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## **Edward C. v. City of Albuquerque: The New Mexico Supreme Court Balks on the Baseball Rule**

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**EDWARD C. V. CITY OF ALBUQUERQUE:  
THE NEW MEXICO SUPREME COURT BALKS  
ON THE BASEBALL RULE**

Christopher McNair\*

INTRODUCTION

Baseball and litigation—arguably two of America’s greatest pastimes. Throughout baseball’s history, injuries to both players and spectators have been as common and accepted as home runs and the seventh inning stretch. Foul balls routinely enter the stands traveling nearly 100 miles an hour.<sup>1</sup> Some estimate that in the course of an average professional baseball game, thirty-five to forty baseballs are hit into spectator areas.<sup>2</sup> While it is true that where injury exists, litigation may soon follow, baseball stadium owners/occupiers (Stadium Operators) have traditionally been granted a generous immunity from liability for spectator injuries resulting from projectiles leaving the field of play.<sup>3</sup> In recent decades, however, courts have retreated from this traditional stance albeit without completely abandoning limitations on stadium operator liability.

In *Crespin v. Albuquerque Baseball Club, LLC*,<sup>4</sup> New Mexico was given its first opportunity to rule on the issue of baseball stadium operator liability for spectator injuries. In 2003, a child was injured while seated in the picnic area of Isotopes Park after being struck by a baseball during batting practice.<sup>5</sup> The child’s family filed suit against the ballpark but the

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\* J.D. 2012, University of New Mexico School of Law. I would like to thank Professor Occhialino for his continued insight through the development of this article. Professor Occhialino assigned *Crespin v. Albuquerque Baseball Club, LLC* as the first case I read for law school. Were I “cold-called” that first day, I hope this article adequately serves as a redemptive response to any questions I certainly flubbed. I would also like to thank Andy Scholl for his patience and attentive feedback throughout the editing process.

1. ROBERT M. GORMAN & DAVID WEEKS, *DEATH AT THE BALLPARK: A COMPREHENSIVE STUDY OF GAME RELATED FATALITIES OF PLAYERS, OTHER PERSONNEL, AND SPECTATORS IN AMATEUR AND PROFESSIONAL BASEBALL, 1862–2007*, at 131 (2009).

2. *Id.*

3. *See, e.g., Akins v. Glens Falls School Dist.*, 424 N.E.2d 531, 534 (N.Y. 1981).

4. 2009-NMCA-105, 216 P.3d 827 *rev’d sub nom.* Edward C. v. City of Albuquerque, 2010-NMSC-043, 241 P.3d 1086.

5. *Id.* ¶¶ 1–2, 216 P.3d at 829.

district court granted summary judgment for the defendants.<sup>6</sup> Subsequently, the New Mexico Court of Appeals rejected adoption of the limited duty rule for stadium operators of commercial baseball stadiums.<sup>7</sup> The limited duty rule, or “baseball rule,” in its most widely articulated formulation, prevented recovery for plaintiffs injured by projectiles leaving the field of play.<sup>8</sup> Under the rule, if stadium operators provided protected seating in the most dangerous area of the stands and provided sufficient seating in that area for those reasonably anticipated to attend the game, then the stadium operators were said to have fulfilled their duty to the plaintiff as a matter of law.<sup>9</sup> The rule, in varying formulations, has enjoyed widespread adoption throughout American courts for nearly as long as baseball has been considered America’s past time.<sup>10</sup> Indeed, Judge Kennedy lamented in dissent, “[m]y colleagues reject nearly one hundred years of American jurisprudence today.”<sup>11</sup>

The New Mexico Supreme Court granted a writ of certiorari on the issue of whether New Mexico recognized a limited duty for stadium operators to spectators injured by projectiles leaving the field of play.<sup>12</sup> In *Edward C. v. City of Albuquerque*, the case name on appeal, the New Mexico Supreme Court reversed the court of appeals and adopted a modified form of the baseball rule.<sup>13</sup> The rule adopted by the court places a duty on spectators of self-protection for inherent risks of the game, and a duty on stadium operators not to increase those risks.<sup>14</sup> Unclear from the court’s opinion, however, is what risks are rightfully considered “inherent” and whether the rationale used by the court opens the door to further modifications to duty in the context of activities bearing inherent risks.

Part I of this article traces the history of the baseball rule, with a special emphasis on cases highlighted by the *Edward C.* court. Part II.A

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6. *Id.* ¶ 7, 216 P.3d at 830.

7. *Id.* ¶¶ 23–24, 216 P.3d at 834–35.

8. *See id.* ¶ 18, 216 P.3d at 833 (stating that the baseball rule “immunizes stadium owners from liability regardless of how the injury occurs”).

9. *Edward C. v. City of Albuquerque*, 2010-NMSC-043, ¶ 10, 241 P.3d 1086, 1089.

10. *See* Gil Fried & Robin Ammon, *Baseball Spectators’ Assumption of Risk: Is It ‘Fair’ or ‘Foul’?*, 13 MARQ. SPORTS L. REV. 39, 40 (2002) (“It did not take long [after the formation of professional baseball] for litigation resulting from the risks associated with baseball to arrive at the courthouse door.”).

11. *Crespin*, 2009-NMCA-105, ¶ 43, 216 P.3d at 838 (Kennedy, J., concurring in part, dissenting in part).

12. *Edward C. v. City of Albuquerque*, 2010-NMSC-043, 241 P.3d 1086.

13. *Id.* ¶ 4, 241 P.3d at 1088.

14. *Id.*

provides a brief overview of New Mexico's approach to duty as an element of negligence. Part II.B examines instances in which New Mexico courts have modified the general standard of ordinary care in response to public policy considerations. Part III discusses the facts and provides a summary of the case from district court through the New Mexico Supreme Court's decision. Part IV.A analyzes the court's unique "symmetrical duty" formulation of the baseball rule. Lastly, Part IV.B discusses the possible implications of the court's holding, including expansion of the "symmetrical duty" concept into other sports and activities bearing an inherent risk to both spectators and participants.

## I. THE EMERGENCE AND HISTORY OF THE BASEBALL RULE

By the turn of the century, the rise of baseball as a spectator sport led to an increase in spectator injuries. Modifications to the game in the late 1800s, such as overhand pitching, increased the risks associated with attending games.<sup>15</sup> The same factors that drew the crowds, i.e., fly balls, fast pitches, and home runs, were often the very same factors that led to spectator injuries.<sup>16</sup> The injuries were often serious, and it was natural that injured fans would turn to the court system for redress.<sup>17</sup> In response, courts began to develop a "baseball specific jurisprudence" to address the growing problem of these baseball spectator injuries.<sup>18</sup>

A limited duty rule, or the "baseball rule," emerged from early cases with an emphasis on shielding owners of baseball stadiums from liability for injuries to spectators. The earliest formulations of the baseball rule stated that the duty owed by stadium operators to spectators "included that of providing seats protected by screening from wildly thrown or foul balls, for the use of patrons who desired such protection."<sup>19</sup> Under this formulation, stadium operators fulfilled their duty when they "provided

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15. *Id.* ¶ 22, 241 P.3d at 1092; See GORMAN & WEEKS, *supra* note 1, at 131 ("In the formative years of the game, there was not much reason to be concerned for fan safety . . . the underhand style of delivering the ball that was the rule until the late 1870s meant fewer foul balls.").

16. See GORMAN & WEEKS, *supra* note 1, at 140 (discussing the death of Clarence D. Stagemyer in 1943). Stagemyer was seated in the front row behind first base when third baseman Sharrard Robertson "unleashed a hard wild throw" that struck Stagemyer in the head. *Id.* Stagemyer died early the next day from a concussion and fractured skull. *Id.*

17. See Fried & Ammon, *supra* note 10, at 40.

18. *Edward C.*, 2010-NMSC-043, ¶ 23, 241 P.3d at 1092.

19. *Crane v. Kansas City Baseball & Exhibition Co.*, 153 S.W. 1076, 1077 (Mo. Ct. App. 1913).

screened seats in the grand stand [sic], and gave [the] plaintiff the opportunity of occupying one of those seats.”<sup>20</sup> Due to customary practices at this time, this usually meant providing screened seating in the area directly behind home plate while leaving the remainder of the grandstands unprotected.<sup>21</sup> This practice was often encouraged by fans that desired an unobstructed view of the game.<sup>22</sup>

From the beginning, courts grounded the baseball rule in the tort doctrines of contributory negligence and assumption of risk. An early example of a court relying on contributory negligence is *Crane v. Kansas City Baseball & Exhibition Co.*,<sup>23</sup> which affirmed a lower court judgment in favor of defendants. The court held that the stadium operators, to fulfill their duty of reasonable care, need only provide *some* screened seating and the opportunity for spectators to choose one of those seats.<sup>24</sup> The court denied recovery to the plaintiff because when given a choice between a screened and unprotected seat, the plaintiff chose the latter.<sup>25</sup> The court, in quoting the agreed upon statement of facts, noted that the risks and dangers associated with the game of baseball are “matters of common knowledge.”<sup>26</sup> Likewise, the court emphasized “that in these games hard balls are thrown and batted with great swiftness . . . and visitors standing in position that may be reached by such balls have voluntarily placed themselves there with knowledge of the situation, and may be held to assume the risk.”<sup>27</sup> Thus, in choosing an unprotected seat, the court held that the plaintiff’s contributory negligence prevented recovery.<sup>28</sup>

Furthermore, some early courts expanded the rule to cover situations where no screened seating was available. In *Quinn v. Recreation*

20. *Id.*

21. See GORMAN & WEEKS, *supra* note 1, at 131 (“These screens were erected in 1878 along the grandstand section directly behind the catcher, an area known as the ‘slaughter pens’ for all the foul ball injuries that occurred there. Similar screens were found in most parks by the turn of the century.”).

22. *Wells v. Minneapolis Baseball & Athletic Ass’n*, 142 N.W. 706, 708 (Minn. 1913) (“In fact, a large part of those who attend prefer to sit where no screen obscures their view. The defendant has a right to cater to those desires.”).

23. 153 S.W. 1076 (Mo. Ct. App. 1913).

24. *Id.* at 1077 (emphasis added).

25. *Id.*

26. *Id.* (internal quotations omitted).

27. *Id.* at 1077–78 (quoting *Blakeley v. White Star Line*, 118 N.W. 482 (Mich. 1908)).

28. *Id.* at 1078; see also *Cincinnati Baseball Club Co. v. Eno*, 147 N.E. 86, 87 (Ohio 1925) (“This theory is fortified by the fact that such spectators can watch the ball and can thus usually avoid being struck when a ball is directed toward them.”).

*Park Ass'n*,<sup>29</sup> the plaintiff requested a seat behind the protective netting but was temporarily placed in an unprotected seat.<sup>30</sup> The plaintiff was struck by a foul ball soon after and brought suit against the ballpark.<sup>31</sup> The court upheld the judgment in favor of the defendant.<sup>32</sup> The court reasoned that the baseball rule does not require a ballpark “to provide scree[n]ed seats for all who may apply for them.”<sup>33</sup> Rather, the duty is satisfied when screened seating is provided for “as many as may be reasonably expected to call for them on any ordinary occasion.”<sup>34</sup> Therefore, even in choosing an unscreened seat over no seat at all, the plaintiff was still held to have assumed the risk of injury by an errant baseball and the suit was barred.<sup>35</sup>

Despite the low standard required for stadium operators, not all early cases found in their favor. In *Wells v. Minneapolis Baseball & Athletic Ass'n*,<sup>36</sup> the court allowed the plaintiff's case to proceed on the issue of whether the screen provided sufficient protection.<sup>37</sup> The plaintiff's position in the grandstands was disputed,<sup>38</sup> however, the court found this contention immaterial to the determination of the case.<sup>39</sup> Rather, the court stated that not all patrons should be held to assume the dangers incidental to the game of baseball, nor the risks associated with sitting outside the protective netting.<sup>40</sup> The court noted that the plaintiff, a woman, was attending the game as part of a promotional event allowing free admittance for women.<sup>41</sup> Important to the court's holding was the assumption that women were unfamiliar with both the game and the potential for injuries posed by an errant baseball.<sup>42</sup> Ultimately, the court held that

29. 46 P.2d 144 (Cal. 1935).

30. *Id.* at 145.

31. *Id.*

32. *Id.* at 147.

33. *Id.* at 146.

34. *Id.*; see also *Brisson v. Minneapolis Baseball & Athletic Ass'n*, 240 N.W. 903, 904 (Minn. 1932) (Ballparks “exercise the required care if they provide screen for the most dangerous part of the grand stand and for those who may be reasonably anticipated to desire protected seats . . .”).

35. *Quinn*, 46 P.2d at 147.

36. 142 N.W. 706 (Minn. 1913).

37. *Id.* at 708.

38. *Id.* at 707. The plaintiff contended that she was seated behind the screen and that the foul ball curved around the netting and struck her. *Id.* Witnesses, however, claimed she was seated beyond the protection of the net when struck by the ball. *Id.*

39. *Id.* at 708.

40. *Id.*

41. *Id.*

42. *Id.* (“Only those who have been struck by a baseball realize its hardness, swiftness, and dangerous force. Women and others not acquainted with the game are in-

whether the stadium operator took sufficient precautions to either warn or protect the unaware plaintiff was for the jury to determine.<sup>43</sup>

Subsequent decades saw modifications to the baseball rule in response to more nuanced fact patterns before the courts. The game itself was being “presented in a different manner and watched by a different demographic than in the era in which the baseball rule had its genesis.”<sup>44</sup> Additionally, secondary entertainment, such as mascots and video displays, were increasingly diverting fans attention away from on-field activity.<sup>45</sup> When coupled with a quicker pace and stronger players,<sup>46</sup> courts became more willing to consider the “pragmatic difficulty [in] applying an old rule to a sport that has changed tremendously” since the baseball rule’s emergence.<sup>47</sup>

An important development that arose from these cases was the application of assumption of risk principles to limit the baseball rule to inherent risks of the game. This development was first articulated in *Brown v. San Francisco Ball Club, Inc.*<sup>48</sup> The court stated that baseball stadium patrons do not assume “the risk of being injured by the proprietor’s negligence but that by voluntarily entering into the sport as a spectator he knowingly accepts the reasonable risks and hazards inherent in and incident to the game.”<sup>49</sup> While this principle was used to deny recovery to the plaintiff in *Brown*,<sup>50</sup> subsequent cases, either explicitly or impliedly, adopted a similar “inherent risks” centered analysis in allowing certain cases to go before juries.

vited, and do attend. It would not be either a safe or reasonable rule to hold that . . . no duty rests upon the management to protect from the dangers incident thereto, other than by a proper screening of part of the seats.”).

43. *Id.*

44. Dave Horton, *Rethinking Assumption of Risk and Sports Spectators*, 51 *UCLA L. REV.* 339, 344 (2003).

45. See Fried & Ammon, *supra* note 10, at 54–58 (discussing “distraction theory” in baseball rule jurisprudence and providing list of modern common distractions in baseball parks, including video displays, on-field contests, and non-traditional spectator areas such as hot tubs and carousels).

46. Horton, *supra* note 44, at 343.

47. *Id.* at 365–66.

48. 222 P.2d 19 (Cal. Ct. App. 1950).

49. *Id.* at 20.

50. *Id.* at 23 (stating that it is common knowledge of the “potential dangers inherent in a baseball in play[,] with the fact that a flying baseball is capable of inflicting painful, sometimes serious and even fatal, injury; and that when in play it may fly in any direction and strike any bystander not on alert to evade it. The knowledge of those characteristics of a baseball must be imputed to every reasonable person having the admitted experience and opportunities of plaintiff to know these things.”).

An early example of a court allowing a case to proceed on the basis that the injury was not a result of an “inherent risk” of the game was *Maytnier v. Rush*.<sup>51</sup> The plaintiff in *Maytnier* requested a ticket outside the protected seating area near the Chicago Cubs dugout.<sup>52</sup> While watching the game, the plaintiff was struck on the left side of his face by an errant pitch thrown from the bullpen.<sup>53</sup> The court acknowledged the traditional formulation of the baseball rule<sup>54</sup> but distinguished the facts presented in this case from earlier cases holding in favor of defendants. The court stated, “[t]hese cases all dealt with injuries to a spectator from a batted or thrown ball that was the ball actually in play . . . or . . . when no game was, in fact, in progress.”<sup>55</sup> Ultimately, the court recognized that spectators should only be held to assume the risk of dangers of which they are likely to be aware.<sup>56</sup> Therefore, the court declined to state as a matter of law that spectators assume the risk of every ball “permitted upon the field” regardless of its proximity to the grandstands or the relative necessity of a ball not in play.<sup>57</sup> Implicit in the court’s holding is the proposition that spectators should only be held to assume the risks associated with on-field or in-game activity. Extending the rule beyond that scope would require spectators to be aware of all potential risks in the park, presumably at the expense of the spectator experience, namely watching the game.

Similarly, in *Jones v. Three Rivers Management Corp.*,<sup>58</sup> the issue before the court was whether the plaintiff assumed an “inherent risk” of the game when struck during batting practice and while inside an interior walkway of the stadium.<sup>59</sup> The court stated that the rationale behind the baseball rule “naturally limits its application to those injuries incurred as a result of risks any baseball spectator must and will be held to anticipate.”<sup>60</sup> The risks must be characterized as “common, frequent, and expected” aspects of the game.<sup>61</sup> Since the interior walkway was neither an “inherent feature” of baseball nor commonly associated with the way in

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51. 225 N.E.2d 83 (Ill. App. Ct. 1967).

52. *Id.* at 85–86.

53. *Id.* at 86.

54. *See id.* at 87.

55. *Id.* at 89.

56. *Id.* at 91.

57. *Id.*

58. 394 A.2d 546 (Pa. 1978).

59. *Id.* at 551.

60. *Id.*

61. *Id.*



which the game is viewed, the court held that the district court improperly applied the baseball rule to bar the plaintiff's suit.<sup>62</sup>

These cases are indicative of the shift in baseball rule jurisprudence during the mid-twentieth century. Similar to the changes in the game which led to the emergence of the rule, changes in the way the game was viewed during this time led to the "inherent risk" modification in the rule's application. As noted by the court in *Maisonave v. Newark Bears Professional Baseball Club, Inc.*,<sup>63</sup> the traditional baseball rule could no longer account for "all of the activities that are part of today's game, nor . . . that players can hit baseballs harder and farther."<sup>64</sup> Similarly, it was not just the game of baseball that was changing during this time. Many states began abandoning the doctrine of contributory negligence, often seen as pro-defendant and "weighed against injured plaintiffs seeking redress," in favor of comparative negligence.<sup>65</sup> As more jurisdictions began making the transition to comparative negligence, the question remained whether the baseball rule, with its grounding in assumption of risk, survived the transition. Like the following cases, this issue marked a point of distinction in the approaches taken by the New Mexico Court of Appeals and the New Mexico Supreme Court in *Edward C. v. City of Albuquerque*.<sup>66</sup>

One of the first cases to consider the baseball rule after a transition from contributory negligence to comparative negligence was *Akins v. Glens Falls City School District*.<sup>67</sup> Not only did the court apply the baseball rule, but it adopted the rule in its most limited formulation. In *Akins*, the plaintiff was attending a high school baseball game and was struck by a foul ball while standing behind a fence along the third-base line.<sup>68</sup> The court held that "in the exercise of reasonable care, the proprietor of a ball park need only provide screening for the area of the field behind home plate where the danger of being struck by a ball is the greatest."<sup>69</sup> Since

62. *Id.* at 551–52.

63. 881 A.2d 700 (N.J. 2005), *superseded by statute* New Jersey Baseball Safety Act of 2006, N.J. STAT. ANN. § 2A:53A-43 to 48 (West 2005), *as recognized in* *Sciarrotta v. Global Spectrum*, 944 A.2d 630, 632 (N.J. 2008).

64. *Id.* at 708.

65. John T. Nockleby & Shannon Curreri, *100 Years of Conflict: The Past and Future of Tort Retrenchment*, 38 LOY. L.A. L. REV. 1021, 1026–1027 (2005).

66. 2010-NMSC-043, ¶¶ 19–20, 241 P.3d 1086, 1091. The New Mexico Supreme Court adopted comparative negligence in *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981), *superseded by statute*, NMSA 1978, § 41-3A-1 (1987), *as stated in* *Reichert v. Adler*, 875 P.2d 384 (1992).

67. 424 N.E.2d 531 (N.Y. 1981).

68. *Id.* at 532.

69. *Id.* at 533.

the baseball field had a backstop, the court held as a matter of law that the school district “fulfilled its duty of reasonable care.”<sup>70</sup> In so holding, the court declined to address the trial court’s jury instruction on assumption of risk because of the framing of the duty.<sup>71</sup> In other words, in satisfying their duty of reasonable care, there was no case of negligence to go before the jury, nor an issue of whether the plaintiff had assumed the risk of being struck by a baseball.

The problem with *Akins*, however, is that whether a defendant has exercised ordinary care is usually an issue for the jury.<sup>72</sup> *Coronel v. Chicago White Sox, Ltd.*<sup>73</sup> is instructive on this point. The *Coronel* court rejected the defendant’s argument that a stadium operator’s duty to spectators is discharged by simply screening the area behind home plate.<sup>74</sup> The *Coronel* court concluded that the issue of whether the White Sox had provided adequate screening was one of whether the defendants had exercised reasonable care.<sup>75</sup> Rather than modifying the standard of reasonable care for stadium operators like in *Akins*, the *Coronel* court held that whether the protective screening was sufficient was an issue of breach, and therefore, a question of fact for the jury.<sup>76</sup> Even the *Akins* court conceded that what constitutes reasonable care is generally for the jury to determine.<sup>77</sup> However, *Akins* further stated that like any negligence action, the court must first determine whether the plaintiff has adequately proven the requisite elements.<sup>78</sup> Absent evidence that the backstop itself was inadequate, the plaintiff in *Akins* failed to prove the essential elements of the action and, as a matter of law, was precluded from seeking recovery.<sup>79</sup>

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70. *Id.* at 535.

71. *Id.*

72. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 8 cmt. b. (2010) (“Accordingly, so long as reasonable minds can differ in evaluating whether the actor’s conduct lacks reasonable care, the responsibility for making this evaluation rests with the jury.”).

73. 595 N.E.2d 45, 48 (Ill. App. Ct. 1992), *superseded by statute*, 745 ILL. COMP. STAT. 38/1 (1992), *as recognized in* *Jasper v. Chi. Nat’l League Baseball Club*, 722 N.E.2d 731 (Ill. App. Ct. 1999). Illinois abolished the defense of contributory negligence and adopted comparative fault in *Alvis v. Ribar*, 421 N.E.2d 886 (Ill. 1981), *superseded by statute*, 735 ILL. COMP. STAT. 5/2-1116 (1986), *as recognized in* *Burke v. 12 Rothschild’s Liquor Mart, Inc.*, 593 N.E.2d 522, 527 (Ill. 1992).

74. *Coronel*, 595 N.E.2d at 48.

75. *Id.* at 47.

76. *Id.*

77. *Akins v. Glens Falls School Dist.*, 424 N.E.2d 531, 534 (N.Y. 1981).

78. *Id.*

79. *Akins*, 424 N.E.2d at 535.

The baseball rule has also survived the transition to comparative fault in jurisdictions that have adopted the distinction between primary and secondary assumption of risk. In *Knight v. Jewett*,<sup>80</sup> the California Supreme Court distinguished between the use of assumption of risk as a “variant of contributory negligence” and its use as a “legal conclusion that there is ‘no duty’ on the part of the defendant to protect the plaintiff from a particular risk . . . .”<sup>81</sup> The former is termed “secondary assumption of risk” while the latter is generally referred to as “primary assumption of risk.”<sup>82</sup> The *Knight* court stated that primary assumption of risk is consistent with the comparative fault system because without a legal duty there is no weighing of fault.<sup>83</sup> This principle was instrumental in the California Court of Appeals decision in *Lowe v. California League of Professional Baseball*,<sup>84</sup> in which the court held that baseball stadium operators had a duty “not to increase the inherent risks to which spectators at professional baseball games are regularly exposed and which they assume.”<sup>85</sup> In *Lowe*, the plaintiff was struck by a foul ball after his attention was diverted from the game by the team’s mascot bumping the plaintiff’s head.<sup>86</sup> The court stated that the key inquiry was whether the injury causing risk was an “inevitable or unavoidable” feature of actually playing baseball.<sup>87</sup> Since a mascot’s “antics” were not integral to the game, summary judgment was reversed and the plaintiff’s suit was allowed to proceed.<sup>88</sup>

While the tort doctrines used by courts to justify the baseball rule have changed with time and the evolution of both the game and how it is viewed, the policy rationales cited by courts have stayed the same. As to spectators, courts have reasoned that the majority of fans desire an unobstructed view of the game.<sup>89</sup> Furthermore, many fans attend baseball games hoping to catch foul balls and other souvenirs from the field of

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80. 834 P.2d 696 (Cal. 1992).

81. *Id.* at 701, 703.

82. *Id.* at 703.

83. *Id.* at 704 (“[W]hen the defendant has not breached a legal duty of care to the plaintiff, the defendant has not committed any conduct which would warrant the imposition of any liability whatsoever, and thus there is no occasion at all for invoking comparative fault principles.”).

84. 65 Cal. Rptr. 2d 105 (Cal. Ct. App. 1997).

85. *Id.* at 106 (internal emphasis omitted).

86. *Id.*

87. *Id.* at 111.

88. *Id.*

89. *See Wells v. Minneapolis Baseball & Athletic Ass’n*, 142 N.W. 706, 708 (Minn. 1913) (“[A] large part of those who attend [baseball games] prefer to sit where no screen obscures the view.”).

play.<sup>90</sup> Courts have routinely held that baseball stadium operators have a legitimate business interest in catering to the majority of fans' desires.<sup>91</sup> Similarly, the possibility that any cause of action involving a fan injured by a projectile leaving the field could lead to a jury trial has led some courts to speculate that it would lead to stadium operators taking unreasonable precautions, such as screening the whole park.<sup>92</sup> This in turn would lead to the "demise or substantial alteration of the game of baseball as a spectator sport."<sup>93</sup> While this may be an instance of judicial fear mongering, it is clear that these basic policy rationales offered for the baseball rule have kept the rule a viable staple of American jurisprudence for the past one hundred years.

## II. FORMULATION AND MODIFICATION OF DUTY IN NEW MEXICO LAW

A major issue in baseball rule jurisprudence is whether the rule defines the scope of a stadium operator's duty to spectators and is thus determined as a matter of law or, rather, if the issue is one of breach of a duty of ordinary care to be determined by the jury. Part II.A provides a general overview of the New Mexico approach to duty. Part II.B dis-

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90. See *Benejam v. Detroit Tigers, Inc.*, 635 N.W.2d 219, 222 (Mich. Ct. App. 2001) ("[P]atrons 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 . . . ."); see also *Rudnick v. Golden West Broadcasters*, 202 Cal. Rptr. 900, 905 (Cal. Ct. App. 1984) ("[T]he chance to apprehend a misdirected ball is as much a part of the game as the seventh inning stretch or peanuts and Cracker Jack[s]."). But see "A Good Kid" Gets in the Way, ESPN (Oct. 16, 2003), <http://sports.espn.go.com/mlb/playoffs2003/news/story?id=1638663>. Steve Bartman, a lifelong Cubs fan, blocked a Cubs outfielder from catching a foul ball in a National League Championship Series game in which the Cubs were playing for the pennant. *Id.* The Cubs led the game 3-0 in 8th inning, however, the inning was extended by the incident and the Florida Marlins rallied to win the game 8-3. *Id.* The Marlins subsequently won game seven and eventually the World Series. *Id.* Bartman was viewed as a scapegoat by frustrated Cubs fans. *Id.* He was escorted out of the stadium by security personnel and received death threats from many fans. *Id.*

91. See *Wells*, 142 N.W. at 708; see also *Akins v. Glens Falls City School Dist.*, 441 N.E.2d 531, 533 (N.Y. 1981).

92. See *Bellezzo v. State*, 851 P.2d 847, 853 (Ariz. Ct. App. 1992) (adopting baseball rule, in part, to "prevent a jury from requiring [defendants] to take precautions that are clearly unreasonable" and declining "to make proprietors of baseball stadiums insurers against the ordinary risk a spectator seated in an unscreened area of the baseball stadium may be struck by a ball").

93. *Benejam*, 635 N.W.2d at 223.

cusses instances in which New Mexico has modified the duty of ordinary care where public policy concerns justify the modification.

#### A. *New Mexico's Approach to the Determination of a Legal Duty*

While it has been stated that there is “nothing sacred” about duty,<sup>94</sup> the myriad of abstract concepts and legal principles have perplexed courts attempting to apply a consistent and approachable framework. Courts may include any combination of “factual foreseeability, legal policy, [and] social policy” but often these terms are ambiguous at best and inconsistently applied at worst.<sup>95</sup> When viewed generally, duty is said to “define[ ] the legal obligations of one party toward another and limits the reach of potential liability.”<sup>96</sup> In practice, however, it may simply become a placeholder, an indefinite word behind which the court will couch its conclusions.<sup>97</sup>

In New Mexico, whether a duty exists is a matter of law and determined by the court.<sup>98</sup> This determination is one of policy and foreseeability.<sup>99</sup> Policy is determined by “reference to legal precedent, statutes, and other principles comprising the law.”<sup>100</sup> Within the policy prong of duty, statutory duties trump caselaw, just as established caselaw trumps considerations of general public policy.<sup>101</sup> The theory behind this hierarchical structure being that it is for the legislature to formulate public policy, not the courts unless required by the absence of legislative direction.<sup>102</sup>

The foreseeability factor of duty in New Mexico is in a state of flux. Traditionally, New Mexico courts have required the plaintiff to have been foreseeably within the zone of risk created by the defendant's conduct.<sup>103</sup> The often cited rule, however, that “[i]f it is found that a plaintiff, and

94. *Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶ 9, 73 P.3d 181, 186. (quoting *Ramirez v. Armstrong*, 100 N.M. 538, 541, 673 P.2d 822, 825).

95. Nancy Desiderio, *Tort Law—Evolution of Duty in New Mexico*: Torres v. State, 26 N.M. L. REV. 585, 588 (1996). *See id.* (discussing the inconsistent approach taken by the New Mexico Supreme Court in determining duty).

96. *Calkins v. Cox Estates*, 110 N.M. 59, 62 n.1, 792 P.2d 36, 39 (1990).

97. *See Herrera*, 2003-NMSC-018, ¶ 9, 73 P.3d at 186 (stating duty “is nothing more than a word, and a very indefinite one, with which [the court] state[s] [its] conclusion” (quoting *Ramirez*, 100 N.M. at 541, 73 P.3d at 825)).

98. *Schear v. Bd. of Cnty. Comm'rs*, 101 N.M. 671, 672, 687 P.2d 728, 729 (1984).

99. *Torres v. State*, 119 N.M. 609, 612, 894 P.2d 386, 389 (1995); *see also Calkins*, 110 N.M. at 61, 792 P.2d at 38 (stating duty “must be decided as a matter of law by the judge, using established legal policy”).

100. *Calkins*, 110 N.M. at 62, 792 P.2d at 39.

101. *See Desiderio*, *supra* note 95, at 589–99.

102. *Torres*, 119 N.M. at 612, 894 P.2d at 389.

103. *Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶¶ 8–9, 73 P.3d 181, 186–87.

injury to that plaintiff, were foreseeable, then a duty is owed to that plaintiff by the defendant”<sup>104</sup> has gradually given way to a phrasing of foreseeability in the negative. In other words, the determination can be articulated as whether the plaintiff could be unforeseeable to any reasonable mind as a matter of law.<sup>105</sup> Thus, while New Mexico courts have long recognized the dual factors of foreseeability and policy in determining duty,<sup>106</sup> the ultimate issue is whether the defendant’s obligation to the plaintiff is one the court will give “recognition and effect.”<sup>107</sup>

In determining the obligations of a defendant to a particular plaintiff, it is important to first distinguish between affirmative and defensive duties. An “affirmative duty” is one defined by a “specific statutory or common-law standard.”<sup>108</sup> It places upon the actor the duty to conform to the standard of care articulated by the statute or common law rule creating the affirmative duty. In other words, it mandates a “legally obligatory course of conduct toward a certain type of individual,” which is often based on an established legally recognized relationship.<sup>109</sup> It is considered “affirmative” because it is asserted by the injured party as the basis for his/her claim.<sup>110</sup> In establishing an affirmative duty, it must be shown that the plaintiff “be a person foreseeably within the scope of [a] defendant’s duty to use reasonable care.”<sup>111</sup> A “defensive duty,” on the other hand, is that found in the common law negligence standard.<sup>112</sup> It is a duty of reasonable care owed by an individual to “society as a whole.”<sup>113</sup> It too considers elements of foreseeability, however, unlike an affirmative duty, the focus here is on the foreseeability that the defendant’s conduct, if below the required standard of care, would injure the plaintiff.<sup>114</sup> It is termed defensive because it is used by a defendant who has acted below the re-

104. *Ramirez v. Armstrong*, 100 N.M. 538, 541, 673 P.2d 822, 825 (1983).

105. *See Torres*, 119 N.M. at 613, 894 P.2d at 390 (“Foreseeability is a question of law when a court, in reviewing whether a duty exists, can determine that the victim was unforeseeable to any reasonable mind.”); *see also Herrera*, 2003-NMSC-018, ¶ 25, 73 P.3d at 192 (stating “we cannot conclude that Plaintiff’s injuries were so unforeseeable that we must hold that Defendant did not owe Plaintiffs a duty as a matter of law”); *Desiderio*, *supra* note 95, at 596 (“The preliminary foreseeability question after *Torres* is not ‘Is the plaintiff, and injury to the plaintiff, foreseeable?’ but is ‘Is the plaintiff, and injury to that plaintiff, not unforeseeable?’ . . .”).

106. *Herrera*, 2003-NMSC-018, ¶ 26, 73 P.3d at 192.

107. *Id.* ¶ 9, 73 P.3d at 187.

108. *Calkins v. Cox Estates*, 110 N.M. 59, 62 n.1, 792 P.2d 36, 39 (1990).

109. *Id.*

110. *Id.*

111. *Id.*

112. *See id.*

113. *Id.*

114. *Id.*

quired standard of care to “limit the potential scope of . . . liability” by claiming that the plaintiff could not have foreseeably been harmed by his/her conduct.<sup>115</sup>

New Mexico recognizes an affirmative duty between landowners and visitors. In *Ford v. Board of County Commissioners*,<sup>116</sup> New Mexico abolished the previous distinctions between business visitors and public invitees and held that standard negligence principles governed the duties of landowners to visitors.<sup>117</sup> As such, “[a] landowner or occupier of [a] premises must act as a reasonable man in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to another, the seriousness of the injury, and the burden of avoiding the risk.”<sup>118</sup> Thus, stated concisely, the common law affirmative duty of landowners to visitors is “the duty to use ordinary care to keep the premises safe for use by the visitor,”<sup>119</sup> with ordinary care being that “which a reasonably prudent person would use in the conduct of the person’s own affairs.”<sup>120</sup>

### *B. New Mexico Modifications to the Duty to Exercise Ordinary Care*

In some instances the duty of ordinary care has been modified in response to particular public policy interests. In fact, when New Mexico courts adopted a generalized landowner to visitor duty of care in *Ford*, the court declined to extend the rule to trespassers.<sup>121</sup> The policy being that extending the same duty to trespassers as visitors would place “an unfair burden on a landowner who has no reason to expect a trespasser’s presence.”<sup>122</sup> Similarly, the “firefighter’s rule,” adopted in *Moreno v. Marrs*,<sup>123</sup> was a modification of the landowner duty to firefighters responding to a call on the landowner’s property.<sup>124</sup> Under the rule, a firefighter could only recover for injuries incurred on the job when the landowner or occupier failed to warn the firefighter of a known hidden danger on the property or negligently or intentionally misrepresented the nature of the hazard being confronted by the firefighter.<sup>125</sup> The policy rationales for the rule began with recognition of the duty firefighters have

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115. *Id.*

116. 118 N.M. 134, 879 P.2d 766 (1994).

117. *Id.* at 139, 879 P.2d at 771.

118. *Id.*

119. UJI 13-1309 NMRA.

120. UJI 13-1603 NMRA.

121. *Ford*, 118 N.M. at 139, 879 P.2d at 771.

122. *Id.* at 138, 879 P.2d at 770.

123. 102 N.M. 373, 695 P.2d 1322 (Ct. App. 1984).

124. *Id.* at 376–77, 695 P.2d at 1325–26.

125. *Id.* at 378, 695 P.2d at 1327.

to respond to hazardous situations and also included encouraging the public to call for assistance when needed.<sup>126</sup> Though *Baldonado v. El Paso Natural Gas Co.*<sup>127</sup> later modified the firefighter's rule by abandoning its basis in landowner/occupier duties of care,<sup>128</sup> the rule highlights the role public policy may play in determining the duty owed by a class of defendants to certain potential plaintiffs.

New Mexico also recognizes modified duties in certain activities that are accompanied by some level of inherent risk. In *Kabella v. Bouschelle*,<sup>129</sup> the court of appeals held that "a cause of action for personal injuries between participants incurred during athletic competition must be predicated upon recklessness or intentional conduct . . ." <sup>130</sup> In so holding, the court stated that "[v]igorous and active participation in sporting events should not be chilled by the threat of litigation."<sup>131</sup> Similarly, the New Mexico Legislature has passed a number of statutes either defining the duty of care owed by particular individuals to members of the public, or in some cases outright denying liability. For instance, due to the public policy of encouraging both the personal and economic benefits of equine activities and recognition of its inherent risks, the Equine Liability Act<sup>132</sup> bars recovery for injuries incurred during equine-related activities. Similarly, the Ski Safety Act<sup>133</sup> limits the duty of ski area operators and places a duty upon patrons to conduct themselves in a manner consistent with the inherent risks of skiing.<sup>134</sup> Like the Equine Liability Act, the policy behind the statute is one of shielding a class of potential defendants from liability from risks inherent in a particular activity.<sup>135</sup> In so doing, it encourages either an economic or socially beneficial activity for the citizens of the state by limiting liability to those who facilitate its continued operation.<sup>136</sup>

126. *Baldonado v. El Paso Natural Gas Co.*, 2008-NMSC-005, ¶ 11, 176 P.3d 277, 280.

127. *Id.*

128. *Id.* ¶ 18, 176 P.3d at 281.

129. 100 N.M. 461, 672 P.2d 290 (Ct. App. 1983).

130. *Id.* at 465, 672 P.2d 294.

131. *Id.*

132. NMSA 1978, §§ 42-13-1 to -5 (1993).

133. NMSA 1978, §§ 24-15-1 to -14 (1969).

134. NMSA 1978, § 24-15-10(A).

135. *See* NMSA 1978, § 24-15-2(B) ("It is the purpose of the Ski Safety Act to define those . . . risks which the skier . . . expressly assumes and for which there can be no recovery.").

136. *But see* *Berlangieri v. Running Elk Corp.*, 2002-NMCA-060, ¶ 20, 48 P.3d 70, 76-77 ("The fact that a recreational activity involves some inherent risk of physical injury does not justify relieving the operators of recreational facilities of a duty of care to protect patrons against unreasonable and unnecessary risks.").



The principle emerges that overriding public policy interests must be at stake before New Mexico courts will engage in duty modification.<sup>137</sup> While it may be true that New Mexico law is moving “away from judicially declared immunity or protectionism,”<sup>138</sup> it is equally clear that courts may still decline to impose on a defendant a duty to a specific class of persons, even if they are foreseeable plaintiffs, for public policy reasons.<sup>139</sup> What constitutes sufficient public policy to warrant the modification of a duty is unclear. However, as noted above, where a plaintiff approaches a socially or economically beneficial activity with some notice of its inherent risks, New Mexico courts and the New Mexico Legislature show some willingness to extend protection to the operators or facilitators of the activity.

### III. *EDWARD C. V. CITY OF ALBUQUERQUE*: NEW MEXICO’S ADOPTION OF A LIMITED DUTY RULE FOR COMMERCIAL BASEBALL STADIUM OPERATORS

On July 21, 2003, four-year-old Emilio Crespin attended an Albuquerque Isotopes minor league baseball game with his family.<sup>140</sup> The Crespin family arrived at Isotopes Stadium early to attend a banquet taking place at picnic tables located beyond the left field fence.<sup>141</sup> The picnic tables were arranged so that those seated at the tables were not directly facing the baseball field.<sup>142</sup> The family alleged that during the banquet, the visiting team, the New Orleans Zephyrs, began batting practice without Isotopes employees warning those in attendance.<sup>143</sup> Subsequently, Zephyr’s player Dave Mantranga hit a ball that entered the picnic area striking Emilio in the head, fracturing his skull.<sup>144</sup>

Isotopes Stadium is owned by the City of Albuquerque and leased to the Isotopes.<sup>145</sup> The family brought suit against the City of Alber-

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137. See *Baldonado v. El Paso Natural Gas Co.*, 2008-NMCA-010, ¶ 14, 176 P.3d 286, 292 (“A defendant who seeks shelter from generally applicable rules of tort liability must demonstrate that the exception is justified by overwhelming public policy considerations.”) (internal citation and quotations omitted).

138. *Yount v. Johnson*, 1996-NMCA-004, ¶ 4, 915 P.2d 341, 342.

139. *Baldonado*, 2008-NMCA-010, ¶ 6, 176 P.3d at 290, 292.

140. *Crespin v. Albuquerque Baseball Club, LLC*, 2009-NMCA-105, ¶ 2, 216 P.3d 827, 829 *rev’d sub nom.* *Edward C. v. City of Albuquerque*, 2010-NMSC-043, 241 P.3d 1086.

141. *Edward C. v. City of Albuquerque*, 2010-NMSC-043, ¶ 6, 241 P.3d 1086, 1088.

142. *Id.* ¶ 6, 241 P.3d at 1088–89.

143. *Crespin*, 2009-NMCA-105, ¶ 2, 216 P.3d at 829.

144. *Id.*

145. *Id.*

que (City), the Albuquerque Baseball Club, LLC d/b/a the Albuquerque Isotopes (Isotopes), the Houston McClane Co. d/b/a the Houston Astros (Astros),<sup>146</sup> and Dave Matranga.<sup>147</sup> The plaintiffs alleged that the City and the Isotopes owed a duty of ordinary care to keep the stadium safe for the patrons.<sup>148</sup> Plaintiffs further alleged that the City and the Isotopes breached that duty by failing to protect the families in the picnic area by not providing sufficient protective netting or warning them batting practice had begun.<sup>149</sup>

#### A. District Court

The Defendants filed motions for summary judgment claiming that the City and the Isotopes fulfilled their duty as a matter of law to the plaintiffs by providing screened seating behind home plate.<sup>150</sup> The City and the Isotopes relied on baseball rule caselaw to persuade the court that they owed a limited duty to the Crespin family.<sup>151</sup> The Astros provided similar caselaw but also included the official rules of baseball to establish that the game “anticipate[s] and expect[s]” players to hit balls into spectator areas.<sup>152</sup> Noting the widespread adoption of the baseball rule in other jurisdictions, the district court granted the defendants’ motions for summary judgment.<sup>153</sup>

#### B. New Mexico Court of Appeals: *Crespin v. Albuquerque Baseball Club*

On appeal, the plaintiffs argued that it was error for the district court to recognize the baseball rule in granting summary judgment since no New Mexico appellate court had expressly adopted the rule.<sup>154</sup> The court of appeals agreed with the plaintiffs and held that New Mexico does not recognize the baseball rule.<sup>155</sup> The court of appeals held instead that the duty stadium operators owe to spectators is that of “ordinary care for

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146. In 2003, the Zephyrs were the Houston Astros farm team. See Derby Gisclair, *History of New Orleans Baseball*, available at <http://www.sabneworleans.com/history.html> (last visited Oct. 22, 2011).

147. *Edward C.*, 2010-NMSC-043, ¶ 1, 241 P.3d at 1088.

148. *Crespin*, 2009-NMCA-105, ¶ 2, 216 P.3d at 830.

149. *Id.* ¶ 6, 216 P.3d at 830.

150. *Id.* ¶ 3, 216 P.3d at 830.

151. *Id.*

152. *Id.* ¶ 30, 216 P.3d at 836.

153. *Edward C. v. City of Albuquerque*, 2010-NMSC-043, ¶ 13, 241 P.3d 1086, 1189–90.

154. See *id.* at ¶ 11, 241 P.3d at 1089 (“Plaintiffs . . . contend that the baseball rule is inconsistent with New Mexico’s system of pure comparative fault . . .”).

155. *Crespin*, 2009-NMCA-105, ¶ 23, 216 P.3d at 834.

the safety of the person and property of others.”<sup>156</sup> The court reversed summary judgment for the defendants since there were issues of material fact as to whether the duty of ordinary care was breached by the City and the Isotopes.<sup>157</sup> The court, however, upheld summary judgment for the Astros and Dave Matranga on the grounds that they “made a prima facie case that their actions satisfied their duty to exercise reasonable care under the circumstances.”<sup>158</sup>

In declining to adopt the baseball rule, the court began by examining New Mexico tort law in light of the *Crespin* facts. The court conceded that in *McFatridge v. Harlem Globe Trotters*,<sup>159</sup> the New Mexico Supreme Court expressed approval, albeit in dictum, of the immunity granted by the baseball rule.<sup>160</sup> The court noted, however, that *McFatridge* was decided prior to New Mexico’s adoption of comparative negligence in *Scott v. Rizzo*.<sup>161</sup> The court cited *Rizzo* for the proposition that, upon adoption of comparative negligence, the doctrine of “assumption of risk” became “subject to the comparative negligence rule.”<sup>162</sup> Therefore, a baseball “spectator’s assumption of the risks inherent in the game may inform the fact finder’s assessment of the parties relative fault” but not “preclude the spectator from recovering if he or she is injured as a result of one of those risks.”<sup>163</sup>

The court made two important characterizations of the baseball rule that were determinative of its outcome. First, the court rejected the defendants’ argument that the baseball rule is a limit on a defendant’s

156. *Id.* ¶ 12, 216 P.3d at 831 (quoting *Bober v. N.M. State Fair*, 111 N.M. 644, 648, 808 P.2d 614, 618 (1991)).

157. *Id.* ¶¶ 25–29, 216 P.3d at 835–36.

158. *Id.* ¶¶ 32–33, 216 P.3d at 836 (reasoning that the plaintiffs failed to show that Matranga intentionally tried to hit the child or another attendee). The court reasoned that Matranga did what his employers expected him to do: “hit a home run over the fence during batting practice.” *Id.*

159. 69 N.M. 271, 365 P.2d 918 (1961). The *McFatridge* court upheld judgment in favor of a plaintiff struck by a basketball thrown by a Harlem Globetrotter by, in part, distinguishing the nature of a basketball game from baseball. *Id.* at 277, 365 P.2d at 922. The court stated “[t]hat there is danger from being injured by being struck by balls hit foul or otherwise striking spectators in certain locations at baseball games which would be known to fans of the game is clear and from this fact arises the custom to protect areas of greatest danger.” *Id.*

160. *Crespin*, 2009-NMCA-105, ¶ 10, 216 P.3d at 831.

161. *Id.* ¶ 11, 216 P.3d at 831; *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981), *superseded by statute*, NMSA 1978, § 41-3A-1 (1987), *as stated in Reichert v. Adler*, 117 N.M. 628, 875 P.2d 384 (Ct. App. 1992).

162. *Crespin*, 2009-NMCA-105, ¶ 11, 216 P.3d at 831 (quoting *Rizzo*, 96 N.M. at 687, 634 P.2d at 1239).

163. *Id.* ¶ 11, 216 P.3d at 831.

duty.<sup>164</sup> In other words, the court found that the baseball rule relates to the breach of a duty and not the initial scope used to determine whether a breach occurred. Second, since the baseball rule relates to breach of duty, the court characterized it as a rule of immunity because it “immunizes stadium owners from liability regardless of how the injury occurs.”<sup>165</sup> Citing New Mexico’s move “away from judicially declared immunity or protectionism,”<sup>166</sup> the court concluded that “there is no compelling reason to immunize the owners/occupiers of baseball stadiums.”<sup>167</sup>

### C. *New Mexico Supreme Court: Edward C. v. City of Albuquerque*

The New Mexico Supreme Court granted a writ of certiorari to consider whether New Mexico “should recognize a limited duty for owners/occupiers of commercial baseball stadiums.”<sup>168</sup> The court overturned the court of appeals and recognized a unique form of the baseball rule applicable only to commercial baseball stadiums.<sup>169</sup> The court held that the duty of a stadium operators is “symmetrical” to that of the spectator.<sup>170</sup> “The spectator must exercise ordinary care to protect himself or herself from the inherent risk of being hit by a projectile that leaves the field of play and the owner/occupant must exercise ordinary care not to increase that inherent risk.”<sup>171</sup> The court, however, upheld the denial of the defendants’ motions for summary judgment.<sup>172</sup> The court stated that the defendants’ affidavits established compliance with a form of the baseball rule that limited a defendant’s duty to screening the most dangerous part of the stands, i.e., the area behind home plate.<sup>173</sup> The defendants, however, did not establish that they had exercised ordinary care to not increase the inherent risks of the game to the plaintiffs.<sup>174</sup> Therefore, issues of material fact existed as to whether the defendants had complied with the rule adopted by the court.<sup>175</sup>

The court began its analysis by stating that the existence and scope of a duty is a legal question and determined by the “sport or activity in

164. *Id.* ¶ 13, 216 P.3d at 831.

165. *Id.* ¶ 18, 216 P.3d at 833.

166. *Id.* ¶ 24, 216 P.3d at 834 (emphasis omitted) (citing *Yount v. Johnson*, 1996-NMCA-046, ¶ 4, 915 P.2d 341, 343).

167. *Id.* ¶ 23, 216 P.3d 834.

168. *Edward C. v. City of Albuquerque*, 2010-NMSC-043, ¶ 3, 241 P.3d 1086, 1088.

169. *Id.* ¶ 4, 241 P.3d at 1088.

170. *Id.*

171. *Id.*

172. *Id.* ¶5, 241 P.3d at 1088.

173. *See id.* ¶43, 241 P.3d at 1098.

174. *Id.* ¶ 5, 241 P.3d at 1088.

175. *Id.*

question, the parties' general relationship to the activity, and public policy considerations."<sup>176</sup> Furthermore, the court emphasized the importance of policy in a court's determination of whether a duty is owed and the scope of that duty.<sup>177</sup> The court took issue with the court of appeals conclusion that, because Emilio Crespin was a foreseeable plaintiff, the defendants owed him a duty.<sup>178</sup> The court reiterated that foreseeability is "but one factor . . . and not the principle question."<sup>179</sup> Rather than first look to foreseeability, the court saw the issue as whether there existed an affirmative or defensive duty.<sup>180</sup> The court concluded that the case dealt with an affirmative duty since New Mexico common law traditionally recognized a relationship between landowners and visitors that gives rise to a legal duty.<sup>181</sup>

While recognizing that ordinary care is the general duty applied in landowner/occupier cases, the court noted that modification of a duty is appropriate in some circumstances.<sup>182</sup> The court stated that modification may be appropriate where "'reasonable minds could differ about the application of the negligence standard to a particular category of recurring facts.'"<sup>183</sup> Further, such modification "'has the benefit of providing clearer rules of behavior for actors who may be subject to tort liability and who structure their behavior in response to that potential liability.'"<sup>184</sup> The court's main concern, however, was whether modification of the duty of ordinary care in this context was "supported by sound policy consistent with New Mexico's pure comparative fault system and a general interest in promoting safety, welfare, and fairness."<sup>185</sup> Thus, in approaching the baseball rule, the court was primarily concerned with two issues. First, whether jurisdictions with a similar landowner-to-visitor duty as New Mexico had applied the baseball rule to spectator injuries;<sup>186</sup> and second, whether the policy rationales for modifying the stadium operator

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176. *Id.* ¶ 14, 241 P.3d at 1090.

177. *Id.*

178. *Id.* ¶ 18, 241 P.3d at 1091.

179. *Id.*

180. *Id.* ¶ 15, 241 P.3d at 1090.

181. *Id.* ¶ 16, 241 P.3d 1090.

182. *Id.* ¶ 21, 241 P.3d at 1091.

183. *Id.* (quoting RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM, § 7 cmt. i (2010)).

184. *Id.* ¶ 21, 241 P.3d at 1092 (quoting RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM, § 7 cmt. i (2010)).

185. *Id.* ¶ 20, 241 P.3d at 1091.

186. *Id.*

duty in these jurisdictions were consistent with New Mexico's pure comparative fault system.<sup>187</sup>

While providing a comprehensive history of the development of the baseball rule, the court focused on cases discussing the risks inherent in viewing the game of baseball, as this development in the baseball rule is associated with the shift to comparative negligence.<sup>188</sup> Important to the court's discussion was *Maisonave v. Newark Bears Professional Baseball Club, Inc.*,<sup>189</sup> *Maytiener v. Rush*,<sup>190</sup> and *Jones v. Three Rivers Management Corp.*<sup>191</sup> All three of these cases limited the baseball rule's application to either risks inherent in the game or to specific areas of the ballpark dedicated solely to viewing the game.<sup>192</sup> The New Mexico Supreme Court found persuasive the rationale in these cases that injured spectators should be "allowed to advance their claim when the injury is the result of some circumstance, design, or conduct neither necessary nor inherent in the game."<sup>193</sup> Implied in the court's emphasis on these cases is the notion that the traditional application of the baseball rule, as a complete bar to a plaintiff's suit, is inconsistent with the adoption of comparative fault.

Similarly, the court's articulation of the baseball rule is substantially drawn from a string of California cases ruling on modified duties in response to the inherent risks of an activity. The court cited *Brown v. San Francisco Ball Club, Inc.*,<sup>194</sup> as an early baseball rule case recognizing a "relative and mutual duty on the owner/occupant and the spectator."<sup>195</sup> Under the *Brown* rationale, the inherent risks of the game place a duty of "self-protection" upon the spectator, but the risks created by the stadium operator's negligence are considered "outside the relative and mutual expectations of the parties."<sup>196</sup> This approach to duty evolved in *Knight v. Jewett*<sup>197</sup> as a duty to "not increase the risks . . . over and above those in-

187. *Id.*

188. *Id.* ¶ 27, 241 P.3d at 1094-95; *see also* Fried & Ammon, *supra* note 1010, at 43 ("Some lawyers involved in baseball negligence cases believed the subtle change toward plaintiff judgments occurred due to the shift in some states from assumption of the risk to comparative negligence as a defense.").

189. 881 A.2d 700 (N.J. 2005), *superseded by statute*, New Jersey Baseball Safety Act of 2006, N.J. STAT. ANN. § 2A:53A-43 to 48 (West 2005), *as recognized in* Sciarrotta v. Global Spectrum, 944 A.2d 630, 632 (N.J. 2008).

190. 225 N.E.2d 83 (Ill. App. Ct. 1967).

191. 394 A.2d 546 (Pa. 1978).

192. *See supra* Part I (discussing *Maisonave*, *Maytiener*, and *Jones*).

193. *Edward C.*, 2010-NMSC-043, ¶ 27, 241 P.3d at 1094.

194. 222 P.2d 19 (Cal. Ct. App. 1950).

195. *Edward C.*, 2010-NMSC-043, ¶ 36, 241 P.3d at 1096.

196. *Id.* ¶ 3, 241 P.3d at 1096-97 (citing *Brown*, 222 P.2d at 20).

197. 834 P.2d 696 (Cal. 1992).

herent in the sport.”<sup>198</sup> While *Knight* was not a baseball rule case, its holding was adopted by the *Lowe v. California League of Prof. Baseball*<sup>199</sup> court to modify California’s baseball stadium operator’s duty to spectators.<sup>200</sup> Thus, this string of cases presented the New Mexico Supreme Court with a formulation of the baseball rule in a jurisdiction with similar comparative fault principles as New Mexico. As noted by the New Mexico Supreme Court, this articulation comported with New Mexico precedent as, like *Knight v. Jewett*,<sup>201</sup> New Mexico also had modified a duty where “physical injury is inherent to the activity.”<sup>202</sup>

Having cited support for the modified baseball rule in jurisdictions employing similar comparative fault principles as New Mexico, the court adopted a similarly modified version of the rule as in California. The court held that a commercial baseball stadium operator owes a duty that is “symmetrical” to that of the spectator.<sup>203</sup> Under New Mexico’s formulation of the rule, “[s]pectators must exercise ordinary care to protect themselves from the inherent risk of being hit by a projectile that leaves the field of play and owner/occupant must exercise ordinary care not to increase that inherent risk.”<sup>204</sup> In so holding, the court rejected the formulation of the baseball rule articulated in *Akins*.<sup>205</sup> Therefore, in New Mexico, the relevant inquiry is not whether the stadium operator provided protected seating. Rather, like *Lowe*,<sup>206</sup> it is whether the risk leading to the plaintiff’s injury is associated with an inherent or necessary aspect of the game.<sup>207</sup>

The court believed that modification of the duty between the stadium operator and spectators was necessary due to the “unique nature” of the relationship between the parties and the “policy concerns implicated by this relationship.”<sup>208</sup> The court stated that its approach also rec-

198. *Edward C.*, 2010-NMSC-043, ¶ 37, 241 P.3d at 1097 (emphasis omitted) (quoting *Knight*, 834 P.2d at 708).

199. 65 Cal. Rptr. 2d 105 (Cal. Ct. App. 1997).

200. See *Edward C.*, 2010-NMSC-043, ¶¶ 36–38, 241 P.3d at 1096–97 (“With this legal backdrop, a division of the California Court of Appeals modified the state’s earliest baseball rule . . .”).

201. 834 P.2d 696 (Cal. 1992).

202. *Edward C.*, 2010-NMSC-043, ¶ 42, 241 P.3d at 1098; *Kabella v. Bouschelle*, 100 N.M. 461, 672 P.2d 290 (Ct. App. 1983).

203. *Edward C.*, 2010-NMSC-043, ¶ 41, 241 P.3d at 1097.

204. *Id.* ¶ 41, 241 P.3d at 1097–98.

205. 424 N.E.2d 531, 533 (N.Y. 1981) (“[I]n the exercise of reasonable care, the proprietor need only provide screening for the area of the field behind home plate where the danger of being struck by a ball is the greatest.”).

206. 65 Cal. Rptr. 2d 105 (Cal. Ct. App. 1997).

207. *Edward C.*, 2010-NMSC-043, ¶¶ 38–39, 241 P.3d at 1097.

208. *Id.* ¶ 40, 241 P.3d at 1097.

ognizes the “impossibility of playing . . . baseball without projectiles leaving the field of play.”<sup>209</sup> Likewise, the rule balances the interest of fans who desire protected seating with those that attend baseball games in hopes of catching a souvenir ball or having an unobstructed view of the game.<sup>210</sup> Implied in these policy justifications is the rationale that stadium operators have a legitimate business interest in catering to the fans’ desires. Thus, the court stated that applying the traditional standard of care owed by landowners to visitors would be “inapposite” in the context of commercial baseball spectator injuries.<sup>211</sup>

The court was confident that the rule announced was both consistent with New Mexico’s system of pure comparative fault and justified by significant public policy. While noting the rule is “rigid” even for injuries arising from inherent risks of the game, the court stated that modified versions of the baseball rule, such as that adopted by New Mexico, do not prevent recovery for spectators injured by all projectiles entering the stands.<sup>212</sup> In “extraordinary circumstances,” cases involving such injuries will still go before the jury to determine whether the stadium operator acted to increase the risks to the spectator, or in some way impeded spectators’ ability to protect themselves.<sup>213</sup> The court stated, however, that “[a]s long as an owner/occupant “exercises ordinary care not to increase the inherent risk[s] . . . he or she need not be concerned about adverse social and economic impacts on the citizens of New Mexico.”<sup>214</sup>

The *Edward C.* court upheld denial of the defendants’ motions for summary judgment because the defendants’ affidavits failed to establish compliance with the rule articulated by the court. While the defendants’ affidavits showed compliance with the rule stated in *Akins*,<sup>215</sup> they did not establish that, as owners and occupiers of the stadium, they exercised ordinary care not to increase the inherent risk to the plaintiffs of projectiles leaving the field of play.<sup>216</sup> Presumably important to the court’s decision was the fact that the child was not seated in an area “dedicated solely to viewing the game” and that batting practice allegedly began without warning.<sup>217</sup> Thus, there were issues of material fact as to whether the de-

209. *Id.* ¶ 41, 241 P.3d at 1098.

210. *Id.*

211. *Id.* ¶ 40, 241 P.3d at 1097.

212. *Id.* ¶ 39, 241 P.3d at 1097.

213. *Id.*

214. *Id.* ¶ 41, 241 P.3d at 1098.

215. 424 N.E.2d 531, 533 (N.Y. 1981) (“[I]n the exercise of reasonable care, the proprietor need only provide screening for the area of the field behind home plate where the danger of being struck by a ball is the greatest.”).

216. *Edward C.*, 2010-NMSC-043, ¶¶ 43–44, 241 P.3d at 1098.

217. *Id.* ¶ 5, 241 P.3d at 1088.



defendants exercised ordinary care to not increase the inherent risks of the game to the plaintiffs.

#### IV. THE SYMMETRICAL DUTY IN NEW MEXICO: PRESENT AND FUTURE

It is important to note that the *Edward C.* court did not technically adopt a “no-duty” rule in this case. In fact, the City and the Isotopes conceded the existence of a duty to the plaintiffs.<sup>218</sup> Rather, the court articulated a specific, or modified, standard of care that stadium operators owe to spectators. While the court defined the scope of the duty, the court did not, however, necessarily limit a stadium operator’s liability for spectator injuries beyond any limitation possible by the application of comparative negligence principles. Part IV.A of the following analysis will discuss the parameters and ambiguities present in the court’s articulation of the “symmetrical duty.” Part IV.B will discuss the future implications of the rule and the potential expansion of modified duties for inherent risk activities in New Mexico.

##### A. *Ambiguities Inherent in the Symmetrical Duty Formulation of the Baseball Rule*

While the court’s holding was correctly applied to the *Edward C.* facts, the opinion itself offers little guidance for future baseball spectator injury litigation occurring in New Mexico. Indeed, depending on the court’s definition of “commercial,” the holding potentially only applies to injuries occurring in Isotopes Park. Similarly unclear is the extent to which the “symmetrical duty” aspect of the holding applies even within the boundaries of the baseball park. In other words, not only is the holding limited by its commercial label, it also limited to circumstances in which a fan is actually hit by a projectile leaving the field of play. Thus, the modified duty is not triggered upon entrance into the stadium but rather only when a fan is, in fact, struck by a projectile.<sup>219</sup> Presumably then, the standard landowner to visitor duty of ordinary care announced in *Ford v. Board of County Commissioners of the County of Dona Ana*<sup>220</sup>

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218. *See id.* ¶¶ 9–10, 241 P.3d at 1089. Defendants did not ask the court to find no duty, but for the imposition of a limited-duty. *Id.*

219. Projectiles are not limited to baseballs. *See Benejam v. Detroit Tigers, Inc.*, 635 N.W.2d. 219 (Mich. Ct. App. 2001) (holding in favor of baseball proprietors where minor was struck by a fragment of a baseball bat).

220. 118 N.M. 134, 139, 879 P.2d 766, 771 (1994) (modifying UJI 13-309 to read, “[a]n owner owes a visitor the duty to use ordinary care to keep the premises safe for use by the visitor”). In practice, this means that the stadium operator duty to patrons

still defines the duty owed by a stadium operator to its patrons, in which the modified duty articulated in *Edward C.* plays only a small, if not situational, role.

In discussing the symmetrical duty dichotomy, it is first important to break down the respective duties of the spectator and the stadium operator according to the rule announced by the court. First, “the spectators must exercise ordinary care to protect themselves from the inherent risk of being hit by a projectile that leaves the field of play . . . .”<sup>221</sup> The opinion does not suggest that the use of “ordinary care” in this context departs from the universally applied standard. Therefore, under the generalized definition of ordinary care, a fan’s exercise of ordinary care “is that care which a reasonably prudent person would use in the conduct of the person’s own affairs.”<sup>222</sup> As “ordinary care varies with the nature of what is being done,”<sup>223</sup> a spectator’s exercise of ordinary care could be articulated as the “reasonably prudent spectator” standard. In practice, this duty of self-protection would certainly include being aware of the game while in play, taking adequate measures to protect oneself should a foul ball enter the stands, and possibly even the exercise of caution should the spectator decide to actively try to catch a foul ball. Regardless, this aspect of the symmetrical duty imparts knowledge to all patrons of a baseball game that inherent risks exist as part of the spectator experience.

The main question raised by the spectator prong of the symmetrical duty, however, is to what extent its inclusion in the court’s holding has any discernable purpose. It is an accepted principle that “[a] plaintiff who engages in an [inherent risk] activity . . . is subject to the defense of . . . comparative fault.”<sup>224</sup> It is unclear, though, how the spectator prong of the symmetrical duty increases the duty upon an injured spectator above what that spectator would be subject to based on a defense of comparative fault. As a general principle, “comparative negligence denies re-

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arising from injuries other than projectiles leaving the field of play is left unmodified. Therefore “slip and fall,” and a host of other potential injuries, are governed by UJI 13-309. Similarly, injuries arising from other “projectiles” would also be analyzed under the non-modified standard of care. See *Dog Daze: Kansas City Royals Fan Sues after Weiner Hits Him*, ESPN (Feb. 23, 2010), <http://sports.espn.go.com/mlb/news/story?id=4939680> (discussing lawsuit brought by fan injured when Royal’s mascot threw a hot dog, striking the fan in the eye).

221. *Edward C.*, 2010-NMSC-043, ¶ 41, 241 P.3d at 1097–98.

222. UJI 13-1603 NMRA.

223. UJI 13-1603 NMRA.

224. *Berlangieri v. Running Elk Corp.*, 2002-NMCA-060, ¶ 21, 48 P.3d 70, 77.

covery for one's own fault."<sup>225</sup> Therefore, regardless of including a spectator duty of self-protection in the rule, a stadium operator defendant would likely argue that the injured spectator was not paying attention or in some way contributed to the injury as a means of limiting the defendant's liability. Further, despite the court rejecting a "sufficient protected netting"<sup>226</sup> analysis for baseball spectator injuries, it is unclear why a spectator's failure to choose a protected seat is insufficient to breach the spectator's duty of self-protection. In other words, if a spectator is aware that fly balls routinely enter the stands and that the stadium provides protected seating, the spectator's failure to occupy one of these seats is a seemingly unreasonable exercise of the spectator's duty. This result, which would essentially bring a "sufficient protected netting" analysis in through the back door, would of course be anomalous with the court's rejection of the *Akins* holding. Yet, this scenario highlights the ambiguity present in the spectator duty of self-protection.

Ultimately, the spectator prong of the symmetrical duty comes down to the three dirty words in comparative fault jurisprudence that the court declined to explicitly state: assumption of risk. Any determination of a spectator's reasonable exercise of self-protection will necessarily entail an examination of what risks spectators knowingly subject themselves to in attending baseball games. As such, it is nothing more than a determination of a plaintiff's "voluntary exposure to a known danger."<sup>227</sup> This concept is routinely characterized as "secondary assumption of risk" because it is a determination of the plaintiff's negligence in knowingly and voluntarily confronting the danger.<sup>228</sup> While New Mexico courts have preserved primary assumption of risk,<sup>229</sup> secondary assumption of risk, as an analysis of a plaintiff's own negligence, is now considered incorporated within the normal weighing of fault under comparative negligence principles.<sup>230</sup> Thus, the spectator's duty of self-protection, as a variant of secon-

225. *Scott v. Rizzo*, 96, N.M. 682, 690, 634 P.2d 1234, 1242 (1981), *superseded by statute*, NMSA 1978, 41-3A-1 (1987), *as recognized in* *Reichert v. Adler*, 117 N.M. 628, 875 P.2d 384 (Ct. App. 1992).

226. *See Akins v. Glen Falls School District*, 424 N.E.2d 531, 533 (N.Y. 1981) ("[I]n the exercise of reasonable care, the proprietor need only provide screening for the area of the field behind home plate where the danger of being struck by a ball is the greatest.").

227. *Thompson v. Ruidoso-Sunland, Inc.*, 105 N.M. 487, 492, 734 P.2d 267, 272 (Ct. App. 1987) (quoting *Williamson v. Smith*, 83 N.M. 336, 341, 491 P.2d 1147, 1152 (1971)).

228. *See Thompson*, 105 N.M. at 492, 734 P.2d at 272.

229. *Id.*

230. *See id.* ("The 'knowing and voluntary confrontation with full appreciation of the danger' that is at issue here is secondary assumption of the risk, i.e., negligence on

dary assumption risk, is seemingly obsolete when considered alongside New Mexico comparative negligence jurisprudence; despite the court's apparent rooting of secondary assumption of risk in the trial court's duty determination, rather than a jury's determination of breach.

Further, primary assumption of risk—a finding that the defendant either owed no duty or did not breach a duty as a matter of law<sup>231</sup>—also lurks within the court's holding. If the plaintiff is struck by a projectile while seated in an unprotect area and is unable to make a factual showing that the defendant negligently increased an inherent risk, then the defendant cannot be said to have breached the stadium operator duty owed to spectators. Importantly, even in this scenario the focus is still on stadium operator's conduct, not actions taken by a plaintiff in self-protection. Potentially, then, the most significant contribution of the spectator's duty of self-protection is its inclusion in the modified baseball rule at all; as without it, there would be no such thing as the novel concept of a "symmetrical duty."

The duty of a stadium operator of a commercial baseball stadium, on the other hand, is admittedly more complex. The duty of the stadium operator to not increase the inherent risks is implicated in two situations. The first situation is when the stadium operator has done "something to increase the risks beyond those necessary or inherent to the game."<sup>232</sup> Second, the duty is implicated when the stadium operator has impeded the "fan's ability to protect himself or herself."<sup>233</sup> These two situations are not mutually exclusive given that a stadium operator could both act to increase an inherent risk of the game while impeding the fans' ability to protect themselves. Before determining, however, whether an stadium operator has acted to increase an inherent risk, or impeded a spectator's duty of self-protection, it is important to determine what actually constitutes an inherent risk.

Cases favorably cited by the *Edward C.* court shed light on this potentially elusive standard. In *Brown v. San Francisco Ball Club, Inc.*<sup>234</sup> inherent risks were the "reasonable risks and hazards" of the game and not risks outside the mutual expectations of the parties.<sup>235</sup> Clearly within the *Brown* court's conception of a reasonable risk was that of being

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the plaintiff's part, which the court below properly compared to defendant's negligence . . .").

231. *Id.* at 491, 734 P.2d at 271.

232. *Edward C. v. City of Albuquerque*, 2010-NMSC-043, ¶ 39, 241 P.3d 1086, 1097.

233. *Id.*

234. 222 P.2d 19 (Cal. Ct. App. 1950).

235. *Edward C.*, 2010-NMSC-043, ¶ 36, 241 P.3d at 1097.

struck by a batted or thrown ball.<sup>236</sup> *Jones v. Three Rivers Management Corp.*<sup>237</sup> defined inherent risks as those risks “common, frequent, and expected” in the activity.<sup>238</sup> Perhaps most restrictively, *Lowe v. California League of Professional Baseball*<sup>239</sup> stated its formulation of inherent risks as “some feature or aspect of the game which is inevitable or unavoidable in the actual playing of the game.”<sup>240</sup> It is important to remember, however, that under these standards, the relevant inquiry concerns the risk that gave rise to the injury, not whether the plaintiff was injured by an inherent risk, i.e., a foul ball.

The specific factual scenarios of the above cases similarly provide insight into the court’s meaning of inherent risks. As previously stated, courts applying an inherent risk analysis have allowed cases to proceed where the plaintiff was struck by an errant pitch from the bullpen,<sup>241</sup> when standing in a concourse,<sup>242</sup> and when struck after being distracted by a mascot.<sup>243</sup> In an additional case cited by the court, application of the baseball rule was limited to areas “dedicated solely to viewing the game.”<sup>244</sup> The reason given for this limitation was that fans in multipurpose areas “understandably let down their guard when they are in other areas of the stadium.”<sup>245</sup> When viewed collectively, these cases present a picture of inherent risks as a relatively limited set of fact patterns. Far from requiring the “extraordinary circumstances” mentioned by the *Edward C.* court,<sup>246</sup> it is plausible that injured spectators need only show that prior to being struck, their attention was diverted from the game by some feature of the ballpark that impaired their ability to protect themselves. In an era of increased marketing techniques and other general distractions meant

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236. *Brown*, 222 P.2d at 21 (“[R]espondent fully discharged its duty toward appellant, as concerns the risk to her of being hit by thrown or batted baseballs, when it provided screened seats for all who might reasonably be expected to request them, in fact many more screened seats than were requested.”).

237. 394 A.2d 546 (Pa. 1978).

238. *Edward C.*, 2010-NMSC-043, ¶ 34, 241 P.3d at 1096 (internal quotations omitted).

239. 65 Cal. Rptr. 2d 105 (Cal. Ct. App. 1997).

240. *Edward C.*, 2010-NMSC-043, ¶ 38, 241 P.3d at 1097 (quoting *Lowe*, 65 Cal. Rptr. 2d at 111).

241. *Maytnier v. Rush*, 225 N.E.2d 83, 86 (Ill. App. Ct. 1967).

242. *Jones v. Three Rivers Mgmt. Corp.*, 394 A.2d 546, 548 (Pa. 1978).

243. *Lowe*, 65 Cal. Rptr. 2d at 106.

244. *Edward C.*, 2010-NMSC-043, ¶ 28, 241 P.3d at 1094 (citing *Maisonave v. Newark Bears Prof'l Baseball Club, Inc.*, 881 A.2d 700, 708 (N.J. 2005), *superseded by statute*, New Jersey Baseball Safety Act of 2006, N.J. STAT. ANN. § 2A:53A-43 to 48 (2005), *as recognized in Sciarrotta v. Global Spectrum*, 944 A.2d 630, 632 (N.J. 2008)).

245. *Maisonave*, 881 A.2d at 708.

246. *Edward C.*, 2010-NMSC-043, ¶ 39, 241 P.3d at 1097.

to provide a lively environment for all ages, it is plausible that without further elaboration on the meaning of inherent risk, the term itself will prove to be of little use in limiting liability for stadium operators.

As a result, the burden on the plaintiff is relatively low in establishing whether a stadium operator has “done something”<sup>247</sup> to either increase the inherent risks, or impede a fan’s ability to protect himself or herself. The plaintiff’s burden is relatively low for a number of reasons. First, the modified duty would likely only apply to bar a suit when the fan is actually located in the stands or an area “dedicated solely to viewing the game.”<sup>248</sup> Second, the plaintiff need only allege that the risk giving rise to the injury—not the projectile itself—was not an inherent risk of the game. This could include such generalized distractions as in-game entertainment, other than the game itself, or a design in the seating area that impedes the fan’s ability to be aware of projectiles, such as picnic tables that face away from the field. Lastly, the plaintiff must allege that it was the stadium operator’s actions or omissions that caused the risk. This low barrier should assuage the fears of those worried that adoption of any form of the baseball rule would prevent injured spectators from getting their case before a jury. Rather, with such fertile ground for issues of material fact, it is plausible that the modified duty articulated by the court does little to insulate stadium operators of commercial baseball stadiums from liability. Likewise, unfortunately for both stadium operators and fans, the rule fails to articulate “clearer rules of behavior” that would allow them to take affirmative steps to limit injuries or potential lawsuits.<sup>249</sup>

### *B. The Baseball Rule in New Mexico Moving Forward*

Though the modified duty announced by the court has often been referred to as the “baseball rule,” in New Mexico it may be properly termed the Isotopes Rule. The court’s holding was limited to the context of commercial baseball.<sup>250</sup> Currently, New Mexico has only one commer-

247. *Id.*

248. *See id.* ¶ 5, 241 P.3d at 1088 (“[I]t is alleged that the injured child was not in an area dedicated solely to viewing the game . . . . Given the scope of duty that we define today and Plaintiff’s allegations, we conclude that . . . Defendants did not make a prima facie showing entitling them to summary judgment.”).

249. *See id.* ¶ 21, 241 P.3d at 1092 (noting that one benefit of modifying a duty of care is in “providing clearer rules of behavior for actions who may be subject to tort liability and who structure their behavior in response to that potential liability” (quoting RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM, § 7 cmt. i (2010))).

250. *Id.* ¶ 41, 241 P.3d at 1097 (stating that “[w]e hold, therefore, that an owner/occup[er] of a commercial baseball stadium . . . .”) (emphasis added).

cial baseball team, the Albuquerque Isotopes. Therefore, barring expansion of commercial baseball in New Mexico, it is likely the court's holding is only applicable to injuries occurring in Isotopes Park. However, the articulation of the duty, and the policy and rationale used to justify it, may provide for expansion in other areas of New Mexico law.

The most obvious extension of the rule would be to non-commercialized baseball. Whether it be Little League, high school, or even collegiate-level baseball, it would seem that the similar inherent risks of attending these activities would impose a duty of self-protection upon spectators. The issue, however, is that the policy justifications supporting the rule do not easily extend to these venues.<sup>251</sup> For instance, most spectators attending a Little League or high school baseball game are likely attending due to some relationship to a player or the team. Most spectators are not there to catch foul balls and the stadium operators of the park, be it a school district or Little League association, have no business interest in encouraging spectators to do so. Perhaps different, but just as substantial, policy reasons would justify a modified duty for these venues. These policy justifications could range from an acknowledgment of the often limited financial resources of these stadium operators to the social benefits of encouraging youth sports. In fact, despite the presumption that the standard duty of ordinary care still applies to non-commercialized baseball stadiums, it is possible that these policy justifications would warrant a more limited form of the baseball rule than that announced in *Edward C.*

A second area of expansion could be similar modified duties for stadium operators of other commercialized sports in New Mexico. Apart from the Isotopes, New Mexico currently also has a minor-league basketball team, the Albuquerque Thunderbirds, and a professional junior league hockey team, the New Mexico Mustangs. Formerly, New Mexico also had a minor-league hockey team, the New Mexico Scorpions, which ceased operations in 2009. In *McFatridge v. Harlem Globe Trotters*, the New Mexico Supreme Court rejected limiting or modifying the duty of care owed to basketball game spectators.<sup>252</sup> The impact of *Edward C.* on *McFatridge* remains to be seen. Basketball, however, seems an unlikely area of expansion of *Edward C.* due both to the *McFatridge* holding and the differing expected spectator experiences between basketball and

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251. *See id.* ¶ 41, 241 P.2d at 1098 (“[The rule] balances the practical interest of watching a sport that encourages players to strike a ball beyond the field of play in fair ball territory to score runs with the safety and entertainment interests of the spectators in catching such balls.”).

252. 69 N.M. 271, 276–77, 365 P.2d 918, 921–22 (1961).

baseball.<sup>253</sup> Hockey is also a potential candidate for a similar modified duty in the context of a traditional commercial sporting event. Similar to baseball, the inherent risk of being injured by a projectile does exist at hockey games and many hockey arenas do provide netting behind the goals to protect fans. Indeed, in some cases the modified or limited duties for baseball stadium proprietors has been referenced in extending a similar rule to hockey spectator injuries.<sup>254</sup> Thus, it would be logical to extend the *Edward C.* holding to hockey, should such a case come before a New Mexico appellate court.

A potentially interesting area of expansion exists in the overlap between the court's holding in *Edward C.* and in *Kabella v. Bouschelle*.<sup>255</sup> In *Edward C.*, the court stated that "it is consistent with New Mexico case law to modify the duty owed in the context of participatory sporting events when a risk of physical injury is inherent to the activity."<sup>256</sup> The *Edward C.* court cited *Kabella* as support for this proposition.<sup>257</sup> Yet, the duty modified in *Edward C.*, unlike *Kabella*, is not directed towards those participating in the sporting event, rather it is directed towards spectators.<sup>258</sup> Likewise, the *Kabella* holding applies regardless of whether the game being played is an organized game or an informal undertaking, e.g., tag football, unlike *Edward C.*'s commercial limitation.<sup>259</sup> The most significant difference between the cases, however, is the different duty standards. In *Kabella* a suit must be based on intentional or reckless conduct,<sup>260</sup> while *Edward C.* requires that a defendant not have increased inherent risks of the game.<sup>261</sup> Nevertheless, the potential for overlap exists in sports or recreational activities where the line between spectator and participant may be blurry. This issue could arise in municipally owned skateboard parks, for instance, or collegiate intramural activities. Used together, then, the two holdings could lead to an expansion of modified duties into a host of both formal sporting events and recreational activities insulating otherwise potential defendants from liability to both participants and spectators.

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253. *See id.* at 276–77, 365 P.2d at 922 (stating that there is no "real danger of injury to spectators at a basketball game from balls entering the spectator section in the usual and ordinary course of a game").

254. *See Sciarrotta v. Global Spectrum*, 944 A.2d 630 (N.J. 2008).

255. 100 N.M. 461, 672 P.2d 290 (Ct. App. 1983).

256. *Edward C.*, 2010-NMSC-043, ¶ 42, 241 P.3d at 1098.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Kabella*, 100 N.M. at 464, 672 P.2d at 293.

261. *Edward C.*, 2010-NMSC-043, ¶ 41, 241 P.3d at 1097–98.



Taken jointly, the *Edward C.* and *Kabella* decisions evidence that, at least in the context of sports, not all movements in New Mexico are away from “judicially declared . . . protectionism.”<sup>262</sup> By incorporating the symmetrical duty concept of *Edward C.*, future sport or high-risk activities may see a rise in duty modifications that include a duty of self-protection for participants and spectators for inherent risks. Any modification will still require significant public policy justifications but both cases provide the needed foundation for these arguments.

### CONCLUSION

Time will tell whether the rule announced by the court has any significance past the gates of Isotopes Park. On the one hand, the case represents a unique judicial response to a potentially recurring, yet limited, factual scenario. On the other, it signals another case in which New Mexico has modified a duty in response to the public, and even private, interests at stake in the litigation. In this vein, it could be a signpost evidencing a shift in New Mexico’s negligence jurisprudence indicating a greater burden on potential plaintiffs to protect themselves against the inherent risks of activities while limiting liability for facilitators of those activities. Regardless, the rule announced by the court reinforces the viability of the baseball rule in American jurisprudence while simultaneously adding a unique, if not novel, twist to its continued evolution.

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262. *Yount v. Johnson*, 1996-NMCA-046, ¶ 4, 915 P.2d 341, 342.