

1992

JONATHAN JONES, Plaintiff and Appellant, vs.
W. CHARLES BARNEY, Defendant and Appellee
: Brief of Appellee

Utah Court of Appeals

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Leonard E. McGee; Goiochea Law Offices- West Valley; Attorneys for the Appellant.

J. Kent Holland; Anderson & Holland; Attorney for Appellee.

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UTAH

DOCKET

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DOCKET NO. 920874

IN THE COURT OF APPEALS OF THE STATE OF UTAH

JONATHAN JONES,

Plaintiff/Appellant,

vs.

W. CHARLES BARNEY,

Defendant/Appellee

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)

BRIEF OF APPELLEE

Appeals

~~Civil~~ No. 920874 - *CA*

Priority No. **15**

ON APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE JUDGE HOMER WILKINSON

BRIEF OF APPELLEE

J. KENT HOLLAND
ANDERSON & HOLLAND
Attorney for Appellee
P.O. Box 11643
623 East 100 South
Salt Lake City, Utah 84147-0643
Telephone (801) 363-9345

LEONARD E. McGEE
GOICOCHEA LAW OFFICES - WEST VALLEY
Attorneys for Appellant
The Harmon Building
3540 South 4000 West, Suite 100
West Valley City, Utah 84120
Telephone: (801) 964-8228

MAY 4 1993

OF APPEALS

IN THE COURT OF APPEALS OF THE STATE OF UTAH

JONATHAN JONES,	)	BRIEF OF APPELLEE
)	
Plaintiff/Appellant,)	
)	
vs.)	
	)	Civil No. 920874
W. CHARLES BARNEY,)	
)	
Defendant/Appellee)	

ON APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE JUDGE HOMER WILKINSON

BRIEF OF APPELLEE

J. KENT HOLLAND
ANDERSON & HOLLAND
Attorney for Appellee
P.O. Box 11643
623 East 100 South
Salt Lake City, Utah 84147-0643
Telephone (801) 363-9345

LEONARD E. MCGEE
GOICOCHEA LAW OFFICES - WEST VALLEY
Attorneys for Appellant
The Harmon Building
3540 South 4000 West, Suite 100
West Valley City, Utah 84120
Telephone: (801) 964-8228

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Defendant/Appellee W. Charles Barney, ("Mr. Barney") pursuant to Rule 24(b) of the Utah Rules of Appellate Procedure, hereby submits the following brief in response to Plaintiff/Appellant, Jonathan Jones ("Mr. Jones").

STATEMENT OF JURISDICTION

This case is before the Utah Court of Appeals under its authority granted by Utah Code Ann. § 78-2a-2 (h). This is an appeal from a final Order granting Summary Judgment.

STATEMENT OF ISSUES

1. Was the doctrine of Assumption of risk properly applied where Mr. Jones was a participant in an amateur sporting event, and was injured in a foreseeable accident, contemplated by the rules of the sport?

2. Can Mr. Jones appeal on the issue of intentional conduct when Mr. Jones's "Second Cause of Action for Intentional Conduct" against Mr. Barney was dismissed voluntarily on Mr. Jones's own motion prior to Summary Judgment?

STATEMENT OF THE CASE

Nature of the Case

This case was brought as an action for negligent, reckless or intentional conduct. Mr. Jones moved to dismiss his own claim for intentional conduct on the 9th day of March, 1992. See Exhibit "A". Mr. Barney filed his Motion for Summary Judgment on the 4th day of June, 1992, after the claim of intentional conduct had been

withdrawn. See Exhibit "B". Therefore, only the negligence and recklessness claims were considered on Summary judgment. On appeal, this court need only consider whether the doctrine of Assumption of Risk applies to negligent or reckless conduct, and need not consider how it might apply to intentional torts. Further, this court need only consider the application of the doctrine of assumption of risk to cases where the injured party is a voluntary participant in an activity, such as an athletic competition, which involves a known, obvious risk.

Course of Proceedings.

After discovery, Mr. Jones moved to dismiss his claim for intentional conduct. Then, Mr. Barney moved for summary judgment of the remaining issues in the case. No oral argument was heard, because neither party requested an oral hearing.

Statement of Undisputed Facts.

1. Mr. Jones was the first batter in an amateur L.D.S. softball game.
2. Mr. Jones hit a "grounder" towards the pitcher's mound.
3. Mr. Barney expected the pitcher to field the ball, but when the ball rolled between the pitcher's legs, he fielded it barehanded, and threw it in the direction of first base, attempting to get an "out."
4. Mr. Barney was somewhere between first and second base, and was struck in the head by the ball.

5. Mr. Barney cannot confirm or deny the extent of Mr. Jones's injuries, if any. However, since the decision of the trial court rests not on a decision of no damages, but on a decision of no liability, this is not material to this appeal.

SUMMARY OF THE ARGUMENTS

Mr. Barney was not negligent, because everything that occurred can reasonably be expected when an actor voluntarily participates in a softball game. Mr. Jones asserted in discovery that he is an experienced softball player, and has participated in numerous games. Mr. Jones should not be able to recover for injuries sustained within the normal course of the game.

The doctrine of assumption of risk is a shorthand way of stating the doctrine of license, and of comparative negligence. Participating in a competitive, athletic event contains within it an implicit license to the types of conduct that are reasonably foreseen by the sport. Therefore, while conduct within the safety rules of the game, e.g., throwing the softball to first, cannot be a tort, while conduct outside the rules, e.g., tackling someone to prevent their taking a base, is not expected by the participants, and should be actionable. Here, Mr. Jones had to know that when you are playing softball, it is possible to be struck by the ball. His participation is an acknowledgement that he has assumed the risk of contact with the ball.

ARGUMENT

POINT I: MR. JONES'S CLAIM IS BARRED

BY THE DOCTRINE OF ASSUMPTION OF RISK.

Mr. Jones, in his brief, fails to distinguish between the concepts of assumption of risk and comparative negligence. Here, in addition to any comparative negligence that may or may not have been present on the part of the Mr. Jones, he knowingly and voluntarily assumed the risks involved in the game of softball. These known risks include the risk of being struck by the ball in the course of play. Rather than simply referring to the possible negligence of the Mr. Jones, the doctrine of assumption of risk is related to the consent given by him when he voluntarily participates in a sport. Tavernier v. Maes, 242 Cal App. 2d 532 (1966).

In the case of Ridge v. Kladnick, 713 P.2d 1131 (Wash. App. 1986), the court stated that "[a]ssumption of the risk is not a mere variant of comparative negligence in this case. rather, assumption of the risk involves a knowing encounter of a danger and a subjective standard of conduct." 713 P.2d at 1132, citing Prosser & W. Keaton, Torts § 68 at 485 (5th ed. 1984). The courts contrasted this to comparative negligence, or "breach of an objective reasonable standard of conduct." The court goes on to note that "this primary type of assumption of risk should continue to bar recovery even after the adoption of comparative negligence or fault because assumption of risk in this form is, in reality,

the principle of no duty-hence no underlying cause of action." 713 P.2d at 1132-1133.

In Ridge, plaintiff was injured in the course of a game of "Shoot the Duck/Wipe Out" at a local skating rink. Plaintiff was injured in the expected course of the game, and brought suit. The court there held that assumption of the risk was a complete bar to recovery, notwithstanding comparative negligence. Here, the facts are substantially similar. Mr. Jones was injured during the expected course of a softball game. Mr. Barney was acting in accordance with the accepted procedures for playing softball. Therefore, Mr. Jones' assumption of the specific risks involved in playing softball should act as a complete bar to recovery

Mr. Jones has characterized the issues involved in assumption of risk as fault, but the doctrine can apply where a claimant is without fault. It is simply a recognition that certain events are not actionable, because the participants have either implicitly or explicitly consented to them. Under Mr. Jones's interpretation of Utah law, a quarterback in any neighborhood football or basketball game would be able to sue for tackles and fouls. This interpretation is contrary to any reasonable conception of voluntary sports. Admittedly, if Mr. Charles had thrown a softball at Mr. Jones on the street without warning, there might be a cause of action, there simply should not be one in this situation.

Actions that could be considered tortious normally have been held not to be a tort in athletic contests. Where a softball

player collided with a baseman, he was held not liable for the baseman's injuries, because he did not act in an unexpected or unsportsmanlike manner, that is his conduct was within the safety rules of the sport. Novak v. Lamar Ins. Co., 488 So. 2d. 139 (La App. 2d Cir. 1986). Where a softball player broke an opposing team member's ankle in a "slide", again the player was not held liable because his action was not prohibited by the rules, and therefore such conduct was within the realm of activities contemplated by a game of softball. Picou v. Hartford Ins. Co., 558 So.2d. 787 (La. App. 5th Cir. 1990). When a softball player was struck in the eye by a softball thrown by a teammate during "warm-up" the court held that the player had voluntarily consented by participating in the injury-causing event, and the player therefore understood and accepted the dangers of the sport, including any carelessness. O'Neill v. Daniels, 522 N.E.2d. 1066 (N.Y. App., 4th Div. 1987).

Here, Mr. Jones had participated in numerous sports activities. According to his testimony, Mr. Jones had played softball for many years, since his teens. see Exhibit "C". He must have realized the danger of sports injuries. In volunteering to participate, he assumed the risks associated with the game of softball. This consent is an element of participation in any sporting event, notwithstanding any contributory negligence or lack thereof on the part of the Mr. Jones. The doctrine of assumption of risk is not barred in this case by Utah's comparative negligence statute. This action should be dismissed because defendant did not

violate any safety rule of softball. In one case in this area, the court permitted suit against a competitor where the player causing the injury violated a safety rule in a unsportsmanlike manner. Nabozny v. Barnhill, 334 N.E.2d. 258 (Ill 1975). There, a soccer player injured a goalkeeper when he kicked the goalkeeper in the head. The player had entered the "penalty area," where any contact with a goalkeeper in possession of the ball is a violation of the game rules. In contrast, Mr. Barney was not in violation of the rules of softball when this incident occurred. He was not attempting to gain an unsportsmanlike advantage, but was attempting to throw the ball to his teammate. This action should be barred because Mr. Barney was acting in accord with the rules of softball.

Participants in sports or amusements are taken to assume known risks of injury, though they are not deemed to have consented to unsportsmanlike rule violations. Ridge v. Kladnick, 713 P.2d 1131 at 1133 (Wash App. 1986); Robillard v. P & R Racetracks, Inc., 405 So.2d 1203 (La.App. 1981) (stock car race driver hit disabled vehicle); Duffy v. Midlothian Country Club, 92 Ill.App.3d 193, 47 Ill. Dec. 786, 415 N.E.2d. 1099 (1980) (Spectator injured at golf tournament); Daniel v. Cambridge Mut. Fire Ins. Co., 368 So.2d 118 (La.App.2d Cir. 1979) (plaintiff injured while horseback riding); Richmond v. Employers' Fire Ins. Co., 298 So.2d 118 (La.App 1st Cir. 1974) (flying baseball bat); Moe v. Steenberg, 275 Minn. 448, 147 N.W.2d 587 (1966) (skating injury); Duskiewicz v. Carter, 115 Vt. 122, 52 A.2d 788 (1947). By participating in the softball

game, Mr. Jones agreed to accept the risks inherent in the game that were obvious and necessary. One of those risks was that of being hit with the softball. Because Mr. Jones placed himself in this area of known risk, Mr. Barney does not owe a duty to him with regard to those risks. Kennedy v. Providence Hockey Club, Inc., 119 R.I. 70, 376 A.2d 329 (1977). It is inconceivable that Mr. Jones could withhold his consent to participate, while still participating, his playing softball evidences his intent to expose himself to these activities.

Contrary to the interpretation given by Mr. Jones, this rule is not a bright-line test for dismissal or retention of a claim. The safety rules of a sport give an easily interpreted guide to the courts for determination of what types of conduct the participants have consented to. Therefore, in playing basketball, baseball or football, one consents to the types of activities normally associated with these sports, as set out in their accepted rules. To claim otherwise would be to advance the position that although you were voluntarily playing softball, you did not realize that there would be softballs being thrown from one player to the other; or that although you had joined a basketball league, you did not expect other players to attempt to block your goals. This is not a reasonable interpretation of sports participation.


POINT II: MR JONES SHOULD NOT BE ALLOWED
TO RAISE THE ISSUE OF INTENTIONAL CONDUCT
AFTER MOVING TO DISMISS HIS CLAIM.

Mr. Jones states in his Brief that the issue of whether Mr. Barney was acting deliberately, willfully or with a reckless disregard for the safety of Mr. Jones should be given to a trier of fact. However, on March 9th, 1992, Mr. Jones filed a motion to voluntarily dismiss his claim that Mr. Barney was acting with intent to injure. See Exhibit "A" Mr. Jones should not be able to appeal the dismissal of a claim dismissed on his motion. Further, there is no reasonable reading of the facts that show even negligence, let alone a reckless disregard of Mr. Jones's safety. Mr. Jones stated in his deposition that he had no reason to believe that Mr. Barney was acting with intent to injure. see Exhibit "C". Therefore, Mr. Jones cannot appeal on the grounds that the intentional conduct claim should be decided by a jury.

CONCLUSION

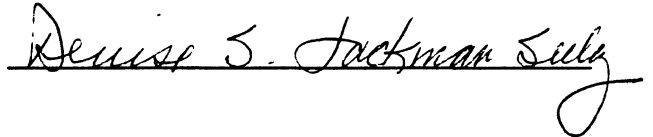
The district court properly granted the motion for Summary Judgment. Mr. Jones cannot appeal on the grounds that his claim of intentional conduct should have been heard by a jury, when he voluntarily moved to dismiss his own claim. The dismissal should be upheld, and this Appeal should be denied.

DATED THIS 3rd day of May, 1993,


J. KENT HOLLAND
Attorney for Appellee.

CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the foregoing Brief of Appellee W. Charles Barney were mailed, postage prepaid, to Leonard McGee, GOICOCHEA LAW OFFICE - WEST VALLEY, Attorneys for Appellant, The Harmon Building, 3540 South 4000 West, Suite 100, West Valley City, Utah 84120, this 3rd day of May, 1993.



E X H I B I T "A"

DEFENDANT' MOTION TO DISMISS

LEONARD E. McGEE - A2185
 GOICOECHEA LAW OFFICE - WEST VALLEY
 Attorneys for Plaintiff
 The Harmon Building
 3540 South 4000 West, Suite 100
 West Valley City, Utah 84120
 (801)964-8228

IN THE THIRD JUDICIAL DISTRICT COURT
 IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JONATHAN JONES,	:	MOTION TO DISMISS
	:	
Plaintiff,	:	
	:	
vs.	:	
	:	Case No. 91-0904369 PI
	:	
W. CHARLES BARNEY,	:	
	:	Judge Homer Wilkinson
Defendant.	:	

COMES NOW the Plaintiff in the above-captioned matter and hereby moves the Court for an order dismissing, with prejudice, his Second Cause of Action for Intentional Conduct against the defendant, with all other causes of action remaining against the defendant.

DATED this 9th day of March, 1992.

GOICOECHEA LAW OFFICE - WEST VALLEY


 LEONARD E. McGEE

ORDER

COMES NOW the Court and, based upon the motion of the Plaintiff and with good cause appearing therefore, and having been fully advised in the premises;

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the plaintiff's Second Cause of Action for Intentional Conduct is dismissed with prejudice, with all other causes of action remaining against the defendant.

DATED this ____ day of _____, 1992.

BY THE COURT:

HOMER WILKINSON
Third District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of PLAINTIFF'S
MOTION TO DISMISS HIS SECOND CAUSE OF ACTION AS AGAINST THE DEFENDANT
and ORDER were mailed, vis First Class U.S. Mail, postage pre-paid, to
the following this 9 day of March, 1992:

J. Kent Holland
ANDERSON & HOLLAND
Attorneys for the Defendant
623 East 100 South
Salt Lake City, Utah 84102

Daniel V. Goodsell
KIRTON, MCCONKIE & POELMAN
Personal Attorney for the Defendant
60 East South Temple, #1800
Salt Lake City, Utah 84111



E X H I B I T "B"

DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

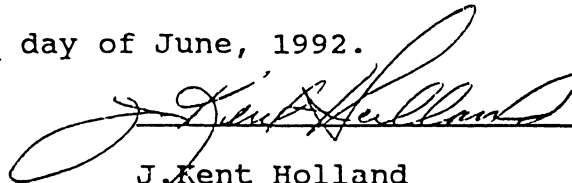
J. KENT HOLLAND, #1520
ANDERSON & HOLLAND
Attorney for Defendant
623 East First South
P.O. Box 11643
Salt Lake City, Utah 84147-0643
Telephone: (801) 363-9345

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

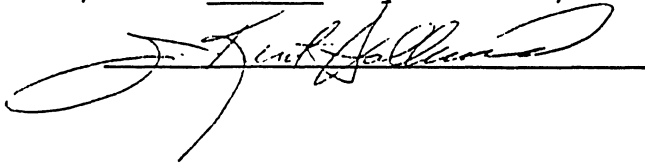
JONATHAN JONES,)	
	)	DEFENDANT'S MOTION FOR
Plaintiff,	)	SUMMARY JUDGMENT
)	
v.)	
)	
W. CHARLES BARNEY,	)	Civil No. 910904369 PI
)	
Defendant.	)	Judge Homer Wilkinson

Defendant, by and through his attorney J. Kent Holland,
and pursuant to Rule 56 of the Utah Rules of Civil Procedure,
hereby moves that Plaintiff's claim be dismissed with prejudice.

DATED THIS 4th day of June, 1992.


J. Kent Holland
Attorney for Defendant

I hereby certify that a true and correct copy of the foregoing Defendant's Motion for Summary Judgment was mailed, postage prepaid, to Leonard E. McGee, GOICOECHEA LAW OFFICE - WEST VALLEY, Attorney for Plaintiff, 3540 South 4000 West, Suite 100 West Valley City, Utah 84120, and to Daniel V. Goodsell, Personal Attorney for the Defendant, 1800 Eagle Gate Tower, 60 East South Temple, Salt Lake City, Utah 84111, this 4th day of June, 1992.

A handwritten signature in dark ink, appearing to read "Daniel V. Goodsell", is written over a horizontal line.

J. KENT HOLLAND, #1520
ANDERSON & HOLLAND
Attorney for Defendant
623 East First South
P.O. Box 11643
Salt Lake City, Utah 84147-0643
Telephone: (801) 363-9345

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JONATHAN JONES,)	
	)	MEMORANDUM SUPPORTING
Plaintiff,	)	DEFENDANT'S MOTION FOR
	)	SUMMARY JUDGMENT
v.)	
)	
W. CHARLES BARNEY,	)	Civil No. 910904369 PI
)	
Defendant.	)	Judge Homer Wilkinson

Defendant, by and through his attorney of record, J. Kent Holland, and pursuant to Rule 56 of the Utah Rules of Civil Procedure, hereby submits the following memorandum of points and authorities in support of his Motion for Summary Judgment filed in conjunction herewith:

STATEMENT OF UNDISPUTED FACTS:

1. Plaintiff was the first batter in an amateur L.D.S. Ward softball game on or about July 11, 1990.
2. Plaintiff hit the ball into the infield.
3. Defendant was playing the second base position, and fielded the ball.
4. Defendant threw the ball in the direction of first base.
5. The player at first base did not catch the ball.
6. The ball struck the plaintiff as he was running near

first base.

ARGUMENT

POINT I:

**PLAINTIFF'S CLAIM IS BARRED BY
THE DOCTRINE OF ASSUMPTION OF RISK.**

As a participant in a team athletic competition, Plaintiff is barred from recovering for injuries which are foreseeable and incidental to the competition. 77 ALR 3d. 1300. The assumption of risk doctrine has been recognized in Utah. Harrop v. Beckman, 387 P.2d 554 (Utah 1963), Mikkelsen v. Haslam, 764 P.2d 1384 (Utah 1988). The doctrine of assumption of risk has been distinguished from contributory, or comparative negligence, in that contributory negligence is a failure to foresee a reasonable danger, and assumption of risk involves the plaintiff knowingly exposing himself to a danger. Moore v. Burton, 631 P.2d 865 (Utah 1981) Plaintiff's injury was caused by his being struck by the softball in the course of normal play. Since the danger of being struck by the ball is an obviously foreseeable element of the game of softball, Plaintiff can not recover. The Plaintiff in this action knew the risk of being hit by the ball during the course of play. In the absence of either an "unsportsmanlike violation" of the established safety rules of the sport or intent to harm the other participant, courts have not held athletic participants liable for injuries. Bourque v. Duplechin, 331 So. 2d. 40 (La App. 1976) cert den. 334 So. 2d. 210 (La. 1976), Nabozny v. Barnhill, 334 N.E.2d. 258 (Ill. App. 1975). Here, Defendant has not violated any safety rule, nor did he intend to injure Plaintiff. Plaintiff

cannot recover against Defendant on the basis of an athletic injury.

In Utah, the courts have held that a participant in a sport voluntarily assumes the risks of a sport of which the participant has knowledge. Mikkelsen v. Haslam, 764 P.2d. 1384 (Utah 1988). In the case of O'Neil v. Daniels, 523 N.Y.S.2d. 264 (1987, 4th Dept) app den. 522 N.E.2d. 768, a New York court held that a plaintiff could not maintain an action for an injury to his eye by a softball during "warm-up"activities, because the plaintiff, as a player, understood and accepted the dangers of the sport. In Gaspard v. Grain Dealers Mutual Ins. Co., 131 So. 2d. 831 (La.App. 1961), a baseball player struck in the head by a bat that slipped out of the hands of another player was denied recovery because the player was shown to be aware of the danger of flying balls and bats. Softball and baseball players, struck by other players, have been denied recovery because the danger of collision is a recognized risk of the sport. Tavernier v. Maes, 242 Cal. App. 2d 532 (1966).

In this case, Plaintiff was a voluntary participant in a game of softball. The danger of being hit by the ball during the course of play is a recognized risk of the sport. Provisions are made in the rules of slow pitch softball. Plaintiff either knew or should have known the danger of being hit by the ball.

Point II:

PLAINTIFF'S CLAIM IS BARRED BECAUSE

DEFENDANT INTENDED NO INJURY.

This action should be dismissed because the injury was

not inflicted intentionally. Some courts have held that an injury inflicted in the course of an athletic competition can be maintained if a participant intentionally injures an opponent. Bourque v. Duplechin, 331 So. 2d. 40 (La App. 1976), Griggs v. Clauson, 128 N.E.2d. 363 (Ill 1955). In Bourque, a baserunner in a softball game was held liable for deliberately running into a baseman, where the runner hit the baseman under the chin attempting to block his view of first base and stop a double play. In Griggs, a basketball player struck an opponent in the face with his fist in an attempt to gain possession of the ball. Here, Defendant did not attempt to injure his opponent but is only alleged to have been negligent. Plaintiff admitted in his deposition that he did not believe the injury was intentional. Plaintiff did not observe the actual throwing of the ball. Defendant was attempting to complete a legal play, as opposed to the cases where liability was allowed. In these cases, liability was allowed because the offending player assaulted a competitor in an intention manner. The defendants in these cases were behaving outside of the rules of the sports and were attempting to disable their competitors, not complete legal plays.

POINT III:

**PLAINTIFF'S CLAIM IS BARRED BECAUSE
DEFENDANT DID NOT VIOLATE ANY SAFETY RULE.**

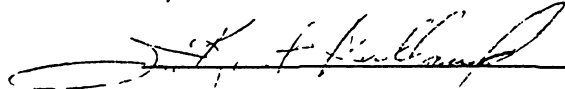
This action should be dismissed because the defendant did not violate any safety rule of softball. In one case in this area, the court permitted suit against a competitor where the player causing the injury violated a safety rule in a unsportsmanlike

manner. Nabozny v. Barnhill, 334 N.E.2d. 258 (Ill 1975). There, a soccer player injured a goalkeeper when he kicked the goalkeeper in the head. The player had entered the "penalty area," where any contact with a goalkeeper in possession of the ball is a violation of the game rules. In contrast, Defendant was not in violation of the rules of softball when this incident occurred. He was not attempting to gain an unsportsmanlike advantage, but was attempting to throw the ball to his teammate. This action should be barred because Defendant was acting in accord with the rules of softball.

CONCLUSION

This suit should be dismissed because the Plaintiff assumed the risk of this injury. The risk of being hit by the ball during the course of the game was foreseeable, known to the players, and part of the course of play. The Defendant did not act with an intent to injure the plaintiff. The injury was not caused by a violation any of the rules of the sport. The Defendant cannot be held liable for this injury because of the doctrine of assumption of risk.

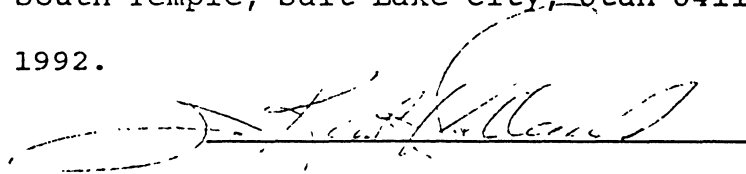
DATED THIS 4th day of June, 1992.

A handwritten signature in dark ink, appearing to read "J. Kent Holland", is written over a horizontal line.

J. KENT HOLLAND

Attorney for Defendant

I hereby certify that a true and correct copy of the foregoing Defendant's Memorandum in Support of Defendant's Motion for Summary Judgment was mailed, postage prepaid, to Leonard E. McGee, GOICOECHEA LAW OFFICE - WEST VALLEY, Attorney for Plaintiff, 3540 South 4000 West, Suite 100 West Valley City, Utah 84120, and to Daniel V. Goodsell, Personal Attorney for the Defendant, 1800 Eagle Gate Tower, 60 East South Temple, Salt Lake City, Utah 84111, this 4th day of June, 1992.

A handwritten signature in dark ink, appearing to read "Daniel V. Goodsell", is written over a horizontal line. The signature is stylized with a large, sweeping initial 'D'.

E X H I B I T "C"

SELECTED DEPOSITION TESTIMONY

(By Mr. Holland)

1 Community College?

2 A. Correct.

3 Q. Were you involved in any sports in high
4 school at Tyler?

5 A. Yes.

6 Q. What did you do there?

7 A. I ran track. I played football and
8 basketball.

9 Q. And did you letter in those sports?

10 A. I did, yes.

11 Q. Any other sports after high school?

12 A. Yes. I was trying out for the Salt Lake
13 Community College basketball team and I did play in
14 several county rec leagues.

15 Q. What kind of county rec leagues?
16 Basketball?

17 A. Yes.

18 Q. Did you play any county rec softball
19 leagues?

20 A. No, not softball. Just church softball.

21 Q. How long have you played church softball?

22 A. Since I was a Deacon. Twelve years old.

23 Q. You are dealing with a gentile here, so
24 you are not going to -- you have to give me ages.

25 A. That's fine.

(By Mr. Holland)

1 Q. And did you play continuously during that
2 period of time?

3 A. I did, yes.

4 Q. Did you ever suffer any injuries of any
5 kind during your athletics prior to the incident
6 here of July of '90?

7 A. I did.

8 Q. What type of injuries did you sustain?

9 A. Senior year in football, I had a broken
10 collar bone.

11 Q. Any others?

12 A. No.

13 Q. Did you play base ball in high school, I
14 believe you said?

15 A. No.

16 Q. You did not play base ball?

17 A. No.

18 Q. Did you play little league?

19 A. I -- yes.

20 Q. Did you play Pony League, or Babe Ruth, or
21 any of those?

22 A. Where I went, it was Pee-Wee League, Minor
23 League, and Major League. And I played through the
24 major leagues.

25 Q. How old does major league go up to, 14?

(By Mr. Holland)

1 A. I was 11 when I played. I went straight
2 from Pee-Wee to Major. So my last year was 11 years
3 old.

4 Q. And during those periods of time, did you
5 ever get hit by the base ball?

6 A. Never.

7 Q. The church all-softball, is that
8 all-softball?

9 A. It's all-softball.

10 Q. Is it all slow-pitch?

11 A. All slow-pitch.

12 Q. And were you ever hit with the ball at all
13 that you can recall?

14 A. Never.

15 Q. You are lucky. I have been hit a couple
16 of times. I must be too slow to move out the way.

17 Q. I'm going to call your attention to the
18 day of this incident, which I believe is July 11th,
19 1990. Is that the correct date, as you recall it?

20 A. Correct.

21 Q. Do you remember what day of the week it
22 was?

23 A. It was a Wednesday, I believe.

24 Q. Was it?

25 A. A Wednesday or Thursday.

(By Mr. Holland)

1 Q. What else?

2 A. A moneymonger.

3 Q. Did you ever say something to Charles
4 about whether he intentionally threw the ball or
5 not?

6 A. Never.

7 Q. You never said that you knew he did not
8 throw it intentionally at you?

9 A. I do remember saying something like that.

10 Q. Do you know that he threw it intentionally
11 at you?

12 A. I don't think it was -- I don't know.

13 Q. Has anyone ever told you that he
14 intentionally threw the ball at you?

15 A. Nobody has ever said anything like that.

16 Q. Are you aware, in your second cause of
17 action, that you claim that he threw it at you?

18 A. I never claimed that he intentionally
19 threw the ball at me.

20 Q. You've never read your complaint?

21 A. Excuse me?

22 Q. Did you ever read the complaint that your
23 lawyer filed on your behalf?

24 MR. MCGEE: I think we sent it to you.

25 THE WITNESS: I don't recall. I'm sorry.