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## Swimming Against the Current: *Mayall v. USA Water Polo* and Its Potential Impact on Overseeing Athletic Organizations

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### Introduction

The concussion epidemic has been a major source of discussion among commentators in a variety of different subject areas, as many attempt to determine how to solve this crisis and curb the threat it poses to sport participation. While much of the discussion is centered around professional and intercollegiate sports, amateur youth sports have been affected as well. According to medical researchers, around 600,000 sport- and recreation-related concussions by youth sport participants are treated each year; between 22.5 percent and 52.7 percent of high school students’ concussions are not reported to medical providers for treatment.<sup>2</sup> It may be impossible to entirely remove concussions from sport. Even still, significant efforts have been made by state legislatures and overseeing athletic organizations, including promulgation of effective concussion management policies, education of coaches about the threat of concussions and

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<sup>2</sup> Mersine A. Bryan et al., Sports- and Recreation-Related Concussions in US Youth, 138 *Pediatrics* 1, 4–5 (2016).

other head injuries, facilitation of better recognition of concussion symptoms, and encouragement of appropriate action to prevent or minimize secondary injuries.<sup>3</sup>

Not all overseeing athletic organizations have jumped onto this bandwagon, however. While the resistance of larger organizations like the National Football League (“NFL”) and National Collegiate Athletic Association (“NCAA”) to enacting effective concussion policies has been well-documented and well-litigated,<sup>4</sup> policymakers in youth sports are often overlooked. This leads to decreased pressure on these youth sports organizations to act.

For example, according to the allegations in a case recently decided by the United States Court of Appeals for the Ninth Circuit, USA Water Polo—“‘the rule-making authority’ for water polo in the United States ‘with the self-proclaimed responsibility for player safety and health’”—failed to implement a clear concussion policy for its sanctioned youth sports competitions at the time the plaintiff’s young daughter was injured during a match in 2014.<sup>5</sup> According to these allegations, this failure occurred despite a 2002 consensus among medical researchers and industry stakeholders concerning the need for firm return-to-play protocols and pressure from associated parents and educators since 2011.<sup>6</sup> In response to these pressures, USA Water Polo allegedly “‘did nothing.’”<sup>7</sup>

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<sup>3</sup> For state legislative efforts, see, e.g., Tracey Covassin et al., *Educating Coaches About Concussion in Sports: Evaluation of the CDC’s “Heads Up: Concussion in Youth Sports” Initiative*, 82 *J. School Health* 233, 233–34 (2012) (detailing efforts by states to pass legislation). For efforts by overseeing athletic organizations, see, e.g., NFL Head, Neck and Spine Committee’s Concussion Protocol Overview, NFL Player Health and Safety (Jun. 22, 2018), <https://www.playsmartplaysafe.com/newsroom/videos/nfl-head-neck-spine-committees-concussion-protocol-overview/>; Concussion Diagnosis and Management Best Practices, National Collegiate Athletic Association, <http://www.ncaa.org/sport-science-institute/concussion-diagnosis-and-management-best-practices> (last visited May 28, 2020); Concussion in Sports, National Federation of State High School Associations Learning Center, <https://nfhslern.com/courses/concussion-in-sports-2> (last visited May 28, 2020).

<sup>4</sup> See Mark Fainaru-Wada & Steve Fainaru, *League of Denial* (2013) (detailing NFL efforts to cover up evidence of concussions and provide counter-studies minimizing the dangers of concussions in professional football); Lauren Ezell, *Timeline: The NFL’s Concussion Crisis*, *Frontline* (Oct. 8, 2013, 9:57 PM), <https://www.pbs.org/wgbh/pages/frontline/sports/league-of-denial/timeline-the-nfls-concussion-crisis/> (providing a timeline of the NFL’s history with concussions, including for comparative purposes both incidents creating “growing scientific concern about the link between football and brain disease” and NFL public statements); Daniel J. Kain, Note, “It’s Just a Concussion:” The National Football League’s Denial of a Casual Link Between Multiple Concussions and Later-Life Cognitive Decline, 50 *Rutgers L.J.* 697 (2008) (further detailing NFL cover-up efforts regarding concussions and examining potential liability by comparing the NFL’s situation with litigation regarding the denial of cigarette companies of the harm caused by their products); *In re Nat’l Football League Players Concussion Injury Litigation*, 821 F.3d 410 (3d Cir. 2016) (examining a proposed class action settlement to a lawsuit filed against the NFL by former NFL players alleging that the NFL failed to take reasonable actions to protect them from the chronic risks of concussions and other head injuries in professional football); Whitney Johnson, Note, *Deception, Degeneration, and the Delegation Of Duty: Contracting Safety Obligations Between the NCAA, Member Institutions, and Student-Athletes*, 49 *Val. U.L. Rev.* 1045 (2014) (detailing alleged historical failures of the NCAA to combat the risks of harm from concussions in intercollegiate sports and the inadequacy of their then-current concussion protocols); *Rose v. NCAA*, 346 F. Supp. 3d 1212, 1217 (2018) (denying motions to dismiss claims of negligence and fraudulent concealment filed against the NCAA and Big Ten Conference by former NCAA college athletes alleging that the NCAA and its conferences “were uniquely aware of the risks of repetitive brain trauma and, yet, exposed players to those risks with no regard for players’ health and safety.”).

<sup>5</sup> *Mayall v. USA Water Polo, Inc.*, 909 F.3d 1055, 1068, 1060 (9th Cir. 2018).

<sup>6</sup> *Id.* at 1068.

<sup>7</sup> *Id.*

Pinning legal liability on these organizations has proven to be a challenge for many plaintiffs.<sup>8</sup> Indeed, the district court in this case—while framing its role as needing to maintain a careful balance between “sports promot[ing] the lifelong values of team work, good health, athletic excellence, fair play, and robust competition” and the need to ensure the safety of athletes—ruled against imposing liability against USA Water Polo, holding that USA Water Polo did not owe a legal duty to promulgate such policies.<sup>9</sup> On appeal, however, the Ninth Circuit fully reversed this ruling and held that USA Water Polo could be liable for gross negligence for its “inaction in the face of substantial evidence of [the] risk of harm” for secondary concussive injuries.<sup>10</sup> While this ruling could certainly be interpreted as a win for youth sport participants, it comes with potentially significant effects on youth sports organizations since, as argued by the Association of Chief Executives for Sports (“ACES”), a trade organization of Olympic sport governing body executives, “the [Ninth Circuit’s] decision exposes sports organizations to substantially greater liability than they have previously anticipated.”<sup>11</sup>

This Article is in many ways a sequel to a previously published work by the author that discussed *Mayall v. USA Water Polo* as one of six recently decided negligence cases that defined the landscape of legal culpability for overseeing amateur athletic organizations like the NCAA and Olympic governing bodies.<sup>12</sup> That Article discussed the district court decision in *Mayall* and found that the plaintiff’s unsuccessful attempts to invoke the voluntary undertaking doctrine<sup>13</sup> to impose liability on USA Water Polo for an alleged failure to promulgate proper concussion policy showed that “organizations that merely take a ‘broad responsibility’ to promote safety in their sport cannot be held as having ‘specifically undertaken a duty’ to keep players safe.”<sup>14</sup>

The Ninth Circuit’s decision overturning *Mayall* undercuts that claim. Indeed, the Ninth Circuit in *Mayall* found that the plaintiff’s contentions that USA Water Polo’s failure to promulgate rules to protect young athletes was not only proper enough to support a negligence claim under the voluntary undertaking doctrine, but was even enough to show that USA Water Polo’s failure to act may constitute gross negligence<sup>15</sup>—a potentially serious development for overseeing organizations that are careless in the way that they institute health and safety policy.

To fully explore the potential impact of the Ninth Circuit’s decision on the landscape of amateur sports policy, this Article seeks to explore the history of *Mayall* and assess the case’s impact on the legal responsibilities of overseeing athletic organizations to promulgate consistent and effective health and safety policy. Part I offers background information on the *Mayall* litigation by providing

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<sup>8</sup> See, e.g., *Mehr v. Féd’n Int’l de Football Ass’n*, 115 F. Supp. 3d 1035 (N.D. Cal. 2015) (dismissing failure-to-act claims against a variety of athletic organizations that oversee youth soccer including U.S. Soccer, the U.S. Youth Soccer Association, and the American Youth Soccer Organization).

<sup>9</sup> *Mayall v. USA Water Polo, Inc.*, 174 F. Supp. 3d 1220, 1223 (C.D. Cal. 2016).

<sup>10</sup> *Mayall*, 909 F.3d at 1068.

<sup>11</sup> Brief of Amicus Curiae [sic] Ass’n of Chief Executives for Sport in Support of Petition for Panel Rehearing and Rehearing En Banc at 11, *Mayall v. USA Water Polo, Inc.* 909 F.3d 1055 (9th Cir. Jan. 14, 2019).

<sup>12</sup> See Sam C. Ehrlich, *Gratuitous Promises: Overseeing Athletic Organizations and the Duty to Care*, 25 *Jeffrey S. Moorad Sports L.J.* 1 (2018).

<sup>13</sup> See Restatement (Second) of Torts § 323 (Am. Law Inst. 1965) (outlining the voluntary undertaking doctrine).

<sup>14</sup> Ehrlich, *supra* note 12, at 34 (quoting *Mehr*, 115 F. Supp. 3d at 1066.)

<sup>15</sup> *Mayall*, 909 F.3d at 1068.

an analysis of the procedural history and future of the litigation at the district court and Ninth Circuit. Part II then summarizes the Ninth Circuit’s opinion and USA Water Polo’s unsuccessful attempt to have the decision reviewed *en banc* by the Ninth Circuit’s full panel. Finally, Part III extrapolates three broad takeaways from the Ninth Circuit’s holding and examines the new frontier of negligence litigation—related to concussions and broader health and safety issues—for overseeing athletic organizations.

### I. The Events Leading Up to the Ninth Circuit’s Ruling

According to the facts of the initial complaint filed by her mother, on February 15, 2014, H.C., a 14-year-old goalie playing on the Livermore Area Recreation and Park District (“LARPD”) Lazars water polo team was hit in the face by a shot from an opponent.<sup>16</sup> The ongoing match was not stopped by either the referee or the coach.<sup>17</sup> Dazed from the impact of the shot, H.C. then swam over to her coach on the sideline while her team was on offense.<sup>18</sup> The coach, who according to the complaint lacked any concussion management training, qualifications, or education from USA Water Polo, allowed H.C. to remain in the game without any treatment after H.C. told her coach that she wanted to stay in.<sup>19</sup>

At the time, H.C. and the LARPD Lazars were playing in the annual “WinterFest” water polo tournament that is organized and managed by USA Water Polo.<sup>20</sup> As part of this tournament, H.C. and her teammates played five matches over three consecutive days.<sup>21</sup> Indeed, despite her reported concussive effects H.C. played goalkeeper in several additional games that day and received additional hits to the face during those games.<sup>22</sup> Just as with the first hit, none of these subsequent hits resulted in a stopped game or the removal of H.C. from the pool, and no medical personnel were on site to provide treatment.<sup>23</sup>

One day after returning home from the tournament, H.C. started feeling various concussive effects, including headaches, sleepiness, fatigue, dizziness, inability to tolerate movement, extreme sensitivity to light, decreased appetite, nausea, and an inability to do any schoolwork.<sup>24</sup> These symptoms worsened through March 4, 2014, when H.C. was diagnosed with post-concussive syndrome by her doctor, and March 12, 2014, when H.C. met with a neurologist who confirmed that H.C.’s symptoms were “completely consistent with concussion.”<sup>25</sup> Unfortunately, H.C.’s symptoms continued to worsen from that point forward. H.C., who according to the complaint was previously “a healthy, high-achieving, straight ‘A’ honors student and multi-sport athlete,” was forced to drop out of school for the rest of the year in favor of a home-and-hospital instructional

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<sup>16</sup> Complaint at 8, *Mayall v. USA Water Polo, Inc.*, No. 15-cv-00171, 174 F. Supp. 3d 1220 (C.D. Cal. 2015). The LARPD Lazars is a USA Water Polo-sanctioned team in Livermore, California. See *Water Polo for Adults and Children in Livermore at LARPD*, Livermore Area Recreation and Park District, <https://www.larpd.org/water-polo> (last visited Oct. 23, 2019).

<sup>17</sup> Complaint, *Mayall*, *supra* note 16, at 8.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 7.

<sup>21</sup> *Id.* at 8.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 9.

program offered by her school district, where her “productivity in completing academic work . . . was greatly diminished” due to her symptoms.<sup>26</sup> While she attended this program, H.C.’s symptoms allegedly worsened to include “a deficit in her ability to hold information in her mind or complete tasks” and she functioned in a “low-average range in memory and controlled attention.”<sup>27</sup>

Approximately one year following her injury, H.C.’s mother, Alice Mayall, filed a class action complaint with the U.S. District Court of the Central District of California alleging negligence against USA Water Polo and asserting that the governing body had “engaged in a pattern of gross negligence and inaction with respect to concussions and concussion-related maladies suffered by players” that had led to her daughter’s injuries.<sup>28</sup> Mayall claimed that USA Water Polo, as the “regulatory body for water polo and water polo players,” acted carelessly and negligently in eight enumerated ways:

- a. Failing to educate players and their parents concerning symptoms that may indicate a concussion has occurred;
- b. Failing to warn of the risk of unreasonable harm resulting from repeated concussions, the accumulation of subconcussive hits, and heading;
- c. Failing to disclose the risks of long-term complications from repeated concussions and return to play;
- d. Failing to disclose the role of repeated concussions or accumulation of subconcussive hits in causing chronic life-long cognitive decline;
- e. Failing to promulgate rules and regulations to adequately address the dangers of repeated concussions and accumulation of subconcussive hits, and a return-to-play policy to minimize long-term chronic cognitive problems;
- f. Concealing and misrepresenting pertinent facts that players and parents needed to be aware of to make determinations of the safety of return to play;
- g. Failing to adopt rules and reasonably enforce those rules to minimize the risk of players suffering debilitating concussions; and
- h. Other acts of negligence or carelessness that may materialize during the pendency of this action.<sup>29</sup>

Moreover, Mayall claimed that USA Water Polo had “voluntarily assumed a duty toward Plaintiff and the Class to supervise, regulate, monitor, and provide reasonable and appropriate rules to minimize the risk of injury to the

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<sup>26</sup> *Id.* at 7, 9.

<sup>27</sup> *Id.* at 9.

<sup>28</sup> *Id.* at 5. The proposed class purported to include “all current or former water polo players who, from 2002 to the present, competed for a team governed by USA Water Polo.” *Id.* The class action component of the complaint has not yet been addressed by the court; following the Ninth Circuit’s ruling in December 2018 the district court ordered the plaintiff to file a renewed Motion for Class Certification by November 5, 2019, with discovery to follow. Order Granting Joint Stipulation for Entry of Agreed Scheduling Order at 1–2, *Mayall v. USA Water Polo, Inc.*, No. 15-cv-00171 (C.D. Cal. May 21, 2019).

<sup>29</sup> Complaint, *Mayall*, supra note 16, at 70–71.

players” and acted negligently by not implementing proper “system-wide ‘return-to-play’ guidelines for athletes who have sustained concussions.”<sup>30</sup> This claim implicated what is known as the voluntary undertaking doctrine, which provides in relevant part that:

[O]ne who undertakes gratuitously or for consideration, to render services to another . . . is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other’s reliance on the undertaking.<sup>31</sup>

To support this claim, Mayall pointed to USA Water Polo’s alleged failure “to enforce *any* of the consensus best practices for concussion management” in running their sanctioned events.<sup>32</sup> These consensus best practices, according to the complaint, included the 2002 Vienna Protocol, which recommended specific return-to-play guidelines including removing players from games or practices when they exhibit any symptoms or signs of a concussion and implementing a medically-supervised process before allowing athletes to return to play.<sup>33</sup> By contrast, despite evidence that USA Water Polo was aware of the specific risk of concussions in water polo—including a statement by USA Water Polo’s former medical director and team physician calling concussions “the ‘king of water polo injuries’ and ‘the most important acute injury to care for’”—the plaintiff asserted that USA Water Polo had not come close to adopting any of these best practices.<sup>34</sup> Instead, the plaintiff alleged that none of USA Water Polo’s official bylaws, playing rules, or policies and procedures even mentioned concussions, concussion protocols, or concussion-related playing rules, and the sanctioning process for coaches and referees did not include any training or education in concussion management or recognition, which the plaintiff called a “contravention of best practices.”<sup>35</sup>

Following the filing of Mayall’s complaint, USA Water Polo filed a motion to dismiss the complaint based on two grounds: First, that H.C. voluntarily assumed the risk of her injuries as concussive injuries are “an inherent risk of the sport,”<sup>36</sup> and second, that there was nothing in the complaint demonstrating that H.C. “in any way relied on USA Water Polo having supposedly voluntarily assumed a duty ‘to supervise, regulate, monitor, and provide reasonable and appropriate rules to minimize the risk of injury to the players’” or that H.C.’s injuries were as a result of that reliance.<sup>37</sup> These deficiencies, USA Water Polo argued, showed that USA Water Polo did not owe a legal duty to H.C. under a

<sup>30</sup> Id. at 71, 73.

<sup>31</sup> Restatement (Second) of Torts § 323 (Am. Law Inst. 1965). See also *Artiglio v. Corning Inc.*, 18 Cal. 4th 604, 614 (Cal. 1998) (explaining the voluntary undertaking doctrine as applied under California law).

<sup>32</sup> Complaint, Mayall, *supra* note 16, at 76.

<sup>33</sup> Id. at 21–25.

<sup>34</sup> Id. at 51–52.

<sup>35</sup> Id. at 55–56.

<sup>36</sup> Mot. to Dismiss Class Action Complaint at 11, *Mayall v. USA Water Polo, Inc.*, 174 F. Supp. 3d 1220 (C.D. Cal. Apr. 1, 2015) (No. 15-cv-00171).

<sup>37</sup> Id. at 17.

negligence theory, which in turn necessitated dismissal of the gross negligence claim, which itself “requires proof of ‘the traditional elements of negligence: duty, breach, causation, and damages.’”<sup>38</sup>

### A. The Two District Court Rulings

After initially dismissing the complaint without prejudice because Mayall did not file a motion to appear as H.C.’s guardian ad litem,<sup>39</sup> Judge Guilford of the U.S. District Court for the Central District of California published his first decision on the legal merits of the negligence claim on March 30, 2016.<sup>40</sup> In the decision, Judge Guilford noted that the case presented “a significant question facing society about how to best maintain” the values of sports “while also ensuring the safety of athletes.”<sup>41</sup>

Even while expressing a need to balance the value of sports with the health and safety of sport participants, Judge Guilford strongly sided with USA Water Polo in several critical areas. First, Judge Guilford ruled that the plaintiff did not have standing to bring the suit, ruling that there was no injury-in-fact because the complaint had shown that H.C. was no longer playing water polo in USA Water Polo-sanctioned events.<sup>42</sup> As the plaintiff had focused her claim on a plea for injunctive relief rather than damages for H.C.’s alleged injuries, Judge Guilford found the complaint “d[id] not allege sufficient facts that H.C. is realistically threatened by a repetition of a violation.”<sup>43</sup> Judge Guilford reasoned if H.C. is not playing water polo for a USA Water Polo team, “she is not exposed to the types of ‘continuing, present adverse effects’ needed to have standing to bring claims against [USA Water Polo].”<sup>44</sup> Even though the plaintiff had argued in her brief in opposition and at oral argument that it was a “plausible inference [that] H.C. will continue to play water polo if [USA Water Polo] implements Plaintiff’s requested concussion policies,” Judge Guilford noted that this only showed that H.C. was not currently playing the game, “much less for a team governed by [USA Water Polo’s] rules and policies.”<sup>45</sup>

Addressing the negligence and gross negligence claims, Judge Guilford noted that under California law’s assumption of risk doctrine, defendants like USA Water Polo do not owe a legal duty to eliminate risks inherent to the sport in question.<sup>46</sup> Finding that the plaintiff’s complaint supported USA Water Polo’s contentions that head injuries—even successive head injuries—are common in

<sup>38</sup> Id. at 19 (quoting *Frittelli v. 350 North Canon Drive, LP*, 202 Cal. App. 4th 35, 52 (Cal. Ct. App. 2011)).

<sup>39</sup> *Mayall v. USA Water Polo, Inc.* (Mayall D.C. I), No. 15-cv-00171, 2015 U.S. Dist. LEXIS 188549, at \*3 (C.D. Cal. June 8, 2015).

<sup>40</sup> *Mayall v. USA Water Polo, Inc.* (Mayall D.C. II), 174 F. Supp. 3d 1220 (C.D. Cal. 2016).

<sup>41</sup> Id. at 1223.

<sup>42</sup> Id. at 1224–25.

<sup>43</sup> Although the “repetition of a violation” language here seems to suggest that Judge Guilford was refer to mootness rather than standing, the case he cited in support of this analysis, *Gest v. Bradbury*, 443 F.3d 1177, 1181 (9th Cir. 2006), frames such discussion in terms of standing when declaratory and injunctive relief is sought. Id. (quoting *Armstrong v. Davis*, 275 F.3d 849, 860–61 (9th Cir. 2001)) (alteration in original) (“Additionally, where, as here, the signature collectors seek declaratory and injunctive relief, they must demonstrate that they are ‘realistically threatened by a repetition of the violation.’”).

<sup>44</sup> *Mayall D.C. II*, 174 F. Supp. 3d at 1224–25 (quoting *O’Shea v. Littleton*, 414 U.S. 488, 496 (1974)).

<sup>45</sup> Id. at 1225 (alteration in original).

<sup>46</sup> Id. at 1226–27 (citing *Knight v. Jewett*, 834 P.2d 696, 707 (Cal. 1992)).



and therefore an inherent risk of water polo, Judge Guilford ruled that Mayall would only be able to show that USA Water Polo owed a duty not to *increase* the risks.<sup>47</sup> While the plaintiff alleged that USA Water Polo “failed to *minimize* the risk of head injuries,” this was not enough to support additional claims that USA Water Polo “*increased* those risks.”<sup>48</sup>

In reaching this finding, Judge Guilford addressed one case in particular that was offered by Mayall to support her allegation that USA Water Polo owed a duty of care. In *Wattenbarger v. Cincinnati Reds*,<sup>49</sup> a young baseball pitcher trying out for the Cincinnati Reds had reported to the tryout organizers that he had felt his shoulder “pop,” which is generally considered a sign of a significant elbow or shoulder injury.<sup>50</sup> After receiving no response from the coaches, the pitcher returned to the mound and experienced severe pain in his arm immediately after throwing another pitch.<sup>51</sup> The pitcher was later found to have torn a portion of the bone and tendons in his triceps, a significant injury that had been exacerbated by the additional pitch.<sup>52</sup> However, Judge Guilford distinguished this case from H.C.’s situation, finding that “unlike a ‘popped’ shoulder, concussions in water polo are not obvious injuries” and that unlike the *Wattenbarger* plaintiff, “H.C. was not impliedly or explicitly encouraged to return to play.”<sup>53</sup>

Judge Guilford also found Mayall’s claim that USA Water Polo had voluntarily assumed a duty “to supervise, regulate, monitor, and provide reasonable and appropriate rules to minimize the risk of injury to the players” to lack merit.<sup>54</sup> Rather than allege that USA Water Polo had undertaken a “*specific* duty to prevent or manage players’ head injuries,” Judge Guilford maintained that Mayall’s claim relied on “vague, sweeping allegations” that could not be found to show that USA Water Polo “undertook a *specific*, affirmative step to protect H.C. from suffering a concussion or aggravating her injury.”<sup>55</sup> At most, Judge Guilford found that Mayall’s claim showed that USA Water Polo had “voluntarily tried to minimize the inherent risks of injury in water polo,” but these voluntary efforts would not be enough to sustain a claim that USA Water Polo actually owed a duty to minimize those risks.<sup>56</sup> Moreover, Judge Guilford held that Mayall had not shown that H.C. had detrimentally relied on these efforts or any other actions by

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<sup>47</sup> *Id.* at 1227.

<sup>48</sup> *Id.* at 1228.

<sup>49</sup> *Wattenbarger v. Cincinnati Reds, Inc.*, 28 Cal. App. 4th 746 (Cal. Ct. App. 1994). *Wattenbarger* would eventually become a key point of precedent relied upon by the Ninth Circuit in overturning the district courts decisions in favor of *Mayall*. See *infra* notes 92–95 and accompanying text; see also *Mayall v. USA Water Polo, Inc.*, 909 F.3d 1055, 1063–64 (9th Cir. 2018) (alteration in original) (finding that *Wattenbarger* is “remarkably similar” to Mayall’s claim and that “[t]he court’s holding in *Wattenbarger*[sic] rests on the primary-secondary distinction that is at the core of Mayall’s case”); *infra* Part III(A) (discussing the duty of care owed for secondary injuries).

<sup>50</sup> *Wattenbarger*, 28 Cal. App. 4th at 750.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*; see also Sam C. Ehrlich & John T. Holden, *Throwing the Book at Irresponsible Coaches: The Need for Consistent Pitch Limit Laws in Amateur Sports*, 47 *Hofstra L. Rev.* 527, 546–48 (2018) (discussing *Wattenbarger* and the risk of harm from throwing another pitch after hearing an arm “pop.”).

<sup>53</sup> *Mayall D.C. II*, 174 F. Supp. 3d at 1228.

<sup>54</sup> *Id.* at 1229.

<sup>55</sup> *Id.* 1229–30 (emphasis in original).

<sup>56</sup> *Id.* at 1230; see *Nalwa v. Cedar Fair, L.P.*, 290 P.3d 1158, 1167 (Cal. 2012) (finding that “voluntary efforts at minimizing risk” do not show that a defendant owes a duty to minimize those risks, as “not every rule imposed by an organizer or agreed to by participants in a recreational activity reflects a legal duty enforceable in tort.”).

USA Water Polo, which “alone would justify dismissing Plaintiff’s claim.”<sup>57</sup> As such, the district court dismissed Mayall’s claims.<sup>58</sup>

Judge Guilford did, however, allow Mayall an additional bite at the apple through a second amended complaint.<sup>59</sup> In this second amended complaint, Mayall addressed the theory of increased risk from the outset. She argued that USA Water Polo’s policies permitting youth athletes exhibiting concussion symptoms to continue to play “without proceeding through a stepwise return to play protocol and/or being cleared by a physician skilled in the diagnosis and management of concussions” innately “increase the risk of permanent or severe neurologic deficit resulting from exertion and reinjury.”<sup>60</sup> Indeed, in this second complaint, Mayall notably shifted her strategy from discussing head injuries generally to instead focusing on the increased risks of harm resulting from allowing athletes to return to play with an active concussion, both in terms of exacerbating the current injury and the documented potential for increased harm through repeat concussions.<sup>61</sup> This shift in strategy was particularly evident when Mayall discussed her legal claims. She alleged in this second amended complaint that USA Water Polo “should—and did—realize that rules regarding concussion management and return to play were necessary for the protection of [H.C.] and the Class” in order to not increase the risk of prolonged concussion injuries, reinjury, and permanent damage.<sup>62</sup>

Mayall’s second amended complaint also included significant allegations that USA Water Polo knew of the risks of secondary concussions but voluntarily chose not to enact return-to-play policies for their sanctioned events.<sup>63</sup> Mayall specifically pointed to several incidents where USA Water Polo youth athletes suffered concussive events and the parents of these athletes were told that USA Water Polo does not have a concussion management policy. One such incident occurred in 2011, when USA Water Polo’s director of club and member programs told an event-hosting university that an injured 19-year-old athlete “is an adult and needs to decide if she is healthy enough to play” on her own based on recommendations from her personal physician.<sup>64</sup> Mayall pointed instead to USA Water Polo’s concussion policy for its national teams, which outlined a three-step protocol that included periodic review by a physician before any athlete identified as suffering a concussion or a mild traumatic brain injury could return to play.<sup>65</sup> This policy had been in place before the 2011 incident, thus well before H.C.’s injury in 2014.<sup>66</sup>

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<sup>57</sup> *Mayall D.C. II*, 174 F. Supp. 3d at 1230.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Second Amended Complaint at 4, *Mayall v. USA Water Polo, Inc.*, 2016 U.S. Dist. LEXIS 115047 (C.D. Cal. Aug. 26 2016) (No. 8:15-cv-00171), 2016 U.S. Dist. Ct. Pleadings LEXIS 24879.

<sup>61</sup> *Id.* at 9 (citing and discussing studies noting that “players who have not recovered from a concussion and those with a history of previous concussions are more likely to have future concussive injuries than those with no history, particularly within the same playing season.”).

<sup>62</sup> *Id.* at 75.

<sup>63</sup> *Id.* at 39–62. Notably, the second amended complaint included a citation and discussion of a July 2014 joint study between USA Water Polo and the University of California-Irvine about the incidence of concussions within the specific context of water polo. *Id.* at 39–40. However, this portion of the complaint was filed under seal and is entirely redacted in the published version of the filing. *Id.* at 40.

<sup>64</sup> *Id.* at 57–61.

<sup>65</sup> *Id.* at 43.

<sup>66</sup> *Id.*

Despite these reframed allegations, Mayall once again struck out at the district court when Judge Guilford granted USA Water Polo's motion to dismiss the second amended complaint in August 2016.<sup>67</sup> In his third written decision, Judge Guilford noted Mayall's shift in focus to "the risk of *secondary injuries* that can occur if a player returns to the game prematurely following a concussion" but found that the distinction between primary and secondary injuries was not enough to allow the claim to proceed.<sup>68</sup> Judge Guilford maintained that like primary concussive injuries, "the risk of secondary [concussive] injuries is part and parcel with playing a sport such as water polo" and that "failing to minimize risks inherent to the sport is not the same as increasing those risks."<sup>69</sup> Furthermore, Judge Guilford pointed to the difficulty of recognizing concussive symptoms during gameplay, once again distinguishing H.C.'s injuries from the more "obvious" injuries suffered by the baseball pitcher plaintiff in *Wattenbarger*.<sup>70</sup>

With regard to the voluntary undertaking claim, Judge Guilford was still not convinced that Mayall had a valid claim for reasons similar to those in his first decision. Just as he had earlier, Judge Guilford once again found that Mayall had "fail[ed] to show that Defendant undertook any 'specific task' to reduce the risk of secondary head injuries—the task they are charged with having performed negligently" and that USA Water Polo's emails discussing the lack of a return-to-play policy "doesn't establish a 'specific undertaking'" necessary for the claim to proceed.<sup>71</sup> Likewise, Judge Guilford once again determined that Mayall had not shown any detrimental reliance on USA Water Polo's policymaking role, which he noted was the only alternative to showing that USA Water Polo increased the risk of harm.<sup>72</sup>

For these reasons, Judge Guilford once again granted USA Water Polo's motion to dismiss. This time, however, Judge Guilford did not grant Mayall leave to amend, holding that because Mayall "present[ed] no argument in its Opposition suggesting that new factual allegations exist to support [her] claims," granting a third leave to amend "would be futile."<sup>73</sup> As a result, Mayall's next step was to appeal to the Ninth Circuit Court of Appeals.

## II. At the Ninth Circuit

### A. Briefing *Mayall*

In her opening brief on appeal, Mayall worked to frame the issue in simple terms: "whether a youth sports organization owes any duties under California law to implement concussion-management and return-to-play protocols for youth water polo."<sup>74</sup> This question, according to Mayall, necessitated addressing three more specific issues: (1) the negligence issue of whether a failure

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<sup>67</sup> *Mayall v. USA Water Polo, Inc.* (Mayall D.C. III), No. 15-cv-00171, 2016 U.S. Dist. LEXIS 115047, at \*15 (C.D. Cal. Aug. 26, 2016).

<sup>68</sup> *Id.* at \*6.

<sup>69</sup> *Id.* at \*7.

<sup>70</sup> *Id.* at \*8–9. See *supra* notes 49–53.

<sup>71</sup> *Id.* at \*10–11.

<sup>72</sup> *Id.* at \*12.

<sup>73</sup> *Id.* at \*14–15.

<sup>74</sup> Appellant's Opening Brief at 1, *Mayall v. USA Water Polo, Inc.*, 909 F.3d 1055 (9th Cir. 2017) (No. 16-56389).

to implement concussion management and return-to-play protocols increases the risks inherent in the sport; (2) the voluntary undertaking issue of whether USA Water Polo's "self-governing authority" constituted an undertaking of "the task of promulgating concussion-management protocols for youth water polo;" and (3) the gross negligence issue of whether an alleged "knowing failure to follow any safety protocols before returning H.C. to play after she was observed receiving a blow to her head" constitutes an "extreme departure from ordinary standards of care."<sup>75</sup>

In order to highlight the perceived error by the district court, Mayall once again focused heavily on the alleged "blind eye" that USA Water Polo turned to the risks of concussion. This included new allegations that before Mayall's injury, the most USA Water Polo had done was to include "a sentence fragment referring to concussions in youth water polo" within its November 2013 Rules of Conduct.<sup>76</sup> By contrast, Mayall alleged that after the appeal was taken by the Ninth Circuit, USA Water Polo posted on its website a new "Heads Up Concussion Policy" for youth water polo that mirrored its stepwise and methodical return-to-play policy for the national team.<sup>77</sup>

Notably, Mayall also stressed that Judge Guilford did not have the correct mindset when deciding Mayall's claim. She highlighted the introductory paragraph in Judge Guilford's first decision on the merits that discussed how sports have long added significant value to society at large by "promot[ing] the lifelong values of team work, good health, athletic excellence, fair play, and robust competition" and providing a "ticket to college" for young athletes.<sup>78</sup> According to Mayall, the court showed a predisposition against her claim by framing the case as a balance between "the 'pain and suffering of H.C.'" and "not discouraging athletes from going 'faster, higher, stronger.'"<sup>79</sup> Further, she contended that framing the case as merely a question of "whether USA Water Polo 'struck the proper balance between promoting vigorous competition and ensuring the safety of its competitors'" was improper since she had not filed her lawsuit "to upend broader societal norms related to sports."<sup>80</sup> Along the same lines, Mayall argued

<sup>75</sup> Id. at 2.

<sup>76</sup> Id. at 11–13. These rules include "encouraging or permitting an athlete to return to play prematurely following a serious injury (e.g., a concussion) and without the clearance of a medical professional" as one of "nine examples of 'physical abuse.'" Id. at 13.

<sup>77</sup> Id. at 19; see supra note 65 and accompanying text. While such evidence of subsequent remedial measures would not be admissible to prove USA Water Polo's negligence under Rule 407 of the Federal Rules of Evidence, Mayall presumably included this evidence to show the feasibility of these precautionary measures, which would be allowed under Rule 407. See Fed. R. Evid. 407. Moreover, as Mayall pointed out, such measures were only taken following the passage of a new California statute expanding the scope of the state's requirements for return-to-play policies from educational institutes to all youth sports organizations. Cal. Health & Safety Code § 124235 (2016); Cal. Educ. Code § 49475 (2012); see Anne Marie Ellis and Paul A. Alarcón, New Calif. Law Will Change Youth Sports Concussion Cases, *Lexology*, (Mar. 23, 2017), <https://www.lexology.com/library/detail.aspx?g=832ce90d-446d-4b46-a209-43674c927134> (describing the language and effects of the new California law on youth sports governance).

<sup>78</sup> Appellant's Opening Brief, supra note 74, at 23 (alteration in original) (quoting *Mayall v. USA Water Polo, Inc.* (Mayall D.C. II), 174 F. Supp. 3d 1220, 1223 (C.D. Cal. 2016)).

<sup>79</sup> Id. at 23–24 (quoting *Mayall D.C. II*, 174 F. Supp. 3d at 1223).

<sup>80</sup> Id. (quoting *Mayall D.C. II*, 174 F. Supp. 3d at 1223). Of note, Mayall also slyly mentioned in a footnote her belief that Judge Guilford's framing of the case "may have been influenced by his experience sustaining a concussion playing football." Id. at 24 n.82. However, Mayall emphasized that her appeal "does not question [Judge Guilford's] impartiality," so it is unclear why exactly that

that the district court overreached by finding “that plaintiff’s ‘proposed remedies’ would ‘fundamentally alter the nature of the sport.’”<sup>81</sup> According to Mayall, this framing showed that the district court decided the case based on facts not alleged in the complaint rather than taking the facts alleged in the complaint as true, which is the standard required at the motion to dismiss stage of the proceedings.<sup>82</sup>

As a means to highlight the shift in strategy from discussing overall risk of concussions to the narrower risk of secondary injuries, Mayall argued that the district court erred in ignoring the distinction between initial concussions and secondary injuries caused by allowing athletes to return to play.<sup>83</sup> Mayall contested the district court’s refusal to address the medically recommended return-to-play protocols and the return-to-play laws passed in many states which, she argued, highlighted USA Water Polo’s deficiency and refusal to conform to industry standards.<sup>84</sup> These faults in the district court’s reasoning—as well as the improper factual determinations in favor of USA Water Polo—were, according to Mayall, also present in the second dismissal order.<sup>85</sup>

In arguing that the district court dismissal was proper, USA Water Polo once again highlighted the strength of their defense under the primary assumption of risk doctrine. They contended that the doctrine still applies even after “the plaintiff changed her theory of the case and claimed that there is a distinction between suffering an ‘initial’ concussion while participating in water polo and suffering ‘secondary injuries’ while participating in water polo following that initial concussion.”<sup>86</sup> USA Water Polo also specifically agreed with the district court’s reasoning that Mayall failed to plead any specific duty that was performed improperly and that there was no reliance on USA Water Polo’s “desire to ‘creat[e] a healthy and safe environment for [their] participants.’”<sup>87</sup>

## B. The Ninth Circuit Decision

Despite the two prior dismissals of the case, the Ninth Circuit unanimously retreated from nearly every line of Judge Guilford’s reasoning in reversing the district court decision. In doing so, the Ninth Circuit adopted Mayall’s framing of the issues, assessing: (1) whether the complaint successfully alleged that USA Water Polo owed a duty to H.C. that could not be eclipsed by primary assumption of risk; (2) whether USA Water Polo’s standing as the governing entity for water polo events constituted a voluntary undertaking of responsibility to H.C.; and (3) whether USA Water Polo’s failure to promulgate a sufficient return-to-play policy constituted the “extreme departure from the ordinary standards of conduct” necessary to prove a gross negligence claim.<sup>88</sup>

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contention was included other than to perhaps more subtly suggest a more unconscious bias in the way the judge framed the issues at hand. *Id.* (alteration in original).

<sup>81</sup> *Id.* at 25–26.

<sup>82</sup> *Id.* at 24–25.

<sup>83</sup> *Id.* at 25 (quoting *Mayall D.C. II*, 174 F. Supp. 3d at 1227).

<sup>84</sup> *Id.* at 26.

<sup>85</sup> *Id.* at 30–32.

<sup>86</sup> Appellee’s Answering Brief at 5–6, *Mayall ex rel. v. USA Water Polo, Inc.*, 909 F.3d 1055 (9th Cir. 2018) (No. 16-56389).

<sup>87</sup> *Id.* at 20 (alteration in original).

<sup>88</sup> *Mayall ex rel.*, 909 F.3d at 1060.

i. *Duty of Care and Primary Assumption of Risk*

According to the Ninth Circuit, the question of whether USA Water Polo owed a duty to H.C. that could not be overcome by USA Water Polo's showing of primary assumption of risk hinged on the distinction between primary and secondary injuries made in Mayall's second amended complaint. The Ninth Circuit found this distinction to be relevant to their analysis, despite California law stating that "a person or entity does not owe a duty of care . . . where 'conditions or conduct that otherwise might be viewed as dangerous . . . are an integral part of the sport itself.'"<sup>89</sup> While USA Water Polo argued that secondary injuries are as inherent to water polo as the initial concussions, the Ninth Circuit compared injuries suffered as a result of being returned to play after an initial injury to those resulting from a baseball bat flying into the stands and striking a patron.<sup>90</sup> While bats flying into the stands are a common part of the sport of baseball, stadium owners still have a duty to those sitting "where 'the greatest danger exists'" and where flying bats could "reasonably be expected."<sup>91</sup> Because H.C.'s coach knew that she had suffered a head injury, had time to evaluate her, and knew (or should have known) of the potential harm that could result from keeping her in the game, any injury following that initial harm could reasonably have been avoided through proper training or policymaking.<sup>92</sup>

While the district court twice distinguished one particularly important case, *Wattenbarger v. Cincinnati Reds, Inc.*,<sup>93</sup> from Mayall's case on its facts, the Ninth Circuit instead found that Mayall's case was "remarkably similar" to *Wattenbarger*, emphasizing that case's holding that throwing a second pitch after a perceived injury was beyond the purview of assumption of risk.<sup>94</sup> To the Ninth Circuit, *Wattenbarger* represented "the primary-secondary distinction that is at the core of Mayall's case": the first injury (i.e. the 'pop' in *Wattenbarger* or the first concussion suffered by H.C.), was inherent to the sport in question, but "[t]he secondary injury, suffered after the plaintiff was allowed to continue . . . was not inherent" since it was foreseeable that further game play "posed an increased risk" of compounding harm.<sup>95</sup> The Ninth Circuit found that like the *Wattenbarger* plaintiff—who had received no instructions from the defendants as to whether to stop pitching after reporting the 'pop'—H.C. "received no guidance or instruction that would have removed her from play" after she "swam to the side of the pool to speak with her coach" and reported her concussion symptoms.<sup>96</sup>

Addressing USA Water Polo's contentions that secondary concussive injuries are an inherent risk of the sport, the Ninth Circuit found that the imposition

<sup>89</sup> Id. at 1061 (quoting *Knight v. Jewett*, 834 P.2d 696, 708 (Cal. 1992)).

<sup>90</sup> Id. at 1061–62 (citing *Ratcliff v. San Diego Baseball Club*, 81 P.2d 625 (Cal. Dist. Ct. App. 1938)).

<sup>91</sup> Id. at 1062 (quoting *Ratcliff*, 81 P.2d at 626).

<sup>92</sup> Id. at 1063. The Ninth Circuit favorably compared H.C.'s case to *Kahn v. East Side Union High School District*, 75 P.3d 30 (Cal. 2003), which involved a fourteen-year-old girl "who broke her neck attempting to perform a racing dive into a shallow pool while practicing for a swim meet." Mayall, 909 F.3d at 1062. In *Kahn*, the girl's swimming coach had not trained her to perform the dive and pressured her into performing it, and as such, while the dangers of a broken neck are clearly inherent to the actions of diving into a shallow pool, the adult coach's actions allowing that risk to occur without instruction or intervention negated the assumption of risk defense. Id.; *Kahn*, 75 P.3d at 44.

<sup>93</sup> 33 Cal. Rptr. 2d 732 (Cal. Ct. App. 1994).

<sup>94</sup> *Mayall*, 909 F.3d at 1063–64. See supra notes 49–53.

<sup>95</sup> Id. at 1063 (quoting *Wattenbarger*, 33 Cal. Rptr. 2d at 738).

<sup>96</sup> Id. at 1064.

of a return-to-play policy for its national team “made clear that using a detailed concussion-management and return-to-play protocol does not alter the fundamental nature of water polo.”<sup>97</sup> The Ninth Circuit found that USA Water Polo breached the duty of care owed to H.C. and other youth athletes given the national team policy—the mere inclusion of concussions as a small part of the general USA Water Polo Rules Governing Coaches’ Conduct did not satisfy USA Water Polo’s obligations.<sup>98</sup>

The Ninth Circuit noted the Rules Governing Coaches’ Conduct that outlined the national governing body’s limited concussion policy stood in “stark contrast” to the much clearer national team policy.<sup>99</sup> Unlike the national team rules, the youth team rules covered a wide variety of topics and were “merely hortatory, saying what the coaches are ‘expected’ to do.”<sup>100</sup> Further, the concussion policy language was essentially “buried in the fine print” of the document.<sup>101</sup> Additionally, the Ninth Circuit noted that the language in the youth team rules was placed “under the misleading heading of ‘sportsmanship’” and discussed a failure to take concussed players out of games as merely one of many forms of “physical abuse,” making the language very vague and difficult to understand.<sup>102</sup> By contrast, the national team policy and the consensus policy recommended by youth sports stakeholders were outlined in “single-topic documents addressing only head injuries,” were “mandatory rather than hortatory,” and were “detailed and clear, instructing coaches and others precisely what to do in order to assess the seriousness of a blow to the head, and in order to protect athletes who may have suffered a concussion.”<sup>103</sup> Since the rules governing H.C.’s coach “f[e]ll short of providing such instruction,” the rules governing H.C.’s coach did not satisfy the duty of care owed to H.C.<sup>104</sup>

ii. *Promulgation of Safety Rules as a Voluntary Undertaking*

On the second issue, whether USA Water Polo’s status as the governing entity for water polo events constituted a voluntary undertaking of responsibility to H.C., the parties and the court were forced to focus on one key question: whether USA Water Polo’s role as an overseeing athletic organization constituted a *specific* undertaking of responsibility to the athletes competing in their sanctioned events.<sup>105</sup> The word ‘specific’ was of particular concern to the court, as throughout the proceedings there had been a disagreement between the parties as to what exactly a voluntary undertaking is in the context of USA Water Polo’s role as the governing body of water polo. While the plaintiff asserted that “USA Water Polo voluntarily undertook the duty of ensuring that ‘proper safety precautions have been taken to protect the personal welfare of . . . athletes,’ and committed itself to ‘creating a healthy and safe environment of all of [its] members,’” USA Water

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<sup>97</sup> Id.

<sup>98</sup> Id. at 1064, 1066.

<sup>99</sup> Id. at 1066.

<sup>100</sup> Id.

<sup>101</sup> Id.

<sup>102</sup> Id.

<sup>103</sup> Id.

<sup>104</sup> Id.

<sup>105</sup> Id. at 1067–68.

Polo argued that “the duty it undertook to ‘create a healthy and safe environment’” was too general, and therefore “insufficient to trigger liability.”<sup>106</sup>

Throughout the district court proceedings, USA Water Polo and Judge Guilford relied on one pointed piece of California Supreme Court precedent: *Nalwa v. Cedar Fair, L.P.*,<sup>107</sup> a case involving an amusement park owner who was sued after a patron fractured her wrist while riding a bumper car.<sup>108</sup> In this case, the patron argued that the amusement park owner’s efforts to minimize head-on collisions between bumper cars meant that the owner owed a duty of care to minimize the risk of injury from these collisions.<sup>109</sup> The California Supreme Court, however, disagreed, holding that “not every rule imposed by an organizer or agreed to by participants in a recreational activity reflects a legal duty enforceable in tort;” sometimes efforts to reduce injury in certain activities are simply voluntary.<sup>110</sup> USA Water Polo had used this precedent to show that their efforts to minimize the risks of concussions in water polo did not equate to a legal duty.<sup>111</sup> The district court agreed, holding that USA Water Polo’s efforts “[a]t most” showed that “it voluntarily tried to minimize the inherent risks of injury in water polo.”<sup>112</sup>

However, the Ninth Circuit disagreed with USA Water Polo and the district court’s application of *Nalwa* in dismissing Mayall’s complaint. By contrast, the Ninth Circuit found that the California Supreme Court’s reasoning in *Nalwa* supported the allegation that USA Water Polo did, in fact, increase the risk of harm to H.C. by failing to promulgate an adequate return-to-play policy.<sup>113</sup> According to the Ninth Circuit, the *Nalwa* precedent also held that an amusement park operator “might still ‘violate its duty to use due care not to increase the risks to a participant over and above those inherent in the activity . . . by failing to provide routine safety measures.’”<sup>114</sup> USA Water Polo’s alleged “fail[ure] to use its authority to provide routine and important safety measures” constituted such a violation.<sup>115</sup> Since, according to the complaint, USA Water Polo could have essentially eliminated the risk of secondary concussions “through the implementation of concussion-management protocols already used by its national team,” not doing so unjustifiably increased the risk of harm for those not covered by the more robust policy.<sup>116</sup>

Finally, while USA Water Polo argued that Mayall’s complaint failed to demonstrate any reliance by H.C. on USA Water Polo’s policymaking authority, the Ninth Circuit determined that demonstration of such reliance did not matter.<sup>117</sup> Since a plaintiff could prove a defendant voluntarily undertook a duty to the

<sup>106</sup> *Id.* at 1066–67.

<sup>107</sup> 290 P.3d 1158 (Cal. 2012).

<sup>108</sup> *Id.* at 1160.

<sup>109</sup> *Id.* at 1167.

<sup>110</sup> *Id.* at 1167.

<sup>111</sup> See, e.g., Appellee’s Answering Brief, *supra* note 86, at 20–21 (citing *Nalwa*, 290 P.3d at 1167) (alteration in original) (“[S]uch voluntary efforts at minimizing risk do not demonstrate defendant bore a legal duty to do so; not every rule imposed by an organizer or agreed to by participants in a recreational activity reflects a legal duty enforceable in tort.”).

<sup>112</sup> *Mayall v. USA Water Polo, Inc.* (Mayall D.C. II), 174 F. Supp. 3d 1220, 1230 (C.D. Cal. 2016) (alteration in original).

<sup>113</sup> *Mayall v. USA Water Polo, Inc.*, 909 F.3d 1055, 1067–68 (9th Cir. 2018).

<sup>114</sup> *Id.* (quoting *Nalwa*, 290 P.3d at 1167–68).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 1067.

<sup>117</sup> *Id.* at 1067–68.



plaintiff by either showing reliance or that “an ‘actor’s carelessness increased the risk of . . . harm,’”<sup>118</sup> the fact that Mayall had successfully proven an increase in harm by USA Water Polo’s failure to act was sufficient to support a claim under the voluntary undertaking doctrine.<sup>119</sup>

### iii. *Gross Negligence*

Having found that USA Water Polo owed a duty of care to H.C. under both traditional negligence theories and under the voluntary undertaking doctrine—and that USA Water Polo had breached those duties by failing to promulgate a sufficient return-to-play policy for its sanctioned youth events—the Ninth Circuit then moved on to the third issue: Whether USA Water Polo’s failure to promulgate a sufficient return-to-play policy constituted the “extreme departure from the ordinary standards of conduct” necessary to prove a gross negligence claim.<sup>120</sup> Demonstrating its clear discomfort with USA Water Polo’s lack of commitment to its youth athletes’ health and safety, the Ninth Circuit found that gross negligence could, in fact, apply to Mayall’s allegations.<sup>121</sup>

Relying on Mayall’s second amended complaint, the Ninth Circuit found that USA Water Polo “repeatedly ignored the known risk of secondary injuries, and repeatedly ignored requests that it implement a concussion-management and return-to-play protocol” despite the fact that “the risks of repeat concussions had been well known for many years, and that a consensus for return-to-play protocols for dealing with athlete concussions has been well-established since 2002.”<sup>122</sup> The Ninth Circuit also echoed Mayall’s focus on communications between USA Water Polo and other stakeholders—including parents and insurers—outlining a need for a concussion policy and that despite those communications, “USA Water Polo continued to do nothing.”<sup>123</sup> These allegations, according to the Ninth Circuit, if taken as true, “demonstrate that USA Water Polo was well-aware of the severe risk of repeat concussions and of the need to implement a policy to remove players from play after suffering a head injury.”<sup>124</sup> Accordingly, the Ninth Circuit found that USA Water Polo’s actions constituted an extreme departure from the ordinary standard of care, and therefore constituted gross negligence under California law.

## C. Moving for *En Banc* Review

Reflecting the rather harsh nature of the Ninth Circuit panel’s judgments of its actions, USA Water Polo quickly petitioned the Ninth Circuit for rehearing *en banc*.<sup>125</sup> According to USA Water Polo, the Ninth Circuit panel erred in applying both the primary assumption of risk and voluntary undertaking doctrines

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<sup>118</sup> *Id.* at 1067 (quoting *Artiglio v. Coming Inc.*, 957 P.2d 1313, 1318 (Cal. 1998)). See generally Restatement (Second) of Torts § 323 (Am. Law Inst. 1965); see also *supra* notes 30–31 and accompanying text.

<sup>119</sup> *Mayall*, 909 F.3d at 1068.

<sup>120</sup> *Id.* at 1060.

<sup>121</sup> *Id.* at 1068.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> See Appellee’s Petition for Panel Rehearing and Rehearing *En Banc*, *Mayall v. USA Water Polo*, 909 F.3d 1055 (9th Cir. 2019) (No. 16-56389).

under California law.<sup>126</sup> The opinion, per USA Water Polo, “may lead to inequitable results as parties having similar claims may achieve different litigation outcomes based upon the happenstance of whether their claim is litigated in federal or state court.”<sup>127</sup> Furthermore, USA Water Polo argued that the *Mayall* opinion would encourage forum shopping by plaintiffs, who would favor the federal Ninth Circuit’s holding over California state court precedent.<sup>128</sup> As part of this petition, USA Water Polo encouraged the court to petition the California Supreme Court for assistance by certifying the questions of interpretation of the two doctrines under the California Rules of Court guidelines.<sup>129</sup>

Notably, USA Water Polo was joined at this stage of the proceedings by the Associations of Chief Executives for Sport (“ACES”), a trade association of national governing body (“NGB”) CEOs who entered the case as amici.<sup>130</sup> While the ACES brief was fairly short, the group of amateur sports executives voiced their concern that the Ninth Circuit decision could have “potentially broad ramifications for all NGBs and similar sports organizations” as the decision “exposes sports organizations to substantially greater liability than they had previously anticipated.”<sup>131</sup>

More broadly, ACES urged the court to reconsider on the basis of their belief that “California courts have made it very clear that the determination of a duty cannot be made in a vacuum, but must take into account the social, sporting, regulatory, and operational frameworks in which the existence of a duty *vel non* is adjudicated.”<sup>132</sup> If the court held firm in allowing the *Mayall* case to move past the motion to dismiss, ACES argued that it would both make it more difficult and expensive for NGBs to defend against “what they perceive to be marginal liability cases” as those cases would have to proceed through the expensive discovery stage.<sup>133</sup> Further, ACES contended that the Ninth Circuit’s decision “could have important ramifications for how NGBs and similar organizations promulgate (or elect not to promulgate) competition rules, how they allocate resources towards enforcement of rules, and even the extent to which national regulation of sports remains a viable goal.”<sup>134</sup>

Despite these arguments, the Ninth Circuit denied USA Water Polo’s motion for rehearing and affirmed its panel’s judgment remanding the case back to the district court.<sup>135</sup> In a May 2019 order, Judge Guilford ordered the parties to

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<sup>126</sup> *Id.* at 5.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 5–6.

<sup>129</sup> *Id.* at 6. See Cal. Rules of Court § 8.548 (allowing the California Supreme Court to decide a question of California law on request by “the United States Supreme Court, a United States Court of Appeals, or the court of last resort of any state, territory, or commonwealth”). The Ninth Circuit has held that this certification process is reserved for “significant issues, including those with important public policy ramifications, and that have not yet been resolved by the state courts.” *Kremen v. Cohen*, 325 F.3d 1035, 1037 (9th Cir. 2003); see also Peder K. Batalden & Felix Shafir, *When the 9th Circuit turns to the California Supreme Court*, Daily Journal, <https://www.dailyjournal.com/mcle/126-when-the-9th-circuit-turns-to-the-california-supreme-court> (last visited Aug. 8, 2019).

<sup>130</sup> Brief of Amicus Curiare [sic] Ass’n of Chief Executives for Sport in Support of Petition for Panel Rehearing and Rehearing En Banc, *Mayall v. USA Water Polo*, supra note 11, at 6.

<sup>131</sup> *Id.* at 10–11.

<sup>132</sup> *Id.* at 12. “Duty *vel non*” is Latin for “duty or not” and in this context would translate to “the existence of a duty or lack thereof.” See *Vel Non*, Black’s Law Dictionary (8th ed. 2004).

<sup>133</sup> Brief of Amicus Curiare [sic] Ass’n of Chief Executives for Sport in Support of Petition for Panel Rehearing and Rehearing En Banc, *Mayall v. USA Water Polo*, supra note 11, at 11.

<sup>134</sup> *Id.*

<sup>135</sup> *Mayall v. USA Water Polo, Inc.*, No. 16-56389, 2019 U.S. App. LEXIS 3092 (9th Cir. 2019).

begin briefing on whether to certify Mayall's purported class and ordered discovery to begin in November 2019.<sup>136</sup>

### III. The Potential Impacts of *Mayall*

Just as ACES expressed in their amicus brief arguing to the Ninth Circuit for rehearing en banc, the *Mayall* decision has “potentially broad ramifications for all NGBs and similar sports organizations.”<sup>137</sup> As ACES argued, the decision to allow *Mayall* to proceed beyond the motion to dismiss stage will likely raise the cost of defending concussion and other health and safety litigation for overseeing athletic organizations like NGBs by forcing them into discovery, and potentially raises the probability of organizations deciding to settle rather than battle in court.<sup>138</sup>

The *Mayall* decision also allowed the Ninth Circuit to continue to adapt the legal landscape surrounding athletic organizations like USA Water Polo in ways that will materially change the way those organizations must operate. These effects can be categorized by the three overarching issues identified by the plaintiff and adopted by the Ninth Circuit as the major questions to be resolved in *Mayall*: (1) secondary injuries overriding primary assumption of risk; (2) promulgating health and safety policy as a voluntary undertaking; and (3) inaction by overseeing athletic organizations as gross negligence.

#### A. Secondary Injuries and Assumption of Risk

The assumption of risk defense is a longstanding tenet of sports law that has significant implications for sports spectators and participants. For spectators, the “baseball rule” that generally bars suit for injuries sustained as a result of foul balls or other flying objects entering the stands has been a subject of significant debate recently due to increased exit velocities on balls hit by batters, new stadiums with stands closer to the playing field, and more distractions due to cell phones and in-game entertainment.<sup>139</sup> In the context of sports participants and concussions, one legal commentator noted the irony in the fact that the prevalence of concussions in sports tends to be favorable to the defense because “[t]he more common the event, the more plausible is the claim of assumption of risk.”<sup>140</sup> Even faced with the plaintiff's arguments that the overseeing athletic organizations “had information about the long-term risks of playing the game and withheld that information from the players,” judges interpreting assumption of risk claims will focus more on “expectations and known risks as a matter of law.”<sup>141</sup> If players

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<sup>136</sup> Order Granting Joint Stipulation for Entry of Agreed Scheduling Order, *Mayall v. USA Water Polo*, *supra* note 28, at 1–2.

<sup>137</sup> Brief of Amicus Curiae [sic] Assoc. of Chief Executives for Sport in Support of Petition for Panel Rehearing and Rehearing En Banc, *Mayall v. USA Water Polo*, *supra* note 11, at 10.

<sup>138</sup> *Id.* at 11.

<sup>139</sup> See, e.g., Nathaniel Grow & Zachary Flagel, The Faulty Law and Economics of the “Baseball Rule,” 60 *Wm. & Mary L. Rev.* 59 (2018); Aaron Benz, Reviewing The “Baseball Rule” — Is it Fair or Foul?, *MULS Sports Law Society Blog* (Mar. 11, 2017), <https://musportslawsociety.wordpress.com/2017/03/11/reviewing-the-baseball-rule-is-it-fair-or-foul/>.

<sup>140</sup> Jeffrey Standen, Assumption of Risk in NFL Concussion Litigation: The Offhand Empiricism of the Courtroom, 8 *FIU L. Rev.* 71, 78–79 (2012) (alteration in original).

<sup>141</sup> *Id.* at 80.

know that head injuries are common in sports, for example, players will almost certainly have their concussion claims barred under the assumption of risk defense.

But while the assumption of risk defense has fallen into disfavor in general tort law jurisprudence,<sup>142</sup> the doctrine is alive and well within the context of sports as a means to avoid court decisions that “alter fundamentally the nature of the sport.”<sup>143</sup> Indeed, the perceived need to protect the competitiveness of sport was evident in the way Judge Guilford framed his decisions in *Mayall*.<sup>144</sup> This deference was criticized by Mayall in her opening briefs at the Ninth Circuit and she took exception to the perceived extrapolation of her complaint by Judge Guilford as a suit filed “to upend broader societal norms related to sports.”<sup>145</sup> While the Ninth Circuit did not directly address this conflict between Mayall and Judge Guilford as to whether “athleticism and safety necessarily conflict,”<sup>146</sup> the panel’s interpretation of the assumption of risk doctrine did in some critical ways shift the balance between the competitiveness of sports and consideration for player health and safety.

Prior to *Mayall*’s citation and reliance, *Wattenbarger* was something of a unique interpretation of the assumption of risk doctrine that had been understood to be quite fact-specific in its potential application. For example, in *Eriksson v. Nunnink* the California Court of Appeals distilled from *Wattenbarger* and similar cases the principle that “a coach has a duty of ordinary care not to increase the risk of injury to a student by encouraging or allowing the student to participate in the sport when he or she is physically unfit to participate or by allowing the student to use unsafe equipment or instruments.”<sup>147</sup> But in cases citing *Wattenbarger* for its effect on the assumption of risk doctrine, *Wattenbarger* had been mainly relied upon to show that thrown pitches are inherent risks of the sport of baseball,<sup>148</sup> and that assumption of risk applies even to sport participants who are minors.<sup>149</sup>

However, *Mayall* was the first case to cite *Wattenbarger* for its language differentiating between the pitch thrown that created the initial injury (the *primary* injury) and the exacerbation of that injury that was caused by the defendants’ tacit approval of the plaintiff’s throwing an additional pitch.<sup>150</sup> This “primary-secondary distinction” between a primary injury, which was deemed inherent to

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<sup>142</sup> *Id.* at 72.

<sup>143</sup> *Knight v. Jewett*, 3 Cal. 4th 296, 319 (Cal. 1992).

<sup>144</sup> *Mayall v. USA Water Polo, Inc.* (Mayall D.C. II), 174 F. Supp. 3d 1220, 1223 (C.D. Cal. 2016). Judge Guilford made clear that while he was “sensitive to the continued pain and suffering of H.C.,” he also recognized the “conflicting interests of discouraging athletes from going ‘faster, higher, stronger.’” *Id.* See supra note 41 and accompanying text.

<sup>145</sup> Appellant’s Opening Brief, *Mayall*, supra note 74, at 23–24.

<sup>146</sup> *Id.* at 24.

<sup>147</sup> *Eriksson v. Nunnink*, 191 Cal. App. 4th 826, 845 (2011); see also *Tan v. Goddard*, 13 Cal. App. 4th 1528, 1535–536 (Cal. Ct. App. 1993) (alteration in original) (holding that a horseback riding instructor owed “a duty of ordinary care to see to it that the horse he assigned [the plaintiff] to ride was safe to ride under the conditions he prescribed for that activity.”). This “unfitness to participate” theory was unsuccessfully proposed for use in jury instructions in *Aspinall v. Murietta Valley Unified School District*, No. D072847, 2018 Cal. App. Unpub. LEXIS 1488 (Cal. Ct. App. 2018), though the plaintiff in that case only “derive[d]” that rule from *Wattenbarger*, not the more robust statement of the principle found in *Eriksson*. *Id.* at \*24–25 (alteration in original).

<sup>148</sup> See, e.g., *Souza v. Squaw Valley Ski Corp.*, 138 Cal. App. 4th 262, 266 (Cal. Ct. App. 2006).

<sup>149</sup> See, e.g., *Kahn v. East Side Union High School Dist.*, 96 Cal. App. 4th 781, 791 (Cal. Ct. App. 2002), rev’d on other grounds, 31 Cal. 4th 990 (Cal. 2003).

<sup>150</sup> *Mayall v. USA Water Polo, Inc.*, 909 F.3d 1055, 1063 (9th Cir. 2018).

the sport, and a secondary injury, which was deemed “not inherent to the game” is a novel twist in the application of the assumption of risk doctrine.<sup>151</sup>

Indeed, it can be extrapolated from this holding that claims concerning secondary injuries like repeat concussions that can be “minimized or eliminated” through affirmative action by coaches or policymakers negate the assumption of risk defense.<sup>152</sup> This effectively narrows the assumption of risk defense to cover only primary injuries inherent to the sport. A concussion itself may be inherent to water polo, but any secondary complications caused by the coach negligently returning the athlete to the pool—as well as the overseeing athletic organization’s failure to establish firm and clear return-to-play policies forbidding coaches from placing athletes with concussive symptoms back in play—may be actionable under this new interpretation. *Mayall* has changed the application of the assumption of risk doctrine by not requiring an acute, second injury to create an action. Complications from the first injury—including the increased probability of a secondary concussion that occurs when a concussed athlete returns to play—can lead to liability for an overseeing athletic organization.

As of this writing, *Mayall* has been cited once by the California Court of Appeals based on this new interpretation of assumption of risk. In *Stevens v. Azusa Pacific University*, the court interpreted *Mayall* and *Wattenbarger* to stand for the proposition that “permitting an injured player to continue participating after an initial injury . . . increase[s] a sport’s inherent risk.”<sup>153</sup> *Mayall* and *Wattenbarger* differ from *Stevens* because the coach in *Stevens* was not present for, or aware of, the first injury, and told the plaintiff to stop practicing after the second injury. In addition, the *Stevens* plaintiff, unlike the plaintiffs in *Mayall* and *Wattenbarger*, did not resume practicing until after being cleared.<sup>154</sup> Nevertheless, *Stevens* shows the likely precedential effect of *Mayall* in the California courts, as it gives one example as to how the California courts will treat *Mayall*’s interpretation of California’s assumption of risk doctrine in comparison to its own precedent.

### **B. Voluntarily Undertaking Responsibility through Promulgation of Policy**

The prior landscape of liability generally held that “organizations that merely take a ‘broad responsibility’ to promote safety in their sport cannot be held as having ‘specifically undertaken a duty’ to keep players safe.”<sup>155</sup> The new *Mayall* decision threatens to change that statement of the law, as the Ninth Circuit held that the plaintiff’s allegations that USA Water Polo “undertook a *specific* responsibility to establish and enforce rules to ensure the safety of athletes in its youth water polo league” was a specific undertaking sufficient for finding liability.<sup>156</sup> This holding contradicts prior precedent, arguably overturning not only the district court decisions in *Mayall* but also *Mehr v. Fédération Internationale*

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 1062.

<sup>153</sup> *Stevens v. Azusa Pac. Univ.*, No. B286355, 2019 Cal. App. Unpub. LEXIS 3653, at \*17 (Cal. Ct. App. 2019) (alteration in original).

<sup>154</sup> *Id.* at \*18–20.

<sup>155</sup> Ehrlich, *supra* note 12, at 34 (quoting *Mehr v. Féd’n Int’l De Football Ass’n*, 115 F. Supp. 3d 1035, 1066 (N.D. Cal. 2015)).

<sup>156</sup> *Mayall v. USA Water Polo, Inc.*, 909 F. 3d 1055, 1067 (9th Cir. 2018) (emphasis added).

*De Football Association* (“FIFA”),<sup>157</sup> a similar case to *Mayall* that never reached the Ninth Circuit on appeal.

In *Mehr*, a group of youth and young adult soccer players filed suit against a variety of soccer organizations including FIFA, U.S. Soccer, and the U.S. Youth Soccer Organization (“USYSA”) for allegedly failing to provide adequate concussion management to reduce the risk of preventable injuries resulting from concussions and repetitive heading.<sup>158</sup> In this case, the U.S. District Court for the Northern District of California examined each defendant organization’s concussion management policy (with the exception of FIFA, which was dismissed for lack of jurisdiction)<sup>159</sup> and found that each organization’s alleged failure to promulgate an adequate policy was not sufficient to support a voluntary undertaking claim.<sup>160</sup>

Of particular note in light of the future *Mayall* ruling at the Ninth Circuit, the *Mehr* court reviewed allegations that U.S. Soccer had created a concussion education, testing, and management program but failed to extend its policies to the youth soccer events under its purview.<sup>161</sup> These allegations call to mind the differences in policy between USA Water Polo’s national team concussion policy and their youth event concussion policy (or lack thereof), differences which the Ninth Circuit strongly relied on in overturning the dismissal of the complaint.<sup>162</sup> However, the court in *Mehr* deemed the allegations “insufficient to support a claim of voluntary undertaking” against the various soccer leagues and governing bodies, including U.S. Soccer.<sup>163</sup> The reasoning in *Mehr*, however, may now be obsolete given the Ninth Circuit’s *Mayall* decision.

In some respects, the Ninth Circuit’s reasoning in *Mayall* echoes the reasoning of the Pennsylvania Superior Court in *Hill v. Slippery Rock University*,<sup>164</sup> a case involving the post-practice death of an NCAA student-athlete after his school did not test him for sickle-cell trait (“SCT”). At the time of the student-athlete’s death, the NCAA required Division I schools to test for SCT but did not require such tests at the Division II and Division III levels.<sup>165</sup> In *Hill*, the trial court found that the plaintiffs failed to show that the NCAA increased the risk

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<sup>157</sup> 115 F. Supp. 3d 1035 (N.D. Cal. 2015).

<sup>158</sup> *Id.* at 1043–44. See Ehrlich, *supra* note 12, at 16–20.

<sup>159</sup> *Mehr*, 115 F. Supp. 3d at 1047–52. The court found that the plaintiffs had failed to show that FIFA, a Swiss corporation, had sufficient relevant contacts within the United States to assert a claim against them. See *id.* at 1052.

<sup>160</sup> *Id.* at 1065–69.

<sup>161</sup> *Id.* at 1065–66.

<sup>162</sup> See *Mayall*, 909 F.3d at 1064–66. See also *supra* notes 96–104 and accompanying text.

<sup>163</sup> *Mehr*, 115 F. Supp. 3d at 1067. There are some key differences between the facts in *Mehr* and the facts in *Mayall*, namely in terms of governance structure. Unlike USA Water Polo, U.S. Soccer did not directly oversee any of the teams or tournaments that the youth athlete plaintiffs participated in, as U.S. Soccer merely oversees several other organizations that are responsible for running youth sporting events (who were named as co-defendants). *Id.* at 1043 (“Each of the local clubs is a member of a regional or state club or association, which is a member of a national youth organization, which in turn is a member of U.S. Soccer, the United States member of FIFA.”). However, the court noted that the *Mehr* plaintiffs alleged in their complaint that U.S. Soccer “has the power to direct and influence how the rest of the defendants treat concussion management issues” and therefore “assumed a duty to protect plaintiffs and the members of the class.” *Id.* at 1066. This allegation would certainly support liability under the Ninth Circuit’s opinion in *Mayall*.

<sup>164</sup> 138 A.3d 673 (Pa. Super. Ct. 2016).

<sup>165</sup> *Id.* at 675. The NCAA required SCT testing for Division I athletes in 2010 but did not require testing for Division II athletes until 2012 and Division III athletes until 2013. *Id.* at 678. The student-athlete passed away on September 9, 2011 after collapsing to the floor during a practice. *Id.* at 673.

of harm to the student-athlete by failing to test for SCT, as the NCAA's actions were "a sin of omission" instead of a "sin of commission" necessary to establish a breach of duty under Pennsylvania law.<sup>166</sup> The Superior Court disagreed, however, holding that a reasonable factfinder could find that "the NCAA's decision to test for SCT at Division I schools as part of its protocols, while forgoing such testing at Division II schools, was an error of omission and a failure in its duty, thereby increasing the risk of harm to Mr. Hill."<sup>167</sup> Quite simply, according to the court, "[h]ad the NCAA's protocols tested for SCT at Division II schools, Mr. Hill may not have suffered the event that caused his death."<sup>168</sup>

*Hill* and now *Mayall* stand for a basic proposition about the voluntary undertaking doctrine as applied to sports: if an organization shows that a more robust health and safety policy is feasible by applying it to one facet of the organizational oversight structure (i.e., to a national team or higher division), not applying the same policy to another facet of the organizational oversight structure may be deemed to increase the risk of harm to those who are unprotected by the more robust policy. Just as the NCAA voluntarily undertook a duty of care to require SCT testing by testing for SCT at the Division I level but not at Division II and III, USA Water Polo voluntarily undertook a duty of care to promulgate a clear and effective return-to-play policy by imposing such a policy for its national team. Put differently, a failure by an overseeing athletic organization "to use its authority to provide routine and important safety measures" that it has shown to be important through the implementation of such measures to other athletes in its organization can be actionable.<sup>169</sup> This is a major change from prior precedent in the area, which held that a defendant's failure to work toward eliminating a risk did not demonstrate the defendant increased that risk for purposes of demonstrating liability under the voluntary undertaking doctrine.<sup>170</sup>

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<sup>166</sup> *Id.* at 680. The distinction between "error of commission" and "error of omission" here can be translated as the distinction between malfeasance and nonfeasance in common law negligence theory, where nonfeasance generally does not create a duty of care unless certain exceptions are met. See, e.g., *Sprecher v. Adamson Companies*, 30 Cal.3d 358, 367 (Cal. 1981) ("Misfeasance was determined to exist when a defendant played some part in the creation of a risk, even if his participation was innocent. Nonfeasance occurred when a defendant had merely failed to intervene in a plaintiff's behalf."). However, the voluntary undertaking doctrine stands as an exception to the nonfeasance rule. See, e.g., *Alvarez v. Jacmar Pacific Pizza Corp.*, 122 Cal. Rptr. 2d 890, 907 (Cal. Ct. App. 2002) (noting that "there generally is no liability for nonfeasance but the voluntary assumption of an undertaking creates a duty to exercise due care"); *Wakulich v. Mraz*, 785 N.E.2d 843, 856 (Ill. 2003) ("Importantly, plaintiff's theory in this case is *not* that defendants failed to perform *at all* and are liable for their nonfeasance. Plaintiff's theory is that defendants *negligently performed* their voluntary undertaking and are liable for their misfeasance."); see generally Charles O. Gregory, *Gratuitous Undertakings and the Duty of Care*, 1 DePaul L. Rev. 30 (1951) (discussing the basic tenets of the voluntary undertaking doctrine).

<sup>167</sup> *Hill*, 138 A.3d at 680.

<sup>168</sup> *Id.* at 679 (alteration in original).

<sup>169</sup> *Mayall v. USA Water Polo, Inc.*, 909 F. 3d 1055, 1067 (9th Cir. 2018).

<sup>170</sup> Restatement (Second) of Torts § 323 (Am. L. Inst. 1965); see, e.g., *Nalwa v. Cedar Fair*, 55 Cal.4th 1148, 1163 (Cal. 2012) (holding that "voluntary efforts at minimizing risk do not demonstrate defendant bore a legal duty to do so" as "not every rule imposed by an organizer or agreed to by participants in a recreational activity reflects a legal duty enforceable in tort"); *Wissel v. Ohio High School Ath. Assoc.*, 78 Ohio App. 3d 529, 540 (Ohio Ct. App. 1992) (alteration in original) (stating, "[c]ases interpreting Section 323(a) have made clear that the increase in the risk of harm required is not simply that which occurs when a person fails to do something that he or she reasonably should have"); *Dale v. Keith Built Homes*, 620 S.E.2d 455, 456–57 (Ga. Ct. App. 2005) (rejecting the plaintiff's argument that the defendant had a responsibility under the voluntary undertaking doctrine to decrease the harm to others by enforcing an in-place policy prohibiting drinking on job sites as "failing to take all possible actions to prevent an occurrence is not the same as increasing the risk of the

As a result of this shift in precedent, overseeing athletic organizations—at least those operating in California—will have to be more careful in crafting health and safety policies as any undertaking to promote the health and safety of athletic participants may be actionable. Several organizations—including other Olympic governing bodies, the NCAA, and high school athletic associations<sup>171</sup>—share USA Water Polo’s status as the rule-making authorities in their respective sports, and now under this precedent “ha[ve] a duty to not increase the risk of injuries.”<sup>172</sup> Claims invoking this duty may now be successful at least in getting past the motion to dismiss stage—where all facts in the complaint are presumed true—and into discovery. While the impact of this decision will be limited to

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occurrence”) (quoting *Griffin v. AAA Auto Club South, Inc.*, 470 S.E.2d 474, 477 (Ga. Ct. App. 1996)). Of course, an alternative to showing an increased risk of harm under the voluntary undertaking doctrine (as demonstrated by section 323 of the Restatement Second of Torts) is to show detrimental reliance, but that path seems to be more difficult than showing increased risk in this context, especially after *Mayall*. See *Wissel*, 78 Ohio App. 3d at 541 (alteration in original). *Wissel* had rejected a claim that a high school athlete relied on the overseeing high school athletic association to improve the safety of high school football by requiring the use of proper helmets as “[c]ourts have generally required that the plaintiff seeking to impose liability under Section 323(b) show actual or affirmative reliance, i.e., reliance ‘based on specific actions or representations which cause the persons to forego other alternatives of protecting themselves.’” *Id.* The court found that it cannot be proven that the high school athlete in question “affirmatively relied on the actions or representations” of the high school athletic association “to the extent that he chose not to wear another, safer helmet (assuming arguendo that such a helmet was available), or that he played or tackled differently than he would normally have done in reliance upon the appellees’ actions or representations.” *Id.* Reliance was not addressed in *Mayall*, as the court noted that *Mayall*’s claim of increased risk was sufficient to support a voluntary undertaking claim. *Mayall*, 909 F. 3d at 1067–68; see *supra* notes 117–119 and accompanying text.

<sup>171</sup> See Ehrlich, *supra* note 12, 9–16. As argued in the author’s prior article, such reasoning may not apply within the context of collectively bargained professional sports, because section 301 of the Labor Management Relations Act allows “the rights and duties of labor and management that are created by collective bargaining” to preempt common law remedies. *Id.* at 15; see 29 U.S.C. § 185; see also *Williams v. Nat’l Football League*, 582 F.3d 863, 880–83 (8th Cir. 2009). *Williams* held that all of the NFL football player plaintiffs’ common law claims—including negligence and gross negligence claims—were preempted by the NFL collective bargaining agreement (“CBA”) under section 301, as determining whether the NFL owed a duty of care to the players to warn about potentially tainted substances that would trigger a positive drug test “cannot be determined without examining the parties’ legal relationship and expectations as established by the CBA and the [Drug Testing] Policy.” *Williams*, 582 F.3d at 881 (alteration in original). But see *Allis-Chalmers v. Lueck*, 471 U.S. 202, 220 (1985) (holding that section 301 does not preempt state law claims merely because the parties involved are subject to a CBA and the events underlying the claim occurred on the job). However, it must be noted that, *Dent v. National Football League*, the case relied upon by the author’s prior article for the conclusion that collectively bargained entities are generally exempt from this type of scrutiny was—like *Mayall*—overturned by the Ninth Circuit in the athletes’ favor after the publication of the author’s prior article. See *Dent v. Nat’l Football League*, 902 F. 3d 1109, 1123 (9th Cir. 2018) (“Whether the NFL made false assertions, whether the NFL knew or should have known they were false, whether the NFL intended to induce players’ reliance, and whether players justifiably relied on the NFL’s statements to their detriment, are all factual matters that can be resolved without interpreting the CBAs.”). *Dent* creates a somewhat narrow exception to section 301 preemption for duties to act with reasonable care with regard to contexts in which the CBA is explicitly silent, despite the CBA’s statements regarding the role of the league in providing measures to protect players’ health and safety. *Id.*; see Nairi Dulgarian, *How the Holding in Dent v. National Football League Tackles Collective Bargaining Agreements*, 39 Loy. L.A. Ent. L. Rev. 205 (2019) (discussing the impact of the Ninth Circuit’s ruling in *Dent* within the broader scope of § 301 preemption jurisprudence); see also Ryans v. Houston NFL Holdings, L.P., 2017 U.S. Dist. LEXIS 66880, \*8–9 (S.D. Tex. 2017) (finding that the defendants’ premises liability claims against the owners and operators of an NFL stadium that allegedly negligently maintained the playing field were not preempted because the plaintiff did not invoke the CBA to satisfy any of the elements of his negligence claim).

<sup>172</sup> *Mayall*, 909 F.3d at 1068 (alteration in original).



California for now, and quite possibly will be rejected in other jurisdictions,<sup>173</sup> *Mayall* serves as a clear and vigorous expansion of the voluntary undertaking doctrine that will almost certainly be further explored in the context of overseeing athletic organizations in the near future.

Indeed, this purported expansion of the voluntary undertaking doctrine will undoubtedly be tested soon by another sports-related negligence case currently before the Ninth Circuit—*Dent v. National Football League*.<sup>174</sup> *Dent* involves a claim by a group of former professional football players who allege that club- and NFL-employed doctors and trainers gave them regular injections and pills containing powerful painkillers in an effort to keep them on the field without warning about potential side-effects, long-term risks, or the addictive properties of the medications.<sup>175</sup> The main thrust of the *Dent* plaintiffs' complaint is centered around a negligence *per se* theory—namely that that NFL violated the Controlled Substances Act by improperly handling, distributing, and administering controlled opioid medications.<sup>176</sup> However, *Dent* also included an allegation of negligence under the voluntary undertaking doctrine based on allegations that the NFL's monitoring of the clubs' compliance with the Controlled Substances Act constituted a voluntary undertaking in regards to the administration of these substances to the players.<sup>177</sup>

In March 2020 oral arguments at the Ninth Circuit, Judge Tallman brought up the *Mayall* case as representing an instance where the court “didn't find that there was a violation—that the league was violating some federal or state law—but had voluntarily undertaken a responsibility towards the players and then failed to come up with an appropriate protocol.”<sup>178</sup> Judge Tallman then pressed the NFL attorney on *Mayall*'s applicability as presenting an alternative path to liability

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<sup>173</sup> Indiana, for example, generally imposes a further requirement for “direct control” by the overseeing defendants over plaintiffs to impose a duty of care through the voluntary undertaking doctrine. See *Yost v. Wabash College*, 3 N.E.3d 509, 518 (Ind. 2014) (rejecting a plaintiff's claim by holding that the defendant college's educational outreach programs to discourage hazing did not extend the alleged specific undertaking “to direct oversight and control of the behavior of individual student members of the local fraternity”); *Smith v. Delta Tau Delta*, 9 N.E.3d 154, 163 (Ind. 2014) (alteration in original) (analogizing a similar claim against a national fraternity to *Yost*, explaining “[l]ike *Yost*, the specific duty undertaken in regards to the policies on hazing and underage and irresponsible drinking was an educational one without any power of preventative control”); *Lanni v. NCAA*, 42 N.E.3d 542, 553 (Ind. Ct. App. 2015) (alteration in original) (applying the reasoning of *Yost* and *Smith* to NCAA safety regulations and holding that “the specific duties undertaken by the NCAA with respect to the safety of its student-athletes was simply to provide information and guidance to the NCAA's member institutions and student-athletes” and that “[a]ctual oversight and control cannot be imputed merely from the fact that the NCAA has promulgated rules and regulations and required compliance with those rules and regulations.”).

<sup>174</sup> No. 19-16017 (9th Cir. 2020).

<sup>175</sup> See *Dent*, 902 F.3d at 1114 (9th Cir. 2018). As a note of clarification (and as discussed *supra* note 171), the *Dent* opinion cited here did not review the merits of the claim but instead reviewed the NFL's affirmative defense of collective bargaining preemption under section 301 of the Labor-Management Relations Act. See generally *id.* The pending ruling will likely more squarely address the merits of the complaint, as the plaintiffs have appealed the district court's holding that the NFL was itself too far removed from the trainers' and doctors' conduct to be liable under a negligence theory. See *Dent v. Nat'l Football League*, 384 F. Supp. 3d 1022, 1029–33 (N.D. Cal. 2019). The district court also ruled that the NFL's conduct did not increase the risk of harm as necessary for a voluntary assumption theory nor created a special relationship between the league and its players. *Id.* at 1033–35.

<sup>176</sup> *Id.* at 1028.

<sup>177</sup> Third Amended Class Action Complaint at 51–56, *Dent v. Nat'l Football League*, 384 F. Supp. 3d 1022 (N.D. Cal. 2019) (No. 14-cv-02324).

<sup>178</sup> Oral Argument at 43:40, *Dent v. NFL*, No. 19-16017 (9th Cir. 2020), available at <https://youtu.be/MfL9j6DI-Y8>.

from the negligence *per se* issue, asking why the NFL's conduct could not "be characterized as a voluntary undertaking by the NFL that was inadequate within the meaning of our decision in *Mayall*."<sup>179</sup> In fact, Judge Tallman indicated in a response to the NFL attorney's defense of judicial estoppel that the plaintiffs "may have had second thoughts" about not focusing on the voluntary undertaking claim "especially after they saw it in [the *Mayall*] opinion."<sup>180</sup>

The *Dent* decision at the Ninth Circuit will signal clearly whether the Ninth Circuit itself sees *Mayall* as having expanded the scope of the voluntary undertaking doctrine in how it applies to the responsibilities of overseeing athletic organizations to promulgate effective policy. Indeed, the facts of *Dent* differ from *Mayall* in two crucial areas where positive treatment of *Mayall* would potentially expand its doctrinal reach even further.

First, the simple fact that the *Dent* plaintiffs are professional football players rather than minors participating in youth sports means that the panel sees all overseeing athletic organizations—not just organizations governing youth sports—as having increased duties to protect the athletes within their care. Second, whereas USA Water Polo lost in *Mayall* due in large part to their complete lack of a concussion policy, the *Dent* plaintiffs admit that the NFL had a policy to monitor controlled substances, but argue that it was insufficient to prevent the harm to the players.

But Judge Tallman noted in oral arguments that this insufficiency may still, based on the *Mayall* precedent, show an increase of harm sufficient to allow the voluntary undertaking issue to perhaps reach a jury. Judge Tallman argued that the plaintiffs could hypothetically overcome a motion to dismiss by alleging that the NFL policies "suggested cover to the clubs, or that there was no problem since the NFL hadn't hollered about anything," thereby increasing the risk of harm to the players.<sup>181</sup> This hypothetical raised by Judge Tallman suggests a dramatic expansion of the voluntary undertaking doctrine under pre-*Mayall* precedent by opening up overseeing athletic organizations to higher scrutiny and a much greater chance of reaching costly discovery.

### C. Inaction by Overseeing Athletic Organization as Gross Negligence

One particularly powerful finding by the Ninth Circuit in *Mayall* was that USA Water Polo's actions in allegedly "repeatedly ignor[ing] the known risk

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<sup>179</sup> *Id.* at 44:35. The NFL countered this point on four grounds: (1) the theory was estopped since the plaintiffs had disavowed the voluntary undertaking claim in briefs during the prior Ninth Circuit appeal; (2) the voluntary undertaking claim was preempted under section 301 of the Labor-Management Relations Act; (3) the facts of the case materially differ from *Mayall* because the fact that the injured party in *Mayall* was a youth created increased duties to that defendant in comparison to the present case where NFL players are professionals who enter a sophisticated collective bargaining agreement; and (4) even if the NFL's measures were insufficient, they did not increase the risk of harm to the extent required under the voluntary undertaking doctrine. *Id.* at 45:00–51:40. While attempting to predict how judges will rule based on their line of questioning at oral arguments is often a fool's errand, it is worth noting that all three judges on the Ninth Circuit panel seemed to object to the first three points, and Judge Tallman argued that the increased harm question "ought to be a jury question," or at least saved for summary judgment following discovery. *Id.* at 49:55.

<sup>180</sup> *Id.* at 45:30.

<sup>181</sup> *Id.* at 50:10.

of secondary injuries, and repeatedly ignor[ing] requests that it implement a concussion-management and return-to-play protocol” could not only constitute negligence, but gross negligence.<sup>182</sup> Under California law, gross negligence is defined as “either a ‘want of even scant care’ or ‘an extreme departure from the ordinary standard of conduct.’”<sup>183</sup> This definition is generally applicable to other jurisdictions as well.<sup>184</sup> In *Mayall*, the Ninth Circuit found that USA Water Polo’s failure to do anything to minimize concussions despite repeated requests by parents and educators “demonstrate[s] that USA Water Polo was well-aware of the severe risk of repeat concussions and of the need to implement a policy to remove players from play after suffering a head injury.”<sup>185</sup> This “inaction in the face of substantial evidence of risk of harm,” according to the Ninth Circuit, would in fact “constitute[] ‘an extreme departure from the ordinary standard of conduct’” and amount to gross negligence under California law.<sup>186</sup>

Raising the bar for this type of conduct from simple negligence to gross negligence has obvious implications for actors like USA Water Polo since gross negligence under California law could open the door to punitive damages. The California Supreme Court has held that the “willful misconduct” standard of culpability for torts like gross negligence and recklessness justifies punitive damages because, even though there is no intent to harm, the action involves “an intention to perform an act that the actor knows, or should know, will very probably cause harm.”<sup>187</sup>

More critically, however, is the fact that higher culpability torts like gross negligence and recklessness are handled differently within the specific context of sport and the primary assumption of risk doctrine. In another recent California sport case, *Swigart v. Bruno*, the plaintiff argued that the defendant rode his horse so recklessly during an organized endurance horseback riding event that it constituted gross negligence under California law.<sup>188</sup> While the court did not find that the defendant’s conduct in this case constituted gross negligence, they agreed with the plaintiff that for the purposes of that case, there was “no meaningful distinction . . . between [recklessness] and gross negligence.”<sup>189</sup> This holding is important because with the assumption of risk doctrine, the inherent risk defense

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<sup>182</sup> *Mayall v. USA Water Polo, Inc.*, 909 F.3d 1055, 1068 (9th Cir. 2018) (alteration in original).

<sup>183</sup> *City of Santa Barbara v. Superior Court*, 41 Cal. 4th 747, 754 (Cal. 2007).

<sup>184</sup> See, e.g., *Transportation Ins. v. Moriel*, 879 S.W.2d 10, 20 (Tex. 1994) (quoting Tex. Civ. Prac. & Rem. Code Ann. § 41.001(5) (1994)) (“‘Gross negligence’ means more than momentary thoughtlessness, inadvertence or error of judgment. It means such an entire want of care as to establish that the act or omission was the result of actual conscious indifference to the rights, safety, or welfare of the person affected”); *Maiden v. Rozwood*, 597 N.W.2d 817, 824 (Mich. 1999) (“Gross negligence is defined by statute as ‘conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.’”).

<sup>185</sup> *Mayall*, 909 F.3d at 1068.

<sup>186</sup> *Id.* at 1068 (alteration in original).

<sup>187</sup> *Donnelly v. Southern Pacific*, 18 Cal. 2d 863, 869–70 (Cal. 1941). However, California law has been inconsistent on this legal principle; other cases have held that gross negligence is *not* sufficient culpability to impose punitive damages. Compare *id.* with *Gombos v. Ashe*, 158 Cal. App. 2d 517, 527 (Cal. Ct. App. 1958) (alteration in original) (holding that “[m]ere negligence, even gross negligence, is not sufficient to justify” punitive damages, as punitive damages require a showing of malice by the defendant); and *Berkley v. Dowds*, 61 Cal. Rptr. 3d 304, 313 (Cal. App. 2007) (“Acts of simple or even gross negligence will not justify the additional civil damage remedies.”).

<sup>188</sup> *Swigart v. Bruno*, 13 Cal. App. 5th 529, 533–35 (Cal. Ct. App. 2017).

<sup>189</sup> *Id.* at 542 (alteration in original) (citations omitted).

generally does not apply to “conduct that is so reckless as to be totally outside the range of the ordinary activity” involved in the sport.<sup>190</sup>

As such, claims predicated on gross negligence override the assumption of risk doctrine within the context of sport. The Ninth Circuit in *Mayall* found that the assumption of risk defense only could be overcome in the context of the secondary injuries claimed by the plaintiff in her second amended complaint.<sup>191</sup> But if future plaintiffs can show that overseeing athletic organizations were grossly negligent or reckless in their imposition of policy in other areas, they can conceivably get around the assumption of risk doctrine and show that the grossly negligent failure to prevent even primary injuries inherent to the sport constitutes a breach of an established duty of care.

At the same time, the impact of the *Mayall* holding may be fairly limited. After all, the Ninth Circuit found that USA Water Polo’s failure to institute a return-to-play policy—i.e., a policy to prevent *secondary* injuries—was grossly negligent. There was no such finding that a failure to institute an effective policy designed to prevent *primary* concussive injuries or any other injuries inherent to the sport could be gross negligence, because it would presumably be much more difficult to show that inaction to prevent injuries that are inherent to the sport was as much of an “extreme departure from the ordinary standard of conduct.”<sup>192</sup> But, as technology advances and the ability for sporting organizations to prevent these inherent injuries increases, further application of this precedent may result in greater liability for overseeing athletic organizations.

## Conclusion

It will likely never be possible to fully remove concussions from sports, but the Ninth Circuit’s decision in *Mayall* is a substantial step towards holding overseeing athletic organizations liable for failures to promulgate policies to remove the risk of preventable secondary injuries. As USA Water Polo and ACES argued in their plea to have the decision overturned, the Ninth Circuit’s holding will likely force organizations including NGBs, high school athletic associations, and the NCAA to spend more time and resources fighting ultimately meritless litigation.<sup>193</sup> However, others will argue that the *Mayall* decision holds these organizations accountable for their failure to act responsibly as the overseeing entities for youth amateur sports, and may represent positive movement towards more widespread and effective concussion management policy.

The true impact of *Mayall* is still unknown and may be for some time. As of this writing, only two opinions have cited the Ninth Circuit’s holding, and both have distinguished *Mayall*’s precedential effect on the facts. *Stevens v. Azusa*

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<sup>190</sup> *Id.* (citing *Knight v. Jewett*, 3 Cal. 4th 296, 318 (Cal. 1992)). In *Knight*, the California Supreme Court also noted that this distinction for “reckless conduct that is totally outside the range of the ordinary activity involved in the sport” constitutes the holdings of “[t]he overwhelming majority” of sport cases invoking the assumption of risk doctrine, “both within and outside California.” *Knight*, 3 Cal. 4th at 318 (alteration in original); see, e.g. *Gauvin v. Clark*, 537 N.E.2d 94, 97 (Mass. 1989) (“The majority of jurisdictions which have considered this issue have concluded that personal injury cases arising out of an athletic event must be predicated on reckless disregard of safety.”).

<sup>191</sup> *Mayall*, 909 F.3d at 1061–64; see *supra* Parts II(B)(i) and III(A).

<sup>192</sup> *Mayall*, 909 F.3d at 1068.

<sup>193</sup> See *supra* Part II(C).

*Pacific University*<sup>194</sup> found that the coach in question did not “permit an injured player to continue participating after an initial injury,” which the court held was required under the *Mayall* precedent to demonstrate a defendant “increase[d] a sport’s inherent risk.”<sup>195</sup> Similarly, *Kabogoza v. Blue Water Boating* held that the Ninth Circuit’s gross negligence holding was inapplicable where the defendants knew the plaintiff “had a history of safely participating” in paddleboarding, the activity at issue in that case.<sup>196</sup> But as shown in the ongoing *Dent v. National Football League* litigation,<sup>197</sup> the Ninth Circuit clearly believes that *Mayall* has potentially expanded the scope of responsibility for overseeing athletic organizations in ensuring athlete health and safety—for both concussions and other risks of harm, and for everyone from youth water polo players to professional athletes. When it is ultimately released, the *Dent* opinion from the Ninth Circuit may contain further clues and further expansions of the negligence theories, and may further hold overseeing athletic organizations like the NFL and USA Water Polo responsible for substandard health and safety policies moving forward.

*Mayall* may ultimately be seen as an outlier in the larger scheme of negligence case law in sports—a case whose holding is extremely fact-specific, which eventually may be disregarded by the California Supreme Court as an improper interpretation of California law.<sup>198</sup> But for now—as demonstrated both in this Article and by the manner in which the Ninth Circuit overturned the district court’s decisions favoring USA Water Polo—*Mayall* represents a monumental shift in the responsibility owed by overseeing athletic organizations to the youth athletes under their care.

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<sup>194</sup> No. B286355, 2019 Cal. App. Unpub. LEXIS 3653 (Cal. Ct. App. 2019); see supra notes 153–154 and accompanying text.

<sup>195</sup> Stevens, 2019 Cal. App. Unpub. LEXIS 3653, at \*17–18.

<sup>196</sup> No. 2:18-cv-02722, 2019 U.S. Dist. LEXIS 60346 at \*9 (E.D. Cal. 2019).

<sup>197</sup> See supra notes 175–181 and accompanying text.

<sup>198</sup> See Batalden & Shafir, supra note 129; see also, e.g., *Emery v. Clark*, 604 F.3d 1102, 1120 (9th Cir. 2010) (holding that “where . . . there are conflicting views within our own court as to whether the California Supreme Court would reject the nearly unanimous decisions of the California Court of Appeals . . . we believe the California Supreme Court should have the opportunity to speak for itself”); see generally Craig A. Hoover, *Deference to Federal Circuit Court Interpretations of Unsettled State Law: Factors, etc., Inc., v. Pro Arts, Inc.*, 1982 Duke L.J. 704 (outlining guidelines where federal courts are required to interpret state law). USA Water Polo argued the California Supreme Court should weigh in on the issue in its petition for rehearing. See Appellee’s Petition for Panel Rehearing and Rehearing En Banc, *Mayall v. USA Water Polo*, supra note 125, at 5 (arguing that “if this opinion stands, it will cause the federal courts in this circuit, which must follow this opinion . . . to apply the primary assumption of risk and voluntary undertaking doctrines in a manner neither intended nor approved by the California Supreme Court.”).