FROM THE BULLPEN

Official Newsletter of the

NEBRASKA HOT STOVE LEAGUE

2023: Our 39th Season

Edition No. 19 July 13, 2023

AT THE ALL-STAR BREAK: SAINTS STILL ON THE MARCH

With the 2023 Hot Stove League season at the so-called halfway mark of the All-Star Break, the **Lincoln Saints** and their halo-topped owner-manager, B.T. Krause, are atop the standings with 7300.7 points, a razor-thin margin of 40.1 points over the Bridges Trust[1] **Yazoos**. Then, it's a wide-open race for the third money spot in the standings between the **Bums** (6824.5 points), the **Skipjacks** (6814.0 points) and the **Cubs** (6684.3 points)

In other league news, the moribund **Redbirds** continue their Summer of Discontent and remain in the basement of the Hot Stove League with a total of 5773.9 points, a chasmic 1526.8 points behind the first-place **Saints**. Underbelly's **Tribe** remains ensconced in twelfth place with 5960.4 points with hopes of moving up in the standings.

Without further ado, the standings:

I. THE STANDINGS

	Team	Points	Pts Back
1	Saints	7300.7	-
2	Wahoos	7260.6	40.1
3	Bums	6824.5	476.2
4	Skipjacks	6814.0	486.7
5	Cubs	6684.3	616.4
6	Bombers	6484.0	816.7
7	Bears	6410.3	890.4
8	Monarchs	6397.1	903.6
9	Tigers	6219.6	1081.1
10	Blues	6184.8	1115.9
11	Senators	5983.7	1317.0
12	Tribe	5960.4	1340.3
13	Redbirds	5773.9	1526.8

[1] Still an oxymoron.

POINT TOTALS FOR WEEK 15

	Team	Pts
1	Skipjacks	614.1
2	Bums	588.0
3	Bombers	536.0
4	Saints	521.9
5	Cubs	488.8
6	Senators	484.6
7	Tribe	480.1
8	Blues	470.0
9	Monarchs	457.6
10	Tigers	423.8
11	Bears	422.6
12	Redbirds	383.0
13	Wahoos	367.3

II. INDIVIDUAL POINT LEADERS

TOP 25 PITCHERS

	Pitchers	Roster	Pts
1.	Spencer Strider	Tigers	431.0
2.	Zac Gallen	Bears	418.0
3.	Gerrit Cole	Bombers	416.0
	Kevin Gausman	Bombers	416.0
5.	Logan Webb	Tribe	401.0
	Nathan Eovaldi	Wahoos	401.0
7.	Mitch Keller	Saints	394.0
8.	Framber Valdez	Wahoos	382.0
9.	Shane McClanahan	Blues	374.0
10.	Jesús Luzardo	Saints	372.0
11.	Marcus Stroman	Tigers	371.0
12.	Joe Ryan	Tribe	367.0
13.	Zach Eflin	Redbirds	365.0
14.	Clayton Kershaw	Cubs	365.0
15.	Shohei Ohtani	Redbirds	357.0
16.	Pablo López	Saints	354.0
17.	George Kirby	Blues	348.0
18.	Tyler Wells	Skipjacks	347.5
19.	Lucas Giolito	Senators	345.0
20.	Luis Castillo	Blues	344.0
21.	Logan Gilbert	Bums	342.0
22.	Blake Snell	Skipjacks	337.0

23.	Justin Steele	Monarchs	336.0
24.	Aaron Nola	Tigers	331.0
25.	José Berríos	Senators	325.0

WHO'S HOT – PITCHERS

	Pitchers	Roster	Pts
1.	Logan Gilbert	Bums	77.0
2.	Joe Musgrove	Saints	74.0
3.	Logan Webb	Tribe	68.0
4.	Jesús Luzardo	Saints	64.0
5.	Blake Snell	Skipjacks	57.0
6.	Pablo López	Saints	48.0
7.	Zach Eflin	Redbirds	45.0
	Bryan Woo	Bums	45.0
	Miles Mikolas	Redbirds	45.0
10.	JP Sears	Bums	44.0
	Aaron Nola	Tigers	44.0
12.	Lucas Giolito	Senators	43.0
13.	Kyle Gibson	Monarchs	42.0
	Kodai Senga	Redbirds	42.0
15.	Tyler Wells	Skipjacks	41.0
	Aaron Civale	Tribe	41.0
17.	Brandon Bielak	Cubs	40.0
18.	Jameson Taillon	Monarchs	38.0
	Lance Lynn	Bombers	38.0
	Spencer Strider	Tigers	38.0
21.	Carlos Carrasco	Blues	37.0
22.	Dean Kremer	Cubs	36.0
	Kenta Maeda	Senators	36.0
24.	Tarik Skubal	Saints	35.0
	Matt Manning	Bears	35.0

WHO'S NOT – PITCHERS

	Pitchers	Roster	Pts
1.	Martín Pérez	Tigers	-14.0
2.	Andrew Heaney	Bears	-13.0
3.	Brady Singer	Saints	-10.0
4.	Reid Detmers	Saints	-9.0
5.	Griffin Canning	Bears	-8.0
	Rich Hill	Cubs	-8.0
7.	Cal Quantrill	Redbirds	-7.0
8.	Hunter Brown	Wahoos	-6.0
	Cristian Javier	Tribe	-6.0
10.	Andrew Abbott	Tribe	-5.0

11.	Mark Leiter Jr.	Tribe	-4.0
12.	Yonny Chirinos	Blues	-3.0
	Shohei Ohtani	Redbirds	-3.0
14.	Zack Greinke	Blues	-2.0
15.	Emmet Sheehan	Bears	-1.0
	Josiah Gray	Bums	-1.0

TOP 25 HITTERS

	Batters	Roster	Pts
1.	Ronald Acuña Jr.	Cubs	469.2
2.	Shohei Ohtani	Skipjacks	462.2
3.	Freddie Freeman	Skipjacks	428.2
4.	Mookie Betts	Bombers	423.4
5.	Matt Olson	Wahoos	411.0
6.	Adolis García	Skipjacks	370.0
7.	Corbin Carroll	Bears	361.2
8.	Juan Soto	Saints	356.6
9.	Marcus Semien	Cubs	356.5
10.	Luis Robert Jr.	Blues	349.9
11.	José Ramírez	Tribe	348.0
12.	Randy Arozarena	Saints	346.3
13.	Francisco Lindor	Monarchs	344.5
14.	Ketel Marte	Saints	342.8
15.	Christian Yelich	Tigers	342.0
16.	Ozzie Albies	Senators	341.2
17.	Josh Jung	Bears	341.2
18.	Bo Bichette	Bears	332.7
19.	Paul Goldschmidt	Cubs	330.8
20.	Lane Thomas	Cubs	329.3
21.	Yandy Díaz	Bums	329.1
22.	Jorge Soler	Bombers	328.0
23.	Luis Arraez	Bums	326.6
24.	Wander Franco	Blues	324.8
25.	Nolan Arenado	Bombers	322.3

WHO'S HOT – HITTERS

	Batters	Roster	Pts
1.	Manny Machado	Redbirds	60.8
2.	Francisco Lindor	Monarchs	49.7
3.	Mookie Betts	Bombers	48.7
4.	Joey Votto	Blues	47.8
5.	Willson Contreras	Bombers	47.2
6.	Elly De La Cruz	Blues	47.1
7.	Willy Adames	Cubs	46.9
8.	Cody Bellinger	Tribe	46.0
9.	Nolan Arenado	Bombers	44.9

10.	Francisco Alvarez	Saints	44.8
11.	Christian Yelich	Tigers	43.0
12.	Freddie Freeman	Skipjacks	42.4
13.	Bobby Witt Jr.	Bums	41.2
14.	Adolis García	Skipjacks	41.0
15.	Josh Jung	Bears	40.5
16.	Anthony Santander	Skipjacks	40.1
17.	Sean Murphy	Tigers	39.2
18.	Jorge Soler	Bombers	38.5
	Jarren Duran	Bears	38.5
20.	Garrett Cooper	Cubs	38.3
21.	Joey Meneses	Redbirds	38.1
22.	Whit Merrifield	Senators	37.3
23.	Corey Seager	Tribe	36.8
24.	Max Muncy	Wahoos	36.3
25.	Eugenio Suárez	Senators	33.1

WHO'S NOT – HITTERS

	Batters	Roster	Pts
1.	Jose Siri	Redbirds	-5.0
2.	Daulton Varsho	Blues	-4.9
3.	Josh Lowe	Saints	-3.0
4.	Christian Vázquez	Tigers	-1.8
5.	Andrew McCutchen	Tigers	-1.5
6.	Elias Díaz	Saints	-0.8
7.	Nolan Jones	Saints	-0.4

III. ANOTHER TALE FROM THE WELL: SCHRADER vs. THE OMAHA ROYALS, REVISITED

Some of you have heard this song and dance before, and it isn't technically a tale "from the well" since this case never went to trial, but I was recently reminded of the case in which I defended the City of Omaha and the Omaha Royals in a lawsuit filed by a fan who took a beaning in the grape from an errant bullpen throw. The date was June 8, 2007. The game was the Omaha Royals vs. the Nashville Sounds. The place was Rosenblatt Stadium. The fan who took the beaning was an off-duty airline pilot by the name of Donald Schrader. The beaner was Aussie pitcher Grant Balfour, who later became a top closer in the Major Leagues. As Balfour was just beginning to warm up in the visitor's bullpen for a relief appearance for the Sounds, he hurled the old pill way, way over the head of the bullpen catcher (who was actually standing at the time, hence not yet in a catcher's crouch) and into the Rosenblatt stands where it found Mr. Schrader's head.

One of our defenses in this case was that Mr. Schrader assumed the risk of his injuries, by virtue of purchasing his ticket which had the standard legalese to this effect along with a written warning about the danger of balls leaving the field. We were also able to show that there were numerous signs posted around Rosenblatt advising patrons that they were there watching the game "at their own risk" and that they should be aware of flying objects from the

field. When I took Mr. Schrader's deposition, he admitted that he had been to many professional baseball games in his life, and knew the risk of attending a game included the risk that a baseball would leave the field and come into the stands. Based upon the state of the law around the country at that time, it seemed to me that we had a very solid defense and that we could very likely get out of the case via a summary judgment, meaning that the Court would rule as a matter of law that Mr. Schrader was barred from recovery because he had assumed the risk. But then I learned during discovery that Rosenblatt was the only one of 28 or 30 Triple-A ballparks around the country wherein the bullpen was not laid out parallel to the outfield stands, but instead, was turned at an angle so that an errant bullpen throw would have naturally gone right up into the stands and put the audience at risk. Eventually we ended up settling the case instead of going to trial, because we had an unfavorable judge[2] and because the Omaha Royals were afraid of the bad publicity that a jury trial might have. But not until we had a chance to take the deposition of Grant Balfour, which was scheduled and taken while he was in Port Charlotte, Florida for spring training in 2009.

Anyway, now you know the rest of the story.

IV. IN PRAISE OF GORDON LIGHTFOOT

The weekend before last HQ and I took a little road trip up to the Gopher State to spend time with Tommy and Grace, who live in Minneapolis, and Molly, who lives in Duluth. While in the latter, a rusty old town on the shore of Lake Gitchegumee, we enjoyed patronizing their ubiquitous breweries and watching in awe as the Duluth Aerial Lift Bridge was raised up to allow a seagoing ore boat to pass beneath it. See below pictures.

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[2] Who denied our motion for summary judgment in a two sentence ruling, despite of the brilliance of our 45-page brief, which if you are extremely curious or extremely bored, or both, you can look at by hitting the following link; to whet your appetite for reviewing the brief, I submit only the first couple of paragraphs:

> *Professional baseball has been played in America since at least 1869, when the Cincinnati Red Stockings announced their intentions of fielding an all-salaried team to compete against the top teams in the land. It has been reported that in their first game as an all-pro team, the Crimson Hose nine took the wood to their overmatched opponent, Great Western of Cincinnati, by the score of 45 to 9. From that day to the present day, covering more than 140 years, spectators have flocked to the ballpark and put down their hard-earned money to gain admission to a sporting event that became America's National Pastime. For all of those 140 years, baseball fans have exalted to the sights and sounds of professional baseball, including the thrilling crack of the wooden bat as it launches the horsehide sphere into space, and the sight of the ball coming off the bat and being scooped up by an infielder, lunged at by a speedy center fielder making a shoestring catch, or caught by a jubilant 8 year-old fan as the ball left the field of play. In other professional sports, such as football, basketball and hockey, everybody in the arena knows exactly where the players are trying to place the ball or puck, but only in baseball is it anyone's guess where the ball might end after a pitch is thrown.*
>
> *Sitting outside on a beautiful spring, summer or fall day to watch a baseball game in the open air is one of the greatest pleasures known to mankind. It is a pleasure which will cease to exist if our courts should begin to rule that a ballpark owner or a ballclub operator has a legal duty to shield all of its fans against the risk of injury at a baseball game -- because team owners and operators will no longer be willing to host such games without having protective screening or netting to envelop the entire baseball field, since a batted baseball or an errant throw can potentially cause injury to a person seated in virtually every seat in a baseball park.*
>
> *Without in any way minimizing the injuries suffered by Donald Schrader on June 8, 2007, or the impact that his injury has had on his life, it is important to articulate at the outset that this lawsuit is about much more than Donald Schrader and the injury that he suffered while attending an Omaha Royals baseball game. It is a case about the institution of baseball -- once and still our National Pastime; it is a case about spectator sports; and it is a case about personal freedoms. The implications of this case could reach far beyond Mr. Schrader's pursuit of monetary damages in this case. The outcome of this case could impact the way in which all of us watch our sporting events, and may leave all of us wondering what has happened to the concepts of free will and personal choice.*


WILMINGTON DEL.

The sight of this giant craft as it came into dock from the vast Lake Superior immediately had us singing the words of *The Wreck of the Edmund Fitzgerald*, written by beloved Canadian balladeer Gordon Lightfoot in 1976. We must have sung this catchy tune at least five or six times on the trip, aided by Spotify.

As our unimpeachable internet research informed us, the Edmund Fitzgerald sank killing all 29 members of its crew in November of 1975, when the lion's share of our baker's dozen in this league were seniors in high school, just for perspective. Lightfoot penned the words to the song the following year, and it first hit the airwaves on June 1, 1976, less than 8 months after the tragic incident. It was an almost instant smashing success for Lightfoot, making its way to #2 on the *Billboard* (U.S.) chart and #1 in his native Canada.

You've all heard it a hundred times or more, but take a look at these beautiful, haunting lyrics:

The legend lives on from the Chippewa on down
Of the big lake they called Gitche Gumee
The lake, it is said, never gives up her dead
When the skies of November turn gloomy
With a load of iron ore twenty-six thousand tons more
Than the Edmund Fitzgerald weighed empty
That good ship and true was a bone to be chewed
When the gales of November came early

The ship was the pride of the American side
Coming back from some mill in Wisconsin
As the big freighters go, it was bigger than most
With a crew and good captain well-seasoned
Concluding some terms with a couple of steel firms
When they left fully loaded for Cleveland
And later that night when the ship's bell rang
Could it be the north wind they'd been feelin'?

The wind in the wires made a tattle-tale sound
And a wave broke over the railing
And every man knew, as the captain did too
T'was the witch of November come stealin'
The dawn came late and the breakfast had to wait
When the gales of November came slashin'
When afternoon came it was freezin' rain
In the face of a hurricane west wind

When suppertime came, the old cook came on deck sayin'
"Fellas, it's too rough to feed ya"
At seven PM, a main hatchway caved in, he said
"Fellas, it's been good to know ya"
The captain wired in he had water comin' in
And the good ship and crew was in peril
And later that night when his lights went outta sight
Came the wreck of the Edmund Fitzgerald

Does anyone know where the love of God goes
When the waves turn the minutes to hours?
The searchers all say they'd have made Whitefish Bay
If they'd put fifteen more miles behind her
They might have split up or they might have capsized

They may have broke deep and took water
And all that remains is the faces and the names
Of the wives and the sons and the daughters

Lake Huron rolls, Superior sings
In the rooms of her ice-water mansion
Old Michigan steams like a young man's dreams
The islands and bays are for sportsmen
And farther below Lake Ontario
Takes in what Lake Erie can send her
And the iron boats go as the mariners all know
With the gales of November remembered

In a musty old hall in Detroit they prayed
In the maritime sailors' cathedral
The church bell chimed 'til it rang twenty-nine times
For each man on the Edmund Fitzgerald
The legend lives on from the Chippewa on down
Of the big lake they called Gitche Gumee
Superior, they said, never gives up her dead
When the gales of November come early

When Lightfoot wrote the song, the investigation of the cause of the sinking of the *Edmund Fitzgerald* was not yet determined, and so he based his lyrics on the conventional wisdom of what likely caused it to sink. Later on, when the investigation was complete, Lightfoot found out that a few of his assumptions were incorrect, and so while he never rewrote the song lyrics, when he sang the song in concert, he started singing the song with some slight modifications to the lyrics to try to make it truer to history.[3] Oh, what a stand-up guy.

As it turned out, *The Wreck of the Edmund Fitzgerald* became Lightfoot's second most popular single after *Sundown*, which is all the more impressive since its air playtime is something like six minutes or so, which undoubtedly discouraged many a radio DJ from playing it as frequently as other recordings.

In the midst of our reminiscing and the research on this trip, I learned that Lightfoot had passed away on May 1 of this year, exactly two months to the day before the beginning of our Duluth adventure. I did not ever see him in concert[4], something that I now deeply regret. If any of the rest of you have ever seen him in concert, please be sure to share your experience with us.

Fun Fact: Did you know this? It's been illegal to dive at the site of Edmund Fitzgerald wreck since 1995, including using side-scanning sonar equipment. One of the reasons for this is that one of the dives sadly found a crew member tied outside, still wearing a life preserver, to the ship's bow.

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[3] The traditional verse goes: "When supper time came the old cook came on deck /Saying 'Fellows it's too rough to feed ya' /At 7 p.m. a main hatchway caved in /He said, 'Fellas it's been good to know ya."
Lightfoot's lyrics have now been changed to: "When supper time came the old cook came on deck /Saying 'Fellows it's too rough to feed ya' /At 7 p.m. it grew dark, it was then/He said, 'Fellas it's been good to know ya'," Lightfoot's spokesperson said.

[4] Although I planned on seeing him back in about 2015 or 2016 when he was slated to perform at *Spirit Cove* over in the Bluffs, but the plan was scuttled by some conflicting event, dang it all.

V. IN PRAISE OF LAKE GITCHEGUMEE

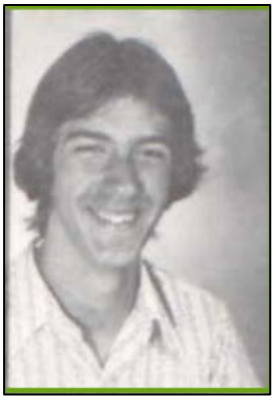
On Sunday of our weekend trip to Duluth, we drove north on Highway 61 along the shore of Lake Superior and visited a number of state parks and did some hiking along the elevated shoreline. It was a beautiful drive along a beautiful and immense lake, and one which I hadn't personally made since the summer after my sophomore year in high school, when Jack and Phyllis dragged me along on a family vacation trip[5] to Isle Royale, a gorgeous National Park located within Lake Superior. If you are ever in the area, it's worth taking some extra time to explore this massive body of water and its environs.

VI. THE KID TURNS 65!

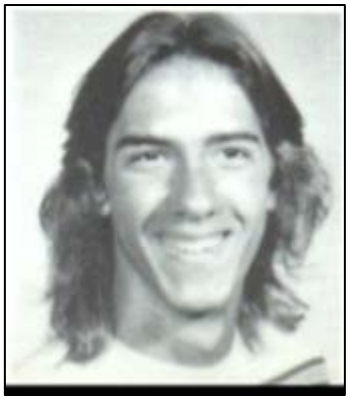
And last, but certainly not least, please join Linda and me in wishing a very happy **65th** birthday to our beloved Baby Trumpetfish a/k/a B.T. a/k/a Saint Scooter a/k/a Teuton Terrific a/k/a Beloved Brother-in-Law a/k/a Fantastic Father a/k/a Good and True Friend!

That's right, the Kid turns 65 tomorrow. Hard to believe that this young man isn't so young anymore. Wear your new crown well, good buddy. Wear it well.

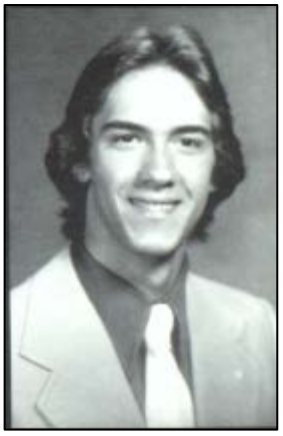
1973



1974



1975



1976

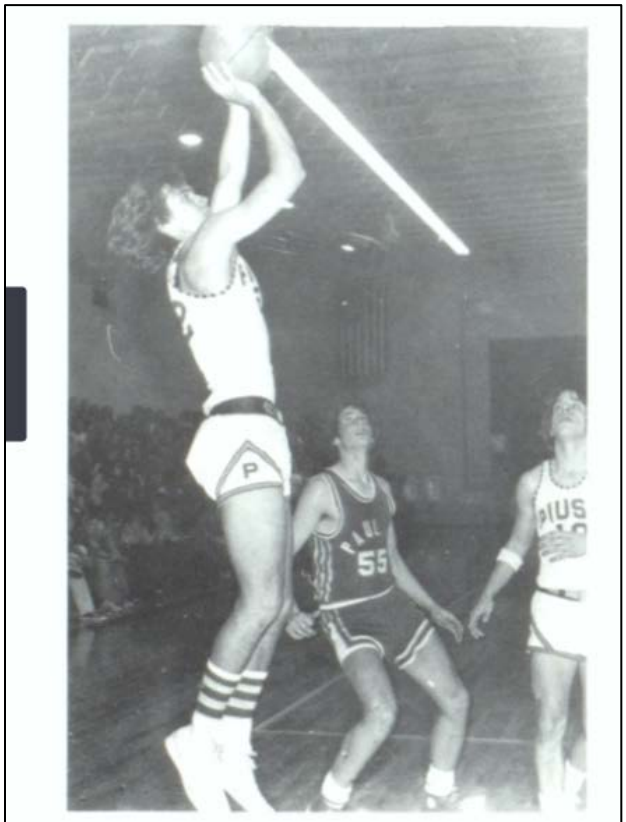
[5] Including catching a baseball game at Old Metropolitan Stadium in Bloomington, Minnesota, where I got to see the great Harmon Killebrew at 3rd base for the hometown Twins. I'm pretty sure he must not have hit a home run in that game, because I would have remembered that.

averaged 15.6 points a game for a season total of 296 points. Scott Krause led in rebound with a season high of 152.

Above left: Seniors Maury Higgins and Scott Krause watch as the Bolts score two points against Aquinas. Above right: Senior Paul Tlamka eyes the basket for a shot. Above far right: Jerry Kobza lays it up for two. Below right: Varsity group picture.

Pius	72	Raymond Central	47
	69	Fairbury	80
	62	Minden	72
	58	Ashland	63
	36	Waverly	39
	37	O. Holy Name	38
	49	D.C. Aquinas	59
	45	Boys Town	64
	55	Syracuse	71
	58	O. Paul VI	51
	69	Hickman Norris	58
	50	Holdrege	84
	56	Lexington	62
	43	Gothenburg	57
	21	Waverly	35
	53	Cozad	50
	57	Cathedral	54
Districts			
	64	Wahoo	61
	43	D.C. Aquinas	50

Team Captains Jerry Kobza, Scott Krause and Tom Doggett

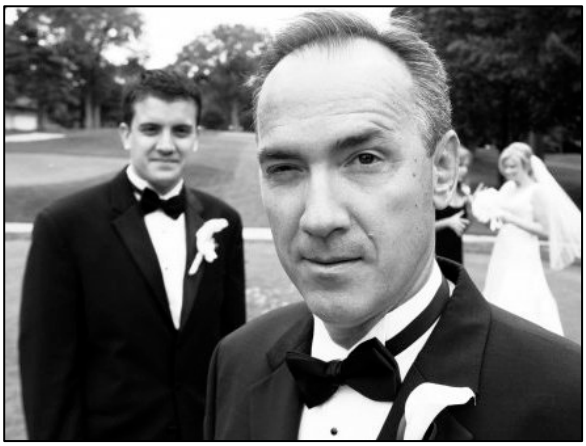


Below far left: Scott Krause shoots against Paul VI. Above far left: Tom Doggett and Mark Cooper close in on an

State Champions – Three-peat!

1981

1991



2009

2015: with Jesse's kids

2015

Editor's Note: Some great pictures of B.T. located by our internet sleuth Linda, which mysteriously end when he went off the grid in 2016.

Have a great weekend, all.

Skipper

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

DONALD SCHRADER, Plaintiff, v. CITY OF OMAHA, and OMAHA ROYALS LIMITED PARTNERSHIP, Defendants.	)	DOC. 1085	NO. 036

DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Professional baseball has been played in America since at least 1869, when the Cincinnati Red Stockings announced their intentions of fielding an all-salaried team to compete against the top teams in the land. It has been reported that in their first game as an all-pro team, the Crimson Hose nine took the wood to their overmatched opponent, Great Western of Cincinnati, by the score of 45 to 9. From that day to the present day, covering more than 140 years, spectators have flocked to the ballpark and put down their hard-earned money to gain admission to a sporting event that became America's National Pastime. For all of those 140 years, baseball fans have exalted to the sights and sounds of professional baseball, including the thrilling crack of the wooden bat as it launches the horsehide sphere into space, and the sight of the ball coming off the bat and being scooped up by an infielder, lunged at by a speedy center fielder making a shoestring catch, or caught by a jubilant 8 year-old fan as the ball left the field of play. In other professional sports, such as football, basketball and hockey, everybody in the arena knows exactly where the players are trying to place the ball or puck, but only in baseball is it anyone's guess where the ball might end after a pitch is thrown.

Sitting outside on a beautiful spring, summer or fall day to watch a baseball game in the open air is one of the greatest pleasures known to mankind. It is a pleasure which will cease to exist if our courts should begin to rule that a ballpark owner or a ball club operator has a legal duty to shield *all* of its fans against the risk of injury at a baseball game -- because team owners and operators will no longer be willing to host such games without having protective screening or netting to envelop the entire baseball field, since a batted baseball or an errant throw can potentially cause injury to a person seated in virtually every seat in a baseball park.

Without in anyway minimizing the injuries suffered by Donald Schrader on June 8, 2007, or the impact that his injury has had on his life, it is important to articulate at the outset that this lawsuit is about much more than Donald Schrader and the injury that he suffered while attending an Omaha Royals baseball game. It is a case about the institution of baseball -- once and still our National Pastime; it is a case about spectator sports; and it is a case about personal freedoms. The implications of this case could reach far beyond Mr. Schrader's pursuit of monetary damages in this case. The outcome of this case could impact the way in which all of us watch our sporting events, and may leave all of us wondering what has happened to the concepts of free will and personal choice.

STATEMENT OF THE CASE

Donald Schrader attended a baseball game at Rosenblatt Stadium on June 8, 2007 between the hometown Omaha Royals and the visiting Nashville Sounds, the Triple A farm club of the Milwaukee Brewers. Together with his daughter, his brother and his sister-in-law, Mr. Schrader purchased four seats in Section 11 at Rosenblatt, Row 1, along the right field foul line, directly adjacent to the visiting team's bullpen. Mr. Schrader had previously attended games at Rosenblatt on numerous occasions, and specifically requested seats near the visiting team's bullpen so that he and his daughter could interact with players from the opposing team. He was aware of the protective netting behind home plate and the availability of seats in that area.

In the eighth inning of the game that night, the manager of the Nashville Sounds asked one of his relievers, Grant Balfour, to get warmed up. As Balfour was beginning to warm up in the bullpen, in preparation for entering the game as a relief pitcher, he threw an errant ball which

was missed by his bullpen catcher, and which entered the stands and struck Mr. Schrader in the head. He suffered an injury to his right eye as a result of being struck by the baseball.

The Lawsuit

Mr. Schrader filed this lawsuit against the Omaha Royals and the City of Omaha on July 9, 2008, alleging a breach of duty on the part of the Omaha Royals and the City of Omaha, and claiming special damages of $45,000 together with general damages and the costs of this action.

Defendants' Defenses

In response to the Complaint, Defendants filed their Answer, admitting that Mr. Schrader was injured during the baseball game on June 8, 2007 when he was struck by a thrown ball from the visitor's bullpen, but denying any negligence on their part, and alleging that they fully met their duty of care to the public in general and to the Plaintiff in particular by offering fans the option of sitting behind a protective netting, and by warning the fans in attendance of the potential dangers of being struck by batted or thrown baseballs. Defendants further affirmatively alleged that Schrader assumed the risk of being injured by a batted or thrown ball by attending a game, and by deciding to sit in an area of the stands which was not protected by safety netting that was available to Schrader.

STATEMENT OF FACTS

The following facts are uncontradicted in this case:

1. Donald Schrader was injured by a baseball thrown by Grant Balfour in the visiting team's bullpen of Rosenblatt Stadium on June 8, 2007.

2. Plaintiff was seated in Row 1, Section 11, along the right field foul line, directly adjacent to the visiting team's bullpen at Rosenblatt Stadium.

3. Plaintiff chose to sit in the front row of Rosenblatt, on the first base side. (Deposition of Donald Schrader 64:22-65:2.)

4. Plaintiff had probably sat in Section 11 on four prior occasions. (Deposition of Donald Schrader 64:18.) Plaintiff and his daughter Katelynn liked sitting in that area so they could talk to the visiting players as they walked back and forth along the sideline. (Deposition of Donald Schrader 63:8-64:5.) They sat in seats near the visitors' bullpen on probably 20 occasions (Deposition of Katelynn Schrader 12:10.)

5. For the ten years prior to 2007, Plaintiff had attended approximately ten Royals games per year (Deposition of Donald Schrader 61:4-8), and also attended approximately half of all of the College World Series games at Rosenblatt between 2005 and 2008 (Deposition of Donald Schrader 59:14-23.)

6. Plaintiff has sat behind the protective netting that runs along the first and third base sides at Rosenblatt Stadium. (Deposition of Donald Schrader 71:14-22.)

7. Prior to June 8, 2007, Plaintiff was aware that at all of the different ballparks that he went to, there were seating areas where he could sit which would have placed him behind a protective screen. (Deposition of Donald Schrader 87:10-15.) Nevertheless, Plaintiff chose to sit in areas other than behind protective screens (Deposition of Donald Schrader 87:16-18) because he felt he could protect himself from the ball in play (Deposition of Donald Schrader 87:20-21) and because he wanted the unobstructed views (Deposition of Donald Schrader 87:23.)

8. During games that Plaintiff went to with his daughter, there were times when people that they went to the game with caught a foul ball, perhaps as many as five times. (Deposition of Katelynn Schrader 13:9-19.) Katelynn Schrader's grandmother was hit by a foul ball when she was seated in Section N at a College World Series game at Rosenblatt. (Deposition

of Katelynn Schrader 14:15-22.) Prior to the day that Plaintiff got hurt, he had instructed his daughter to be careful about foul balls. (Deposition of Katelynn Schrader 41:21-24.)

9. When Plaintiff sat down by the bullpen in Section 11 of Rosenblatt Stadium, he understood prior to June 8, 2007, that there would be pitchers warming up to his right at the same time as the game was going on to his left. (Deposition of Donald Schrader 88:9-13.) He and his daughter sat down in that area because they liked to be up close and be able to "talk" with the players from the visiting teams. (Deposition of Donald Schrader 88:14-17.) According to his brother, Plaintiff was the "antagonizer." (Deposition of Stephen Schrader, 26:1.)

10. During the game itself, Plaintiff would watch when a pitcher and catcher would come up out of the dugout and walk down to the bullpen area and start warming up. (Deposition of Donald Schrader 89:8-13.) Sometimes Plaintiff's daughter got souvenir baseballs from the bullpen players. (Deposition of Katelynn Schrader 12:21-24.)

11. As a knowledgeable baseball fan, Plaintiff knew that the pitchers in the bullpen were getting their arms warmed up to go into the game (Deposition of Donald Schrader 90:16-19), that they throw the ball hard, that they throw curveballs, they throw sliders, and that some throw knuckle balls. (Deposition of Donald Schrader 90:16-91:2.) Plaintiff knew that some pitchers in the bullpen throw wild pitches. (Deposition of Donald Schrader 91:3-5.)

12. As he was sitting in his seat on the night of his injury, while Grant Balfour was warming up in the bullpen, Plaintiff knew that the game was still going on. (Deposition of Donald Schrader 91-10-14.) During the game, as Plaintiff talked to his brother who was seated to his right in the front row of Section 11, Plaintiff was able to see the pitcher warming up in the bullpen. (Deposition of Donald Schrader 91:23-92:7.) The visitors' bullpen area was active that

night, with players warming up throughout the night, tossing balls to kids who brought gloves, and interacting with fans. (Deposition of Karen Schrader, 25:13-26:2.)

13. The ticket that was purchased by Mr. Schrader on June 8, 2007 contained language on the reverse side that says:

> Holder of this ticket assumes all risks incidental to the game of baseball, including specifically (but not exclusively) the danger of being injured by **thrown bats or thrown or batted balls**. Holder agrees that management, its agents and players are not liable for injuries resulting from such causes.

(Affidavit of Martie Cordaro, paragraph 5, emphasis supplied.)

14. As of the day that he attended the game in question, June 8, 2007, Plaintiff was aware that as a fan attending a professional baseball game, there was a risk of being hit and injured by a baseball. (Deposition of Donald Schrader 126:12-20.) Plaintiff was aware of that whether or not he read his ticket stub that day. (Deposition of Donald Schrader 126:21-127:1.)

15. Plaintiff was willing to assume the risk of being hit by a ball so that he could go to the game. (Deposition of Donald Schrader 127:9-12.)

16. Plaintiff knew that there were seats available behind a screened area that he could have purchased that night. (Deposition of Donald Schrader 127:13-17.)

17. Plaintiff decided to not sit behind a screened area that evening because he felt like he could protect himself against <u>any</u> risk, and because he liked the better visibility of not being behind a screen. (Deposition of Donald Schrader 127:18-23, emphasis supplied.)

18. Although watching the ballgame to his left, Plaintiff was aware that there were bullpen pitchers warming up to his right. (Deposition of Donald Schrader 137:7-12.) He also knew that pitchers can throw wild pitches, and that this could happen in the bullpen as well as out on the field on the pitcher's mound. (Deposition of Donald Schrader 137:13-19.)

19. In addition to the language on the back of Mr. Schrader's ticket stub, there are signs posted above the ticket booth windows which contain the following language:

> Those entering this stadium voluntarily assume all risks of property loss and personal injury arising during its use whether occurring prior to, during or subsequent to the event.

Additionally, there are multiple signs inside the stadium which warn of the risks of injury while in attendance at the baseball game, and indicating that spectators attend the game at their own risk. (Affidavit of Martie Cordaro, paragraph 6.)

20. During each Omaha Royals home baseball game, including the game on June 8, 2007 that Mr. Schrader attended, there are multiple audio announcements made which warn the fans to be aware of baseballs coming into the stands from the playing field. (Affidavit of Martie Cordaro, paragraph 7.)

21. In 2007 and currently, there is a large area behind home plate which is protected by netting from baseballs entering the stands from the playing field. This netting provides direct protection for fans seated in the area behind the netting. Each night, the Royals have seats protected by this netting which are available for any fans to sit in if they feel that they are unable or unwilling to protect themselves from baseballs coming into the stands from the playing field. On an average night, there are several patrons who are moved from their purchased seats to seats behind the netting at their request, at no additional charge. If Mr. Schrader had desired to sit behind the protective netting on June 8, 2007, he would have been allowed to move from his purchased seat in Section 11 to a protected area. No such request was made by him. (Affidavit of Martie Cordaro, paragraph 8.)

22. To the knowledge of Martie Cordaro, General Manager for the Omaha Royals, Plaintiff is the first fan who has reported being injured by an errant ball being thrown from either bullpen at Rosenblatt Stadium. (Affidavit of Martie Cordaro, paragraph 9.)

23. The College World Series has been played at Rosenblatt Stadium since 1950, recently completing its 60th year of play at Rosenblatt. The bullpen configuration for both the home team and the visitor's team at Rosenblatt Stadium is the same for Omaha Royals games as it is during the College World Series each year, and when Creighton University plays baseball games at Rosenblatt Stadium. There has been no request from the NCAA or from Creighton University to modify the bullpen set-up or to add protective netting or screening adjacent to the bullpens because of a perceived threat of injury to fans during the College World Series or Creighton Blue Jay baseball games. (Affidavit of Martie Cordaro, paragraph 10; Deposition of Doug Stewart, 32:23-33:15.)

24. There are many other major league and minor league ballparks which contain bullpens on the field of play along the left field and right field lines, and many of these bullpens are configured so that the pitcher throws the ball to the bullpen catcher in the direction of the outfield-to-infield. (Affidavit of Martie Cordaro, paragraph 11.)

25. The Omaha Royals have never been advised that their bullpen configurations, or the absence of protective screens along the bullpens, are in violation of good safety practices, or in contravention of any uniform rules, regulations or procedures with respect to baseball park safety. (Affidavit of Martie Cordaro, paragraph 12.)

26. The following night, after Plaintiff was injured, he returned to Rosenblatt as a guest of Grant Balfour, and sat in the exact same spot as the evening of Plaintiff's injury. (Deposition of Stephen Schrader 42:25-44:3.)

Standard for Summary Judgment

Summary judgment is proper when the pleadings, depositions, admissions, stipulations and affidavits in this record disclose that there is no genuine issue as to any material fact, or as the ultimate inferences that may be drawn from those facts, thereby entitling the moving party to a judgment as a matter of law. *Fackler v. Genetzky*, 257 Neb. 130, 595 N.W.2d 884 (1999). The primary purpose of the summary judgment statutes, Neb. Rev. Stat. §25-1330 et seq., is to pierce sham pleadings, and to dispose of those cases where there is no genuine claim or defense. *Ashby v. First Data Resources*, 242 Neb. 529, 544, 497 N.W.2d 330 (1993). In *Anderson v. Service Merchandise Co. Inc.*, 240 Neb. 873, 485 N.W.2d 170 (1992), the Nebraska Supreme Court explained the rationale for the use of summary judgment:

> A rationale for the use of summary judgment is the disposition and elimination of frivolous or baseless lawsuits that would otherwise necessitate unwarranted trials and consume valuable time, avoidable expenses and judicial resources better directed toward litigation that resolves real controversies, meritorious claims, and valid issues.

Anderson, supra, 240 Neb. at 876-77, 485 N.W.2d at 174.

Defendants believe that summary judgment is appropriate in this case, because the uncontroverted facts of this case disclose that as a matter of law, Defendants met the duty to Mr. Schrader of providing him with the opportunity to sit in a seat at Rosenblatt Stadium which was protected by screening, and that Mr. Schrader assumed the risk of injury as a matter of law when he chose instead to sit in Section 11, in the front row, in an area that he knew subjected him to the risk of injury by a thrown or batted ball.

ARGUMENT

I.

DEFENDANTS MET THE LIMITED DUTY OF A BASEBALL TEAM AND BALLPARK OWNER AND OPERATOR BY PROVIDING THE PLAINTIFF WITH THE OPPORTUNITY TO SIT IN SEATS WHICH WERE PROTECTED BY SCREENING.

There do not appear to be any reported decisions in Nebraska which have expressly decided the fate of a baseball spectator injury case in Nebraska. It appears that the closest that the Supreme Court of Nebraska has come to deciding the issue was in the 1943 hockey case known as *Tite v. Omaha Coliseum, Corp.* 144 Neb. 22, 12 N.W. 2d 90 (Neb. 1943). In *Tite*, the plaintiff, Grace Tite, attended a hockey game at the Omaha Coliseum (a/k/a Aksarben, which was located at 6800 Mercy Road in Omaha, Nebraska) on the evening of January 1, 1941, to observe an amateur exhibition with her husband and another married couple. The two couples occupied box seats next to the playing area, and during the second game of the evening a flying puck from the playing arena struck Grace in the face, causing her injuries for which she sought recovery in the underlying lawsuit. From a judgment in favor of the Plaintiff, the owner of the Omaha Coliseum appealed. On appeal, the Nebraska Supreme Court noted that an operator of a "place of public amusement" is "not an insurer of the safety of his patrons, but he owes them the duty which under the particular circumstances is ordinary and reasonable care for their safety." *Tite, supra*, at 25, 93. The primary issue which was considered by the Nebraska Supreme Court was whether to apply the general rule of law in baseball cases to a spectator injury case involving hockey. In this regard, the Nebraska Supreme Court noted the following:

> An analysis of these (baseball cases) reveals a definite trend of the Courts to deny recovery for injuries received by spectators from balls going into unscreened stands from the playing field. The basis of the denial seems to be placed on the conduct of the spectator and culpability on his part. It seems to be predicated on the principal that a spectator with knowledge of the dangers incident to the

> playing of the game assumes the risk of being injured thereby, and this without regard to any negligence on the part of the operator. In those cases, however, in which the spectator denied actual knowledge of the dangers a recovery was not permitted because it was held up to circumstances surrounding his attendance were such and the game of baseball was so commonly known that knowledge was imputed to him and he was held to have assumed the hazards of the game. Seemingly the tendency of the courts is to hold that in all baseball cases involving injuries to spectators from balls going into the unscreened stands from the playing field, the question of knowledge, either actual or constructive, is one of law for the courts. While in some cases there was evidence that would show knowledge, the courts in deciding that the spectator had knowledge as a matter of law emphasized the fact that there was a common knowledge of baseball and its incidental dangers. The common knowledge seems to have been the deciding factor in causing the courts to view the question as one of law for the court rather than one of fact for the jury. The distinction which appellant perceives in baseball cases does not show a different rule of substantive law as respects the duties of the operator of spectator. It merely shows establishment of knowledge of danger which precludes recovery is arrived at in a different manner. (Emphasis added.)

Tite, supra, at 30-31, 95-96. Of interest, the court also cited a decision from the State of Rhode Island (*James v. Rhode Island Auditorium, Inc., 60 R.I. 405,* 199 A. 293 (R.I. 1938) which contains the following quotation:

> The average person of ordinary intelligence in this country is so familiar with the game of baseball that it is reasonable to presume that he appreciates the risk of being hit by a pitched or batted ball without being specifically warned of such danger. Therefore, a spectator at this national known game may ordinarily be held to have assumed such a risk.

Tite, supra, at 33, 96. In the end, the Nebraska Supreme Court in *Tite* declined the appellant's motion to apply the recognized rule of law for baseball spectator cases to a hockey spectator case, and elected not to reverse the trial court's decision denying a directed a verdict in favor of the Omaha Coliseum Corporation, citing the "novelty of the game of hockey in this state" as one of its reasons. (*Tite, supra* at 34, 96.) Nevertheless, the Nebraska Supreme Court at least recognized in that opinion that there was a clear tendency of the courts in baseball spectator injury cases to decide such matters as a matter of law, and not to submit cases such as this one to the jury. Although not specifically referring to it as such, the Nebraska Supreme Court in *Tite* at

least recognized there to be a "doctrine of common knowledge of baseball," which the courts in other jurisdictions have held to preclude recovery so long as the owner or operator of the ballpark has met its limited duty of providing screening to those fans who require protected seating.

The Limited Duty Rule

Although the Nebraska Supreme Court and the Nebraska Court of Appeals have never been specifically faced with the issue, the great majority, if not all, of the jurisdictions around the country who have encountered a case such as this one have adopted the so-called "limited duty" or "no duty" rule in baseball spectator injury lawsuits.

The limited duty rule is a specialized negligence standard that has provided necessary protection against legal liability to baseball team owners and operators since the early days of professional baseball. Counsel for Defendants is not aware of any jurisdiction in which an appellate court has rejected the legal concept of this limited duty or no duty rule, and Defendants urge this Court to follow this undisputed majority rule with respect to the liability of ballpark owners and operators for injuries suffered by fans from baseballs and bats leaving the field of play. A discussion of the limited duty rule follows.

Crane v. Kansas City Baseball and Exposition, Co.

Most courts and commentators believe that the limited duty rule has its origin in the 1913 case of *Crane v. Kansas City Baseball and Exposition, Co.*, 168 Mo.App. 301, 153 S.W. 1076, 1078. In that case, a fan by the name of S.J. Crane attended a baseball game between two American Association clubs at a ballpark in Kansas City, paying fifty cents to gain admission to the grandstand. He had the option of sitting in a seat behind a protective net, or in an unprotected seat, and choosing one of the latter, he was struck by a foul ball and injured during

the course of the game. He claimed that the owner of the Kansas City team (the Blues) was negligent in not screening in the entirety of the grandstand.

The *Crane* case was submitted to the trial court on an agreed statement of facts, including a stipulation that if the court decided that the plaintiff had a good cause of action, he would obtain a judgment for the staggering sum of $100 and costs. A circuit court judge for Jackson County, Judge W. L. Thomas, ruled in favor of the Kansas City club. His decision was appealed by Mr. Crane to the Kansas City Court of Appeals, which considered the arguments of the parties.

In deciding *Crane*, the Kansas City Court of Appeals opined that:

> Defendants were not insurers of the safety of the spectator; but, being engaged in the business of providing a public entertainment for profit, they were bound to exercise reasonable care, i.e., care commensurate to the circumstances of the situation, to protect their patrons against injury (citations omitted). In view of the fact that the general public is invited to attend these games, that hard balls are thrown and batted with great force and swiftness, that such balls often go in the direction of the spectators, we think the duty of defendants toward their patrons included that of providing seats protected by screening from wildly thrown or foul balls, for the use of patrons who desired such protection.
>
> Defendants fully performed that duty when they provided screened seats in the grandstand, and gave plaintiff the opportunity of occupying one of those seats. It is unnecessary to consider the question of whether Defendants were bound to have a protected seat available for the use of the Plaintiff. We are not dealing with the case where the patron was compelled to occupy an unprotected place or not see the game, but with the case where he was offered a choice between a protected and an unprotected seat, and with full knowledge of the risks and dangers of the situation, voluntarily chose the latter. (emphasis supplied)

Crane, supra, at 1077.

In deciding against the fan, the court in *Crane* cited from an earlier decision from the Supreme Court of Michigan in *Blakely v. White Star Line*, 154 Mich. 635, 118 N.W. 482 (1908), which has been quoted by a number of courts over the years, dealing with the knowledge of the dangers of baseball:

> It is knowledge common to all that in these games hard balls are thrown and batted with great swiftness; that they are liable to be muffed or batted or thrown outside the lines of the diamond; and visitors standing in position that may be reached by such balls have voluntarily placed themselves there with knowledge of the situation, and may be held to assume the risk.

Crane, supra, at 1077-78.

Just one year later, the Kansas City Court of Appeals was faced with another spectator lawsuit arising out of the same ballpark in the *Edling v. Kansas City Baseball & Exposition Co.*, 181 Mo.App. 327, 168 S.W. 908, (1914). In that case, the plaintiff, like Mr. Crane before him, purchased a seat in the grandstand for fifty cents for the purpose of attending a baseball game involving the Kansas City Blues on May 31, 1911. The fan, Mr. Charles A. Edling, took his seat behind the catcher's box, which was screened in with chicken netting to protect the occupants from being struck by foul balls. However, the evidence in that case showed that a foul ball passed through a large hole that had been worn in the netting, striking Mr. Edling and breaking his nose.

The trial of the *Edling* case resulted in a verdict for the plaintiff in the sum of $3,500, and the decision was appealed by the owner of the Kansas City Blues. On appeal, the Kansas City Court of Appeals cited the standard from the *Crane* decision from a year earlier, and reiterated the duty of care expected of a ballpark owner:

> The fact that the general public is invited to attend these games, that hard balls are thrown and batted with great force and swiftness, and that such balls often go in the direction of the spectators, we think the duty of defendants toward their patrons included that of providing seats protected by screening from wildly thrown or foul balls for the use of patrons who desired such protection.

Edling, supra, at 909.

The court went on to state:

> Defendant recognized this duty by screening that part of the grandstand most exposed to the battery of foul balls, and impliedly assured spectators who paid for

> admission to the grandstand that seats behind the screen were reasonably protected. None of those seats were closed to patrons, and when plaintiff entered the grandstand he was invited to seat himself where he pleased, with the assurance that reasonable care had been observed for his protection. It was the duty of defendant to exercise reasonable care to keep the screen free from defects, and if it was allowed to become old, rotten, and perforated with holes larger than a ball, the jury was entitled to infer that it did not properly perform that duty, but was guilty of negligence.

Edling, supra, at pg. 909-910.

Over the years, many, many baseball spectator injury cases have been filed against professional baseball club owners and ballpark (baseball and softball) operators. The vast majority of these cases have resulted in summary judgments or directed verdicts for the defendants, either on the basis that the owner/operator met the limited or no duty rule by offering the spectator the chance to sit in seats protected by netting, or on the basis of the defense of assumption of the risk, or both. The following is a discussion of some of the more recent cases dealing with this issue, with pertinent quotations included:

Arnold v. City of Cedar Rapids

In *Arnold v. City of Cedar Rapids,* 443 N.W.2d 332 (Iowa 1989), decided by the Supreme Court of Iowa in 1989, the plaintiff, Margaret Arnold, was a spectator at a softball game in Cedar Rapids. Her husband, Travis, was playing in the game as a member of one of the teams. Instead of sitting in protected bleachers behind home plate, the plaintiff chose to sit in open bleachers along the first base line, which were protected only by a three foot fence. While sitting there she was injured when she was hit in the face by an errantly-thrown ball.

The trial court sustained the defendants' motions for summary judgment in *Arnold*, and the plaintiff appealed. In deciding this case, the Iowa Supreme Court determined that:

> The principle seems well established that the owner or operator of a ballpark fully discharges any obligation to protect spectators from thrown or hit balls by providing seating in a fully protected area. Where a spectator rejects the protected

> seating and opts for seating that is not, or is less, protected, the owner or operator is not liable.

Arnold, supra, at 333.

The court in *Arnold* also cited a frequent precedent from New York State, *Akins v. Glens Falls City School Dist.*, 53 N.Y.2d 325, 424 N.E.2d 531 (NY, 1981) with respect to a two-prong test regarding the duty of the owner of a baseball park. This test provided that:

> The proprietor need only provide screening for the area behind home plate where the games are being struck by a ball is the greatest. Moreover, such screening must be of sufficient extent to provide adequate protection for as many spectators as may reasonably be expected to desire such seating in the course of an ordinary game.

A similar result was reached in the case of *Swagger v. City of Crystal*, 379 N.W.2d 183, 186 (Minn.App. 1985.)

> The Defendants here screened the most dangerous parts of the spectator stands, behind home plate. There was sufficient seating for the Plaintiff. Defendants owed her nothing further. Summary Judgment was properly granted.

Arnold, supra, at 333.

Alwin v. St. Paul Saints Baseball Club, Inc.,
672 N.W.2d 570 (Minn.App., 2003)

The *Alwin* case involved an injury suffered by Ronald Alwin at a St. Paul Saints (Independent League) baseball game at Midway Stadium in St. Paul, Minnesota. Mr. Alwin had a general admission ticket and was seated in the open-seating, bleacher section of the stands on the third base side of the field. During the end portion of the game, Alwin left his seat and went to the men's restroom located behind the grandstand on the third base side of the field. When Alwin was returning from the restroom and was close to the concession area, he was hit in the mouth by a foul fly ball. He was not watching the game at the time, could not see the batter, and never saw the ball coming at him.

As a result of his being hit by the foul ball, Alwin lost a tooth and required extensive restorative dental procedures. He subsequently sued the owner of the St. Paul Saints Baseball Club, claiming negligence on the part of the Defendant.

From a trial court granting of summary judgment to the defendant, Alwin appealed to the Court of Appeals of Minnesota. In deciding the case in favor of the St. Paul Saints Baseball Club, the Minnesota Court of Appeals determined that a ballpark owner "owes its spectators only a limited duty, which is to offer the spectators a choice between screened-in seats and seats without protective netting." (672 N.W.2d at 572.) The court noted that the record indicated that the ballpark had protected and unprotected seating areas, thus meeting the limited duty. Alwin's appeal asked the court to expand the limited duty to include an additional duty to protect spectators in other areas of the ballpark, where they may not actually be watching the ballgame.

The following excerpt from the *Alwin* case is instructive:

> Our principal inquiry is thus to determine whether Alwin assumed a risk inherent to the game of baseball even though he was not seated in the bleachers when he was struck by a fly foul ball. Under the doctrine of primary assumption of the risk, a defendant landowner has no duty to protect an entrant from risk of harm when the entrant has assumed a well-known, incidental risk. *Wagner v. Thomas J. Obert Enters.*, 396 N.W.2d 223, 226 (Minn. 1986). If the doctrine of primary assumption of the risk applies, then no further duty exists and the landowner cannot be held liable for negligence.
>
> Minnesota, like other states, has determined that certain sporting events, including baseball, present inherent risks that are well known to the public, and that anyone who attends those events assumes the risk of injury. *See, e.g., Modec v. City of Eveleth*, 224 Minn. 556, 562, 29 N.W.2d 453, 456 (1947) (noting common nature of and dangers involved in attending a baseball game); *Brisson v. Minneapolis Baseball & Athletic Ass'n*, 185 Minn. 507, 507, 40 N.W.2d 903, 903 (1932) (holding that a spectator sitting in temporary seats provided by management and located behind third base and outside the foul line assumes the risk of injury from foul balls); *Swagger*, 379 N.W.2d at 186 (declining to overrule application of primary assumption of the risk where spectator was injured by a wildly thrown softball). *See also Benejam v. Detroit Tigers, Inc.*, 246 Mich.App. 645, 635 N.W.2d 219, 225 (2001); *City of Milton v. Broxson*, 514 So.2d 1116, 1118-19 (Fla.App.1987); *Friedman v. Houston Sports Ass'n*, 731 S.W.2d 572, 575

> (Tex.App. 1987.) Signs warning of the dangers of watching baseball remind the spectator that he or she has primarily assumed the risk of watching the game and no duty lies with the ballpark against dangers incident to watching a baseball game. *Wells v. Minneapolis Baseball & Athletic Ass'n*, 122 Minn. 327, 335, 142 N.W. 706, 709 (1913).

Alwin, supra, at 572-573. The court in Alwin noted that it was undisputed that Alwin was a baseball fan, had been to many games during the course of his lifetime, and had an understanding of the risk of being hit and injured by a ball while viewing the game. The court also noted that the defendant printed warnings on the back of admission tickets, provided a number of seats behind protective screening, and posted numerous warning signs throughout the ballpark of the risk of injury. The court noted that although these were "not necessary" to establish assumption of risk and avoid liability, they highlight the principle that Alwin primarily assumed the risk inherent to attending a baseball game, including being hit by a foul fly ball while walking near the concession area. *Alwin, supra*, at 574.

Lawson v. Salt Lake City Trappers, Inc., 901 P.2d 1013 (Utah, 1995)

This Utah case arose out of an injury sustained by 6 year-old Brooke Lawson when she attended a Salt Lake City Trappers baseball game at Derk's Field in Salt Lake City on July 4, 1991. The Lawsons purchased general admission tickets which allowed them to sit together in a location above first base, approximately 143 feet from home plate. There was no protective screening blocking foul balls in the area where the Lawsons chose to sit, and it was noted in the court's opinion that the only area at Derk's Field with protective screening was directly behind home plate, and along portions of the first and third base lines.

During the game, a foul ball left the playing field and struck Brooke Lawson, causing her head injuries. The Lawsons sued the Trappers and Salt Lake City, alleging negligence for failing to provide adequate protection to spectators from known dangers at the playing field. The trial

court entered an order of summary judgment, holding that being struck by a foul ball is an inherent risk of attending a baseball game, and that the defendants breached no duty to the Lawsons by not fencing the entire playing field.

On appeal, the Supreme Court of Utah stated that the first issue to be decided in the case was whether the Trappers or Salt Lake City owed a duty of care to the Lawsons. The court cited to a 1951 opinion in *Hamilton v. Salt Lake City*, 120 Utah 647, 237 P.2d 841 (Utah 1951), in which the Utah Supreme Court held that a baseball facility was required to use "reasonable care" in providing a "reasonably safe place for its patrons." The court in *Lawson* noted that since *Hamilton* was decided, "the standard for 'reasonable care' for a baseball park has been extensively explored in case law from other jurisdictions." *Lawson, supra*, at 1015.

The court in Lawson did a thorough review of the case law from other jurisdictions, and stated that:

> The majority rule is that an owner of a baseball stadium has a duty to screen the most dangerous part of the stadium and to provide screened seats to as many spectators as may reasonably be expected to request them on an ordinary occasion (citations omitted). The area behind the home plate is generally considered to be the most dangerous part of a ballpark.

Lawson, supra, at 1015.

The Supreme Court of Utah decided that the policy and rationale of the majority rule were sound in that they insured that those spectators needing and desiring protection from foul balls would be accommodated, and that seats in the most dangerous area of the ballpark would be safe. The court determined that "at the same time, the majority rule recognizes baseball tradition and spectator preference by not requiring owners to screen the entire stadium." *Lawson, supra,* at 1015 (emphasis supplied).

Despite the seemingly harsh result of denying recovery to a 6 year-old girl, the Supreme Court of Utah agreed with the trial court's decision that the defendants met their limited duty in this case as a matter of law, and affirmed the granting of the summary judgment.

Benejam v. Detroit Tigers, 246 Mich.App. 645, 635 N.W.2d 219 (Mich.App., 2001)

The *Benejam* case involved a claim by plaintiff Alyssia M. Benejam, a young girl who attended a Tigers game with a friend and members of her friend's family, and was seated close to the playing field along the third base line. The evidence in that case was that the stadium was equipped with a net behind home plate, which extended part of the way down the first and third base lines. Although Alyssia was behind this net, she was injured when a player's bat broke and a fragment curved around the net and struck her. The plaintiff and her parents sued the owner of the Tigers' team, Detroit Tigers, Inc., claiming primarily that the net was insufficiently long, and that the warnings about the possibility of projectiles leaving the playing field were inadequate.

The Detroit Tigers responded to the complaint with motions, before, during and after trial, arguing that as a matter of law the plaintiffs did not present a viable legal claim. The motions were all denied by the trial court. After a trial to a jury, an award was made to the plaintiffs totaling $917,000 for their non-economic damages, together with a loss of earning capacity of $56,700 and $35,000 for past and future medical expenses. Defendant appealed on the issue of liability, but did not challenge the damages.

On appeal, the defendant argued that although there was no Michigan law directly on point, other jurisdictions have "balanced the safety benefits or providing a protective screen against the fact that such screening detracts from the allure of attending a live baseball game by placing an obstacle or insulation between fans and the playing field." *Benejam, supra,* at 649. The court in *Benejam* noted that:

> The rule that emerges in these cases is that a stadium proprietor cannot be liable for spectator injuries if it has satisfied a "limited duty" – to erect a screen that will protect the most dangerous area of the spectator stands, behind home plate, and to provide a number of seats in the area sufficient to meet the ordinary demand for protected seats.

Benejam, supra, at 649.

The *Benejam* court noted that there was no Michigan case law directly on point, but that their review of precedents from other jurisdictions found "overwhelming, if not universal, support for the limited duty rule that defendant advocates." *Benejam, supra,* at 650. The court recognized the argument of the plaintiffs that two Illinois cases, *Yates v. Chicago National League Ball Club, Inc., infra,* and *Coronel v. Chicago White Sox, Ltd.*, infra, had rejected the limited duty rule. However, as noted by the *Benejam* court, "however, those cases have been superseded by more recent legislation granting baseball owners limited immunity from liability for spectator injuries. *Benejam, supra,* at 650.

In forecasting its decision, the *Benejam* court noted the following:

> The logic of these precedents is that there is an inherent risk of objects leaving the playing field that people know about when they attend baseball games. See, e.g., *Swagger, supra,* at 185 ("[N]o one of ordinary intelligence could see many innings of the ordinary league [baseball] game without coming to a full realization that batters cannot and do not control the direction of the ball." (citation omitted)) Also, there is inherent value in having most seats unprotected by a screen because baseball patrons generally want to be involved with the game in an intimate way and are even hoping that they will come in contact with some projectile from the field (in the form of a souvenir baseball).

Benejam, supra, at 651.

The *Benejam* court went on to state:

> We find *Akins* and similar precedents to be well-reasoned and persuasive. It seems axiomatic that baseball fans attend games knowing that, as a natural result of play, objects may leave the field with the potential of causing injury in the stands. It is equally clear that most spectators, nonetheless, prefer to be as "close to the play" as possible, without an insulating and obstructive screen between them and the action. In contrast, a smaller number of spectators prefer the

> protection offered by screening. The most dangerous part of the spectator stands is the area in the lower deck behind home plate and along each of the baselines. Certainly home plate is the center of the most activity on the field. Most notably, it is there that pitched balls, traveling at great speeds in a line that would extend into the stands, are often deflected or squarely hit into those stands. Quite logically, the limited duty rule protects a stadium owner that provides screening for this most dangerous area and, in so doing, accommodates baseball patrons who seek protected seating. Because the limited duty rule is based on the desires of spectators, it further makes sense to define the extent of screening that should be provided behind home plate on the basis of consumer demand.

Benejam, supra, at 653.

After setting forth their thoughtful analysis of the cases, the Court of Appeals of Michigan reversed the jury's verdict and remanded the *Benejam* case for entry of an order finding that there was no cause of action against the defendant Detroit Tigers, Inc.

Turner v. Mandalay Sports Entertainment, LLC, 180 P.3d 1172 (Nev. 2008)

The most recent reported case involving the limited duty rule is *Turner v. Mandalay Sports Entertainment, LLC*, a 2008 decision of the Supreme Court of Nevada. In that case, the plaintiff, Kathleen Turner, was injured when she was struck by a foul ball while attending a baseball game of the Las Vegas 51's, a minor league baseball team owned by Mandalay Sports Entertainment, LLC, which played its games at Cashman Field in Clark County, Nevada. The evidence in that case was that Mrs. Turner was struck in the face by a foul ball while sitting in the Beer Garden at Cashman Field, in which she did not see the ball coming her way and allegedly had no opportunity to get out of the way. From a summary judgment for the defendant entered by the trial court, Mrs. Turner and her husband appealed to the Nevada Supreme Court.

In reviewing the summary judgment, the Nevada Supreme Court noted that at least twelve different jurisdictions had adopted the "limited duty rule," which defines the duty of a baseball stadium owner or operator with specificity. The court noted that this rule shielded the stadium owner or operator from the need to take precautions which were clearly unreasonable,

while also establishing the outer limits of liability. The court noted that once the owner or operator met their legal duty of providing a sufficient amount of protective seating for those spectators who desired such protection, the stadium owner or operator had no remaining duty to protect spectators from baseballs leaving the field of play, which are a "known, obvious and unavoidable part of all baseball games." *Turner, supra,* at 1176. After performing its analysis of the case law from other jurisdictions and reviewing the facts of the *Turner* case, the Supreme Court in Nevada affirmed the decision of the trial court granting the defendant summary judgment.

There are a myriad of other cases employing and supporting the limited duty rule, and finding that the owner and/or operator of a baseball team is free from liability if it is established that it complied with its duty. See, for example, *Tucker v. ADG, Inc.*, 102 P.3d 660 (Okla., 2004) (fan injured by foul ball in luxury suite); *Taylor v. The Baseball Club of Seattle, LP*, 132 Wash.App. 32, 130 P.3d 835 (Wash., 2006) (spectator at baseball game injured by ball errantly thrown into stands during pre-game warm-up; *Loughran v. The Phillies*, 888 A.2d 872 (Penn Super., 2005) (spectator injured when center fielder, after catching a ball for the last out, threw the ball into the stands and injured spectator); *Pira v. Sterling Equities*, 790 N.Y.S.2d 551 (N.Y. 2005) (spectator struck by baseball tossed casually to fans as a souvenir by pitcher); *Ray v. Hudson Valley Stadium Corp.,* 760 N.Y.S.2d 232 (N.Y. 2003)(spectator hurt by foul ball behind dugout); *Rees v. Cleveland Indians Baseball Company*, 2004 WL 2610531 (Ohio 2004) (spectator hit in face by broken bat).

II.

PLAINTIFF ASSUMED THE RISK OF HIS INJURIES BY CHOOSING TO SIT WHERE HE SAT, IN THE FRONT ROW OF SECTION 11, BEING FULLY AWARE OF THE RISK OF BEING HIT BY A BATTED OR THROWN BASEBALL.

Defendants have alleged that Plaintiff assumed the risk of his injuries in this case, by purchasing a ticket to sit in the front row of Section 11 of Rosenblatt Stadium instead of choosing to sit in one of the available seats behind protective screening. It is undisputed that Mr. Schrader was aware of the availability of protected seating at Rosenblatt Stadium, but that he chose to sit in an unprotected area because it afforded him a better view of the game, and a chance to banter with members of the opposing team in the area of the visitor's bullpen.

Assumption of the risk is a defense that is available in Nebraska. As recently described in the 2004 opinion from the Nebraska Supreme Court in *Burke v. McKay*, 268 Neb. 14, 679 N.W.2d 418 (Neb. 2004), the defense of assumption of risk is derived from the maxim "*volente non fit injuria*," which means that "where one, knowing and comprehending the danger, voluntarily exposes himself to it, although not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for an injury resulting there from." *Burke, supra*, at 424. Indeed, Nebraska has a statute which specifically recognizes the defense of assumption of the risk, codified at Neb. Rev. Stat. §25-21,185.12. Pursuant to that statute, "assumption of the risk" as an affirmative defense means that 1) the person knew of and understood the specific danger, 2) the person voluntarily exposed himself or herself to the danger, and 3) the person's injury or death or the harm to property occurred as a result of his or her exposure to the danger.

<u>Mr. Schrader's Testimony</u>

In the case at bar, there is a surfeit of evidence, all of which is uncontradicted, that Mr.

Schrader understood the risk of an injury by being struck by a baseball when he purchased his ticket to attend the Royals game against the Nashville Sounds on June 8, 2007. The following excerpts from his deposition in this case, taken on September 29, 2008, are uncontradicted:

53:16 – 54:1

A: I have never been to any stadium that didn't have netting behind home plate.

Q: Okay. Did you sit behind netting for those games?

A: No.

Q: Did you ask for seats behind netting?

A: No.

Q: Have you ever done that at any game, got up and said I want to go to the game today, I would like to sit behind a net or a screen?

A: No.

* * * * *

87:5 – 25

Q: Okay. Prior to March – I'm sorry, prior to June 8, 2007, you were aware that going to a professional baseball game carried with it the **risk of being hit by a baseball**; true?

A: Yes.

Q: And prior to June 8, 2007, you were aware that at all of the different ballparks that you went to there were seating areas where you could have sat which would have placed you behind a protective screen; true?

A: Yes.

Q: And you chose to sit in areas other than behind protective screens; true?

A: Yes.

Q: Why?

A: Hopefully I could protect myself from the ball in play.

Q: Any other reason?

A: **Unobstructed views.**

Q: Anything else?

A: No.

* * * * *

88:9-17

Q: Okay. When you sit down by the bullpen area, **did you understand prior to June 8, 2007 that there would be pitchers warming up to your right at the same time as the game was going on to your left?**

A: **Yes.**

Q: In fact, you sat there at least several times before June 8, 2007 because you liked to be up close and to be able to talk with the players?

A: Yes.

* * * * *

88:25–89:2

Q: Alright. From time to time, would you watch the pitchers warm up?

A: Yes.

* * * * *

89:8-13

Q: You say usually before the game. But during the game itself, would you watch when a pitcher and catcher would come out of the dugout and walk down to the bullpen area and start warming up?

A: Yes.

* * * * *

90:9 – 91:14

Q: Now, when you would watch pitchers warm up in the bullpen, you were able to observe **they throw hard**, don't they?

A: **Yes**.

Q: They don't just lob them back and forth, do they?

A: No.

Q: And you know as a knowledgeable baseball fan that they are getting their arms warmed up to go into the game?

A: Yes.

Q: And they throw **hard**, and they throw **curve balls**, don't they?

A: **Yes**.

Q: They throw sliders, don't they?

A: Yes.

Q: Some pitchers throw knuckleballs, don't they?

A: Yes.

Q: And you know that some pitchers will throw **wild pitches**; true?

A: **Yep**.

Q: You've been around baseball long enough to know that **even the best pitchers will throw wild pitches** from time to time; true?

A: **Yes**.

Q: Okay. Now, when you were sitting in your seat on the night of your injury while Mr. Balfour was warming up in the bullpen, **did you know the game was still going on?**

A: **Yes**.

* * * * *

91:23-92:7

Q: Okay. And your brother was seated to your right?

A: Yes.

Q: Would you turn to look at him when you would talk to him?

A: Yes.

Q: You would be able to see the pitcher warming up right there, wouldn't you, if you did that?

A: Yes.

* * * * *

94:19-95:8

Q: **Have you ever seen anybody get hit by a foul ball?**

A: **I am sure I have, yes.**

Q: Have you been to quite a few games –

A: Not a – not close to me, I would say, but –

Q: Okay.

A: -- in the distance, yeah.

Q: Most of us who have been to a lot of games have seen a hard liner come flying off the bat and hit somebody hard and everybody goes, Oh –

A: Uh-huh.

Q: -- you know, winces. Have you had that sort of experience?

A: Yes.

* * * * *

126:12-127:23

Q: As of the day that you went to the game in question, on June 8, 2007, you were aware that as a fan attending a professional baseball game, **there is a risk of being hit and injured by a baseball; correct**?

(Objection by Mr. Rock)

A: **Yes**.

Q: And you were aware of that risk whether or not you read your ticket stub that day; true?

(Objection by Mr. Rock)

A: **Yes**.

Q: Alright. Even though I believe the record will show that your ticket stub did have language on there about it, regardless of that, **you were still aware of the risk of being hit by a ball at a professional game, true?**

(Objection by Mr. Rock)

A: **Yes.**

Q: **AND YOU WERE WILLING TO ASSUME THAT RISK SO THAT YOU COULD GO TO THE GAME; TRUE?**

(Objection by Mr. Rock)

A: **YES.**

Q: **And you knew that there were seats available behind a screened area that you could have purchased that night; correct?**

(Objection by Mr. Rock)

A: **Yes.**

Q: And you chose not to sit behind the screened area because you felt like you could protect yourself against any risk and because you liked the better visibility of not being behind a screen; correct?

A: Yes.

* * * * *

137:7-19

Q: You testified that your attention at the time of your injury was diverted to your left to watch the game. **You knew, though, that there were bullpen pitchers warming up to your right; correct?**

A: **Yes**.

Q: And **you also knew that pitchers can throw wild pitches**; correct?

A: **Yes**.

Q: And you – **you knew that could happen in the bullpen as well as out on the field on the mound; correct?**

A: **Yes.**

Mr. Schrader's honest and candid responses to counsel's questions at his deposition make it clear that he understood the risk of being hit by a baseball, be it a foul ball off the bat or a wild pitch from the bullpen, when he sat in an unprotected seat at Rosenblatt Stadium on June 8, 2007. His deposition testimony makes it clear that he was fully aware of the risk of a bullpen pitcher throwing a wild pitch while warming up. Plainly, Mr. Schrader is barred from recovery in this case because of his assumption of the risk, as a matter of law.

Many of the cases which deal with baseball spectator injuries recognize that the "limited duty" rule and the defense of assumption of the risk are interrelated. In these cases, the courts refer to this defense of assumption of risk as "primary" assumption of the risk. As stated by the Supreme Court of Utah in *Lawson v. Salt Lake Trappers, Inc., supra*, "in its primary sense, it is an alternative expression for the proposition that defendant was not negligent, that is, there was no duty owed or there was no breach of an existing duty." *Lawson, supra*, at 1016. Another

case describing the relationship between assumption of the risk and the duty of the owner is *Harting v. Dayton Dragons Professional Baseball Club, LLC*, 171 Ohio App.3d 319, 870 N.E.2d 766 (Ohio, 2007), in which a spectator at a baseball game was injured when struck by a foul ball while distracted by the antics of a costumed mascot. In that case, the defendants obtained a summary judgment from the trial court, and the injured spectator appealed. On appeal to the Court of Appeals of Ohio, Second District, the court affirmed the summary judgment, holding that "primary assumption of risk is a defense generally applied in cases in which there is a lack of duty owed by the defendant to the plaintiff, and it is a complete bar to recovery." *Harding, supra*, at 768. It is further stated by that court, "in that form, while there is a knowledge of the danger and acquiescence in it on the part of the plaintiff, there is also no duty owed by defendant to the plaintiff." *Harding, supra*, at 768.

An early baseball spectator lawsuit involving assumption of the risk was *Lorino v. New Orleans Baseball and Amusement Co., Inc.*, 16 La.App. 95, 133 So. 408 (La.App. 1931). In that case, the plaintiff sought to recover for injuries sustained when he was struck on the head by a batted ball during practice immediately preceding a game conducted by the defendant. As the court pointed out in its opinion in that case,

> It is well known, as the evidence demonstrates, that it is not possible, at baseball games, for the ball to be kept at all times within the confines of the playing field. Errors must inevitably occur and foul balls must frequently be knocked, and on any such occasion there is a danger that the ball may enter that portion of the park occupied by the spectators. Those who fear such dangers may, as we have said, secure protection in those seats in front of which screens are erected, and which screens extend from the ground to the roof and afford complete safety. Those who do not elect to take advantage of such protection assume the risks of such obvious dangers. (emphasis supplied)

Lorino, supra, at 408.

Finally, in the 1993 opinion of the Court of Appeals of Arizona in *Bellezzo v. State of*

Arizona, 174 Ariz. 548, 851 P.2d 847 (Ariz.App. Div. 1, 1992) involving an injury incurred by the mother of a visiting UNLV baseball player at a college baseball game at Packard Stadium (Arizona State University) in Tempe, Arizona, the court described the open and obvious danger of attending a baseball game in unique terms:

> The lack of a screen is as obvious as the fact that the Grand Canyon is a chasm, and the danger that a spectator hit by a foul ball may be injured is as evident as the likelihood that one who falls into the Grand Canyon may be hurt.

Bellezzo, supra, at 852.

The court in *Bellezzo* concluded as a matter of law that the defendants had complied with their duty to protect spectators from the risk of being injured by a foul ball by providing protective seating, and determined that the plaintiff assumed the risk of her injuries. In reaching this decision, the court noted that it was joining the many other jurisdictions who have considered the question, in which "the overwhelming majority have concluded, as a matter of law, that a stadium operator is not liable for injury to a spectator struck by a batted or thrown ball where the spectator was seated in an unscreened area of the stadium." *Bellezzo, supra,* at 850-851.

III.

PLAINTIFF'S RELIANCE ON *MAYTNIER* IS MISPLACED. *MAYTNIER* IS NO LONGER GOOD LAW.

The Plaintiff relies heavily in this case on the 1967 *Maytnier* case from the State of Illinois, involving a lawsuit filed on behalf of a young boy against the Chicago Cubs and one of the Cubs' pitchers, Robert Rush, which resulted in a jury verdict in favor of Maytnier. The decision was subsequently affirmed on appeal to the Appellate Court of Illinois. Because the *Maytnier* case also involved a baseball fan who was injured by an errant ball out of the bullpen,

Plaintiff claims that this Court should rely heavily on *Maytnier* in deciding the parties' summary judgment motions. However, not only is *Maytnier* factually distinguishable from this case, more importantly, *Maytnier* is no longer good law because in 1992 the Illinois legislature passed the Baseball Facility Liability Act which provides the legislative standard for determining liability in baseball spectator cases, and which gutted the *Maytnier* case of any precedential value. In view of the weight attached to the *Maytnier* decision by Plaintiff in this case, a thorough discussion of that case, its progeny, and the Baseball Facility Liability Act is warranted.

Maytnier v. Rush/Chicago National League Ball Club,
80 Ill.App.2d 336, 225 N.E.2d 83 (Ill.App. 1967)

On September 13, 1957, David M. Maytnier purchased a ticket to a Chicago Cubs double-header, requesting a seat as close to the Cubs dugout as possible so that he could have a better view of the players. He received and occupied a seat in the front row, approximately 10-15 seats in the outfield at Wrigley Field. During the sixth inning of the second game of the double-header, Maytnier was struck and injured on the left side of his head by a ball thrown from the bullpen by the pitcher, Robert Rush.

Testimony was elicited at the trial of the *Maytnier* case which revealed that Rush was having a bad pitching year, and that when pitchers have a bad year, they attempt to correct their pitching rhythm. The warm-up pitcher, Gordon Massa, testified that Rush's wild pitch went up to his left and beyond his reach, despite the fact that Massa was six feet and three inches tall. Defendant Rush also testified that he had thrown wild pitches while warming up on prior occasions.

The *Maytnier* case proceeded to a jury verdict in favor of the plaintiff in the amount of $20,000, from which the Cubs' ownership appealed. The Cubs urged the Appellate Court of Illinois to adopt a rule such as was articulated in the 1932 case of *Brisson v. Minneapolis*

Baseball and Athletic Association, 185 Minn. 507, 240 N.W. 903:

> In our opinion they exercise the required care if they provide a screen for the most dangerous side of the grandstand and for those that may be reasonably anticipated to desire protective seats, and that they need not provide such seats for an unusual crowd, such as the one in attendance at the game here involved.

However, the court in *Maytnier* stated that it did not necessarily follow that once a ballpark's owner provided protection for the most dangerous part of the grandstand, that "he is there after he exculpated himself from further liability as defendant Chicago Cubs contends." *Maytnier, supra,* at 87. Ultimately, the court in *Maytnier* elected not to follow the "limited duty" or "no duty" rule of law, and determined that it was a matter for a jury to decide whether the Cubs acted reasonably toward the plaintiff in terms of the protective seating provided and whether a duty to warn against the risk of injury existed.

On its face, the *Maytnier* case differs from the Schrader case in many important respects, including but not limited to the following:

1. David Maytnier was a 13 year-old boy, and Donald Schrader is a 47 year-old man;
2. Maytnier was hit by a warm-up pitch from a Cubs pitcher who was known to be experiencing problems with control, while Schrader was hit by a warm-up toss (not a full speed pitch) from a pitcher with no known history of control problems;
3. There is no indication in the *Maytnier* opinion that David Maytnier had any knowledge that pitcher Rush was warming up in the bullpen to his left, unlike Schrader's admission that he was aware of players going to the visitor's bullpen at Rosenblatt for the purpose of warming up, and that he was aware that bullpen pitchers can throw wildly in bullpen warm-ups; and
4. There was no evidence in the *Maytnier* case of any written or verbal warnings

issued to the fans about watching for balls or bats leaving the playing field, or that Mr. Maytnier's ticket stub had language indicating his understanding of the risks being assumed; unlike the evidence of same in this case.

The *Maytnier* case resulted in a jury verdict for the Plaintiff in the amount of $20,000. On appeal, the decision was affirmed by the Appellate Court of Illinois, although there was no discussion in the court's opinion of a "limited duty" or "no duty" rule in the State of Illinois.

Maytnier's Progeny

Following the Maytnier case, at least two other cases filed in the State of Illinois resulted in favorable decisions for the spectators who were suing for their injuries.

Coronel v. Chicago White Sox, Ltd.

In *Coronel v. Chicago White Sox, Ltd.*, 230 Ill.App.3d 734, 595 N.E.2d 45 (Ill.App. 1 Dist., 1992), the Appellate Court of Illinois was faced with a case filed by a spectator who was injured on August 16, 1986, while attending her first Chicago White Sox game at Comiskey Park. The evidence in that case was that Blanca Coronel, attending her first game, sat in the "Golden Box Seats" behind home plate, facing first base, approximately three seats away from the edge of a protective screen. During the sixth inning, while the plaintiff looked down into her lap to pick up some popcorn, she was struck on the right side of her face by a line drive, foul tipped ball, and suffered a broken jaw. She then sued the Chicago White Sox, Ltd. and Comiskey Park Corp. The plaintiff in *Coronel* alleged a failure by the defendants to provide adequate protection from batted balls for those spectators who were seated in the area of the stadium most vulnerable to being hit by stray, foul balls, and for failing to provide an adequate number of seats in the areas screened off from the playing field. She also alleged a failure to warn that the batted balls were being projected toward her and spectators seated around her.

In overruling a summary judgment for the White Sox which was granted by the trial court, the Appellate Court of Illinois reversed and remanded *Coronel* for further proceedings, finding that a question of fact existed as to whether there was a violation of the duty owed by the White Sox to spectators seated in the most dangerous part of the ballpark.

Yates v. Chicago National League Ball Club, Inc.

The other case decided after *Maytnier*, by the same Appellate Court of Illinois and in the same year (1992), was *Yates v. Chicago National League Ball Club, Inc.*, 230 Ill.App.3d 472, 595 N.E.2d 570 (Ill.App.1 Dist. 1992). In *Yates*, a spectator, Delbert Yates, Jr., a minor, through his father and next friend, Delbert Yates, Sr., filed a lawsuit against the owner of the Chicago Cubs for injuries sustained when he was hit in the face by a foul ball at Wrigley Field. The incident happened at a baseball game with the Atlanta Braves on August 20, 1983, and a foul ball hit by Cubs' player Leon Durham. The plaintiff's father testified that he requested seats behind home plate, and believed that the seats would be protected by a screen.

The plaintiff in *Yates* presented expert testimony that the screening behind home plate could have been extended down the first and third baselines, and that the Cubs did not exercise reasonable care in not having such extended screens. The defense presented contradictory evidence regarding the safety of the screening. At the conclusion of the trial, the jury in *Yates* returned a verdict for the plaintiff in the amount of $67,500, from which the defendant appealed.

On appeal, the Cubs argued that they met their duty to Delbert Yates by providing screening for the most dangerous part of the grandstand, and for those that might be reasonably anticipated to desire protected seats for a typical game. The Cubs argued that they were entitled to a judgment notwithstanding the verdict because the record showed that there was a screen behind home plate. With little discussion, the Appellate Court of Illinois affirmed the jury's

verdict in the *Yates* case, choosing not to grant the Cubs a judgment notwithstanding the jury verdict.

Enactment of the Baseball Facility Liability Act

In 1992, following the *Coronel* and *Yates* decisions, the Illinois Legislature put into effect a law relating to injuries suffered at baseball games. As stated by the author of the 2002 law review article, "Baseball Spectators is Assumption of Risk: Is it 'Fair' or 'Foul'?" in the Marquette Sports Law Review, these Illinois decisions were "rendered obsolete" by the passage of this statute. As stated in that law review article, "the 1992 legislation stated that the only time a plaintiff may sue is when he is either sitting behind a protective screen when injured, or if a facility employee or owner injures the plaintiff by willful or wanton conduct." As further stated in this article, "also, the law took the question of fact away from the jury by determining no liability, as a matter of law."

The text of the Baseball Facility Liability Act reads as follows, in pertinent part:

> § 10 Liability limited. The owner or operator of a baseball facility shall not be liable for any injury to the person or property of any person as a result of that person being hit by a ball or bat unless: (1) the person is situated behind a screen, backstop, or similar device at a baseball facility and the screen, backstop, or similar device is defective (in a manner other than in width or height) because of the negligence of the owner or operator of the baseball facility; or (2) the injury is caused by willful and wanton conduct, in connection with the game of baseball, of the owner or operator or any baseball player, coach or manager employed by the owner or operator.

With the passage of the Illinois Baseball Facility Liability Act, the previous case law precedent in Illinois from the *Maytnier, Coronel* and *Yates* decisions has been nullified, and is no longer good law in the Land of Lincoln, or anywhere else. *Maytnier* has no precedential value. Accordingly, any reliance on *Maytnier* by Plaintiff in this case is misplaced.

CONCLUSION

It is clear from the uncontradicted evidence in this case that the Defendants are entitled to summary judgment as a matter of law in this case, because they met their duty of providing Plaintiff with the option of sitting in protected seats behind a screened area at Rosenblatt Stadium, and because Mr. Schrader chose instead to sit in an unprotected area of the ballpark to afford himself closer access to the players and the action, and an unimpeded view. As such, the Plaintiff is barred from recovery as a matter of law because he assumed the risk of being injured by a baseball entering the grandstand from the playing field. Mr. Schrader's factual testimony in his deposition makes it clear that he understood the risk of being hit by a batted or thrown baseball, including an errant toss from the visitor's bullpen. He testified unequivocally that he understood that players warmed up in the bullpen during the course of live action on the playing field.

Defendants have established without contradiction that they met the duty required of them as the owner of a baseball park and the operator of a baseball team. Plaintiff has not provided a scintilla of evidence regarding other, prior injuries suffered by fans at Rosenblatt Stadium, from errant throws coming from the home or the visitor's bullpen. Plaintiff has not established any duty on the part of Defendants other than the limited duty recognized by the vast majority of the jurisdictions which have considered the "limited duty" or "no duty" rule of law.

Plaintiff relies heavily on the *Maytnier* case against The Chicago National League Ball Club, Inc., decided in March of 1967, because that case also involved an injured spectator who was hurt when struck by a ball coming from an errant toss from the bullpen. However, as described in detail in this brief, *Maytnier* and its progeny, two other Illinois cases decided in favor of spectators, are no longer valid legal authority, because the Illinois legislature in 1992, in

response to the adverse decisions, enacted the Baseball Facility Liability Act, which provides an entirely different standard of liability. As such, *Maytnier* and its progeny are no longer good law, neither in Illinois, nor in any other jurisdiction, and Plaintiff's reliance on this line of cases is entirely misplaced.

As reflected by the cases cited and discussed in Defendants' brief, virtually all of the recent cases which have decided similar issues have held as a matter of law that the owner and operator of a baseball team and park has a limited duty to its patrons, that is, to provide an ample number of seats protected by screens or nets, so that the baseball fan himself (or herself) can decide whether to be protected from injury, or to assume the risk of being hit by a baseball or bat coming from the playing field. Recent cases provide extensive analysis and thoughtful reasoning, and clearly demonstrate the sound rationale for imposing this sort of limited duty on the baseball team and ballpark owners. As stated by the Michigan Court of Appeals in *Benejam*,

> By providing greater specificity with regard to the duty imposed on stadium owners, **the rule prevents burgeoning litigation that might signal the demise or substantial alteration of the game of baseball as a spectator sport.**

Benejam, supra, at 223 (emphasis supplied).

As stated in the introductory section of this brief, this case is about much more than the injuries suffered by Donald Schrader on June 8, 2007. This is a case about the institution of baseball, about spectator sports, and about personal freedoms – the freedom to choose whether to watch the great game of baseball in the open air, and accept the risks which go along with it, or to choose to sit in a part of the ballpark which is protected by netting or screening. What the Plaintiff is asking this Court to do in this case is to take this freedom of choice away from the thousands and thousands of baseball fans who flock to Rosenblatt Stadium to watch the Omaha Royals, the Creighton Blue Jays, and the many college teams who come to the College World

Series. By merely following the law of virtually every other jurisdiction which has faced this precise issue, this Court can keep alive this essential freedom of choice.

Defendants renew their prayer for summary judgment in their favor in this case, a dismissal of Plaintiff's lawsuit, with prejudice, as a matter of law.

DATED this _____ day of July, 2009.

Respectfully submitted,

CITY OF OMAHA and OMAHA ROYALS LIMITED PARTNERSHIP,
Defendant

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Certificate of Service

The undersigned hereby certifies that a copy of the foregoing has been furnished to Daniel L. Rock, 8805 Indian Hills Drive, #280, Omaha, Nebraska 68114-4070, by United States Mail, postage prepaid, on the _____ day of July, 2023.