

1951

Gladys E. Hamilton v. Salt Lake City Corporation,
Kenneth J. Finney, dba Pinney Beverage Company,
and Provo City Baseball Club : Brief of Appellant
on Appeal

Utah Supreme Court

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Case No. 7650

IN THE SUPREME COURT
of the
STATE OF UTAH

GLADYS E. HAMILTON,

Appellant,

vs.

SALT LAKE CITY CORPORATION, KENNETH J. PINNEY,
doing business as PINNEY BEVERAGE COMPANY, and PROVO
CITY BASEBALL CLUB, a partnership,

Respondents.

FILED
JUN 12 1951

Clerk, Supreme Court, Utah

APPELLANT'S BRIEF ON APPEAL

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GLADYS E. HAMILTON,

Appellant,

vs.

SALT LAKE CITY CORPORATION,
KENNETH J. PINNEY,
doing business as PINNEY BEV-
ERAGE COMPANY, and PROVO
CITY BASEBALL CLUB, a part-
nership,

Respondents.

Case No.
7650

APPELLANT'S BRIEF ON APPEAL

Appellant brought this action against the Respondents above named in the District Court of Salt Lake County to recover damages for injuries received by her by reason of her having been struck by a baseball on the 9th day of July, 1947, during a game then being played in Derk's Field between a baseball team known as the Pinney Beverage Company Team and the Provo City Baseball Team.

Prior to this appeal, upon Plaintiff's motion the action was dismissed as to Defendant Kenneth J. Pinney, doing business as Pinney Beverage Company and the Defendant Provo City Baseball Club, leaving the Defendant, Salt Lake City Corporation the sole Respondent herein. (R-6)

Appellant alleged in her Complaint as follows:

"2. That prior to the 9th day of July, 1947, the Defendant Salt Lake City Corporation, constructed a baseball park, together with a grandstand for the use of spectators, and other facilities, on land owned by it in Salt Lake City, Utah, known as 'Derk's Field' or 'Derk's Ball Park,' and on and prior to the said 9th day of July, 1947, the said Defendant City has owned and operated said park, in its proprietary capacity, said Defendant City sharing the proceeds from the operation and use of said park in the staging of baseball games and other sports events, being played and held therein from time to time, including the proceeds of the baseball game hereinafter specifically referred to.

"3. That on the 9th day of July, 1947, while said park was being jointly operated, controlled, used and maintained by all of the Defendants, Plaintiff paid admission for, and attended a baseball game being played in said Park, that had been advertised publicly by the Defendants, by and between a baseball team known as 'Pinney Beverage Baseball Team,' owned and controlled by the Defendant, Kenneth J. Pinney, and the 'Provo Baseball Team,' owned and controlled by the Defendant, Provo City Baseball Club.

"4. That Plaintiff, upon entering the stands of said Derk's Field, selected a seat about 15 feet behind and in the center of the screened portion of the grandstand, which she considered and assumed to be, and which she selected as being, in a place of safety, and where she could not be injured by batted or thrown balls. That during the fourteenth inning of said baseball game, one of the Pinney Beverage Company ball players hit a foul ball which went over the said screen in front of said grandstand, and struck claimant on the base of her neck, fracturing the spinus process of her sixth and seventh cervical vertabrae, causing her excruciating pain and suffering, and permanent injuries and damages, as hereinafter more specifically set forth.

"5. That said Defendant, Salt Lake City Corporation was negligent in its construction and maintenance of the said Derk's Field, and in authorizing and permitting the use thereof while not having a screen in front of said grandstand, and Plaintiff's seat, of sufficient height, or of sufficient overhead covering, so as to prevent batted balls from going over said screen and striking Plaintiff, and the said Defendants, Kenneth J. Pinney and the Provo City Baseball Club, were likewise negligent in using said field in its dangerous condition, which said facts were well known to said Defendants, or should have been known to them, in the exercise of reasonable care, and in permitting Plaintiff to be injured by a batted ball, after being lulled into a sense of security by reason of said screen. That the negligence of the Defendants, and each of them, as aforesaid, proximately caused Plaintiff's said injuries.

“6. That Plaintiff has been caused to suffer great pain and shock, and she will continue to suffer great pain and shock, and she has been totally disabled from performing her household and other duties, and will be so disabled for a long period of time, and Plaintiff is informed, and upon information and belief alleges, that the injuries received by her will be permanent in character, and she will be permanently disabled for the rest of her lifetime, all to her general damage in the sum of \$25,000.00, and by reason of Plaintiff’s injuries, as aforesaid, she has, to date hereof, incurred the following expenses: A brace for her back and neck, at a cost of \$175.00, and doctor and medical expenses in the sum of over \$400.00.

“7. That within the time, and as provided by law, Plaintiff caused a claim, in writing, properly itemized and described and verified as to correctness, to be presented to the Defendant, Salt Lake City Corporation, setting forth the particulars hereinabove set forth, and claiming damages, as aforesaid, and said Defendant City has wholly failed to audit and allow the same.

“WHEREFORE, Plaintiff prays Judgment against the Defendant, and each of them, both jointly and severally, for the sum of \$175.00, the cost of said brace for her back and neck, the sum of \$400.00, doctor and medical expenses, and the sum of \$25,000.00 general damages, for her costs of suit herein expended, and for such other and further relief as is just and proper.” (R-1)

The Respondent filed a general and special Demurrer to Appellant’s Complaint, which said Demurrers were argued and overruled by the Court. The Respondent

filed its Answer admitting that Respondent Salt Lake City constructed the Baseball Park and Grandstand for the use of spectators, on land owned by it, known as Derk's Field, but denied all other allegations of Appellant's Complaint.

As a further Answer to the Complaint, Respondent alleged that if Appellant was injured as alleged in her Complaint, that her injury was proximately contributed to and caused by her own negligence in failing to keep a proper lookout for the ball; in failing to use reasonable care and circumspection in attending to her own safety; in failing to do anything to protect herself or to avoid being hit by said ball after she knew, or by the exercise of reasonable care should have known, said ball was likely to go over the screen and fall in the vicinity where she was sitting.

Respondent further alleged that the height and character of the screen in front of the grandstand where Appellant claimed she was sitting when injured was at all times open and visible and its height and character readily discernable by Appellant, and the fact that foul balls could be batted over the screen and fall in the grandstand was as readily perceivable to her as to Respondent, and that Appellant chose said seat and remained in said seat assuming whatever risk of injury would be encountered in the ordinary and usual course of the game of baseball then being played, well knowing

the height and character of the screen in front of her and the extent of the protection such screen would afford. (R-4)

The case came on for pre-trial before the Court and from the pleadings in the cause and statements of counsel the Trial Court, Judge J. Allan Crockett presiding, made its Findings and Order as follows:

“This matter having come before the Court for pre-trial, Plaintiff appearing by and through Oscar W. Moyle, Jr., of the firm of Moyle & Moyle, her attorneys, the Defendant, Salt Lake City Corporation appearing by and through E. Ray Christensen, Homer Holmgren, and A. Pratt Kesler, its attorneys, and the Defendant, Kenneth J. Pinney appearing by and through E. R. Callister, of the firm of Callister, Callister & Lewis, his attorneys, and from the pleadings in this cause, and statements of counsel, the Court makes its Findings and Order as follows:

“1. That the Defendant, Salt Lake City Corporation, is a municipal corporation duly organized and existing under and by virtue of the Laws of the State of Utah.

“2. That prior to July 9, 1947, Defendant constructed a baseball park with grandstand and bleachers and other facilities for use of spectators on land owned by it, said park being known as ‘Derk’s Field’. That in constructing said baseball park Defendant City erected a mesh wire screen immediately in front of the front seats of said grandstand and about thirty-five feet behind the home plate of the baseball diamond in said park, said screen being thirty-two feet high and one

hundred fifty feet long, the center thereof being immediately behind said home plate. Said screen was erected by Defendant City to afford protection to spectators viewing baseball games from batted and thrown baseballs that otherwise would enter that portion of the stand behind the screen. Photographs of said screen and stand are introduced in evidence as exhibits 1, 2, and 3.

“3. For the purpose of this Pre-trial proceeding the Court finds that prior to July 9, 1947, and after the construction of said park as above described, Defendant City leased the said park to two baseball teams, one sponsored by Pinney Beverage Company, and one by Provo City Baseball Club, for use by them for baseball games on certain scheduled days when the park was not otherwise in use. That by the terms of said lease said ball teams were to pay to Defendant City as rental seven and a half per cent of the gross income from the sale of admission tickets, and for a license to conduct concessions, such as sale of refreshments, soft drinks, beer, and other articles, at said park said teams were to pay seven and a half per cent of the gross income from such concessions. It was further agreed that said teams would collect for Defendant City five cents upon each admission ticket to the game. Should this Order of dismissal be reversed on Appeal, then either party may offer additional evidence on the matters in this paragraph 3.

“4. That on July 9, 1947, Plaintiff paid admission for and attended a baseball game being played by said Pinney Beverage Company team and Provo City Baseball Club team, which game had been publically advertized.

"5. That Plaintiff, upon entering the stands of said 'Derk's Field', and desiring and intending to view said game from a place of safety, selected a seat about 15 feet behind and in the center of the screened portion of the grandstand, which she considered and assumed to be, and which she selected as being in a place of safety, where she could not be injured by batted or thrown balls. That during the fourteenth inning of said baseball game one of the Pinney Beverage Company ball players hit a foul ball, which went up over the said screen in front of said grandstand and came down inside said screen and struck claimant on the base and back of her neck, causing her serious and substantial damage.

"6. That Plaintiff claims in this case that Salt Lake City Corporation was negligent in its construction and maintenance of the Ball Park, and in authorizing and permitting the use thereof while not having a screen in front of said grandstand and Plaintiff's seat, of sufficient height or of sufficient overhead covering so as to prevent batted balls from going over said screen and striking Plaintiff, and in permitting Plaintiff to be injured by a batted ball after being lulled into a sense of security by reason of the screen; and that the negligence of the Defendant City proximately caused Plaintiff's injuries.

"7. That Plaintiff further claims that in the operation of said Ball Park, it was the duty of the City to have a reasonable number of protected seats so that those patrons, including Plaintiff, who desired a protected seat, could select such a protected seat, where they, and she, would be in a place of safety and a place where they, and she, would be protected from injury.

"8. That Defendant City claims the City had discharged any duty it owed to Plaintiff in the premises by constructing and providing the screen above described; that the height and character of said screen in front of the grandstand where Plaintiff was sitting when injured, was at all times open and visible and its height and character were as readily discernable by Plaintiff as by the Defendant City, and the fact that foul balls could be batted over said screen and fall in the grandstand was as readily perceivable to Plaintiff as to the Defendant City, and that Plaintiff was equally aware thereof, as was Defendant City, and that Plaintiff chose her seat and remained in said seat, assuming whatever risk of injury would be encountered in the ordinary and usual course of the game of baseball then being played, well knowing the height and character of the screen in front of her, and the extent of the protection the screen would afford.

"9. That on August 12, 1947, Plaintiff presented to and filed with Defendant City a written claim as set out in Exhibit 'A' attached hereto. That Defendant City has failed to audit and allow said claim.

"10. The Court finds as a matter of Law that in so far as Defendant City was under any legal obligation to furnish protection to Plaintiff as a patron at said ball game Defendant City discharged such duty by providing the protective screen described in paragraph two hereof, and Defendant City was not guilty of any negligence in the premises toward Plaintiff, and that Plaintiff, as a matter of Law, assumed any risk because of inadequate protection to spectators.

"11. The Court concludes that Plaintiff's complaint should be dismissed no cause of action, the Plaintiff to have her exceptions to these Findings and Order.

"BY ORDER OF THE COURT made this 28th day of December 1950.

"J. ALLAN CROCKETT
Judge"

"ORDER"

"Upon the above Findings and Order, IT IS HEREBY ORDERED, that Plaintiff's complaint be, and the same hereby is, dismissed without prejudice.

"BY ORDER OF THE COURT made this 28th day of December 1950.

"J. ALLAN CROCKETT
Judge"

(R-7)

From the Order made and entered as aforesaid, dismissing her Complaint, Appellant has taken this appeal.

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY.

1. THE TRIAL COURT ERRED IN HOLDING RESPONDENT AS A MATTER OF LAW DISCHARGED IT'S DUTY TO APPELLANT BY FURNISHING THE SCREEN DESCRIBED IN THE FINDINGS ON PRE-TRIAL.

2. THE TRIAL COURT ERRED IN HOLDING THAT APPELLANT AS A MATTER OF LAW ASSUMED THE RISK OF THE INJURIES RECEIVED BY HER.

3. THE TRIAL COURT ERRED IN DISMISSING APPELLANTS COMPLAINT.

4. THE TRIAL COURT ERRED IN FAILING TO SUBMIT THE CASE TO THE JURY TRIAL DEMANDED.

There are two main issues raised by Appellant's appeal in this case :

1. Did Respondent, as a matter of law, discharge its duty to the Appellant as a patron at said ball game by providing the screen described in the above Findings? (R-7-10)

2. Did Appellant, as a matter of law, assume the risk of the inadequacy of the protection when, as found by the Court she, desiring and intending to view the game from a place of safety, selected a seat about fifteen feet behind and in the center of the screened portion of the grandstand, which she considered and assumed to be, and which she selected as being in a place of safety where she could not be injured by batted or thrown balls? (R-8-10)

These issues raise the questions as to the duty of the owner and operator of a baseball park to protect its patrons, and the duty of the patrons and spectators with regard to their own safety.

THE ARGUMENT

DID RESPONDENT, AS A MATTER OF LAW, DISCHARGE ITS DUTY BY FURNISHING THE SCREEN FURNISHED.

There are many cases where the Appellate Courts of the various states have been called upon to pass upon some phase of the duty imposed upon the owner and the assumption of risk on the part of the spectator. The general rule drawn from a careful study of the cases is that the owners and operators of baseball parks, in view of the dangers to spectators from thrown or batted balls, owe a duty of providing seats protected by screens or otherwise for as many patrons as may be reasonably expected to call for such seats on an ordinary day of reasonable attendance, and that a breach of this duty may constitute negligence making the owner or operator answerable in damages to a patron who is injured by reason of the failure to provide such protection. Said general rule is stated in 52 *Am. Jur.* page 309 as follows:

“In view of the dangers to spectators at baseball games from thrown or batted balls, the duties of owners and operators of ball parks to exercise care commensurate with the circumstances for the protection of their patrons include the duty of providing seats protected by screens or otherwise for as many patrons as may be reasonably expected to call for such seats on an ordinary day of reasonable attendance, and the breach of this duty may constitute negligence making the owner or management answerable in damages to a patron who is injured by reason of the failure to provide such protection. The duty of providing such protection is not satisfied where the screening provided contains holes or is otherwise so defective as to provide no stop for flying balls.”

Probably the leading and most cited case propounding the general rule referred to in *Am. Jur. Supra*, is the case of *Crane vs. Kansas City Baseball & Exhibition Co.*, 168 Mo. App. 301, 153 S. W. 1076, which we quote from as follows:

“Defendants were not insurers of the safety of spectators; 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. *King. v. Ringling*, 145 Mo. App. 285, 130 S. W. 482; *Muriel v. Smith*, 152 Mo. App. 95, 133 S. W. 76. In view of the facts 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 spectators, we think the duty of defendants towards 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.”

Following the *Crane* case, the same Court in the case of *Edling vs. Kansas City Baseball & Exhibition Co.*, 181 Mo. App. 327, 168 S. W. 908, affirmed the same rule, and in holding the owner of a baseball park liable for injuries to a patron where a foul ball passed through a large hole that had been worn in the netting and struck the patron in the face while seated in the screened-in portion of the stand beyond the catcher's box, the Court said:

“Defendant recognized this duty by screening that part of the grand stand most exposed to the battery of foul balls, and impliedly assured spectators who paid admission to the grand stand that seats behind the screen were reasonably protected. None of those seats were closed to patrons, and when plaintiff entered the grand stand 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 allowed it to become old, rotten, and perforated with holes larger than a ball, the jury were entitled to infer that it did not properly perform that duty, but was guilty of negligence.

“In seating himself where he did plaintiff did not assume the risks resulting from such negligence.”

See also *Quinn vs. Recreation Park Association*, 3 Cal. 2d 725, 46 Pac. 2d 144, at page 146 of the Pacific report of the case: “The duty imposed by law is performed when screened seats are provided for as many as may be reasonably expected to call for them on any ordinary occasion.” And the cases cited in the Annotation appearing at 142 L. R. A. at page 868.

Appellant takes the position that the Respondent did not, as a matter of law, discharge the duty placed upon it to provide a reasonable number of screened seats; in fact, it did not provide any seats that were reasonably protected from foul balls for persons who desired such protection, as did Appellant. Certainly, if a patron

selects a seat in a grandstand, in the center, and within 15 feet of the screen, and that person can still be struck by a foul ball, the operator of the park has not furnished any seats that are reasonably safe, and certainly not so as a matter of law. The sufficiency of the protection afforded Appellant under all of the surrounding circumstances was a question of fact to be determined by the jury, not one of law.

Under the uniform holding of all of the baseball cases, it is necessary to furnish a reasonable number of safe seats for the use of patrons who desire such protection, and here, under the express findings of the Court upon the pre-trial, Appellant desired such protection, the Court having found that Appellant "desiring and intending to view said game from a place of safety, selected a seat about 15 feet behind and in the center of the screened portion of the grandstand which she considered and assumed to be, and which she selected as being in a place of safety where she could not be injured by batted or thrown balls."

The Trial Court was clearly in error in finding that as a matter of law, in so far as Respondent was under any legal obligation to furnish protection to Appellant, it discharged such duty by providing the screen described in said Findings, and that as a matter of law, Respondent was not guilty of any negligence in the premises toward Appellant. This brings us to the question as to whether

or not Appellant, as a matter of law, assumed any risk because of inadequate protection to her under the existing facts as disclosed by the Findings upon the pre-trial.

DID APPELLANT AS A MATTER OF LAW ASSUME THE RISK OF THE INADEQUACY OF THE PROTECTION FURNISHED?

If the Appellant, as a matter of law, assumed the risk of being struck by the ball that struck her, she certainly did so without so intending. The express finding is that she desired and intended to view the game from a place of safety, and that she selected the seat as being in a place of safety where she could not be injured by batted or thrown balls. There is nothing in the Findings of the Trial Court on pre-trial upon which the Order of Dismissal is based that would indicate that Appellant had any reason to believe that she would or might be struck by a ball fouled from home plate over the screen and into the vicinity of her seat. In fact, as stated, the express Finding of the Trial Court was that she considered herself to be in a place of safety.

Appellant admits that where a patron voluntarily selects a seat in an unscreened portion of the grand stand at a baseball game, that the cases show a strong tendency toward holding that the patron assumes the risk of being struck by a ball, at least where the patron has knowledge of the game, unless some unusual circumstances exist, such as where, in the case of *Grimes vs. American League Baseball Company*, 78 S.W. 2d. 520, the Missouri Court of Appeals sustained a judgment for a patron

where the ball struck a temporary box that had been placed on the playing field, and the ball was deflected into the unscreened stand and struck the patron, the Court holding that the construction of boxes within the playing field, created an unusual and extraordinary hazard; and in the case of *Cincinnati Baseball Club vs. Eno, Supra*, in which case the Court held that it was a question of fact for the Jury to determine whether or not the management of the Baseball Club, in permitting practice by its baseball team in close proximity to the unscreened section of the grand stand between the two games of a double header, was guilty of negligence, and also a question of fact for the jury as to whether or not a spectator sitting in the unscreened portion of the grand stand at the time of the practicing, was guilty of contributory negligence or assumed the risk of injury.

The theory or basis for holding that, as a matter of law, a patron assumes the risk of injury by selecting a seat in an unscreened portion of the stand is that the spectator has knowledge of the dangers incident to the playing of the game and therefore, assumes the risk of being injured in such a seat regardless of the question of negligence on the part of the operator, and in those cases in which the Courts have refused recovery where the spectator denied actual knowledge of the danger, it was held the circumstances surrounding the attendance were such, and the game of baseball so commonly known, that knowledge was imputed to him. This imputed knowledge of danger precluding recovery when struck while

voluntarily sitting in an unscreened portion of the stand would certainly not be the same as imputing that knowledge to the spectator who has voluntarily and intentionally selected the safest seat that he is able to find, in a portion of the stand considered by him to be in a place of safety. The very erection and existence of the screen impliedly assures spectators that the seats immediately behind the same are reasonably protected. Certainly there can be no implication of such protection when sitting in an unscreened portion of the stand.

As stated in the *Edling case, Supra*: "Defendant recognized this duty by screening that part of the grand stand most exposed to the battery of foul balls, and impliedly assured spectators who paid admission to the grand stand that seats behind the screen were reasonably protected. None of those seats were closed to patrons, and when Plaintiff entered the grand stand he was invited to seat himself where he pleased, with the assurance that reasonable care had been observed for his protection."

In refusing to apply the doctrine of implying common knowledge of the game and its incidental dangers and of assumed risk as a matter of law in baseball cases where struck by a ball while in an unscreened portion of the stand to a hockey game, the Supreme Court of the State of Nebraska, after carefully considering the baseball, former hockey and other amusement cases, in the

case of *Tite vs. Omaha Coliseum Corp.* 12 N. W. 2d. 90, 149 A. L. R. 1164, at page 1171 of the A. L. R. report of the case states:

“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 is a common knowledge of baseball and its incidental dangers. This 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 or spectator. It merely shows establishment of knowledge of dangers which precludes recovery is arrived at in a different manner.”

Appellant contends that the doctrine of implied risk as a matter of law should not be extended to cover the factual situation existing in the case at bar, and particularly so in the face of the affirmative finding by the Trial Court that Appellant selected the seat 15 feet behind the screen considering the same to be in a place of safety and where she could not be injured by batted or thrown balls. This Finding of the Trial Court is entirely contrary to the presuming of knowledge that

she was voluntarily choosing a place of danger. The reasons behind applying the assumed risk doctrine to a spectator voluntarily selecting a seat in an open portion of the stand do not in any way apply to a patron who selects a seat behind the screen for the express purpose of placing herself in a position of safety. Certainly, at the most, it would be for the jury, which had been demanded by Appellant in this cause, to determine the question of whether or not, under all of the circumstances, she assumed the risk of receiving the injuries she received, and not a question of law for the Trial Court to determine.

WHEREFORE, Appellant submits that the Court erred: First, in finding as a matter of law that Respondent was not guilty of any negligence; and Second, that Appellant, as a matter of law, assumed any risk because of inadequate protection to her; and respectfully requests that the Order dismissing Plaintiff's complaint be reversed, and this cause be remanded to the Trial Court for trial upon its merits before a jury.

OSCAR W. MOYLE, JR.,
Of the Firm of Moyle & Moyle
Attorneys for Appellant

Received copies of this Brief, this———day of

_____, 1951.

**Attorneys for Respondent
Salt Lake City Corporation**