

1951

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

Utah Supreme Court

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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.

BRIEF OF RESPONDENT SALT LAKE CITY

FILED

JUN 23 1901

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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 BEV-
ERAGE COMPANY, and PROVO
CITY BASEBALL CLUB, a part-
nership,

Respondents.

Case No.
7650

BRIEF OF RESPONDENT SALT LAKE CITY

STATEMENT OF FACTS

This case was disposed of by the Trial Court at the pre-trial hearing. The positions of the parties were there taken and stated, and thereupon the Trial Court reached the conclusion that Plaintiff was not entitled to recover. The findings of the Court in its pre-trial order, give the basic elements upon which the parties

relied. Since the Court disposed of the case by concluding that whatever duty the City may have been under to furnish protection to Plaintiff, it discharged such duty by providing the protective screen described in the findings and revealed in the photographs of the screen, introduced in evidence as Exhibits 1, 2 and 3, and that the Plaintiff assumed any risk involved of inadequate protection, we shall confine our statement of facts to those facts having a bearing upon these legal propositions. Therefore, such questions as to whether the City, in the maintenance and conduct of Derk's Field, was acting in a governmental or proprietary capacity, or whether it had any responsibility to Plaintiff at all since it was a lessor, or as an owner who had permitted others to use its property and to whom it had surrendered control, or what its relationship to the ball clubs and hence to Plaintiff was, are purposely not considered in our brief.

Defendant owns Derk's Field and constructed a baseball park thereon with a grandstand and bleachers. It erected a mesh wire screen in front of the grandstand, about 35 feet back from home base. The screen is 32 feet high and 150 feet long. Defendant permitted the use of the park by two baseball teams sponsored by Pinney Beverage Company and Provo City Baseball Club. These teams played in the park on the evening of July 9, 1947. Plaintiff paid the admission charge to the game and selected a seat about 15 feet behind the

screen and in the center of the screened portion of the grandstand. In the 14th inning a foul ball went over the screen and came down inside the screen, striking Plaintiff on the back and base of her neck, causing the injuries for which this action is brought.

It is apparent from the Court's finding, paragraph 5, which also follows the language of Plaintiff's claim filed with the City, in evidence as Exhibit 'A', and Complaint, that Plaintiff was well aware of the fact that to watch a baseball game involved some danger to spectators from batted or thrown balls. She alleges, and the Court finds, that she "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." This clearly indicates that she was well aware that there were hazards involved in watching the game from batted and thrown balls. It further indicates that she saw the screen; was aware of its nature and height and that there was no overhead coverage as the screen was plainly visible before her and was there to be seen. To her the screen appeared sufficient to protect her. She deliberately chose a seat behind it, having passed judgment as to its adequacy as a protection to her.

There is no allegation, nor is there any finding in the pre-trial order, that this desire of the Plaintiff to be seated in a place which would afford her absolute protection against balls was ever communicated to any-

one connected with the Defendant or the management of the ball field at any time. From all that appears in the case this was simply her own unexpressed thinking, of which she alone was aware. Had she made known her desire to sit in a fully covered spot, she could have used the press box in the top of the grandstand shown on Exhibit 1, which has a roof and is entirely enclosed. There is no evidence that that place was not available.

Nor is there anything in the record to show that any representations were made to Plaintiff by anyone as to the screen being sufficient to intercept and prevent every ball from falling back of it or at the place where the Plaintiff sat. All that the record shows is that the screen was there plainly visible; its nature could readily be seen as the photographs show. She knew it was there. No one, therefore, misled or influenced her in any way in her selection of the seat she chose. In assuming she was selecting a place of absolute safety she relied solely on her own judgment with the physical conditions fully visible and apparent. No one but herself knew why she made the selection she did or how she came to conclude that she was in a place of absolute safety.

There is no allegation or claim that she was incapable of arriving at a judgment of the hazards involved in view of the type of screen there before her. It is not claimed that she was ignorant of the hazards or that she had never before seen a baseball game. On the contrary, as already pointed out, she well knew there

were hazards and she relied solely upon her own judgment in selecting what she considered to be a safe place. Her selection was made with the physical facts plainly apparent to anyone who might look.

On the question of negligence, Plaintiff's position is stated by the Trial Court, Paragraphs 6 and 7 of the findings as follows:

"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."

This position so stated by the Court in Paragraph 6 above follows almost identically the allegations of negligence in Plaintiff's claim, Exhibit 'A', and in her Complaint. It is thus apparent that Plaintiff's action

is not based upon a failure of the City to exercise reasonable care to afford reasonable protection to spectators in screening the grandstand. It is based upon the proposition that it was the Defendant's duty to provide Plaintiff a place of absolute safety and immunity against the hazards naturally incident to a baseball game; that Plaintiff, having observed there was a screen in front of her, had the right to assume that that screen would absolutely prevent any ball from reaching her and so she had no risk to assume. Plaintiff's position is that the City was bound to erect a screen of sufficient height or an overhead covering that would prevent balls from going over the screen and falling in the grandstand where she was sitting. In other words, it is clear that Plaintiff attempts to recover in this action upon the basis that the City was an insurer of her safety when she chose a seat in the grandstand back of the screen.

STATEMENT OF POINTS

I.

THE CITY AS THE OWNER OF DERK'S FIELD IS NOT AN INSURER OF THE PERSONS ATTENDING BASEBALL GAMES.

II.

THE CITY DISCHARGED ANY DUTY WHICH IT OWED TO PLAINTIFF IN THIS CASE BY PROVIDING THE SCREEN SHOWN BY THE EVIDENCE.

III.

WHATEVER DANGER TO PLAINTIFF EXISTED FROM FOUL BALLS GOING UP OVER THE SCREEN WAS AS OBVIOUS TO HER AS TO DEFENDANT, AND SHE ASSUMED THE RISK INCIDENT THERETO.

IV.

THAT THERE ARE DANGERS INHERENT IN BASEBALL GAMES IS A MATTER OF COMMON KNOWLEDGE AND PLAINTIFF WAS, UNDER THE EVIDENCE, CHARGED WITH SUCH KNOWLEDGE AND BOUND TO TAKE NOTICE THEREOF.

ARGUMENT

POINT I.

THE CITY AS THE OWNER OF DERK'S FIELD IS NOT AN INSURER OF THE PERSONS ATTENDING BASEBALL GAMES.

In view of the conclusion reached by the Trial Court that the Defendant discharged its duty to Plaintiff in providing the screen it did, we do not desire in this appeal to attempt a statement of the precise duty, if any, which Defendant owed Plaintiff in this case. The fact is the Defendant owned the ball park, but at the time of Plaintiff's injury it was being used by two (2) semi-pro ball teams under an arrangement with Defendant for its use. Just what the relationship was between Defendant and the ball clubs was not decided. The Trial Court simply found, for the purposes of the

pre-trial proceeding, that the Defendant leased the ball field to the two (2) teams, but left the matter open for further evidence in the event of a reversal by the appellate court. For the purpose of its decision, the Trial Court concluded that whatever duty Defendant owed to Plaintiff to furnish a protected seat, it discharged that duty by providing the protective screen described in the findings. It was clear to the Trial Court, and it was frankly admitted by Plaintiff's counsel, that Plaintiff's action was predicated upon the legal premise that it was Defendant's duty to furnish absolute protection to Plaintiff from batted or thrown balls by providing her with a seat where no ball could reach her at any time under any conditions. And, further, that she had a right to assume that the screen provided by the Defendant was of such structure and nature as to prevent any ball from reaching her in the course of the game, which would relieve her of any assumption of risk.

That the owner or user of a ball park is not an insurer of the safety of the persons attending a baseball game is held by all the authorities, including those cited by Plaintiff. Counsel for Plaintiff now seems to concede this proposition for he apparently abandons the position stated as his position by the Trial Court in Paragraph 6 of his findings, above quoted, and now, for the first time, in his brief takes the position that Defendant's duty did not extend beyond the furnishing of seats that "were reasonably protected from foul

balls.”—(Page 14 of Plaintiff’s brief). He goes on to assert that the fact that a foul ball fell at a place 15 feet back of the screen indicates that there were no seats “reasonably safe” or safe as a matter of law.

We shall cite a few of the authorities to illustrate the proposition stated under Point I.

38 Am. Jur. Sec. 92 pp. 751-52, states :

“An owner’s liability to such persons for injuries not intentionally inflicted must be predicated upon negligence; and the owner, as such, is not an insurer against accidents upon the premises, even as to persons whom he had invited to enter.”

Edling vs. Kansas City Baseball and Exhibition Co., 181 Mo. App. 327, 168 S.W. 908, a case where the ball went through a hole in the screen about a foot square, the screen being old, worn, and rotten, the Court says:

“One of the natural risks encountered by spectators of a professional baseball game is that of being struck by a foul ball, and it goes without saying that Defendant was not required by law, and it did not undertake, to insure the patrons of the screened-in portion of its grandstand immunity against injury from such source; but being in the business of providing public entertainment for profit, Defendant was bound to exercise reasonable care to protect its patrons against such injury.”

Curtis vs. Portland Baseball Club, 130 Ore. 93, 279 P. 277, in which a spectator behind the screen was struck by a foul ball curving around the end of the screen far enough into the grandstand to strike Plaintiff. It was contended that the Defendant should have had wings at the end of the screen. The Court said:

“It (Defendant) was not, however, an insurer of their safety. It was required to use only that degree of care exercised by persons of ordinary prudence and caution engaged in similar business.”

Hudson vs. Kansas City Baseball Club, 164 S.W. 2d 318. Here Plaintiff assumed he was sitting in a screened portion, having asked for the best reserve seat. He was sitting, however, in an unscreened portion of the grandstand. The Court says:

“Conversely, and as applied to a place of public amusement as well as to a place of business, the invitor is not an insurer of the safety of the invitee. Neither is the invitee protected against all hazard, nor relieved of all duty to himself for his own safety and to the extent that the duty of ‘protection rests upon the invitee, the duty of the invitor to protect is reduced. The extent of these relative duties depends upon many factors involving the capacity and opportunity of the invitor to protect the invitee and the capacity and opportunity of the invitee to protect himself.’ *Ivory vs. Cincinnati Baseball Club Co.*, 62 Ohio Ap. 514, 518, 24 N.E. 2d, 837, 839.”

Pollan vs. City of Dotham, 8 So. 2d 813: This case involved the sufficiency of the Complaint to state a cause of action. The foul ball went through a hole in the screen. The Court says:

“There is an absence of averments of negligence in either Counts I or II or statement of fact showing a duty owing by either of the Defendants to Plaintiff and a breach thereof. The pleader, in drawing these Counts, apparently proceeded on the idea that the Defendant municipal corporation, because of the leasehold were insurers of the safety of persons entering as invitees, and that they were therefore liable for Plaintiff’s personal injury, by negligence. That is not the law. *City of Birmingham vs. Carle*, 191 Ala. 539, 68 So. 22 L.R.A. 1916 F. 797.”

POINT II.

THE CITY DISCHARGED ANY DUTY WHICH IT OWED TO PLAINTIFF IN THIS CASE BY PROVIDING THE SCREEN SHOWN BY THE EVIDENCE.

Plaintiff took the position that it was the duty of the Defendant to provide either a screen of sufficient height that no foul ball could go over it, or Defendant should have provided an over-head covering or roof over the grandstand in addition to the upright screen. No case is cited to sustain such view and no case can be found which will support it, for, as already pointed out, such a proposition is tantamount to making Defendant an insurer of the safety of those seated in the grandstand. Nor does Plaintiff cite any case or authority

to sustain Plaintiff's new position, asserted for the first time in her brief, namely, that the screen provided did not furnish reasonable protection to Plaintiff. In view of Plaintiff's new position involving "reasonable protection" instead of absolute protection, as contended for in her claim and Complaint and before the Trial Court at the pre-trial reflected in Paragraph 6 of the Court's findings, it might be well here to inquire as to how high should the screen be to afford reasonable protection? Again, at what height above the height of Defendant's screen would an upright screen be considered inadequate and so require an over-head protective covering to supplement it? For admittedly there is a limit to the height a screen could be built to stand the stress of storms or other forces and yet be open enough to permit spectators a reasonably unobstructed view of the game. It is common knowledge that foul balls frequently attain a height of 100 feet or more and sometimes go so high as to be almost lost to sight.

Plaintiff cites three (3) cases. The first case, *Crane vs. Kansas City Baseball & Exhibition Co.*, 168 Mo. App. 301, 153 S.W. 1076, involved a case where Plaintiff was injured while sitting in an area unprotected by a screen while protected seats were available. It was held that Plaintiff could not recover. The Court was not, therefore, attempting to define what kind of a screen would, in law, be adequate to discharge the owner's

duty to spectators. It merely said there should be seats provided which were protected by screening, the one there involved evidently being an upright one.

The case of *Edling vs. Kansas City Baseball and Exhibition Co.*, 181 Mo. App. 327, 168 S.W. 908, from which we have quoted, involved an upright screen that had a hole in it one foot square. The Court there held the Defendant was not an insurer; that it was Defendant's duty to keep the screen free from defects, and if it allowed to secreen to become defective with holes and rotten, that constituted negligence. As to such negligence the Plaintiff did not assume the risk in seating himself behind the screen.

In *Quinn vs. Recreation Park Association*, 3 Cal. 2d 725, 46 P. 2d 144, a 14-year old girl wanted a screened seat near first base. There being none available, she was ushered to an unscreened section near first base. She was struck by a foul ball. There is no description of the screen in the opinion. The seats in the grandstand are spoken of as "screened seats." But the Court does say that the duty "imposed by law is performed when screened seats are provided." It further holds that the "management is not required, nor does it undertake to insure patrons against injury from such sources (batted or thrown balls). All that is required is the exercise of reasonable care to protect patrons against such injuries." The Court held Plaintiff assumed the risk of sitting where she did. Certainly this case is no authority for Plaintiff's position.

In *Leek vs. Tacoma Baseball Club*, Wash., 229 P. 2d 329, the precise propositions relied upon by Plaintiff in this appeal were disposed of contrary to Plaintiff's position and in complete harmony with the Trial Court's ruling. In that case Leek purchased a grandstand ticket and entered the park about 8:00 p.m. It was then twilight and the flood lights had not yet been turned on. His seat was directly behind home plate in the fourth row from the front. It was behind a vertical wire screen 26 feet high and 34 feet wide. The grandstand was not roofed and there was no overhead screen. Leek did not look to see if there was any overhead protection and he had never before been in this ball park.

A short time after he had taken his seat, the batter hit a high foul into this section of the grandstand. Leek watched the ball start up, but lost sight of it in the twilight haze. He turned around, and just then the ball struck him in the head, rendering him unconscious. He was a man 65 years old, a carpenter by trade. He had played ball as a boy and had seen games infrequently since that time. He wore glasses and had normal vision. An officer of the Defendant testified that five to eight balls dropped into the stands at every game; that it was not unusual for these fouls to drop into the stands immediately behind the home plate. The only question presented on appeal was whether under these facts Plaintiff was entitled to recover. The case was dismissed by the Trial Court on Defendant's motion at the close of Plaintiff's case. The judgment of the lower

Court was affirmed. The Plaintiff contended that Defendant "provided no seats which were effectively screened, and that there was accordingly a failure of the proprietor to perform his established duty of providing some screened seats." The Court refers to some cases, including the *Crane* case and the *Quinn* case, *supra*, relied upon by Plaintiff in the instant case, which state that it is the duty of the proprietor to furnish some screened seats. The question is stated by the Court as follows:

"Did the proprietor, in providing a perpendicular screen 26 feet high in front of the seats immediately behind home plate, fulfill his duty to provide some screened seats, or was it necessary to also provide overhead protection for such seats?"

The Court points out that there were no precedents precisely on the factual situation and so resorts to general principles, stating them as follows:

"Lacking a precedent on the factual situation, we turn to general principles. Basic in the law of negligence is the tenet that the duty to use care is predicated upon knowledge of danger, and the care which must be used in any particular situation is in proportion to the actor's knowledge, actual or imputed, of the danger to another in the act to be performed. *Burr v. Clark*, 30 Wash. 2d 149, 190 P. 2d 769; 38 Am. Jur. 678, Negligence, P. 32; 65 C.J.S., Negligence, P. 5, p. 351.

"This principle is an integral part of the law relating to the liability of owners or occupants of premises. Generally speaking, the possessor of land is liable for injuries to a business visitor caused by a condition encountered on the premises only if he (a) knows or should have known of such condition and that it involved an unreasonable risk; (b) has no reason to believe that the visitor will discover the condition or realize the risk; and (c) fails to make the condition reasonably safe or to warn the visitor so that the latter may avoid the harm.—Hudson v. Kansas City Baseball Club, 349 Mo. 1215, 164 S.W. 2d 318, 142 A.L.R. 858; 2 Restatement of Torts 938, P. 343; 38 Am. Jur. 754, Negligence, P. 96; 65 C.J.S., Negligence, P. 45, p. 521.

"Respondent baseball club, of course, knew that the seats immediately behind home plate were not provided with overhead protection. But did respondent have reason to believe that this lack of overhead protection involved an "unreasonable risk" of injury to the patrons?

"This would seem to be a jury question, had there been a jury. There was no jury, and the cause was dismissed at the close of appellant's case, so that no findings of fact are before us. It is therefore a question which we must determine de novo, on the basis of the plaintiff's evidence, summarized above.

"In our opinion, under the facts of this case, respondent did not have reason to believe that the lack of overhead protection involved an unreasonable risk of injury to appellant. It was not uncommon for foul balls to drop over the vertical screen into this section of the stand. However, there is nothing in the record, aside

from this one incident, or in common experience, to indicate that foul balls of this kind cause serious injuries with sufficient frequency to be considered an unreasonable risk.

“So-called foul tips, going into adjacent stands without gaining any considerable elevation, are known to be dangerous, because their speed makes avoidance difficult and serious injury more likely. Foul balls which go high enough to clear a twenty-six-foot screen, however (and the ball in question apparently went much higher), take longer to reach the seats, and are therefore easier to dodge or catch. If unsuccessful in this, the spectator is usually not seriously injured, because the driving force of the ball is gone and there is left only the force of gravitation. The fact that in this case a serious injury did result is not controlling. The question is whether the proprietor had reason to believe, before the accident happened, that lack of overhead protection would unreasonably endanger appellant.

“While the baseball cases cited above do not involve factual situations similar to the case before us, several of them, in discussing the necessity of screening some seats, employ reasoning which lends support to the views expressed above. Thus, in *Wells v. Minneapolis Baseball & Athletic Ass’n*, it is stated that “the perils are not so imminent” (122 Minn. 327, 142 N.W. 708) that due care on the part of the management requires all the spectators to be screened in. In *Grimes v. American League Baseball Club*, Mo. App., 78 S.W. 2d 520, 523, the court said that “the perils of the game are not so great” as to require the screening of all seats. In *Curtis v. Portland*

Baseball Club, where the plaintiff contended that a foul ball had curved around the end of a screen, the court held that the accident was one which "could not reasonably have been anticipated." (130 Ore. 93, 279 P. 278.) In Cincinnati Baseball Club v. Eno, it was said that the proprietor had the duty not to lead its invited guests "into unusual dangers."—(112 Ohio St. 175, 147 N.E. 88.) In Hull v. Oklahoma City Baseball Co., 196 Okl. 40, 163 P. 2d 982, 984, the court absolved the defendant on the ground that "there was no unreasonable risk" not appreciated by the plaintiff as spectator.

"Applying any of these quoted tests as to the duty to provide protective screening, we conclude that respondent was not, with respect to appellant, under a duty to provide overhead protection on the occasion in question.

"Appellant further argues however, that having undertaken to provide some screening for the seats in question, the proprietor impliedly assured the spectators who paid for admission to the screened grandstand that seats behind the screen were reasonably protected from the known hazards of the game. In support of this proposition, appellant cites Wells v. Minneapolis Baseball & Athletic Ass'n, supra, and Edling v. Kansas City Baseball & Exhibition Co., 181 Mo. App. 327, 168 S.W. 908.

"In the Wells case, the screen extended to the grandstand roof. The plaintiff claimed to have been seated ten feet within the area behind the screen, but that a foul ball curved around the end of the screen and struck her. Holding for the defendant as a matter of law, the court stated, among other things, that where the pro-

prietor undertakes to screen, the screen must be 'reasonably sufficient as to extent and substance.' No question was presented as to whether this required overhead protection, the court simply ruling that lateral screening was adequate under the facts of the case. In the Edling case, the plaintiff, while sitting in a screened section immediately behind home plate, was struck by a foul ball which passed through a large hole in the wire netting. It was in this connection that the court, in sustaining a verdict for the plaintiff, stated that the proprietor "impliedly assured spectators" (181 Mo. App. 327, 168 S.W. 909) who paid for admission to the grandstand that seats behind the screen were reasonably protected.

"We are in full agreement with the rule as announced in these cases. It must be apparent, however, that this implied assurance of protection has reference only to those hazards against which the screen is obviously designed to protect. Just as the screening of seats in the Wells case was held not to constitute an implied assurance that foul balls would not curve around the end of the screening, so here, the twenty-six-foot vertical screen gives rise to no assurance that foul balls may not go over the top of the screen and drop into the stands. It is true that the curving of a foul ball around the end of the screen is a highly improbable occurrence, while the dropping of fouls behind vertical screens is relatively frequent. The point is, however, that in each case the obvious limits of the protection afforded is open and apparent to all patrons, and in no sense constitutes a trap for the unwary.

“We have in mind, of course, that appellant here did not actually know that there was no overhead screening, and assumed that such protection was provided. Appellant’s failure to observe what was plainly there to be observed cannot, however, operate to enlarge respondent’s duty of care beyond that which it would otherwise be. The proprietor was entitled to assume that patrons walking into the grandstand would note that there was no roof, and hence nothing to which overhead screening could attach.

“A somewhat similar contention was advanced in *Hudson v. Kansas City Baseball Club*, 349 Mo. 1215, 164 S.W. 2d 318, 142 A.L.R. 858, the plaintiff there claiming that he was under the impression that there was screening between him and home plate. In affirming a judgment for the defendant, the court said: “* * * A business invitee may not recover for a condition as well known to him as it is to his invitor and neither may he impose liability on the owner or proprietor by failing and neglecting to see and observe that which is perfectly open and obvious to a person in possession of his faculties. (Citing cases.)” 349 Mo. at page 1226, 164 S.W. 2d at page 324.

“In our opinion, respondent is not liable to appellant on any theory that the presence of the vertical screen constituted an implied assurance to appellant that overhead protection was provided, or was unnecessary.”

Jones vs. Alexandria Baseball Ass’n., La. App., 50 So. 2d 93, plaintiff alleges he paid the admission fee to the ball game and seated himself in the

second row of one of the bleacher sections behind a wire screen 10 feet high. To the rear and left of plaintiff was a pole from which the lights for night games were controlled. A foul ball cleared the screen but struck this pole, causing the ball to ricochet therefrom and striking plaintiff. Plaintiff watched it clear the screen and go over his head, but watched it no farther. Plaintiff contended he was entitled as a patron to assume that he was protected from hazards of the game at which he was an innocent spectator; that the pole was negligently placed and constituted a hazard known to defendant only and a danger to spectators. The Court held the petition failed to state a cause of action and said:

“Plaintiff’s petition discloses the fact that defendant had taken reasonable precautions to protect its patrons against any ordinary or expected hazards. To conclude that the defendant was required to protect its patrons against every possible danger or hazard would be, in effect, to declare it the insurer of all spectators at its games. It is only reasonable to consider that almost all sports events and exhibitions comprehend certain risks and elements of danger to spectators. Those who patronize such events must assume the risk of injury unless carelessness or negligence with respect to the neglect of reasonable precautions is established.”

Curtis vs. Portland Baseball Club, 130 Ore. 93, 279 P. 277. Plaintiff sought to recover damages for personal injuries sustained when he was struck by a foul ball while attending a baseball game.

“He testified, however, that the screen was directly in front of him and was about flush with his seat. His seat was about 60 feet from the batter’s box and approximately 10 feet south of a line between third base and home plate. It was on the second row, about 6 feet behind the screen, and on the extreme northern end. The screen covering the front of the grandstand was 40 feet high and 150 feet long. Plaintiff says a foul-tipped ball, which had been pitched with great speed, curved around the end of the screen and struck him on the nose, inflicting serious and permanent injuries.

“Wherein was defendant derelict in its duty? What did it fail to do which ought to have been done for the reasonable protection and safety of plaintiff who paid for a seat in the grandstand behind the screen? Under the law, defendant was obliged to exercise reasonable care and diligence commensurate with the danger involved, to protect its patrons from injury. Plaintiff, in the absence of notice to the contrary, had the right to assume that defendant would exercise care in maintaining the premises in a reasonable safe condition. Being in the business of providing public entertainment for profit, the defendant was required to use due care to protect its patrons from injury. *It was not, however, an insurer of their safety. It was required to use only that degree of care exercised by persons of ordinary prudence and caution engaged in similar business.* It was not bound to guard against highly improbable dangers or perils.

“Plaintiff says that a wing of the screen should have been extended back into the grandstand for a distance of 8 or 10 feet in order to

protect persons from foul balls. No court, so far as we are aware, has ever held that it was the duty of a baseball park management to screen the entire grandstand nor to construct such wings. Indeed, many people prefer to sit where their vision is not obstructed by wire netting. *The defendant, in constructing 150 feet of screen and maintaining it in good condition, did its full duty in protecting patrons who might reasonably be expected to be hit by a foul ball. To hold that defendant should be obliged to erect a winged screen as claimed by plaintiff would be subjecting it to a standard of care not warranted by law. We fail to see wherein the defendant has been remiss in its duty.*"

POINT III.

WHATEVER DANGER TO PLAINTIFF EXISTED FROM FOUL BALLS GOING UP OVER THE SCREEN WAS AS OBVIOUS TO HER AS TO DEFENDANT, AND SHE ASSUMED THE RISK INCIDENT THERETO.

As already pointed out, Plaintiff's desire to sit in a seat affording absolute protection against batted or thrown balls, was not communicated to the Defendant. It was hidden in her own mind. The Defendant had a grandstand with a protective vertical screen 32 feet high and 150 feet long. A seat in this screened area was available to Plaintiff and she chose it, after passing judgment upon the protection which the screen there before her afforded. No one told her balls would not go up over the screen and fall in the area where she was seated. She was not misled by anything the De-

fendant did or failed to do, with knowledge of the security which Plaintiff sought as a spectator. The screen was there visible for her to see, and it was perfectly obvious that there was no overhead covering. There was no entrapment or latent or hidden defects involved.

The general principle governing the owner's liability to an invitee is stated in 38 Am. Jur. Sec. 97, p. 757, as follows:

“The liability of an owner or occupant to an invitee for negligence in failing to render the premises reasonably safe for the invitee, or in failing to warn him of dangers thereon, must be predicated upon a superior knowledge concerning the dangers of the premises to persons going thereon. It is when the perilous instrumentality is known to the owner or occupant and not known to the person injured that a recovery is permitted. The owner is liable to invited persons for injuries ‘occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and was negligently suffered to exist, without timely notice to the public or to those who were likely to act upon such invitation.’

“There is no liability for injuries from dangers that are obvious, reasonably apparent, or as well known to the person injured as they are to the owner or occupant.”

Hull vs. Oklahoma City Baseball Company, 163 P. 2d 982. The Court says:

“Generally speaking, the possessor of land is liable to a visitor only if he knows of or should have known of a dangerous condition and realizes that it involves unreasonable risk and has no reason to believe that the plaintiff will discover the condition and fails to warn the visitor so that the latter may avoid the harm. Restatement Torts, Sec. 343.

“As we view the case, there was no unreasonable risk not appreciated by the plaintiff as a spectator of the baseball game. As a consequence, the trial court was justified in determining upon failure to prove primary negligence.”

Hudson v. Kansas City Baseball Club, 164 S.W. 2d 318. Plaintiff’s complaint describes the typical baseball diamond and grandstand with the grandstand seats immediately back of home plate protected by a wire netting or screen; that plaintiff asked for the best reserved seat, payed the admission fee, and was under the impression that he had secured a seat back of the wire netting. However, his seat was outside the netting. He alleges that the defendant was negligent in failing to protect with wire netting the grandstand lying between his seat and the batter’s box, in offering for sale grandstand seats without notifying him whether they were protected by a wire netting, and offering for sale reserved seats which were not protected by the wire netting, giving plaintiff reason to believe that his seat would be protected by a wire netting, and giving him notice to the contrary. The court quotes as follows from 2 Restatement Law of Torts, Section 343, as follows:

“‘A possessor land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereon if, but only if, he (a) knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them, and (b) has no reason to believe that they will discover the condition or realize the risk involved therein, and (c) invites or permits them to enter or remain upon the land without exercising reasonable care (1) to make the condition reasonably safe, or (2) to give a warning adequate to enable them to avoid the harm.’”

The Court continues:

“In baseball the patrons participate in the sport as a spectator only, but in so doing subjects himself to the dangers necessarily and usually incident to and inherent in the game. This does not mean that he ‘assumes the risk’ of being injured by the proprietor’s negligence but that by voluntarily entering into the sport as a spectator he knowingly accepts the reasonable risks and hazards inherent in and incident to the game. Bohlen, Studies in The Law of Torts, pp. 441-444.

“The rules governing the land proprietor’s duty to his invitee presuppose that the possessor knows of the condition and ‘has no reason to believe that they (his invitees) will discover the condition or realize the risk involved therein.’ 2 Restatement, Law of Torts, Sec. 343. The basis of the proprietor’s liability is his superior knowledge and if his invitee knows of the condition or hazard there is no duty on the part of the pro-

prietor to warn him and there is no liability for resulting injury because the invitee has as much knowledge as the proprietor does and then by voluntarily acting, in view of his knowledge, assumes the risks and dangers incident to the known condition. *State ex rel. First National Bank v. Hughes*, 346 Mo. 938, 144 S.W. (2d) 84; *Murray v. Ralph D'Oench Co.*, 347 Mo. 365, 147 S.W. (2d) 623; *Paubel v. Hitz*, 339 Mo. 274, 96 S.W. (2d) 369.

“Neither do we think the plaintiff’s alleged special circumstances or his specific allegations of negligence aid him in this respect. *A business invitee may not recover for a condition as well known to him as it is to his invitor and neither may he impose liability on the owner or proprietor by failing and neglecting to see and observe that which is perfectly open and obvious to a person in possession of his faculties.* *Ilgenfritz v. Missouri P. & L. Co.*, 340 Mo. 648, 101 S.W. (2d) 723; *Stoll v. First National Bank*, 345 Mo. 582, 134 S.W. (2d) 97; *Mullen v. Sensenbrenner Mercantile Co.*, Mo. Supp. 260 S.W. 982, 33 A.L.R. 176.

Anderson vs. Kansas City Baseball Club, 231 S.W. 2d 170, the Court quotes the restatement of law of torts, quoted in the *Hudson* case, *supra*, and says:

“There are no special circumstances alleged in the petition in the instant case which imposed upon defendant a duty to warn plaintiff against the dangers necessarily incident to the game she was attending and which did not result from negligence on the part of the defendant. The danger of balls being fouled into the stands is open and obvious to anyone who possesses normal

powers of observation. A knowledge of the rules or strategy of the game is not necessary to a realization of such hazard. *Plaintiff does not allege that she communicated to Defendant her unawareness of the dangers involved in sitting in an unscreened portion of the stand.*"

Brown v. San Francisco Ball Club, Cal., 222 P. 2d 19.

The Court states:

"The applicable general principle is that the owner of property, insofar as an invitee is concerned, is not an insurer of safety but must use reasonable care to keep his premises in a reasonably safe condition and give warning of latent or concealed perils. He is not liable for injury to an invitee resulting from a danger which was obvious or should have been observed in the exercise of reasonable care. *Shanley v. American Olive Co.*, 185 Cal. 552, 555, 197 P. 793; *Mautino v. Sutter Hospital Ass'n*, 211 Cal. 556, 560, 296 P. 76; *Blodgett v. B. H. Dyas Co.*, 4 Cal. 2d 511, 512, 50 P. 2d 801; *Dingman v. A. F. Mattock Co.*, 15 Cal. 2d 622, 624, 104 P. 2d 26. To the extent that the duty of self-protection rests upon the invitee, the duty of the invitor to protect is reduced. The extent of these relative duties depends upon many factors involving the capacity and opportunity of the invitor to protect the invitee and the capacity and opportunity of the invitee to protect himself.

"In baseball, one of these factors is that the patron participates in the sport as a spectator and in so doing subjects himself to certain risks necessarily and usually incident to and inherent

in the game; risks that are obvious and should be observed in the exercise of reasonable care. This does not mean that he assumes the risk of being injured by the proprietor's negligence but that by voluntarily entering into the sport as a spectator he knowingly accepts the reasonable risks and hazards inherent in and incident to the game."

Shaw v. Boston American League Baseball Co.,
..... Mass., 90 N.E. 2d 840: The Court states the legal principles here pertinent as follows:

"One maintaining a place of amusement who has invited the public to attend upon the payment of an admission fee is bound to exercise reasonable care to keep the premises in a reasonably safe condition for their use, and to warn them against any dangers which he knows or ought to know they might encounter while upon the premises and which they reasonably could not be expected to know. * * * But no warning is required to be given to one who already has become apprized of the danger or where the situation is so obvious that a person of ordinary intelligence would readily sense the likelihood of impending harm and would take active measures to avert it." 307 Mass. page 104, 29 N.E. 2d page 718. To the same effect are *Shanney v. Boston Madison Square Garden Corp.*, 296 Mass. 168, 5 N.E. 2d 1, and cases therein cited.

"Cases involving baseball have arisen in other jurisdictions and it has uniformly been held—and correctly we think—that a spectator familiar with the game assumes the reasonable risks and hazards inherent in the game. *Hudson v. Kansas City Baseball Club, Inc.*, 349 Mo. 1215,

1224, 164 S.W. 2d 318, 142 A.L.R. 858; *Crane v. Kansas City Baseball & Exhibition Co.*, 168 Mo. App. 301, 153 S.W. 1076; *Kavafian v. Seattle Baseball Club Association*, 105 Wash. 215, 219-221, 177 P. 776, 181 P. 679; *Brisson v. Minneapolis Baseball & Athletic Association*, 185 Minn. 507, 240 N.W. 903. See note in 142 A.L.R. 868 et seq. And it is common knowledge that one of these hazards is the possibility of being hit by a foul ball.” ’

POINT IV.

THAT THERE ARE DANGERS INHERENT IN BASEBALL GAMES IS A MATTER OF COMMON KNOWLEDGE AND PLAINTIFF WAS, UNDER THE EVIDENCE, CHARGED WITH SUCH KNOWLEDGE AND BOUND TO TAKE NOTICE THEREOF.

The proposition here stated is closely connected with the proposition discussed under Point III and some of the cases there sustain our Point IV. But as bearing specifically upon this matter, we cite the following additional authorities:

Blakeley vs. White Star Line, 154 Mich. 635, 118 N.W. 482; The Court says:

“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 positions that may be reached by such balls have voluntarily placed themselves and with knowledge of the situation and may be held to assume the risk.”

Quinn vs. Recreation Park Association, 46 P. 2d 144, 3 Cal. 2nd 725. On the question of assumption of risk the Court says:

“With respect to the law governing cases of this kind it has been generally held that one of the natural risks assumed by spectators attending professional games is that of being struck by batted or thrown balls; that the management is not required, nor does it undertake to insure patrons against injury from such source. All that is required is the exercise of ordinary care to protect patrons.”

Brisson vs. Minneapolis Baseball and Athletic Association, 185 Minn. 507, 240 N.W. 903. Plaintiff was injured when struck with a foul ball while he was seated outside the screened part. He claims he was ignorant of the risks to which he was exposed by the game with which he said he was unfamiliar. As a small boy he had witnessed ball games and as an adult he had witnessed at least one league game. The Court says:

“As said in the Ohio Case, above cited: ‘The consensus of the above opinions is to the effect that it is common knowledge that in baseball games hard balls are thrown and batted with great swiftness, that they are liable to be thrown or batted outside the lines of the diamond, and that spectators in positions which may be reached by such balls assume the risk thereof. This theory is fortified by the fact that such spectators can watch the ball and can thus usually avoid being struck when a ball is directed toward them.’ Does the plaintiff’s asserted ignorance of the risk to which he was exposed take him outside of the

usual rule in regard to spectators in his situation at such games? We are assuming it to be true that his knowledge of the game was such only as he had acquired by observation when he was young and by seeing the more recent league game, as well as the one he was then attending. *In our opinion no adult of reasonable intelligence, even with the limited experience of the plaintiff, could fail to realize that he would be injured if he was struck by a thrown or batted ball, such as are used in league games of the character which he was observing, nor could he fail to realize that foul balls were likely to be directed toward where he was sitting. No one of ordinary intelligence could see many innings of the ordinary league game without coming to a full realization that batters cannot, and do not, control the direction of the ball which they strike and that foul tips or liners may go in an entirely unexpected direction. He could not hear the bat strike the ball many times without realizing that the ball was a hard object. Even the sound of the contact of the ball with the gloves or mitts of the players would soon apprise him of that. It is our opinion that the plaintiff, notwithstanding his alleged limited experience, must be held to have assumed the risk of the hazards to which he was exposed.*

“The order appealed from is reversed, and the case is remanded, with directions to the trial court to enter judgment for defendant notwithstanding the verdict.”

CONCLUSION

It is perfectly clear, from the authorities we have cited, that the Defendant was not an insurer of the Plaintiff's safety while she was seated in the grand-

stand. It seems to be Plaintiff's position now, as revealed in her brief, that the Defendant was required only to furnish a screen affording reasonable protection to Plaintiff from foul balls, but the mere fact that a foul ball reached her position back of the screen raises such an inference that the screen did not afford reasonable protection as to require submission to the jury, the question as to whether the screen afforded reasonable protection. The fallacy of such a position is apparent. Under it, either one of two alternatives must result: either the protection must be absolute so that no ball could, under any condition, reach the spectator, in which event there would never be a law-suit, or there could be no instance where the ball happened to reach the spectator when the Court could decide as a matter of law that the screen afforded such reasonable protection as to discharge the owner's duty to the spectator.

Furthermore, Plaintiff's position with respect to assumption of risk follows the same concept. While she now states that the duty of the owner is to furnish a screen affording reasonable protection, she, nevertheless, when a screen is furnished, may assume she will be absolutely protected from foul balls, and if a foul ball reaches her, it is always a question for the jury to decide whether she was cognizant of and assumed the risk of being struck by a foul ball.

We submit that on both propositions Plaintiff's position is untenable. There is no dispute as to the character of the screen; there is no claim that it was defective in any particular; it was perfectly visible to Plaintiff, and its nature, height, and location were definitely shown and agreed upon before the Trial Court. So there is no additional evidence that could be given on these features, and there is no conflict of evidence as to any of them. It then became a question for the Court to determine, as a matter of law, whether the Defendant's duty to provide a screen affording reasonable, not absolute, protection had been provided, and, further, whether Plaintiff assumed the risk. Under the facts before the Court, it could not do otherwise than hold against Plaintiff on both propositions. As to the assumption of risk, in the absence of evidence to the contrary, the Trial Court was required to assume that Plaintiff was of age and was a woman of ordinary intelligence; that she had ordinary vision and saw what was perfectly obvious and apparent to be seen; that she had knowledge that baseballs are hard and might be batted in any direction with speed or at considerable height; that she knew a person struck by a ball might sustain injury; and that she knew a game of baseball involved some hazard to spectators from batted or thrown balls, which the Courts all say is common knowledge.

Under such conditions it became a question of law as to whether Plaintiff was entitled to recover. Under Plaintiff's theory Defendant was an insurer of her safety. We have demonstrated that such is not the law. When all the facts are undisputed, it is for the Trial Court to say, as a matter of law, whether under such facts the case should be submitted to the jury. And we earnestly submit that under the facts of this case Plaintiff was not entitled to recover; first, because the Defendant discharged its duty to her as a spectator, and second, because she assumed whatever risk was involved in sitting where she did. The judgment should be affirmed.

Respectfully submitted,

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.....copies of the foregoing brief received
this.....day of June, 1951.

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