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No. 71545-3-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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**TERESA REED-JENNINGS** and **CLIFF JENNINGS,** Wife and Husband and their marital community,

*Appellants*,

v.

**THE BASEBALL CLUB OF SEATTLE, L.P.**, a Washington Corporation, d/b/a **THE SEATTLE MARINERS,**

*Respondent*.

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# REPLY BRIEF OF APPELLANTS

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On behalf of Appellants
Teresa Reed-Jennings and
Cliff Jennings

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## A. INTRODUCTION

Appellants, Teresa Reed-Jennings and Cliff Jennings (hereinafter "the Jennings"), Reply to the Brief of Respondent, the Baseball Club of Seattle, L.P. (hereinafter "the Mariners"). As set forth in Appellants' Opening Brief, and in this Reply, the Jennings respectfully request this Court reverse the trial court's order granting the Mariners' Motion for Summary Judgment.

The Mariners' response brief fails to directly address several arguments presented by the Jennings' opening brief. Instead, the Mariners continue to advocate that the Jennings are barred from trying their case to a jury because of both a limited duty rule for stadium operators and the Jennings' impliedly assumed risk.

The issues presented by this Appeal can all be answered with reference to Washington jurisprudence: (1) the duty of care owed to invitees of baseball stadiums in Washington; (2) whether there is sufficient evidence in the record to reach a jury on the issue of the breach of that duty; and (3) whether there is sufficient evidence in the record to reach a jury on the issue of the Jennings' implied primary assumption of risk as alleged by the Mariners.

In regards to the first issue, the Mariners continue to argue for a special rule of limited liability for baseball stadium operators that dates to

1919. Its position runs contrary to developments in tort law. Today, Washington courts employ the Restatement (Second) of Torts §§ 343 and 343A to define the liability of possessors of land to invitees for physical injuries due to conditions or activities on the land.

In regards to the second issue, the Jennings argue that there is sufficient evidence in the record for a reasonable person to conclude the elements of Restatement § 343 have been met. Apparently accepting the application of Restatement § 343 for the sake of argument, the Mariners' response claims that the Jennings fail to produce sufficient evidence that batting practice at Safeco Field presents an unreasonable risk. Such an argument disregards the record. When viewed in the light most favorable to the Jennings, there is sufficient evidence for a reasonable person to conclude that the Mariners knew, or should have discovered, that batting practice posed an unreasonable risk of harm to patrons sitting along the right field foul line.

In regards to the third issue, the Jennings argue that primary implied assumption of risk cannot bar recovery in light of sufficient evidence that a plaintiff's injuries were caused by a defendant's negligence. This rule was applied in both *Scott v. Pacific West Mountain* and *Kirk v. WSU*. The Mariners' response ignores this line of reasoning. Instead, the Mariners assert that Teresa Reed-Jennings, despite her

testimony to the contrary, should be charged with full subjective knowledge of the nature and extent of the risks unique to batting practice for having watched practice for five to ten minutes. The logic of such an argument breaks down when taking a closer look at *Ridge v. Kladnick*, the case cited by the Mariners in support. The Mariners' position serves to underline the existence of material issues of fact, not their absence.

## B. ARGUMENT

### 1. There is no "limited duty rule" applicable to baseball stadium operators in Washington

A central argument of the Jennings' opening brief is that the limited duty rule for baseball stadium operators was impliedly overruled by Washington State's adoption of comparative fault statutes. Appellants' Br. 29-32. Rather, a baseball stadium operator's duty to invitees for conditions or activities should be defined by the Restatement (Second) of Torts § 343 and, for allegedly open and obvious dangers, § 343A. Id. at 20-21.

The Mariners fail to produce any direct response to the Jennings' argument. There is no attempt made by the Mariners to explain how the limited duty rule for baseball stadium operators could persist despite Washington's adoption of comparative fault statutes. There is no attempt

to argue that the Restatement §§ 343 and 343A, as adopted by the Washington State Supreme Court, do not apply.

Instead of addressing the Jennings' argument, the Mariners simply continued to state the limited duty rule as fact with citations to three Washington cases: *Kavafian v. Seattle Baseball Club Association,* 105 Wash. 215, 181 P. 679 (1919) (*en banc*); *Leek v. Tacoma Baseball Club*, 38 Wn.2d 362, 229 P.2d 329 (1951); and *Taylor v. Baseball Club of Seattle, L.P.*, 132 Wn.App. 32, 130 P.3d 835 (2006).

All three of the cases cited by the Mariners fail to support the continued existence of the limited duty rule for Washington stadium operators.

The *Kavafian* decision that announced the limited duty rule in 1919 based it on a now obsolete theory of pure contributory negligence. Appellants' Br. 30-32. Any measure of fault in 1919, imputed upon the patron who took an unscreened seated, barred recovery. Today, because of the system of comparative negligence, the patron's choice of an unscreened seat could diminish, but not preclude, recovery.

The *Leek* Court based its decision on an application of Restatement § 343. 38 Wn.2d at 366, 229 P.2d 329. The announcement of the limited duty rule by the *Leek* Court was a summation of the majority of jurisdictions at that time, not used to decide the case, and amounts to dicta.

The Court explicitly pointed to *Kavafian* for an application of the limited duty rule. *Id.* at 369.

Contrary to the Mariners' assertion at page 16 of Respondent's Brief, the Jennings did not suggest, nor argue, that the *Leek* decision would have been different if it was decided after Washington adopted comparative fault statutes. The *Leek* Court applied Restatement § 343, not the limited duty rule. Thus *Leek* would not be decided any differently today then in 1951.

Finally, the *Taylor* Court based its holding on an application of primary implied assumption of risk, not on the limited duty rule. 132 Wn.App. at 34, 130 P.3d 835. Although the *Taylor* Court stated the limited duty rule, it cited generally to *Leek* for its support. *Id.* at 37.

Contrary to the Mariners' assertion at page 17 of Respondent's Brief, the Jennings did not concede the standard of care announced in *Taylor* at summary judgment. The point made by the Jennings, and based in part on the reasoning of the *Taylor* decision, is that the Mariners' standard of care, defined by Restatement § 343, is applicable during batting practice the same as during actual game play. CP 159-60. Thus a baseball stadium operator is not subject to varying standards of care – only one standard that is commensurate with the circumstances.

Here, the Jennings urge this Court to define the standard of care the Mariners owed them pursuant to Restatement § 343. The Mariners had a duty to repair, safeguard, or warn as reasonably necessary for the Jennings' safety under the circumstances of pre-game batting practice.

The limited duty rule, predicated on an obsolete legal foundation, was not used to decide *Leek v. Tacoma Baseball Club* or *Taylor v. Baseball Club of Seattle, L.P.* Standard principles of landowner liability to invitees should be applied to a stadium operator the same as any other business.

**2. The limited duty rule's importance**

The parties appear to agree on the significance of the limited duty rule's application in this case. As stated in the Jennings' opening brief, a strict application of the limited duty rule here would be decisive and render mute the issue of primary implied assumption of risk. Appellants' Br. 19. The Mariners' response cites this statement with approval, yet incorrectly characterizes it as concessionary. Respondent's Br. 25-26.

The statement about the primacy of the limited duty rule is meant to focus attention on the logical order in which this Appeal's issues present themselves. For primary implied assumption of risk to logically apply, there must first be a duty to shift from defendant to plaintiff. If Washington baseball stadium operators do not owe a duty to invitees

beyond screening behind home plate, then there would be no duty for the Jennings to impliedly assume.

For the Mariners to advocate for both the application of a limited duty rule and primary implied assumption of risk is logically inconsistent. These arguments should be in the alternative.

**3. The record before the trial court contains sufficient evidence for a reasonable person to find the elements of Restatement § 343 are met**

The Jennings' opening brief argues that there exists sufficient evidence in the record before the trial court for a reasonable person to conclude the Mariners are liable to the Jennings for their injury pursuant to Restatement § 343. Appellants' Br. 22-27. In response, the Mariners argue that the Jennings failed to cite to any evidence that batting practice at Safeco Field creates an unreasonable risk. Respondent's Br. 20. (Apparently the Mariners' argument, in attacking the sufficiency of the evidence regarding Restatement § 343(a), accepts the applicability of Restatement § 343.)

In support of its no-evidence position, the Mariners cite, in turn, to: its interpretation of the statistical frequency of patron injuries at Safeco Field over the last five years; the Mariners' use of a screen on the right field foul line; the limited duty rule; the inadmissibility of an opinion of

Gil Fried; and the lack of evidence presented by the Jennings that other ballparks provide more safety than at Safeco Field. Id. at 20-21.

All these points miss the mark. The Mariners' claims serve to substantiate the existence of a triable issue of fact, not its absence.

To defeat a motion for summary judgment, the record need only reflect sufficient evidence, when viewed in the light most favorable to the Jennings, for a reasonable person to conclude that the Mariners knew, or should have discovered, that batting practice posed an unreasonable risk of harm to patrons sitting along the right field foul line. It is for the jury to decide whether a general field of danger should have been anticipated. *Wells v. City of Vancouver*, 77 Wn.2d 800, 803, 467 P.2d 292 (1970) (citing *McLeod v. Grant County School Dist.* 128, 42 Wn.2d 316, 255 P.2d 360 (1953)).

The record before the trial court included the deposition testimony of Teresa Reed-Jennings and Cliff Jennings. Each described how they were focused on the batted baseball. CP 198; CP 233. Yet, before that ball fell to the ground, the next ball was batted. CP 198-99; CP 233. The Jennings were doing exactly what they should have been doing to protect themselves: watching the trajectory of the batted baseball. Neither of them expected, nor could they react fast enough, for the second baseball. The second ball appeared as a flash to Cliff; it struck Teresa in the head. CP

233.

It is reasonable to anticipate that a patron will not be able to protect themselves when more than one baseball is batted into the air at the same time. A reasonable person could conclude that the Mariners should have realized the risk posed to patrons, like the Jennings, of simultaneously batted baseballs.

The record before the trial court included testimony that the Mariners' organization knew baseballs were batted into the air before the prior ball was caught during practice. The Mariners' hitting coach, Dave Hansen, confirmed that another ball could be thrown to the batter before the previous ball is caught. CP 262. The Mariners' head groundskeeper, Robert Christofferson, confirmed that he has seen multiple balls batted into the air simultaneously during batting practice. CP 250. The Mariners' third base coach, Jeff Datz, stated that it is unimportant where baseballs land during batting practice. CP 333-34. A reasonable person could conclude that the Mariners knew of the risk posed to patrons by batting practice and, specifically, of the risk associated with simultaneously batted baseballs.

The record before the trial court included testimony and documentation that Major League Baseball encouraged the Mariners to analyze Safeco Field and add more screening for batting practice where

necessary. CP 270, 298. Yet, as the Mariners' VP of Operations testified, he "felt when that memo came out that we were adequately protected." CP 272. He could not recall any independent study of patron accidents occurring at Safeco Field. CP 273-74. A reasonable person could conclude the Mariners failed to take reasonable measures to discover and address the risks to patrons during batting practice.

Finally, the record before the trial court included the testimony and declaration of Gil Fried, the Jennings' expert on ballpark safety and management. Mr. Fried described how batting practice presents different risks to patrons than actual game play. CP 303, ¶ 8. During game play, a patron can track a single baseball and take measures, as necessary, to protect themselves from being struck. CP 304, ¶ 16. Yet, during batting practice, a patron cannot protect themselves from the danger posed by errant batted baseballs in the same way, for the simple reason that a patron cannot focus his or her attention on two batted baseballs at the same time. CP 304, ¶ 17. A ballpark owner can anticipate that patrons will not apprehend the enhanced risk of harm present during batting practice in the seating along the foul lines. CP 305, ¶ 21.

Taken together, the record of admissible evidence presents sufficient evidence for a reasonable person to conclude that the Mariners knew or should have known of an unreasonable risk of harm to invitees

presented during batting practice at Safeco Field.

Certainly the Mariners may present to a jury its own evidence. This may include its statistical analysis of the frequency of patron injuries at Safeco Field, the use of a screen on the right field foul line during practice, or the lack of information that other ballparks provide more safety than at Safeco Field. Yet none of those points, at the stage of summary judgment, bear relevance.

**4. The Mariners' warnings argument is not relevant**

The Mariners argue in its response that the Jennings "had no evidence that the warnings provided by the Mariners were inadequate." Respondent's Br. 22.

First, the existence of warnings at Safeco Field for "balls and bats" leaving the field does not exculpate the Mariners from legal liability. At most it stands as an argument, to be made to a jury, that the Mariners met its duty of care to reasonably warn invitees of a dangerous condition or activity occurring at Safeco Field.

Second, the Jennings did provide evidence that the warnings at Safeco Field were inadequate. Gil Fried's declaration describes how a ballpark operator should provide adequate warnings tailored to the unique risks posed by batting practice. CP 305, ¶ 24. As for the warnings at Safeco Field, Mr. Fried stated that "the warnings provided by [the

Mariners] by visual signage or on the back of the ticket, did not provide reasonable notice to Teresa and Cliff Jennings of the risk of multiple baseballs batted into the air simultaneously during batting practice." CP 305, ¶ 25. Mr. Fried suggested that reasonable measures to warn of the unique risks of batting practice could include public address announcements before batting practice, scoreboard announcements during batting practice, usher notification, and more specific signage for lower stadium seating areas during batting practice. CP 305, ¶ 26.

The Jennings wish to describe the inadequacy of the warnings about the risks unique to batting practice to a jury, such that a jury can decide the factual matter of the reasonableness of the Mariners' efforts.

**5. Primary implied assumption of risk cannot support summary judgment in light of sufficient evidence of negligence**

The Jennings' opening brief argued that primary implied assumption of risk cannot bar a plaintiff's recovery in light of sufficient evidence that the plaintiff's injuries were caused by negligence. Appellants' Br. 42-43. The legal foundation for the Jennings' argument is found in both *Scott v. Pacific West Mountain*, 19 Wn.2d 484, 834 P.2d 6 (1992), and *Kirk v. WSU*, 109 Wn.2d 448, 746 P.2d 285 (1987). Both cases are additionally helpful in that they provide examples of the doctrine's application in a sports setting.

The Mariners fail to directly address the Jennings' point. Instead, the Mariners argue that the *Scott* decision: (1) supports its argument that primary implied assumption of risk can still bar recovery; and (2) that "[n]owhere does the *Scott* court say that assumption of risk is only a partial defense that must be heard by a jury." Respondent's Br. 27.

The parties are actually in agreement on the continued ability of primary implied assumption of risk to bar suit at summary judgment. The same was pointed out by the Jennings. Appellants' Br. 35. As for the Mariners' second point on *Scott*, the Court's decision actually said: "Since the plaintiff's evidence raised genuine issues of material fact with regard to whether the defendants acted negligently and whether such negligence, if any, was a proximate cause of the injuries, these issues are not properly decided on summary judgment." *Scott*, 19 Wn.2d at 503, 834 P.2d 6.

In *Scott*, the Washington Supreme Court reversed a trial court's grant of summary judgment that was based on the plaintiff's primary implied assumption of risk because there was sufficient evidence of the defendant's negligence. *Id.* The Court, citing several examples, stated the rule in Washington: "These cases illustrate the proposition that primary assumption of the risk in a sports setting does not include the failure of the operator to provide reasonably safe facilities." *Id.* at 502.

The same outcome is advocated for here by the Jennings: there is

sufficient evidence that their injury was caused, in whole or in part, by the Mariners' negligent provision of facilities, warnings, and regulation of batting practice at Safeco Field. As such, primary implied assumption of risk cannot bar the Jennings' suit at summary judgment.

*Kirk v. WSU* provides another example, and further support, for the Jennings' position. In *Kirk*, the University argued that the trial court erred in refusing to instruct the jury that implied assumption of risk would completely bar the cheerleader's recovery. 109 Wn.2d at 451, 746 P.2d 285. The position of WSU is analogous to the position taken by the Mariners here: that primary implied assumption of risk is a complete, unmitigated bar to recovery. Yet the *Kirk* Court did not agree. There was evidence that the University failed to provide adequate facilities, failed to warn, and failed to adequately train and supervise practice. *Id.* at 451. Therefore, the matter was properly submitted to a jury for it to determine the extent to which the cheerleader's injuries were the result of risks specifically assumed or from risks created by the University's negligence. *Id.* at 455. Indeed, the doctrine is a partial defense that must be heard by a jury.

In a broader sense, application of primary implied assumption of risk points back to the sufficiency of the evidence to establish a defendant's liability. Here, the doctrine cannot support the trial court's

ruling when there is sufficient evidence the Mariners' are liable to the Jennings pursuant to Restatement § 343.

**6. Teresa Reed-Jennings' declaration that she did not understand the nature and extent of the specific risk that caused her injury is not nullified by the happenstance of a prior errant baseball**

In its response, the Mariners argue that Teresa Reed-Jennings is prohibited from claiming she did not have a full subjective understanding of the risk of injury from a foul ball during batting practice because she "saw a foul ball land in the row of seats directly in front of her immediately prior to this accident." Respondent's Br. 28.[1] The Mariners cite to *Ridge v. Kladnick*, 42 Wn. App. 785, 713 P. 2d 1131 (1986), for support of the argument that Teresa should be charged with the knowledge of a risk that would have been clear and obvious to a reasonably careful person under the same or similar circumstances. Respondent's Br. 29.

*Ridge* stands as a decision that applies primary implied assumption of risk in the sport setting. In *Ridge*, the setting was a roller skating rink in Burien. 42 Wn. App. at 786, 713 P. 2d 1131. The plaintiff was a frequent patron of the roller rink and had participated in the "game" that lead to his injury on previous occasions. *Id.* at 787. The case was presented to a jury,

[1] To clarify, Teresa stated in her deposition that, prior to her injury, she saw one baseball land in the stands to the left of her section and bounce into her section. CP 196 at lines 9-24; CP 197 at lines 13-17. Yet her Twitter posting, read into the record during the deposition, stated that a "A foul ball landed in the seats in front of us and the young man next to Cliff scampered over the seats and grabbed it." CP 113, lines 17-20. The difference between the statements was not addressed.

where the jury was asked to determine the extent to which the plaintiff's injuries were received pursuant to the rules of the game. *Id.* The jury was further instructed that the plaintiff should be deemed to know and understand the risk of injury that would be clear and obvious to a reasonably careful person under the same or similar circumstances. *Id.* The *Ridge* court clarified that, "[b]y taking part in the game, Ridge agreed to accept the risks inherent in the game that were obvious and necessary." *Id.* at 788.

The primary reason why *Ridge* does not help the Mariners here is that it took a jury to determine the factually disputed matters presented in *Ridge*. A jury was necessary to determine the extent to which the plaintiff-skater had acquiesced to the risks of the game.

A second reason that the logic of *Ridge* does not help the Mariners here is that the plaintiff in *Ridge* was the participant in the game and had often played the game. That is why it makes sense to charge him with knowledge of the risks a reasonable person would understand in his position; playing the game naturally imbues a sport's participant with a sense of the risks involved. Further, as a matter of public policy, such a rule opens the door to participation in sports and activities without the risk of legal liability.

The logic breaks down when the plaintiff is the spectator and not the participant. Watching a sport does not imbue the spectator with the same logical understanding of the sport's risks as its participants.

Here, the Jennings were not participants in the Mariners' batting practice. The Jennings were spectators and, at least for Teresa, a first time spectator at that. It is not reasonable to hoist the full subjective understanding of the risks of batting practice upon Teresa Reed-Jennings because she watched a practice for between five and ten minutes. A jury is required to determine the degree to which Teresa Reed-Jennings assumed the specific risks unique to batting practice.

**7. Material issues of fact regarding Teresa Reed-Jennings' full subjective knowledge of the specific risk that caused her injury preclude summary judgment**

The Mariners insist that, despite Teresa stating that she did not understand the risks involved in batting practice, including that baseballs could be batted into the air simultaneously, she should be charged with such subjective knowledge. The problem with such an argument is that the record cited by the Mariners only reflects that Teresa knew of a generalized risk of a baseball entering the seating area. The record does not reflect that she realized the existence and magnitude of the specific risk that caused her injury.

Implied primary assumption of risk applies only to specific known risks. *Scott*, 119 Wn.2d at 497, 834 P.2d 6 ("It is important to carefully define the scope of the assumption, i.e., what risks were impliedly assumed and which remain as a potential basis for liability.")

Here, what caused Teresa Reed-Jennings' injury was a line drive baseball struck when she was watching another batted baseball midair. CP 303, ¶ 6. Thus the risk she encountered was the risk that the batter, during practice, would strike a baseball before the previous ball had landed. Such an occurrence results in a confusing situation for a patron, where two points of action that have a high potential for injury occur simultaneously.

On this point, the record before the trial court reveals that Teresa did not have subjective knowledge of the specific risk. First and foremost, Teresa declared that she did not know multiple baseballs could be batted into the air simultaneously. CP 280, ¶ 7. Further, the Jennings watched batting practice for a short amount of time (less than ten minutes) before the injury. CP 194-95. A few minutes of observing batting practice is not a reasonably sufficient amount of time to fully comprehend the various risks associated with batting practice.

What the Mariners have established is the existence of a material issue of fact regarding the Jennings' implied assumption of risk. A jury should be tasked with determining the degree to which Teresa subjectively

comprehended the nature and magnitude of the specific risk that caused her injury.

**8. Material issues of fact regarding the inherency and necessity of simultaneously batted baseballs during batting practice preclude summary judgment**

The Mariners' response attempts to argue that simultaneously batted baseballs are a necessary and inherent part of batting practice. Respondent's Br. 5. According to the Mariners, a "pitcher cannot wait for a batted ball to be caught because it would break the rhythm and expose players and coaches to undue risk of injury." Id.

The argument does not address the Jennings' point that batting practice rhythm can be maintained, but slowed by a small margin, to allow for the previously batted baseball to land before the next pitch is thrown. Appellants' Br. 26. This would accommodate for not only the safety of players and coaches but also for the reasonable safety of patrons in the stands who are exposed to the flight paths of baseballs.

Based on the Mariners' argument for the safety of players and coaches, it appears that patrons of Safeco Field must be exposed to an enhanced danger of simultaneously batted baseballs. Batting practice should not require such a trade off. This is not an activity whose continued existence hinges on the rapid striking of baseballs during the time allotted with patrons along the right and left field foul lines.

## C. CONCLUSION

There exist material issues of fact regarding the Mariners' liability to the Jennings for their injury and the degree to which the Jennings impliedly assumed the specific risk that caused their injury.

For the foregoing reasons, the Jennings respectfully request this Court reverse the trial court's grant of summary judgment.

DATED this 2nd day of October, 2014.

Respectfully submitted,

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DECLARATION OF SERVICE

I certify that on the 2nd day of October, 2014, I emailed a courtesy copy and deposited in the U.S. Postal Service for service a true and accurate copy of the Reply Brief of Appellants in Court of Appeals Cause No. 71545-3-I to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED this 2nd day of October, 2014.

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