Association of Defense Counsel of Northern California and Nevada

ASCDC
Association of Southern California Defense Counsel

April 30, 2020

Letter Supporting Review
Cal. Rules Court, r. 8.500(g)

Chief Justice Tani G. Cantil-Sakauye
Justice Ming W. Chin
Justice Carol A. Corrigan
Justice Goodwin Liu
Justice Mariano Florentino-Cuéllar
Justice Leondra R. Kruger
Justice Joshua P. Groban
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Summer J. v. United States Baseball Federation* No. S261473

Dear Honorable Justices,

Pursuant to Rule 8.500(g) of the California Rules of Court, the Association of Defense Counsel of Northern California and Nevada ("ADC-NCN") and the Association of Southern California Defense Counsel ("ASCDC") write jointly to urge the Court to grant the petition for review in this case.

Interest of the Requesting Organizations

Northern California and Nevada Civil Defense Counsel. ADC-NCN is celebrating its 60th anniversary this year, and currently numbers approximately 800 leading attorneys primarily engaged in the defense of civil actions. Members represent civil defendants of all stripes, including businesses, individuals, HOAs, schools and municipalities and other public entities. Members have a strong interest in the development of substantive and procedural law in California, and extensive experience with civil matters

generally. ADC-NCN's Nevada members are interested in the development of California law because Nevada courts often follow the law and rules adopted in California.

Southern California Civil Defense Counsel. ASCDC is the nation's largest and preeminent regional organization of lawyers who specialize in defending civil actions. It has over 1,100 attorneys in Central and Southern California, among whom are some of the leading trial and appellate lawyers of California's civil defense bar. ASCDC is actively involved in assisting courts on issues of interest to its members. In addition to representation in amicus appellate matters, ASCDC provides its members with professional fellowship, specialized continuing legal education, representation in legislative matters, and multifaceted support, including a forum for the exchange of information and ideas.

Although ASCDC and ADC-NCN are separate organizations, they coordinate from time to time on matters of shared interest, such as this letter. Together and separately, they have appeared as *amicus curiae* in many cases before both the California Supreme Court and Courts of Appeal across the state to express the interests of their members and their members' clients, a broad cross-section of California individuals, businesses, and organizations. The Associations and their members have a particular interest in issues regarding primary assumption of risk, issues that come up repeatedly in the defense of civil personal injury matters. (See *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148 [Associations appearing as amici curiae in this Court].)

No party has paid for or drafted this letter.

Why review is needed

Review is needed for both "uniformity of decision" and to "settle an important question of law." (Rules of Court, rule 8.500(b)(1).) The Court of Appeal's decision breaks with decades of authority on both the specific issue presented, whether foul balls are a part of the game of baseball and watching it, and on the larger issues of duty and assumption of risk at sporting and other public events. The decision represents a sea-change in the law that will

have far-reaching consequences affecting every collegiate, scholastic, and youth sports program in the state, imposing potentially ruinous new requirements.

The *Summer J.* opinion's new fan-experience changing rule. *Summer J.* addresses the primary assumption of risk duty doctrine in the context of spectators at sporting events. It creates novel duties owed to spectators by sporting event venues and organizers that far exceed the duties that the sports participants themselves owe to each other or to those same spectators. Under *Summer J.*, sports organizers and venues owe a duty to "increase safety and minimize the risk of injury to spectators," even if doing so substantially changes the fan experience.

It *will* fundamentally change the nature of the fan experience if fans can no longer sit courtside at basketball games, fans cannot catch home run or foul balls, or Little League parents are not allowed in the stands to watch their children because the League lacks the resources to fortify the stands.

***Summer J.* rejects, and conflicts with, well-established, universally recognized law.** *Summer J.* rejects the considered opinion of no less than Chief Justice Benjamin Cardozo in *Murphy v. Steeplechase Amusement Co.* (1929) 250 N.Y. 479, 166 N.E.173, 174 (Cardozo, C.J.): "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.... The timorous may stay at home." (The *Murphy* rule).

Until now, California has always followed the *Murphy* rule. (E.g., *Quinn v. Recreation Park Ass'n.* (1935) 3 Cal.2d 725 [player owed no duty to spectator re negligently batted ball]; *Brown v. San Francisco Ball Club, Inc.* (1950) 99 Cal.App.2d 484 [ballclub/stadium owner owed no duty to fan injured by ball accidently thrown into stands]; compare *Rudnick v. Golden West Broadcasters* (1984) 156 Cal.App.3d 793, 802 [Opn. of Crosby, J.: "[T]here is no reason to doubt the continuing vitality of the duty analysis of the *Quinn* line of cases…. 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. Reasonable screening is defined in the expectations of the fans and the traditions of the national pastime itself. The law of torts imposes no higher standard"] *with id*. at pp. 802-805 [Trotter, P.J., concurring in result, arguing that comparative fault replaced assumption of the risk in the baseball context and generally]; see Fleming, *The Supreme Court of California 1974–1975 Foreword: Comparative Negligence at Last—By Judicial Choice* (1976) 64 Cal.L.Rev. 239, 264 [accurately predicting that primary assumption of risk would continue to exist post-adoption of comparative fault].)

For over 90 years, the *Murphy* rule has been the near-universal rule across the nation. (E.g., *Coomer v. Kansas City Royals Baseball Corp.* (Mo. 2014) 437 S.W.3d 184, 194 fn. 6 ["This 'no duty' or 'limited duty' rule for claims by baseball spectators has been dubbed the Baseball Rule and has been adopted by every court to consider it, save one"]; *Benejam v. Detroit Tigers, Inc.* (Mich.Ct.App. 2001) 246 Mich.App. 645, 650 [635 N.W.2d 219, 221-222] ["review of precedents from other jurisdictions finds overwhelming, if not universal, support for the limited duty rule," and noting that the contrary decisions in Illinois were overruled by statute; "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)"]; *Akins v. Glens Falls City Sch. Dist.* (N.Y. 1981) 53 N.Y.2d 325, 330 [441 N.Y.S.2d 644, 424 N.E.2d 531, 533] ["many spectators prefer to sit where their view of the game is unobstructed by fences or protective netting and the proprietor of a ball park has a legitimate interest in catering to these desires"]; see *Zitter, Liability to Spectator at Baseball Game Who Is Hit by Ball or Injured as Result of Other Hazards of Game—Failure to Provide or Maintain Sufficient Screening* (2013) 82 A.L.R.6th 417, 417 ["Part of the experience of attending a baseball game is that many of the dozens of baseballs used in each game are hit out of play into foul territory, into the backstop and screens, and into the stands. Most fans would love to return from a game with a souvenir of the actual play, and some even bring gloves with them in the hope of making a catch"]; Leigh Augustine, Esq., *Who Is Responsible When Spectators Are Injured While*

Attending Professional Sporting Events? (2008) 2008 Den. U. Sports & Ent. L.J. 39, 40, 42-46 ["Courts operate under the premise that spectators assume the risk of attending a game/event, and that it should be obvious to the spectator that a baseball, puck, tire, or golf ball can hit them. 'Only when the plaintiff introduces adequate evidence that the amusement facility in which he was injured deviated in some relevant respect from established custom will it be proper for an "inherent-risk" case to go to the jury,'" collecting cases].)

***Summer J.* imposes a radical, new duty on a broad swath of California sports leagues, organizations and venues.** *Summer J.* refers to the *Murphy* rule and the issue before the court as a "baseball rule," as if the duty issue were unique to that sport. But the issue of a sport organizer's or venue's duty to a spectator is of general interest to *all* spectator sports. The duty issue is equally relevant to spectators of basketball, hockey, golf, motor sports, bicycle racing, and any other spectator sport. Spectators *are* part of the experience and being close to the action is part of the spectator experience. There is a reason why the court-side Warriors or Lakers seats are more expensive, why people want to be trackside or in the infield at a racing event, why front-row baseball seats are more desired. They enhance the *spectator's* experience. Imposing a duty to protect against the incidental effects of watching the competition close up will change the fan experience, no less than imposing a duty to avoid injury during games would fundamentally change the nature of the competition. (See *Knight v. Jewett* (1992) 3 Cal.4th 296, 319 ["imposition of *legal liability* for such (game-rule violating) conduct might well alter fundamentally the nature of the sport," original italics].)

Nor is this an issue relegated to *professional* sports. Whatever duty is owed to spectators is likely owed equally by amateur, college, high school, and youth teams and venues across California. (In *Summer J.*, the defendant federation is not part of Major League Baseball; and a college owns the venue.) *Summer J.* radically changes *statewide* the liability landscape for schools, public-entity recreational facilities, youth-sports organizations, and amateur leagues. Its new spectator-liability duty will just as surely decrease the number of sporting events, or reduce spectator involvement, as imposing liability on athletes for their conduct during games would. *Summer J.*

imposes this far-reaching novel duty by discarding a century worth of universally recognized law. It cries out for this Court's review.

***Summer J.* uses professional baseball's new yet-to-be-implemented netting standards to impose a new duty retrospectively on non-professional defendants.** A particularly troubling aspect of the *Summer J.* decision is that it applies evolving *professional* sporting event standards *retroactively* to impose a duty on non-professional venues with less resources. *Summer J.* involved an injury in 2013 at a college baseball stadium being used to run a non-Major League Baseball tournament. *Summer J.* held that evolving *professional* Major League Baseball standards regarding the use of netting, first considered in 2019 and to be imposed for the first time during the now-suspended 2020 season, should inform what duty was owed *in 2013* in the operation of a *collegiate* stadium.

Duty is not an after-the-fact 20/20 hindsight consideration. Rather, the existence of tort duties informs citizens of what steps, based on current standards, they must take to prevent harm. Judging a 2013 duty based on just-emerging 2019 standards is not just unfair, it undermines certainty and any meaning of a prospective duty. It is as if athletes were to be subject to legal liability for violating game rules (e.g., blocking home plate, a targeting tackle) that were not imposed until years after the incident. The issue is compounded by judging collegiate (or by extension, high school, local park recreation, or youth league) organizations and venues by the duties that might be owed by well-financed professional sports leagues.

***Summer J.* further confuses whether the standard for avoiding primary assumption of risk is increasing the risk or merely failing to alleviate inherent risks.** The *Summer J.* opinion creates further confusion as to what a sport organizer or venue owner must do to alleviate a sport's risk. Numerous cases hold that the organizer or premises owner must not *increase* the sport's inherent risks but need not actively mitigate those risks. (E.g., *Souza v. Squaw Valley Ski Corp.* (2006) 138 Cal.App.4th 262, 266-268 [ski mountain has no obligation to pad plainly visible collision hazards; collecting cases]; *Balthazor v. Little League Baseball, Inc.* (1998) 62 Cal.App.4th 47, 50-52 [league not liable to batter hit by wild pitch]; see *Kim*

v. County of Monterey (2019) 43 Cal.App.5th 312, 326-328 [race track operator potentially liable because it *increased* risk of harm]; *Hass v. RhodyCo Productions* (2018) 26 Cal.App.5th 11, 38 [failure to adhere to required emergency services plan for half-marathon; "While 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," first italics added, second and third italics original]; *Grotheer v. Escape Adventures, Inc.* (2017) 14 Cal.App.5th 1283, 1300-1302 [event operator not required to take measures to increase safety or minimize inherent risk unless it can do so without interfering with the fundamental nature of the activity experience; no duty to take measures to prevent crash landings which are inherent in hot air ballooning].)

Summer J.'s new duty creates a conflict in the law that leaves sports organizations and venue owners confounded as to their duties. Do they have to affirmatively take steps to mitigate risks inherent in the sport or being a spectator? *Summer J.* says "yes"; *Souza* and *Balthazar* say "no"; and *Haas* and *Grotheer* are somewhere in the middle. And what does it mean to fundamentally alter the nature of the spectator experience? Does putting netting between fans and professional ballplayers that both obscures views and limits opportunities to reach out and catch balls do so? Does putting netting between parents and Little League or high school players do so? Sports organizations and venues are left to wonder without clear guidance.

Only review by this Court can provide such guidance and resolve the confusion over the proper scope of their duties.

Conclusion. *Summer J.* is a radical remaking of the law that moves long-established legal goal posts, or perhaps more appropriately, foul poles. It creates confusion in the law, including massive new duties for sports organizations and venues with no clearly defined boundary. Review is not only appropriate, it is necessary to clean up what has become an unclear area of the law.

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On April 30, 2020, I served the foregoing document described as: **LETTER SUPPORTING REVIEW** on the parties in this action by serving:

SEE ATTACHED SERVICE LIST

(X) I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

Executed on April 30, 2020, at Los Angeles, California.

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

/s/ Monique N. Aguirre
Monique N. Aguirre

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