *Id.* at 1176.

The court also found that the plaintiff failed to demonstrate that any other spectator had suffered injuries as a result of a foul ball landing in the concessions area. *Id.* The court went on to state that it recognized the importance of establishing parameters around personal injury litigation stemming from baseball and that the stadium owner satisfied the applicable duty of care by providing sufficient protected seating under the limited duty rule. *Id.* at 1176 and fn. 17.

Likewise, in *Lawson ex rel. Lawson v. Salt Lake Trappers, Inc.*, 901 P.2d 1013 (Utah 1995), the Utah Supreme Court affirmed summary judgment for the minor league baseball team and city where a spectator at a baseball game was injured when a foul ball struck her in the head while sitting in an unprotected seating area along the first-base line. In affirming the trial court's judgment, the court applied the limited duty rule and found that although a baseball facility must use reasonable care in providing a reasonably safe place for its patrons, having provided adequate seating and protection for those spectators seated in the area behind home plate – the area considered to be the most dangerous – the baseball facility had no duty to provide additional

screening along the baselines of its field where the risk of being struck by a foul ball is considerably less. *Id.* at 1015-16.

This Court should join the vast majority of courts throughout the country, including neighboring states, which have adopted the limited duty rule.

5. The Boise Hawks Complied With the Limited Duty Rule.

The Appellants request this Court enter judgment in their favor because they have complied with the limited duty rule.

Under the circumstances of this case, the Boise Hawks have fulfilled the first component of the limited duty rule by providing protection for the spectators in what is considered the most dangerous section of the stands at Memorial Stadium – the home plate area. (*See* Anderson Aff., ¶¶ 10-13, R. Vol. I, pp. 512-13; *See also* Ex. A (Diagram of Memorial Stadium used by Allsports), R. Vol. I, p. 515 and Ex. C (Photographs of the barrier netting at Memorial Stadium), R. Vol. I, pp. 525-43.) Memorial Stadium exceeds industry standards by providing extra barrier netting almost all the way down the first-base and third-base lines at Memorial Stadium. (*Id.*) In Mr. Anderson's own words, "[t]he barrier netting at Memorial Stadium has more extensive coverage than any other baseball stadium I have worked on or observed in my 43 years in the netting industry." (Evett Aff., ¶ 9, R. Vol. I, p. 512.)

The Boise Hawks have also fulfilled the second component of the limited duty rule by providing adequate protection for as many spectators as may reasonably be expected to desire such seating in the course of an ordinary game at Memorial Stadium. (*See* Rahr Aff., ¶ 5,

R. Vol. I, p. 550; *See also* Anderson Aff., Ex. A (Diagram of Memorial Stadium used by Allsports), R. Vol. I, p. 515.) Generally this component is satisfied as long as there is an adequate amount of protected seating around the home plate area alone. *See, e.g., Benejam*, 635 N.W.2d at 223; *Akins*, 441 N.Y.S.2d at 645-47, 424 N.E.2d at 532-34; *Arnold v. City of Cedar Rapids*, 443 N.W.2d 332, 333 (Iowa 1989).

The Boise Hawks have exceeded this industry standard by placing barrier netting that is approximately 30 feet in height almost all the way down the first-base and third-base lines of Memorial Stadium (as discussed *supra*). (*See* Rahr Aff., ¶ 5, R. Vol. I, p. 550; *See also* Anderson Aff., ¶ 12, R. Vol. I, p. 513, Ex. A (Diagram of Memorial Stadium used by Allsports), R. Vol. I, p. 515 and Ex. C (Photographs of the barrier netting at Memorial Stadium), R. Vol. I, pp. 525-43.)

At the time of the August 13, 2008, accident, Mr. Rountree had four season ticket seats in the Viper section of Memorial Stadium – Row H, Seats 7-10 – which has barrier netting between Mr. Rountree's seats, as well as all other seats in the Viper section of Memorial Stadium, and the field of play. (Rahr Aff., ¶ 19, R. Vol. I, p. 552.) The night of the accident, however, Mr. Rountree chose not to sit in his season ticket seats. (*See* Evett Aff., Ex. B (Deposition of Linda Ballard), 30:17-32:5, R. Vol. I, p. 461.) Instead, Mr. Rountree chose to enter and view the game from the Executive Club – a location in Memorial Stadium that does not have barrier netting between it and the field of play. (*See* Evett Aff., Ex. B (Deposition of Linda Ballard), 34:16-35:9, R. Vol. I, p. 462; *See also* Rahr Aff., ¶ 9, R. Vol. I, p. 551.)

This Court should find that the limited duty rule applies and that the Appellants are relieved from liability because they have provided protection for spectators in what is considered the most dangerous section of the stands and have netted more extensively than the limited duty rule requires.

C. The District Court Erred in Finding That Primary Implied Assumption of Risk is Not A Viable Defense in Idaho, and That Only Written or Oral Consent Under *Salinas v. Vierstra*, 107 Idaho 984, 695 P.2d 369 (1985) Is a Viable Assumption of Risk Defense.

Appellants seek clear guidance on whether primary implied assumption of risk remains a viable defense in Idaho.

Assumption of risk has been described in two ways: in its primary sense, it is an alternative expression for the proposition that defendant was not negligent, that is, there was no duty owed or there was no breach of an existing duty. *See, e.g., Lawson ex rel. Lawson*, 901 P.2d at 1016. In its secondary sense, assumption of risk is an affirmative defense to an established breach of duty and as such is a phase of contributory negligence. *See id.*

Stated another way, primary implied assumption of risk is commonly understood to arise when a plaintiff impliedly assumes those risks that are *inherent* to a particular activity.[10] *See, e.g., Turner*, 180 P.3d at 1177 (citing *Davenport v. Cotton Hope Plantation*, 333 S.C. 71, 508

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[10] The concept of implied assumption of risk, in its "primary" sense, is frequently used interchangeably with the concept of "consent" – particularly in the sports setting. *See, e.g., Turcotte v. Fell*, 68 N.Y.2d 432, 502 N.E.2d 964, 510 N.Y.S.2d 49 (N.Y. Ct. App. 1986); *Neinstein v. Los Angeles Dodgers, Inc.*, 185 Cal.App.3d 176, 229 Cal.Rptr. 612 (1986); *Hunt v. Portland Baseball Club*, 207 Or. 337, 296 P.2d 495 (Or. 1956).

S.E.2d 565, 569-71 (1998)). Whereas secondary implied assumption of risk is commonly understood to arise when a plaintiff knowingly encounters a risk created by a defendant's negligence, *i.e.*, as a form of contributory negligence. *See Winn*, 116 Idaho at 503, 777 P.2d at 725; *See also Davenport*, 508 S.E.2d at 571.

Secondary implied assumption of risk was discussed by this Court in *Salinas v. Vierstra*, 107 Idaho 984, 695 P.2d 369 (1985), while primary implied assumption of risk was discussed by this Court in *Winn v. Frasher*, 116 Idaho 500, 777 P.2d 722 (1989).

The Court in *Salinas* rejected implied assumption of risk in the secondary sense, *i.e.,* as a form of contributory negligence, but it did not reject implied assumption of risk in the primary sense. *See Winn*, 116 Idaho at 503, 777 P.2d at 725. The district court, however, declined to consider the language in *Winn* and relied solely on the language in *Salinas* in denying Appellants' motion for summary judgment on the issue of whether primary implied assumption of risk remains a viable assumption of risk defense in Idaho.

Specifically, in the district court's Memorandum Decision on Defendants' Motion for Summary Judgment entered on May 23, 2011, the district court ruled that "[t]his Court is constrained to abide by the language in *Salinas*. Because *Salinas* only recognized a consent exception for oral and written expressions of consent, the Court declines to analyze whether Plaintiff may have impliedly consented to the risk in this case." (Mem. Dec. on Defs' Mot. for Summ. J., R. Vol. I, pp. 804-12.)

Likewise, Mr. Rountree ignored the language in *Winn* and relied entirely on the language in *Salinas* to support his position on this issue. (*See* Pl.'s Mem. In Opp'n to Defs' Mot. For Summ. J., R. Vol. I., pp. 729-32; *See also* Tr. on Defs' Mot. for Summ. J., Vol. I, p. 21, l. 6 - p. 22. l. 7.)

In *Salinas*, the Court held that Idaho's comparative negligence statute – Idaho Code § 6-801 – applies to the use of assumption of risk as a defense and abolished its legal effect in Idaho, with the exception of where a plaintiff expressly assumes (orally or in writing) the risk involved. *See Salinas*, 107 Idaho at 989-90, 695 P.2d at 374-75. In order to avoid any misunderstanding and confusion, the *Salinas* Court stated that the terminology of assumption of risk should no longer be used because express assumption of risk sounds in contract and not tort. *Id.* Rather, the correct terminology to use to assert this defense is "consent." *Id.*

The Court in *Winn*, however, was of the opinion that primary implied assumption of risk is still a viable defense in Idaho, and found that the facts in *Salinas* were not appropriate to overrule implied assumption of risk in the primary sense. Specifically, the *Winn* Court said that the facts in *Salinas* were only appropriate for the application of implied assumption of risk in the secondary sense and therefore any implied rejection of implied assumption of risk in the primary sense by the *Salinas* Court was *dicta*. *See Winn*, 116 Idaho at 503, 777 P.2d at 725.

The holding in *Salinas* is now almost thirty years old and the Court has not revisited the issue of "consent" since that time. Considering the language in *Winn*, a case that was decided

four years after *Salinas*, and the district court's ruling on this issue, there is an apparent conflict between *Salinas* and *Winn*.

Considering the adoption of Idaho's comparative negligence statute – Idaho Code § 6-801 – the abolishment of secondary implied assumption of risk, with the exception of where a plaintiff expressly consents (orally or in writing) to a risk created by a defendant's negligence, makes complete sense because with the adoption of comparative negligence, any negligence on the part of a plaintiff is not a complete bar to his or her case. Rather, any negligence on the part of a plaintiff is simply afforded weight under the comparative negligence scheme. *See Salinas*, 107 Idaho at 988-89, 695 P.2d at 373-74; I.C. § 6-801.

Under this same rationale, the survival of primary implied assumption of risk makes complete sense because secondary implied assumption of risk was based upon outdated notions of contributory negligence, whereas primary implied assumption of risk is not. *See, e.g., Winn*, 116 Idaho at 503, 777 P.2d at 725; *Lawson ex rel. Lawson*, 901 P.2d at 1016; *Davenport*, 508 S.E.2d at 571. Rather, primary implied assumption of risk applies when a plaintiff impliedly

assumes those risks that are *inherent* to a particular activity.[11] *See, e.g., Turner*, 180 P.3d at 1177; *Lawson ex rel. Lawson*, 901 P.2d at 1016.

The survival of primary implied assumption of risk also makes complete sense due to the impracticality of "consenting" orally or in writing, particularly in certain contexts – like being a spectator at a sporting event. The impracticability of applying the *Salinas* rule to spectator events is apparent, as it would be difficult, if not impossible, to obtain the oral or written consent of each spectator before a game. *See, e.g., Turcotte v. Fell*, 68 N.Y.2d 432, 437-39, 502 N.E.2d 964, 967-68, 510 N.Y.S.2d 49, 52-53 (N.Y. Ct. App. 1986); *Neinstein v. Los Angeles Dodgers, Inc.*, 185 Cal.App.3d 176, 182-84, 229 Cal.Rptr. 612, 615-16 (1986); *Hunt v. Portland Baseball Club*, 207 Or. 337, 347-48, 296 P.2d 495, 499-50 (Or. 1956).

Even in a different but related setting, like where injuries are sustained while engaged in participatory sports the doctrine of primary implied assumption of risk has a very practical application. If *Salinas* abrogated primary implied assumption of risk, then sports participants in Idaho could be sued by a co-participant for injuries sustained as a result of voluntarily playing

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[11] As one court noted, "being struck by a foul ball is one of the natural risks assumed by spectators attending professional games." *Lawson ex rel. Lawson*, 901 P.2d at 1016 (quoting *Quinn v. Recreation Park Ass'n*, 3 Cal.2d 725, 46 P.2d 144, 146 (1935)). Another court noted, "[N]o adult of reasonable intelligence, even with the limited experience of the plaintiff, could fail to realize that he would be injured if he was struck by a thrown or batted ball ... nor could he fail to realize that foul balls were likely to be directed toward where he was sitting. No one of ordinary intelligence could see many innings [of baseball] without coming to a full realization that batters cannot and do not control the direction of the ball." *Swagger v. City of Crystal*, 379 N.W.2d 183, 185 (Minn. App. 1985).

sports like baseball, softball, basketball, boxing, football, soccer, hockey, golf, lacrosse, martial arts, among others, despite the fact that there are *inherent* risks to these sports that are known to participants and they consent to accept by their participation in the sporting event.[12] *See, e.g., American Powerlifting Ass'n v. Cotillo*, 401 Md. 658, 669-71, 934 A.2d 27, 34-35 (Md. 2007) (quoting *Conway v. Deer Park Union Free School Dist. No. 7*, 234 A.D.2d 332, 651 N.Y.S.2d 96, 97 (1996)) ("Voluntary participants in sports activities may be held to have consented, by their participation, to those injury-causing events which are known, apparent, or reasonably foreseeable consequences of their participation."); *Sanchez v. Candia Woods Golf Links*, 161 N.H. 201, 204, 13 A.3d 268, 270 (N.H. 2010) ("Participating in a sport gives rise to commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation.").

This Court should find that primary implied assumption of risk remains a viable assumption of risk defense in Idaho.

IV. CONCLUSION

Boise Baseball, Boise Hawks and Home Plate respectfully request this Court find that the district court erred in declining to adopt the limited duty rule, *i.e.,* the baseball rule, and find that Boise Baseball, Boise Hawks and Home Plate complied with this rule, and that the district court

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[12] For instance, does this mean that every time anyone plays basketball at the park they need to have everyone they intend to play with either orally say "I consent to the risk involved," or sign a written release from each player stating that they will not hold the identified individual liable for an injury that occurs while playing the game?

erred in declining to consider whether primary implied assumption of risk remains a viable defense in Idaho.

DATED this 8th day of March, 2012.

ELAM & BURKE, P.A.

By: _____ for
Joshua S. Evett, of the firm
Attorneys for Defendants/Appellants Boise Baseball, LLC, Boise Hawks Baseball Club, LLC and Home Plate Food Services, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of March, 2012, I caused a true and correct copy of the foregoing document to be served as follows:

Wm. Breck Seiniger, Jr. Seiniger Law Offices, P.A. 942 Myrtle Street Boise, ID 83702 Attorney for Plaintiff/Respondent Bud Rountree	____ U.S. Mail __✓__ Hand Delivery ____ Federal Express ____ Facsimile– 345-4700

_____ for
Joshua S. Evett